

## CHAPTER IV.

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### THE DIFFERENT SORTS OF STREETS IN NEW ZEALAND.

The term "street" is generally understood in New Zealand to refer to a highway in a borough, and it is so used herein. Its use in the Public Works Acts is held to imply such a meaning (see *Borough of Onslow v. City of Wellington*, 22, N.Z.L.R., 926). The term street is used consistently in the above sense in "The Municipal Corporations Act, 1900"; but it is also used in "The Land Act, 1892," in "The Native Townships Act, 1895," in "The Maori Lands Administration Act, 1900," in "The Town Main Streets Act, 1902," in "The Native and Maori Lands Laws Amendment Act, 1902," and in "The Maori Land Laws Amendment Act, 1903," where it means a road in all cases if the street be situated outside the limits of a city or borough.

The term "street" includes "public street," "private street," "private way," and "right-of-way," and the law as to the constitution of each class of street is dealt with separately below.

#### PUBLIC STREETS.

A street (really meaning thereby a "public street") is defined in Section 209 of "The Municipal Corporations Act, 1900," to mean and include the whole of any land lying within any borough constituted under that Act, that:—

- (1) Immediately before the date of such constitution was a public highway under the control, as such, of any Borough Council, County Council, Road Board, or Town Board.

- (2) Is laid out by the Borough Council as a public highway after the date of such constitution.
- (3) For twenty years next before the date of such constitution has actually, and whether legally or not, been maintained and controlled as a public highway by any one or more of such of the authorities as are mentioned in (1) above, and has been used by the public.

Conditions upon which "private street" 1900," declared to be "public street."

Section 233 of "The Municipal Corporations Act, 1900," provides that a Borough Council may by special order declare any private street to be a "public street" :—

- (a) If it is not less than 66 feet wide.
- (b) If it was a private street within the meaning of any Act in force at the time of its being laid out, and which was laid out within a borough at any time prior to the 2nd day of November, 1878, and is 20 feet or more in width.
- (c) If it was a private street or right-of-way within the meaning of any Act in force at the time of its being laid out, and which was laid out within a borough on or after 2nd November, 1878, but before 1st January, 1887, and is of not less width than 40 feet.

Such street to be formed.

If in either of the cases above mentioned the private street or right-of-way shall have been properly formed by the owner thereof, or of the frontagers thereto, and if the owner comply with the requirements of the Borough Council and of "The Municipal Corporations Act, 1900," in relation to such private street, private way, or right-of-way, the Borough Council is obliged by Sections 234 and 235 of the Act to declare the same to be a public street, and it thereupon becomes a street vested in the Corporation.

Street includes carriage way, footpath, etc.

A street may include both a carriage way or way for horses or vehicle traffic and a footway. A footway means so much of any street as the Borough or City Council may think fit to lay out or construct for foot passengers only, and it includes the edging and kerbing thereto in cases where

either exists, or the Council thinks fit to make the same (see Section 210, Sub-section 2, of "The Municipal Corporations Act, 1900.")

A street also includes every public square, or public place, and every bridge, culvert, drain, channel, footway, ferry, ford, gate, building, or other thing belonging thereto or lying upon the line or within the limits thereof (see Section 211 of "The Municipal Corporations Act, 1900.")

Street includes squares, public places, etc.

All public streets and the soil thereof, and all materials of which they are composed are vested in the Corporation of the borough or city in which they are situated; and all materials placed or laid on such streets in order to be used for the purposes thereof also vest in such Corporation, and all public streets are under the control of the Borough or City Council. The term "vest" means vested in fee-simple (see Section 212 of "The Municipal Corporations Act, 1900," and *Plimmer v. Loughrey*, 4, N.Z.L.R., C.A., 73).

Streets vested in Corporation.

A public street should by virtue of Sub-section 3 of Section 212 of "The Municipal Corporations Act, 1900," be 66 feet wide at least; but many streets already laid out and used in boroughs are of less width. The enactment aims at preventing both public and private streets being made of a less width than 66 feet that are laid out after the passing of the Act, for Section 237 of the Act provides that every Mayor or Councillor who shall consent to the laying out of any street of a less width than required by law, or to any unlawful act in relation to the width of a street, shall be liable to a penalty not exceeding £50, and there is power under the same enactment for the Attorney General to institute proceedings for preventing the laying off of any street of a less width than required by law.

Street to be 66 feet wide.

There is, however, power in Section 236 of the Act, as amended by Section 24 of "The Municipal Corporations Act, 1902," to allow narrower streets to be made in certain cases; for it is therein provided that "where the configuration of a borough is such that within any particular area or areas thereof it is difficult or inexpedient to lay off public or private streets of a width of 66 feet, the Governor-in-

Street may be 40 feet wide in certain cases.

Council may, on application by the Borough Council, permit streets to be laid off of a less width than 66 feet, but not less than 40 feet." This provision is, however, sometimes evaded by Borough Councils calling a street of a less width than 40 feet a "right-of-way," and relying upon Sub-section 2 of Section 211 of "The Municipal Corporations Act, 1900," as sufficient authority. Prior to the Act of 1900 this was frequently done, but it is now more difficult, as that Act limits the width of right-of-ways to 20 feet or less. The term "Right-of-way" in Section 211 has, however, now been changed to "private way" by Section 13 (j) of "The Municipal Corporations Act Amendment Act, 1906."

Authority of  
Governor-in-  
Council  
required.

When a Borough Council desires to obtain the authority of the Governor-in-Council to the authorisation of a street of a less width than 66 feet, under Section 236 of "The Municipal Corporations Act, 1900," it should apply to the Governor through the Minister for Public Works. The application should be accompanied by a plan showing clearly the road or roads referred to, and the area which the application deals with. The application should also state the reasons why the Borough Council considers that the configuration of the borough is such as to bring the application within the terms of the Act, and whether the roads are being laid off by the borough itself or by some private person.

Dedication not  
required prior  
to 1900.

Prior to the passing of "The Public Works Amendment Act, 1900," an owner of land who in subdividing the same into allotments found it necessary to lay off a road or street through it, was not compelled to dedicate the road or street as a public road or public street; and where that was done such streets are not public streets, and do not vest in the Corporation of the borough in which they are situated, unless they have been made public streets under the powers conferred by Section 233 of "The Municipal Corporations Act, 1900," or unless they otherwise come within the definition of public street in the Act, or dedication can be assumed by the Act of the parties.

Roads to sub-  
divisions of  
land now  
required to be  
dedicated.

Since the date of the passing of "The Public Works Act, 1900" (viz., 20th October, 1900), all roads or streets laid off by an owner to give access to such subdivision must

be one chain wide, and must be irrevocably dedicated as public roads or streets (see Section 20 of "The Public Works Amendment Act, 1900," and Section 116 of "The Public Works Act, 1905." If, however, the configuration of the borough is such that it is inexpedient or impossible to lay off the street one chain wide, the provisions of Section 236 of "The Municipal Corporations Act, 1900," may apply. In such a case the owner of the land should move the Borough Council to apply to the Government for the necessary authority to make the street less than one chain wide, as already advised in the second and third paragraphs that immediately precede this one.

In addition to any statutory provision relating to the constitution of streets, it would seem that a street can still become a public one by common law, if the owner by his actions shows dedication or acquiescences in the use of his land by the public as a public highway. This is so even though the title to the street be still in himself, and he takes no action to lay off such street; and although he has allowed it to be so used under an agreement with the local body, and which agreement was afterwards rescinded by the parties and the street shut up (see *Hughes v. Boakes and another*, 17, N.Z.L.R., 113; 1, Gaz. L.R., 122). Also such a street appears to be a public street, and it would appear from the dicta of the Judge in the recent case of *In the matter of the Land Transfer Act, ex parte the Assets Realisation Board*, that some so-called private streets in boroughs which the Borough Councils hesitate to take over are really public highways vested in the Corporation.

Private Streets can become public highways under the Common Law.

### PRIVATE STREETS.

A private street is defined in Section 210 of "The Municipal Corporations Act, 1900," as meaning any roadway laid out within a borough on private property by the owner thereof, but intended for the use of the public generally. Such streets are usually constituted when owners of land in boroughs subdivide their land for purposes of sale or disposal, and to do so require additional streets. Streets of this nature were constituted in numerous instances in boroughs.

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up to the passing of "The Public Works Act, 1900," and they can still exist as private streets, but since the passing of that enactment any owner in so subdividing his land in a borough must dedicate the new streets required therefor as public streets. The last enactment does not, however, make it impossible to lay off a private street, it only limits the power by requiring that many streets required in the subdivision of land that would otherwise be private streets will in future have to be laid off in compliance with that Act, and will therefore become public streets.

Consent of  
Borough  
Council  
necessary.

A private street can now only be laid off, made, granted or reserved with the consent of the Borough Council, and it must be 66 feet wide, but if the configuration of the Borough be such that within the area in which it may be intended to lay off such a street it is difficult or inexpedient to lay of the same to the full width of 66 feet, it may, with the permission of the Borough Council, be laid off of a less width than 66 feet, but not less than 40 feet, provided that such permission is approved by the Governor-in-Council (see Sections 227 and 236 of "The Municipal Corporations Act, 1901," as amended by Section 24 of "The Municipal Corporations Act, 1902," and also Section 117 of "The Public Works Act, 1905." Any application for such approval should be made to the Minister for Public Works, accompanied by a copy of the resolution of the Borough Council granting the permission, and also accompanied by a sufficient plan of the area affected, and of the streets proposed to be laid off therein, stating clearly the position and width of such streets, and giving full and substantial reasons for the application.

Council may  
impose  
conditions.

In granting the permission referred to in the last paragraph, the Council may impose such conditions as it pleases as to width, levels, entrances, course of street, formation, maximum number of buildings to be erected on such private street or private way, and the Council can also stipulate the minimum distance that shall be left between any two buildings if they are dwelling-houses, also the position of the building line, and otherwise in all respects whatsoever as the Council thinks fit (see Section 227 of "The Municipal Corporations Act, 1900"). The conditions should be endorsed

upon the plan of the street, and the Council should see that the plan so endorsed is registered. This will secure to the public the full benefits of Section 230 of the Act, and thus tend to prevent the owner or his assign from evading those conditions.

Section 237 of "The Municipal Corporations Act, 1900," prescribes that any Mayor or Councillor consenting to the laying off of a private street of a less width than is required by law, or in respect to any other unlawful act relating to a private street, is liable to a penalty not exceeding £50, and by Section 228 of the same Act any person who lays out or makes, or permits, or allows to be open for use, any private street or private way, or who grants or reserves any right-of-way contrary to the provisions of the Act, is liable to a penalty of £10 for every day during which the offence continues after the day on which he receives notice from the Council that such offence has been committed; and Section 229 of the Act provides that no plan, deed, or instrument of any kind whatsoever whereby any private street or private way is created which is contrary to the provisions of the Act, shall be received for registration by the Deeds or District Land Registrar of the District.

*Penalties for consenting to the laying off of street less than required width, etc.*

In cases where a plan or other instrument affecting a private street can be registered, the Registrar is directed by Section 230 of "The Municipal Corporations Act, 1900," to enter upon the certificate of title or other proper instrument a note of all the conditions imposed by the Borough Council on the owner of the land which are contained in or are endorsed upon the plan or instrument. It is essential, therefore, that if a Borough Council wishes to protect itself and the public, it should see to it that these conditions are actually endorsed on the plan, and are not left to be gathered from other documents, as otherwise it may be found that after all the land owner or his assigns cannot be compelled to fulfil such conditions.

*Plans and instruments affecting Private Streets to be registered.*

In certain cases a private street may be vested in the Corporation of the borough, and may become a public street by special order made by the Borough Council upon the terms

*How Private Streets may be made Public Streets.*

mentioned in Sections 233 to 235, inclusive, of "The Municipal Corporations Act, 1900." It should, however, be distinctly understood that if the private street has been laid out subsequently to 2nd November, 1887, it cannot be made a public street under the above enactment, unless it be 66 feet wide, and it would appear that even if authority be obtained to lay off the private street of a less width than 66 feet (under the powers contained in Section 236 of the Act, or if the private street be allowed to remain at a less width than 66 feet under the powers contained in Section 117 of "The Public Works Act, 1905," Sub-section 1 of Section 233 of "The Municipal Corporations Act, 1900," would be a bar to such street being made a public street. This is a very important point, because the Borough is under no liability to construct, maintain, or repair a private street, and it may require the owners of land abutting thereon to repair the same, and in default may do so at their expense, as provided by Section 231 of the last-named Act.

### PRIVATE WAYS.

#### Definition.

A Private Way means any way or passage whatsoever over private property within a borough, the right to use which is confined or intended to be confined to certain persons or classes of persons, and which is not thrown open or intended to be thrown open to the use of the public generally (see Sub-section 3 of Section 210 of "The Municipal Corporations Act, 1900"). A private way differs from a private street, inasmuch as the latter is intended to be open to the public generally, while the former is not.

#### Distinction between

"Private Way" and "Right-of-way"

The terms "Private Way" and "Right-of-way" seem to cover much the same ground, and to mean much the same thing; but it would seem from Section 227 of "The Municipal Corporations Act, 1900" that a right-of-way may be granted or reserved over a private way, thus implying therefore that it may be essentially different; and the Act differentiates between the two in the following manner:— Section 211 of the Act says that a right-of-way must not exceed 20 feet in width, while Section 232 of the Act says that the provisions of Section 231 shall make certain



conditions apply to every private way of not less than 20 feet in width. There is no limitation in the Act as to the width of a private way; so that a private way can apparently be authorised of any width, while a right-of-way cannot be authorised of a greater width than 20 feet. The term "right-of-way" in Section 211 has, however, now been changed to "private way" by Section 13 (j) of "The Municipal Corporations Act Amendment Act, 1906."

### RIGHTS-OF-WAY.

Although a right-of-way is frequently mentioned in Definition.

The Municipal Corporations Act, 1900," it is not defined therein. It was defined in "The Municipal Corporations Act, 1886," which has now been repealed by the Act of 1900, and as the latter enactment is substituted for the former Act, it must be assumed that failing any special definition of a "right-of-way" therein, it means a "right-of-way" as was recognised as such under the Act of 1886.

The Act of 1886 defines it as "Any way or passage whatsoever over private property, the right to use which is confined or intended to be confined to certain persons or classes of persons, and which is not open or intended to be open to the use of the public generally."

The difference between a private street and a right-of-way is shown in the case of *Peers v. Melrose Borough Council* (14, N.Z.L.R., 188). In that case the owner of certain land subdivided the same into allotments, before the Borough was constituted, and he laid out a roadway leading from the public road to the subdivisions. After the constitution of the Borough, the Borough Council sought to recover from the owner of one of the subdivisions a proportionate part of the cost of draining the roadway as a private street, under Section 264 of "The Municipal Corporations Act, 1886." The Magistrate before whom the action was tried, found that the roadway was dedicated to the public prior to the constitution of the Borough; and that it was never, after the constitution of the Borough, laid out, constructed, or dedicated by or with the sanction of the Difference between "Private Street" and "Right-of-way"

Borough Council; and that the only user proved was for the purpose of access to the buildings and lands abutting on the roadway. On these facts the Supreme Court held that there was no evidence that the roadway was intended for use by the public generally, and that it was not therefore a private street within the meaning of Section 231 of the said Act, but a right-of-way only. The case of *The Borough of Lower Hutt v. Yerex* (24, N.Z.L.R., 697), shows, however, that even if a road is used only by a single owner, and by those visiting him, if it is so used as a public road (and not by permission, or as a private right-of-way) then that amounts to public user, which is evidence of dedication. It is safer, therefore, in laying off a right-of-way, to construct and maintain gates at the junction of the right-of-way with a public street, or on the boundary of the owner's land, as an indication that no dedication to the public is intended, and also to indicate by a notice board that there is no public thoroughfare, etc.

Right-of-way  
may be created  
in the sub-  
division of land.

The distinction between a "right-of-way" and a "private way" has been already discussed in dealing with the latter sort of way, but it may be pointed out that what is practically a right-of-way is often constituted by owners in subdividing their property. This is done by leaving narrow strips between some of the sections and calling them Reserves, such as Drainage Reserves, Plantation Reserves, etc. These are really intended to be rights-of-way, and are understood to be such by the purchasers of the land, but being called reserves, the Borough Council has no right to interfere, and as the original owners do not, after the land has been sold, usually exercise any control over these reserves, but allow any one to use them as they think fit, a right-of-way may thus be created.