

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Graham and Bindon v. Berry, from New South Wales ; delivered 26th May, 1865.

Present :

LORD KINGSDOWN.

THE MASTER OF THE ROLLS.

SIR EDWARD VAUGHAN WILLIAMS.

THIS is an Appeal from a decision of the Supreme Court of the Colony of New South Wales, on a special case.

The only question which we have to consider is "Whether the municipality mentioned in the case was duly constituted or created in point of law."

The Court below has decided that the municipality was not duly constituted or created.

The Appellants, one of whom has been appointed Mayor of the Municipality, and the other of whom is a Bailiff who has acted under his authority, have brought this decision by Appeal before Her Majesty in Council. The Respondent Berry, who is a large landholder within the district thus alleged to have been incorporated, appears to maintain the Judgment.

The question depends mainly upon the construction of a Colonial Act, entitled "The Municipalities Act, 1858."

By this Act, after reciting that it was expedient to establish municipal institutions in certain cities, towns, and districts of New South Wales, it was, amongst other things, enacted as follows :—

" 1. Any city, town, or hamlet, now or hereafter established, or any rural district, may, as hereinafter provided, be constituted a municipality.

"2. The Governor, with the advice of the Executive Council, may, on the receipt of a petition signed by not fewer than fifty householders resident within any such city, town, hamlet, or rural district, praying that the same may be declared a municipality under this Act, and stating the number of the inhabitants thereof, cause the substance and prayer of such petition to be published in the Government Gazette; and unless a counter-petition signed by a greater number of householders, resident as aforesaid, be received by the Colonial Secretary within three months from the date of such proclamation, the Governor, by the advice aforesaid, may, by proclamation published in like manner, declare such city, town, or hamlet, or such rural district, to be a municipality, by a name to be mentioned in such proclamation; and may also, by the same or any other proclamation, define the limits and boundaries thereof, and upon such publication the municipality shall be constituted accordingly."

After providing by the three following sections for the division, if desired, of a municipality into Wards, and for the annexation of additional areas to municipalities, the 6th section enacts:—

"6. After the constitution of any municipality by any such proclamation, all previous proceedings hereinbefore required shall be deemed to have been duly taken, and no objection shall be allowed on the ground of any defect or irregularity in such proceedings, or any non-compliance with the provisions of this Act."

After the passing of this Act, certain persons describing themselves as householders residing at Nowra and Nowra Hill, Greenhills, and Good Dog presented a petition to the then Governor of the Colony, in which they stated that they were desirous of availing themselves of the powers of municipal self-government and of the endowment connected therewith under the Municipalities Act; that the population of the town of Nowra and suburbs amounted to not fewer than 600. They suggested that the following be the boundaries of the said municipality. (Certain proposed boundaries were then described in great detail.) The petition then stated that the petitioners desired that the town of Nowra and suburbs should be divided into two wards; that the Shoalham River be the boundary of each ward; and that the said wards be incorporated by the designation of the Nowra and Good Dog Wards.

The petition, therefore, treated the whole district proposed to be incorporated as a town and its suburbs.

It did not represent the proposed boundaries as corresponding with the limits of any known or ascer-

tained districts, or assign any reason why these boundaries would be the most convenient.

The prayer of the petition was in these words:—
 “That your Excellency and the honourable the Executive Council may be pleased to take the premises into consideration, and that the said town of Nowra and Nowra Hill, Greenhills, and Good Dog may be divided into two wards, and proclaimed, with the boundaries aforesaid, a municipality under the Municipalities Act of 1858.”

The district proposed to be incorporated is within the police district of Shoalhaven; and a counter petition was presented by the Respondent and many other householders in that district, praying that no such incorporation might take place.

After various advertisements had been issued, as directed by the Act, the Governor, with the advice of his Executive Council, issued a proclamation, dated the 21st September, 1859, which, after reciting the powers given by the Act and the petition for incorporation, and its publication in the Government “Gazette,” and that no counter petition, signed by a greater number of householders resident within the said rural district of Nowra and Nowra Hill, Greenhills, and Good Dog was received by the Colonial Secretary within three months from the date of such publication, and reciting that the Governor, with the advice of the Executive Council, had, in exercise of the powers conferred by the said Acts, determined to declare by proclamation such rural district to be a municipality by the name therein after mentioned, and to divide the said municipality into two wards, with the limits and boundaries therein after defined, the Governor proceeded to declare that the district to be divided into two wards therein after described should be a municipality within the meaning of the said Act, and that the limits and boundaries of the said municipality and limits and boundaries of the said wards forming the municipality should be as follows. The proclamation then proceeds to define the boundaries by lines to be drawn from certain known points to other known points. It defines in like manner the limits of the wards, which are to be called Nowra and Good Dog Wards, and directs that the municipality shall be called by the name of the Municipality of Shoalhaven.

It will be observed that the proclamation speaks of the district to be incorporated in very different terms from the petition. The proclamation describes it as a rural district; whereas the petition had spoken of it as the town of Nowra and suburbs.

By the map referred to and made evidence by the special case, it appears that what is called the town of Nowra consists, including outhouses and barns and unfinished houses, of twenty-one houses, and that the population consists of fourteen men, twelve women, and thirty-seven children. The district described in the Petition as suburbs is of a very irregular shape, extending in its greatest length about fourteen miles, and in its greatest breadth to about eight miles, and as it seems that the whole population of the town is only sixty-three, and the population of the town and suburbs, as referred to, is represented to be not less than 600, the population of the remainder of the district must have been above 500.

It is at least very singular that such a district should have been described by the petitioners as the suburbs of such a town.

The objections, however, raised by the Respondents to the validity of this incorporation were not that the Governor having been asked to incorporate a town and suburbs had incorporated a rural district, but quite of a different character. They were two:—

1. That the Governor by his proclamation had incorporated a rural district with a town, which the law did not allow.

2. That he had included in the incorporation some lands which the petitioners had not prayed to have included, and had omitted others which the petitioners had prayed to have included.

The first objection depends on the 1st and 2nd sections of the Act:—

The 1st section declares, that any city, town, or hamlet, now or hereafter to be established, or any rural district, may be constituted a municipality.

The 2nd section provides, that after certain proceedings described in the Act, the Governor may by proclamation declare such city, town, or hamlet, or such rural district, to be a municipality.

Upon the language of these sections it is argued that a distinction is drawn between a city, town, or hamlet on the one hand, and a rural district on the

other, and that a town and a rural district cannot be incorporated in one municipality. Now it is said Nowra is a town and cannot be incorporated with the remainder of the lands included by the proclamation in one municipality.

The reason for this is said to be that the interests of the town may be diametrically opposed to those of the rural district, and that as the question is to depend in a great measure on the majority of votes of the inhabitants, a populous town may procure to be incorporated with it, and make subject to its burthens a very large and wealthy district much more thinly populated, deriving no benefit whatever from the town, and strongly objecting to any connection with it. This inconvenience is pointed out very forcibly in the Judgment delivered in the Court below.

That such injustice might be attempted unless the construction of the Act contended for by the Respondent be maintained, is certainly true; but on the other hand, the success of such an attempt can scarcely be supposed possible, since the issuing of the proclamation is to depend upon the discretion of the Governor, with the consent of the Executive Council, and no Governor or Council would be likely to sanction such a proceeding.

But the inconveniences to arise from the opposite construction are more serious, and not to be remedied by the exercise of any discretion on the part of the Governor or his Council. If a rural district cannot be incorporated in which a city is contained, neither can it be incorporated where a hamlet is found in it. In this case what is called a town consists of twenty-one houses, some unfinished. If a collection of twenty-one houses may make a town, how many may make a hamlet? Half-a-dozen houses within a short distance of each other might perhaps answer the description. How would it be possible to find any rural district desiring incorporation in which a hamlet would not be found? It appears to their Lordships that even if the construction insisted on by the Respondent were correct (which they think that it is not) it may be doubtful whether the place called a town in this case would be a town within the meaning of the Act. It is stated in the special case that Nowra at the date of the petition and proclamation was and still is a place proclaimed by the

Governor as a town, and was and is a town wherein fermented and spirituous liquors may be sold in quantities not less than two gallons at one time; but it seems little to resemble a town in any other particular. But it is not necessary to express an opinion on this point; on the other ground we think that the incorporation of the rural district described in the proclamation is not invalidated, because the town, as it is called, of Nowra is included in it.

The other objection is of a more serious character. It was fairly admitted by the Appellants' Counsel at the hearing that if by the Proclamation considerable quantities of land were included in the municipality which the Petitioners had not prayed to have included, the incorporation could not be supported. Now upon this objection we think we are concluded by the statement in the special case in these words:—

“The area set forth in the said Proclamation as thereby declared to be incorporated includes land which was not included in the said Petition for incorporation, and omits land which was included in the said Petition.”

The map to which we have already referred shows the boundaries of the district which the Petitioners prayed to have incorporated and the boundaries of the district which the Proclamation incorporated, and there can be no doubt that considerable quantities of land are included in the latter which are not included in the former.

If, therefore, the Petition be understood as praying that the district included in the boundaries which it suggests may be incorporated, there can be no doubt that the objection urged by the Respondent is well founded.

But it is said that this is not the true meaning of the Petition, and that it means to ask that four districts known by the names of Nowra, Nowra Hill, Green Hills, and Good Dog, may be incorporated, and it is contended that the boundaries suggested are not an essential part of the description. But supposing this to be the meaning of the Petition, there is no statement whatever in the case that the land included in the Proclamation and omitted in the Petition are part of any of these districts, and on the contrary, the statement in the special case is distinct, that, read the petition as we may, lands

not included in the Petition for incorporation are incorporated by the Proclamation.

This objection appears to us to be fatal.

There still remains to be considered how far the objection can be cured by the effect of the sixth clause.

We are clearly of opinion that this clause cannot be held to have the effect of dispensing with the conditions which by the other clauses of the Act are made essential to the exercise of authority by the Governor and Executive Council. One essential condition is that there shall be a majority of the inhabitants within the district sought to be incorporated in favour of the incorporation. But the Petition and counter-Petition are confined to persons residing within the area sought to be incorporated, and if the incorporation may include any quantities of land not included in the Petition, that condition is entirely disregarded, and a district may be incorporated though a majority of the inhabitants within it may be opposed to the incorporation. If the 6th clause is to have the effect contended for, an incorporation proclaimed by the Governor could not be disputed though every inhabitant within the district had petitioned against it.

It is plain that the 6th clause was meant to supersede the necessity, after a proclamation of incorporation, of proving the proceedings on which it had been founded and to cure any irregularities or defects in those proceedings and leading to the proclamation, and that it does not apply to a radical vice in the proclamation itself.

We must therefore humbly report to Her Majesty our opinion that the Municipality in question was not duly constituted or created in point of law, and that the Appeal should be dismissed. By the terms of the order admitting the Appeal, the Appellants are to pay the expenses of it, whatever may be the result.

