

## CHAPTER XV.

### DEDICATION OF ROADS AND STREETS.

Important decision.

A very important decision has recently been given by the Supreme Court in the case of *In the matter of "The Land Transfer Act, 1885," ex parte the Assets Realisation Board* (9, Gaz. L.R., 262).

Case deals exhaustively with creation of public road by dedication.

This case deals exhaustively with the question of the creation of a public road by dedication by the owner of the soil, and it shows the law to be somewhat different from what it was understood to be. The case shows that an owner can dedicate land for a road or street without any acceptance of such dedication by the public or local authority, at any rate prior to the passing of "The Public Works Act, 1900," and apparently such dedication can still be made where the road is not set apart for the subdivision of the adjacent land, and does not, therefore, come under Section 116 of "The Public Works Act, 1905."

Case has important bearing on Section 116, "Public Works Act, 1905."

This case has an important bearing on Section 116, and it will also enable the status of many roads and streets throughout the colony to be definitely ascertained, for it apparently shows that many so-called private roads or private streets, which local bodies will not take over and maintain (believing them to be private roads), have in law now become public roads or streets, for which the local body is liable.

Following is copy of judgment.

The following copy of so much of the judgment as will be of general interest is therefore given below. The case was heard before His Honour Mr Justice Edwards at Auckland, on December 11th, and judgment was given on December 17th, 1906, and he is reported to have stated, *inter alia*, as follows:—

“This is a summons under the provisions of Section 192 of ‘The Land Transfer Act, 1885,’ calling upon the District Land Registrar to substantiate and uphold the grounds of his refusal to register a certain memorandum of transfer of a parcel of land in the Borough of Grey Lynn. Originating summons.

“The Ground given by the Registrar pursuant to Section 191 of the statute was that there was no evidence to show that roads had been formed to the satisfaction of the local body, pursuant to Sub-section 2 of Section 2 of ‘The Public Works Act Amendment Act, 1905,’ No. 11. The answer to this is that the land included in the memorandum of transfer abuts upon a public street, in existence many years before the legislation of 1905 had been enacted. Objection by Registrar.

“The facts relied upon in support of the claim that the land affected by the memorandum of transfer in question abuts upon an existing public street are as follows:— Facts of case.

“In the year 1883 the owners of a parcel of land of considerable area, known as the Surrey Hills Estate, now included in the Borough of Grey Lynn, desired to subdivide it for the purposes of sale. To this end they caused a plan of subdivision to be prepared, showing a large number of roads, and also a narrow right-of-way, passing through the centre of each section shown upon the plan. The land in question was then within the Newton Road District, constituted under ‘The Road Boards Act, 1882.’ The plan was submitted to the Newton Road Board for its approval. The Board objected to the rights-of-way, and the plan was withdrawn. Later in the same year another plan of subdivision, omitting the rights-of-way, was submitted by the owners of the land to the Road Board, and was duly approved. A number of plans of subdivision under the provisions of Section 171 of ‘The Land Transfer Act, 1885,’ which, together make up the plan approved by the Road Board, were subsequently deposited in the Land Transfer Office by the owners of the land. In the year 1884 the allotments shown upon the plan of subdivision were offered for sale by auction. In the same year the Newton Road Board began to expend public money on the formation and upkeep of the roads shown upon the plan. This expenditure by the

Road Board continued until the Newton Road District was, in the month of November, 1885, constituted a borough under the name of the Borough of Newton. The name of the borough was afterwards changed to Grey Lynn, but the change was in name only, not in constitution. From the time of the incorporation of the borough it has continuously expended money in the formation and maintenance of roads shown upon the plan of subdivision, including footpaths, and in kerbing and channeling, and in laying water mains along such roads, and in the erection of gas lamps and name plates for the roads. It has made a constant practice upon the request of the owner of any new house erected upon the estate of forming a footpath to give access to such house. In the year 1886 the Borough Council caused to be prepared the map of the borough required by Section 189 of 'The Municipal Corporations Act, 1876,' showing the streets and the levels thereof. All the streets shown upon the subdivision are shown upon such map as public streets within the borough. On one occasion, the date is not given, but it must have been prior to the year 1895, the Bank of New Zealand Estates Company, Ltd., the then owner of the land in question, applied to the Borough Council for permission to erect a fence across certain of the roads shown upon the plan of subdivision, for the purpose of enclosing part of the estate for grazing purposes. The Council granted permission to do so, but only subject to the condition that the Company should erect swing gates 10ft wide wherever the fence crossed any of such roads, and should attach to such gates placards marked "Public Road." These conditions were complied with. There is a general statement that all the roads have from the month of October, 1883, been continually open to the public without permission by the owner. In particular it is proved that in the year 1889 the Borough Council purchased from the then owners of the estate portion of the estate for the purpose of erecting Council Chambers thereon, and that it did erect Council Chambers thereon; also that in the year 1898 the Borough Council purchased another portion of the estate for the purposes of a public pound; and that persons from all parts of the borough have used the roads shown upon the plan of subdivision to go to and from the

Council Chambers and pound. All the roads shown upon the plan of subdivision are shown as public roads on the map of the County of Eden, issued by the Survey Department. It was stated at the Bar and admitted that the roads which were in question in the recent case of *Auckland Gas Co. v. Mayor, etc., of Grey Lynn* (25, N.Z.L.R., S.C., 617), and which, as that case shows, had been treated by the Borough as public streets under its control since 1887, are parts of the roads shown upon this plan of subdivision.

Counsel for the District Land Registrar urges that the evidence should be limited to evidence as to the road which abuts upon the parcel of land included in the transfer. I am not of that opinion. The evidence shows, I think, conclusively, that all the roads in question had become public highways many years before any restriction had been placed upon the power of an owner in fee to dedicate land for that purpose. That there was a dedication by the owners of the land is put beyond all question. Their acts from first to last are consistent only with an *animus dedicandi*. The English cases show that to make a highway there must not only be a dedication by the owner of the fee, but also an acceptance of that dedication by the public, both of which are ordinarily but not necessarily shown by long user. *Cubit v. Mause* (8, C.P.D., 704, at p. 715), *Spedding v. Fitzpatrick* (38, C.D., 410, 414). In my opinion, however, if the dedication by the owner of the land can be conclusively established, it is not necessary in New Zealand, at all events under the statutes under consideration in the present case, to show acceptance of the dedication by the public. By 'The Public Works Act, 1882,' which was in force at the time when the various Acts which conclusively show dedication by the owners of the land took place, it was provided (Section 78) that:—

Evidence shows that the roads have become public roads.

Throughout this Act the word "road" means a public highway, whether carriage way, bridle path, or footpath, and includes the soil of (a) Crown Lands over which a road is laid out and marked on the survey map; (b) lands over which right-of-way has in any manner been

granted or dedicated to the public by any person entitled to make such grant or dedication.

“Section 79 vests all roads as defined in the Crown.

Road on Crown  
Lands shown  
on survey map  
is a highway.

“Now it is quite plain that as to Crown lands, the dedication of a road upon a survey map made it a highway, and that the Crown could not afterwards deprive the public of the right of highway except under statutory authority: *Turner v. Walsh* (6, C.A., 636). User by the public is not necessary to give effect to the dedication. It appears to me to be equally clear that user or any other act of acceptance by the public is not necessary to complete the right of highway under a grant or dedication by the private owner. The statute speaks of ‘grant’ or ‘dedication’ in such manner as to show that it was conceived that there might be a difference between grant and dedication in this connection, and that both alike refer to the acts of the owners of the land alone. The word ‘grant’ may be inappropriate. There could be no grant to the public, though there might be a grant to a person or corporation for public purposes. There may, however, be a dedication under ‘The Public Works Act, 1900,’ and is under the Compilation Act, if the law has not been altered, into which I have not thought it necessary to enquire: *Ex parte Wilson* (21, N.Z.L.R., S.C., 53). Such a dedication would not take effect in England unless it were followed by user by the public or by some other act which showed an acceptance by the public of the dedication, but I think it would be impossible to say that it was not an effectual dedication under Section 78 of ‘The Public Works Act, 1882.’

Not necessary  
to show user to  
perfect dedi-  
cation under  
“Public Works  
Act, 1882.”

“In my opinion, therefore, it is not necessary to perfect a dedication under the Act of 1882 to show user or any other unequivocal act of acceptance by the public, nor is there any reason why, under the legislation of those years, it should be so. The creation of a highway entailed no liability upon the public, who might use it or not, as they pleased, and who were under no obligation to construct or repair it. In those days, before the acts of every individual were regulated in detail as they are under recent legislation, the dedication of land as a highway, whether formed or

unformed, was looked upon as a public advantage. The English cases, it may be observed, are all cases in favour of the owner of the soil, denying the existence of a highway, and there is, of course, no legislation such as the provisions of Section 189 of 'The Public Works Act, 1882.'

"If, however, it is necessary to prove acceptance of the dedication by the public, I think that it has been overwhelmingly proved in the present case.

If necessary to prove acceptance by public it has been proved in this case.

"Even in England it is not necessary to prove user by the public, all that is necessary is to prove acceptance of the dedication by the public. No doubt, as was said by Bret, L.J., in *Cubitt v. Maxse*, 'acceptance by the public is ordinarily proved by user by the public, and user by the public is also evidence of dedication by the owner.' But other acts have been held to establish a dedication, when the evidence of user would have been insufficient for that purpose, as in *Rex v. Lloyd* (1, Camp., 260), where it was held by Lord Ellenborough that if places are lighted by public bodies, that is strong evidence of the public having a right-of-way over them; and *Rex v. Edmonton* (1, M. and Rob., 24), in which it was held that the expenditure of public moneys in repairing a road made by the inhabitants chargeable with its maintenance as a highway; and in *Vernon v. Vestry of St. James* (16, C.D., 449), in which it was held that the expenditure of public moneys in lighting, paving and cleansing a news, which was a *cul-de-sac*, was strong evidence that it was a highway. In this colony we have public bodies, which are charged with such matters, and which are able to bind the public, whom they represent, by their acts. By 'The Road Boards Act, 1882,' Section 138, it was enacted that every Road Board should have control and management of all district roads within its district. By 'The Public Works Act, 1882,' Section 90, it was provided that every Road Board should have power to construct, maintain and keep in good repair roads within its control, and especially (among other powers) to make surveys for laying out new roads, and to take land under that Act for the purpose of making new roads. It is impossible to doubt, I think, that the Road Board, having

these and other wide powers given by the Act, had the power to accept the dedication of the roads in question.

“ If the Road Board had the power, there can be no doubt that it exercised it, both by its resolution and by its acts, which would otherwise have been illegal, in expending public moneys upon the formation and maintenance of these roads.

Borough cannot repudiate dedication made before constitution of Borough.

“ When the Borough was constituted, therefore, these roads were highways, which upon the incorporation of the borough became vested in the corporation thereof: ‘ The Municipal Corporations Act, 1876,’ Section 185. The Municipal Council could not, therefore, even if it had wished to do so, have repudiated the dedication, and the acceptance by the duly constituted authority of the dedication, which were then complete. Not only did the Borough Council not do so, but its every act has been an affirmation of the prior dedication. Section 190 of the Act required the Corporation to distinguish upon the map made pursuant to that section between ‘ streets’ and ‘ private streets,’ and it was most essential that it should do so. A ‘ private street’ under the Act of 1876, Section 184, is defined as meaning merely what is popularly but incorrectly called a right-of-way over which the public had no right of passage. The Municipal Council had no right to expend the borough funds on the formation or maintenance of such a street, and though it might, under the provisions of Section 211, and subject to the conditions thereby imposed, declare a private street to be a public street, it could not do so unless the street had first been constructed in such manner and of such materials as it approved. Here, for over twenty years, the Borough Council has dealt with these streets as public streets, has exercised over them powers which it did not possess over private streets, and has expended upon them large sums of money, no part of which could lawfully have been expended upon private streets.

Matter not affected by Land Transfer Act.

“ The fact that the land is subject to the provisions of ‘ The Land Transfer Act, 1885,’ was held by Mr Justice Richmond, in *Martin v. Cameron* (12, N.Z.L.R., S.C., 769), in no way to affect the matter, and, apart from authority, is plain.

The District Land Registrar objects that his records show the soil of these streets to be vested in the Assets Realisation Board, subject only to the private rights-of-way which the transfer of a parcel of land as an allotment upon a deposited plan gives to the transferee over the roads shown upon that plan: *Baird v. Jackson* (2, N.Z.L.R., C.A., 271). This is one of the inconveniences which are from time to time found to affect the working of a very excellent system, but, as is shown by the case of *Martin v. Cameron*, it does not affect the matter in substance, nor is it without a remedy even so far as the Registrar is concerned.

Difficulties of registration does not affect matter.

“The soil is, as I have already observed, vested in the Corporation of the Borough of Grey Lynn. The certificates of title have, therefore, been issued in error, if they show the streets to be vested in the Assets Realisation Board. I see nothing to prevent the District Land Registrar from calling in the certificates of title, and correcting them, under the powers given by Section 69 of ‘The Land Transfer Act, 1885.’ The Assets Realisation Board could not now resist this, and at the hearing, counsel for the Board declared its willingness to do anything which was necessary to correct the Register in this respect.

The soil of dedicated road vests in corporation.

“Nor do I see any reason why, as the streets are vested in the Corporation of the Borough of Grey Lynn by statute, a certificate of title for the streets, as streets, should not be issued to that Corporation under the authority given by Section 10 of the Act. I confess, however, that this last step appears to me to be quite unnecessary.

Certificate of title should be issued to Borough.

“As I do not see how the District Land Registrar could be expected to act contrary to his records, I think that he has acted quite properly in declining to register transfers upon this plan of subdivision until directed to do so by the Court.

Registrar has acted properly.

“I shall make an order directing the District Land Registrar to register the transfer.”

Order of Court.