

CHAPTER II.

ROADS GENERALLY.

Difference between a Road and a Street.

Public highways will, in this work, be dealt with under the two main divisions of "Roads" and "Streets." The former will be generally used as a comprehensive term embracing all roads, streets, thoroughfares, highways, carriage ways, bridle paths, footpaths, tracks, and other public rights-of-way outside the limits of Boroughs. The latter will embrace all similar things within the limits of a Borough; and in this sense these two terms are generally used in New Zealand law (see *Borough of Onslow v. City of Wellington*, 22, N.Z.L.R., p. 926; 5, Gaz. L.R., 437).

DEFINITION OF PUBLIC ROAD.

Definition of "Road."

The term "Road" means a public highway, whether used as a carriage way, bridle path, or footpath, or intended to be used as such, and it includes the soil thereof and the things thereon that are mentioned in the last paragraph but one hereof. The term "Road" also includes any road which has been set apart, defined, proclaimed, or declared to be a road under any law or authority at any time in force

Road includes Bridge, Culvert, &c., thereon.

The term "Road" also includes every bridge, culvert, drain, ferry, ford, gate, building and other thing thereto belonging upon the line and within the limits of the road; see Section 101, "The Public Works Act, 1905."

METHODS BY WHICH ROADS ARE MADE PUBLIC ROADS AND ARE VESTED IN THE CROWN.

Methods by which Roads become Public Roads.

Roads are made or become Public Roads and are vested, as such, in the Crown in one or other of the ways shown in the following paragraphs:—

Any road on Crown Land which is laid out and marked as such on the record maps in the office of the Chief Surveyor of the District in which the land is situated, is a public road, *vide* Sub-section 1 of Section 101 of "The Public Works Act, 1905." A road made by a private person through Crown Lands, not marked upon the survey maps, but managed by a County Council and used by the public, is not a road within the meaning of the above provisions (see *Marie v. MacGeorge*, 3, N.Z.L.R., S.C., 80), but such a road may, it seems, be made a County Road by the County Council under Section 245 of "The Counties Act, 1886."

Roads on Crown Lands.

Apart from the above, a road on Crown Land or on lands set apart for any public purpose, cannot become such by user only, for Section 14 of "The Land Act, 1892," declares that "No dedication or grant of a right-of-way shall be presumed or allowed to be asserted or established against the Crown or as against any person or body holding lands in trust for any public purpose, by reason of user only, and whether such user commenced before or after the passing of the said Act, or any Act or any regulation at any time heretofore in force."

Road on Crown or Public Land does not become Public Road by user only.

When a road has once been made or has become a Public Road as described above, or in any of the ways hereinafter described, the fact that such road is not shown on the instrument of title to the land issued, either before or after such road has become a public road, does not affect it, and even the issue of a Crown Grant or certificate of title under "The Land Transfer Act, 1885," omitting any mention of a road that has been so laid off through the land included therein, will not quash the right of the public to use such road as a public road unless it has been legally stopped by process of law, for "Once a highway, always a highway" (see *Mackay v. Lynch*, 3, N.Z.L.R., S.C., 425; and also *Cherry v. Snook*, 12, N.Z.L.R., 54; *Martin v. Cameron*, 12, N.Z.L.R., 769; *Hughes v. Boakes and another*, 17, N.Z.L.R., 113; *Borough of Onslow v. Rhodes and another*, 23, N.Z.L.R., 653; 6, Gaz. L.R., 336; and *Borough of Lower Hutt v. Yerex*, 24, N.Z.L.R., 697).

When Road has become Public Road it cannot be stopped except by process of law.

How Private
Road may be
made a Public
Road in certain
cases.

Any land over which a right-of-way has in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication is a public road. This, however, does not necessarily include a road shown on a subdivisional plan of private land lodged in the office of the Registrar of Deeds, or in the Land Transfer Office of the district in which such land is situated; for such road, unless dedicated to the public by deed, or in some other way that amounts to a dedication to the public, is merely a private road, and the only persons who have rights therein are the owner of the land, and those persons to whom he may have sold or leased the various sub-divisions of the land. It appears that in such a case dedication may be assumed on very slight grounds (see the case of *In the matter of "The Land Transfer Act, 1885," ex parte the Assets Realisation Board*, referred to in a later chapter under the heading "Dedication of Roads and Streets"). Such a road must, however (if it is required in the subdivision of land for sale), now be dedicated by an instrument in writing under the hand of the owner, and registered in the office of the District Land Registrar or the Registrar of Deeds for the district, under Section 116 of "The Public Works Act, 1905," or it can be proclaimed to be a public road by the Governor under Section 13 of "The Land Act, 1892," with the consent of the local body; and this latter course is frequently followed on the ground of simplicity and expediency.

Streets and
Roads in Native
Townships.

Section 12 of "The Native Townships Act, 1895," declares that all streets shown on the deposited plan of the town constituted thereunder shall be deemed to be vested in the Crown for an estate in fee simple, and shall be roads within the meaning of "The Public Works Act, 1894." Roads in Native Townships constituted under "The Native and Maori Land Laws Amendment Act, 1902," must not be confused with roads in Native Townships constituted under "The Native Townships Act, 1895," as roads in the former case are not public roads for all purposes, nor are they vested in the Crown (see Section 10 of "The Native and Maori Land Laws Amendment Act, 1902," and Section 22 of "The Maori Land Laws Amendment Act, 1903").

Any land taken for a road under the provisions of "The Public Works Act, 1905," or taken under any other Act or Provincial Ordinance that contains the necessary powers, is a public road (*vide* Section 101 of that Act). There are several other Acts at present in force besides "The Public Works Act, 1905," under which roads may be taken or legalised; but this will be found explained later on in the part that specially refers to the taking, deviating and stopping of roads.

Land taken for Road under Public Works Act is a Public Road.

Any land over which a road has been, or is, in use by the public, and which has been formed or improved out of public funds, can for the width so formed or used, agreed upon, or fenced, be made a public road if a sufficient plan thereof is approved by the Chief Surveyor, and it is registered in the office of the Registrar of Deeds, or District Land Registrar for the district.

Land may be made Public Road if Public Funds spent thereon.

The application for such registration must in the first place be made to the Minister for Public Works, as he alone has the power to request the Registrar to register it. The road so registered must not be more than one chain wide (see Section 101 of "The Public Works Act, 1905").

In such case application to be made to Minister for Public Works.

In obtaining the legalisation of roads under this enactment the chairman of the local body is required by the Minister to forward to him an approved plan and a description of the road certified as correct by the Chief Surveyor, accompanied by a statutory declaration setting forth the facts of the case. The form of declaration can be obtained on application to the Department of Roads, and the declaration must be stamped with a 2s 6d stamp. In order to prevent disappointment, local bodies should be careful to see that the plan does not include more than the statute authorises. Thus, if the road has only been formed, or is used by the public to the extent of, say, ten, twelve, or twenty feet, then the statute does not authorise a width of one chain being legalised as a road, but only the width "formed, used, agreed upon, or fenced." "Agreed upon" means that if the owner has agreed to a certain width being taken, then that width can be legalised, even if it be more than has been formed or used. "Fenced" means that if

Conditions under which such application may be granted.

the owner has fenced off the road, then the portion so fenced off can be legalised, even if it be more than has been formed or used, provided it be not more than one chain wide.

Roads taken
under authority
of Provincial
Councils,

Any land over which a road has been taken, used, or constructed under the authority of the Government of any former province, or of any local body, is a public road; notwithstanding any legal or technical informality in the taking or construction thereof, and provided that a sufficient plan thereof is registered in the manner set forth in Paragraph (e) of Section 101 of "The Public Works Act, 1905." This portion of the enactment is believed to refer to cases where there was originally a right to take land for a road, but where the right has been exercised in an informal manner. It does not apparently legalise an informal taking where there was originally no right to take the land.

Rights of road
reserved in
Crown Grants,
etc.

It has frequently happened that where land has been sold or disposed of by the Crown, no road has been laid off to the same or to lands beyond. In such cases it has been customary to insert in the Crown Grant, or other instrument of title, a reservation of a right to take a road or roads through the land so sold, and in some cases an extra area, without payment, has been added to the title to make up for the road so required. If the right is definite, and the road is delineated on the grant, or if the Crown Grant reserves the right to take the road *at any time*, or words to that effect, it is believed it will stand; but if the right is indefinite, and no indication is given of the direction of the road in the grant, and no limitation of time is expressed, then such right must be exercised within five years from the date of the grant (see Sections 42 and 43 of "The Crown Grants Act, 1883," and Section 3 of "The Land Transfer Act Amendment Act, 1888"). A right of this nature is usually exercised by someone under warrant from the Governor, who enters on the ground, and gives notice to the occupier, and lays off and takes the road, and it is customary to publish in the *New Zealand Gazette* a notice of such taking, signed by the Governor; but the want of such notice or other formalities mentioned is not material, if the road has in fact been taken. The construction of a road on the land within

the time is probably sufficient to legalise it if done under the authority of the Governor, either express or implied.

Lands may also be taken as public roads in certain cases without payment of compensation, or with a limited payment only, under "The Harbours Act, 1878," "The Land Act, 1892," "The Public Works Act, 1905," "The Native Land Court Act, 1894," and some other Acts. In all other cases land can only be taken for roads on payment of adequate compensation for land, severance, and fencing. The method and extent to which lands can be taken under statutory provisions, with or without compensation, will be found detailed in a subsequent chapter relating to the taking, deviating, and stopping of roads.

Lands may be taken for roads in certain cases without payment.

In addition altogether to the statutory provisions under which land may become a public road, the Common Law of England still has some force here if the land be not under "The Land Transfer Act, 1885," as Section 57 of that Act is probably a bar to the right being established by user only, but user coupled with some action of the owner, which amounts to dedication, may be sufficient (see *Clark v. Hopkins*, 17, N.Z.L.R., 201; and *In the matter of "The Land Transfer Act, 1885," ex parte the Assets Realisation Board*, referred to in a later chapter under the heading "Dedication of Roads and Streets"). Under the Common Law, if any one allows the public to use a way, track, or road over his land for twenty years without hindrance or obstruction on his part, such way, track, or road becomes a public road, and dedication by him may then be assumed. Such way or track may, however, now become a public road in a less period than twenty years where there is evidence that the owner has by his action shown that he has dedicated the land as a public road; and in one recent case in England, six years, and in another case eight years, was held by the Courts to be sufficient. (See "Glen on Highways," 1897, p. 32; and *Hughes v. Boake*, 17, N.Z.L.R., 113). If, however, a road becomes a public road in this manner, then it would seem (from the dicta of Edwards, J., in the case of *Land Transfer Act and ex parte the Assets Realisation Board*, referred to above), that the fee simple of

Roads becoming Public Roads by user.

the land occupied by the highway will pass to the Crown or Borough Council, as the case may require.

Dedication
apart from user.

It must, however, be observed that there may be a dedication in law apart from user; and if the owner has done something which amounts to dedication, the road will become a public road, whether the land is under the Land Transfer Act or not. See also further remarks on this subject in the portion of next chapter that deals with private roads.

Roads or tracks
on Crown or
Native Lands
made Public
Roads by being
declared to be
County Roads.

Section 245 of "The Counties Act, 1886," declares that roads or tracks over Crown or native lands are public roads in a certain limited sense, viz., if they are made county roads, even though they are not surveyed, laid off, or dedicated. This sort of public road is dealt with more in detail in the portion of next chapter which deals with county roads.