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The judgment of the Commissioner must, therefore, be reversed, and judgment be entered for the plaintiffs for the amount claimed with costs generally.

*Judgment for plaintiffs with costs.**

[CIVIL JURISDICTION.]

June 15.

WILSON *v.* BANK OF NEW ZEALAND.

Real Property Ordinance 1876, *s.* 93, *sub-ss.* 4, 5—*Removal of Caveat—Insufficiency of Summons—Costs.*

On an application by summons under sub-s. 5 of s. 93 of the Real Property Ordinance 1876 for the removal of a caveat lodged by an equitable mortgagee the Court held that the creditor had no right to put a caveat upon the register unless he was prepared at once to enforce his lien; and ordered the removal of the caveat, but, under the circumstances, without compensation and without costs.

Semble, the grounds of the application should be stated in the summons itself, and not in the affidavit filed in support.

This was an application by summons under s. 93, sub-s. 4, of the Real Property Ordinance 1876, by William Wilson, of Melbourne, Victoria, claiming as the owner of the Deuba Estate, Serua, and calling on the Bank of New Zealand to remove a caveat lodged by it on the 30th January, 1888, in respect of the above lands, and for compensation for the Bank having put the caveat upon the said land and having continued it up to the present time, wrongfully and without reasonable cause.

The Attorney-General (Mr. Udal) and *Mr. Scott* for the applicant, William Wilson.

Mr. Garrick for the Bank of New Zealand.

* Affirmed on appeal to the Privy Council. L. R. [1893] App. Cas. 301.

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It appeared that in the year 1884 Matthew Wilson and John Murchie, trading together as timber merchants in Fiji and owning then one-tenth share each in the Deuba Estate Sugar Company, being indebted to the Bank of New Zealand gave it a lien upon their interests in the said company. Upon the 30th January, 1888, a caveat was lodged by the Bank with the Registrar of Titles against the registration of any dealings with the lands comprised in the Deuba Estate, and claiming an equitable and legal lien on the interests of Matthew Wilson and John Murchie in the said lands, notice of which, was, a day or two afterwards, sent to the proprietors of the Deuba Estate Sugar Company at Melbourne. On the 13th February, 1888, the company being in course of winding-up, the above estate was sold by public auction in Melbourne; and the applicant, William Wilson, being at the time the owner of four-tenths of the shares in the said company, became the purchaser of the whole for the sum of 33,000*l*. A transfer was duly made to him by the said Matthew Wilson, who was the trustee and registered proprietor of the said estate on behalf of the said company, but its registration was prevented by the existence of the caveat lodged by the Bank of New Zealand. In October, 1888, Matthew Wilson and John Murchie were adjudicated bankrupt, when it was found that, after allowing for their interests in the said company, a considerable balance was found due from them to the said company. On the 2nd August, 1889, no steps having meanwhile been taken by the Bank of New Zealand to realise the security given by Matthew Wilson and John Murchie, notice was given to the Registrar of Titles on behalf of the caveatee, Matthew Wilson (as such registered proprietor and trustee as aforesaid and acting at the instance

of the then owner of the estate, William Wilson), under s. 93, sub-s. 5, of the Real Property Ordinance 1876, to remove the caveat. On the 23rd August an order was obtained from the Supreme Court by the Bank of New Zealand extending the caveat indefinitely; but, the order not having been served within the twenty-one days allowed by the Ordinance, the registrar removed the caveat. On the 12th September the Bank of New Zealand, upon an *ex parte* application, obtained another order commanding the registrar to register the previous order of the 23rd August and to reinstate and extend the said caveat indefinitely. On the 30th September the Bank commenced an action against Matthew Wilson and John Murchie for the purpose of enforcing its lien, but on the 20th November following discontinued the same, and from that time to the present made no further attempt to enforce its claim, or to take steps to withdraw the caveat. It also appeared that, by the terms of the partnership deed of the said company, all the partners were prohibited from charging their interests in the said lands without the consent of all the rest.

The present proceedings were therefore instituted by William Wilson as the beneficial owner of the land, with the object of compelling the Bank to withdraw its caveat and so remove the obstruction to his being registered as the proprietor of the said estate.

The Attorney-General, for the applicant, contended that the Bank of New Zealand had no right to lodge a caveat upon an estate belonging to a company merely on the ground that two of its members had charged their interests in it with the repayment of a private debt, so as to prevent a *bonâ fide* purchaser of the property becoming the registered owner of it; and this apart from any question as to whether the Bank had

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any notice of the terms of the partnership deed, which was not admitted by the Bank. And further, that the Bank having, when called upon to withdraw it, obtained an extension of the caveat, which, by the discontinuance of its subsequent action, it admitted it had no right to have lodged; and by its persistent continuance of it up to the present time, the applicant, as beneficial owner of the property, was entitled not only to an order for its removal but should be awarded reasonable compensation for the expenses he had been previously put to in endeavouring to remove the impediments that stood in the way of the registration of his title.

Mr. Garrick for the Bank, after a preliminary objection to the summons which was overruled, argued that the order made on the 25th August, 1889, extending the caveat could not be set aside or altered by an order in chambers; and claimed the right of the Bank of New Zealand to continue the caveat until the settlement of its claim against Matthew Wilson and John Murchie, as an equitable mortgagee was bound by no limit of time as to when he was to take proceedings to enforce his lien.

The Attorney-General, in reply.

H. S. BERKELEY, C.J. [After reciting the circumstances of the case which led to the Bank taking a lien from Matthew Wilson and John Murchie upon their interests in the Deuba Estate in 1884, said :—] In my opinion the Bank of New Zealand had a right to put a caveat upon the property as it had done, but of course it did it at its own risk. As to the question whether the notice of the caveat given by the Bank to the proprietors of the Deuba Estate Sugar Company was a good one, I do not consider that it is properly before me.

[His Honour then referred to the fact of William Wilson having purchased the Deuba Estate after the caveat had been on for some little time, of the subsequent notice given to the registrar to remove it and of the Bank having applied to the Court to have it extended, when it seemed to have been extended in the terms of the order as prayed, "indefinitely."]

I regard the word as meaning "without any limit as to time," or as meaning "with liberty to apply," and not as a permanent extension. The order not having been served on the registrar within the proper time and the caveat having been removed by the registrar, application was made on the 12th of September to this Court, on grounds which satisfied it as to its propriety, to have it reinstated and registered, which was done. An action was subsequently brought by the Bank on 30th September, 1889, against Matthew Wilson and John Murchie to enforce its lien, and discontinued on 20th November following. William Wilson made no application to have the caveat removed then. He was, I think, guilty of laches for not having done so. I agree with Mr. Garrick that an equitable mortgagee may proceed to enforce his rights when he pleases; but he had no right to place a caveat on the register unless he was prepared to put his equitable rights into force, and if he does not so proceed the caveat ought to be removed. The caveat ought to be removed now, as it would have been had application been made for that purpose in November, 1889.

But then comes the question of compensation which is not so easy of settlement. Certain sums representing interest on stamp-duty, certain law costs that have been incurred, were claimed as compensation. There is no evidence of any application having been made to the

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Bank by William Wilson calling upon it to remove the caveat. I do not think the applicant can claim any right to the interest on the stamp-duty. The applicant ought to have moved himself to have the caveat removed. As to the rights and interests of the Bank with respect to the lien I will express no opinion. I do not think the applicant is entitled to be repaid any of the law costs claimed as compensation, as the Bank was right in putting the caveat on and the Court was right in extending it. With regard to the costs of the present application I do not consider that the grounds of the application are sufficiently stated in the summons. They should have been stated on the face of the summons itself, and not in the affidavit, and for that reason I shall allow no costs upon the present proceedings against the Bank.

The result will be that the application for the removal of the caveat will be granted, but without costs on the ground of insufficiency of the summons, the order to take effect at the expiration of fifteen days from the date of the service of the order.

Order made accordingly.