Privy Council Appeal No. 30 *of* 1922.

Henry Snushall - - - - - - - *Appellant*

v.

The Chairman, Councillors and Inhabitants of the County of Kaikoura *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST MARCH, 1923.

Present at the Hearing :
VISCOUNT HALDANE.
LORD ATKINSON.
LORD SUMNER.
LORD WRENBURY.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from a judgment of the Court of Appeal of New Zealand, affirming one delivered in the Supreme Court of that Dominion by Herdman J.

The question to be determined is whether certain roads in the County of Kaikoura are public roads under the control of the respondents, and whether the respondents are entitled to recover from the appellant a small sum of money as the expense to which they have been put in removing fencing improperly placed on the roads by the appellant. The latter does not deny that if the roads have been public roads actually laid out on the land or used as roads by the public he was not entitled to interfere with them. His case is that they were never public roads so laid out or used.

The roads in question are strips of land, about a chain in width, which either form the boundaries of or intersect land now belonging to the appellant. The land was formerly the property of the Crown, and was granted to a predecessor in title of the appellant. The particular strips of land have never been in fact

fenced off or made up, or actually used as roads by the general public. Strips of this kind are not uncommon in the Dominion and are commonly referred to as "paper roads" or as subdivisional roads. The strips in controversy contain an area of about 70 acres, and there is said to be a total acreage in the County of Kaikoura of about 2,000 of such acres.

In order to understand what these strips are, and how they were determined, it is necessary to refer to the history of the manner in which the New Zealand Government has dealt with the land under its control, and particularly with the roads which bound or intersect it. In 1856, to take an example illustrative of the present case, certain regulations, which had statutory authority, were gazetted for the regulation of the sale and disposal of the waste lands of the Crown within the Province of Nelson, within which the land in the now existing county of Kaikoura was situated. Of this land that to which the controversy relates formed part. Apparently three surveys were made of it—in 1865, in 1897 and in 1907. The survey of 1865 was made under the Nelson Regulations of 1856. Under these regulations the principal surveyor for the Government within the Province was charged with the duty of notifying that the native title had been extinguished in the land within the district, and of transmitting with the notification an outline map descriptive of the land within the district to the official superintendent. As soon as the notification and map had been received proper surveys were to be made, and the superintendent was to divide the district into Counties and Hundreds, and from time to time to make reserves for the sites of towns and villages, or for lines of internal communication, by roads and otherwise, for buildings, such as churches, court-houses and prisons, and for other purposes of public utility, convenience or enjoyment.

A thirty-second part of this land was to be set apart and reserved as an endowment for education. All these reserves of land were to be notified in the Government Gazette, and all reserves for roads, streets and squares throughout the Province were to be vested in the superintendent under the Public Reserves Act, 1854. Reserves, lines of road and sections were to be laid down on the proper maps of each district, and roads and streets were to be not less, as a rule, than a chain in width. In laying out sections certain rules were to be adhered to as nearly as possible, among them that every section should front a road, that road frontages should not exceed two-thirds of the depth of a section, and that, except in the case of natural boundaries, the sections should be rectilinear. There was to be an authentic copy of the map or plan of each district signed by the principal surveyor, together with all reports of the surveyors respecting the same, deposited in the Land Office and open to public inspection.

The appellant's land, which contains about 4,831 acres, consists of six sections, comprised in Crown grants made in 1860. On each of these grants there is a plan drawn in the margin, and the parcels granted are described by reference to the margina

plan. The roads adjoining or intersecting the sections comprised in the grants are shown on the marginal plans as enclosed between parallel lines, and are verbally described as "public roads." When, later on, the title to the appellant's land came to be registered under the Land Transfer Act of the Dominion, it was registered in two parts, with separate certificates, each of which again contained a plan showing the roads marked off between parallel lines, and also contains descriptions of the property by reference to the then existing public record maps. These include the surveyor's plan which was made of the area, as well as the Crown grant index record map of the district, and show the roads in question in such a manner that their situation can be sufficiently identified from the map and plan.

To what extent the notification and survey required by the Nelson Regulations of 1856 were carried out before the survey by Ward does not clearly appear. It is at all events clear that, in 1866, a map was made by Ward showing the roads (including those in question in these proceedings), and the sections, rivers and other natural features of the ground. It also shows by red dots the position of numerous marks on the ground used in ascertaining the peripheries of the property granted. It appears that Ward was assisted in his work by a son, A. C. T. Ward, who is still alive, although old and blind, and whose evidence was taken on commission. He said that he did not himself survey or peg off any roads, the reason being, in his view, that the road lines were shown on the plans themselves to comply formally with the regulations. He went round the boundaries of the block, taking some observations as to whether it was hilly or flat. He did enough work to estimate the area. Individual sections were estimated on the plan, but not on the ground, and he considered that such a survey complied with the regulations. During his time the roads on the estate in question, which was known as the Greenhills Estate, were never actually laid out as roads. He could not remember whether he himself made the plans or whether his father made them from his survey. The party that made this survey consisted of himself, his brother and another man. He denied that any pegs were put in to mark roads. At a boundary corner they put on the ground a heap of stones, not a peg. He was twenty-one at the time, and was seventy-six when he gave his evidence, and had been blind for nine years. It would have been possible, he considered, for a surveyor to peg off on the ground the paper roads shown on the plan and a Government surveyor might have done it.

Leader, however, who was the county engineer, and also a practical surveyor, says that he was instructed before the present proceedings to locate the roads in question, and that the tracings he had enabled him to find them. Macintyre, another surveyor who had been instructed to inspect the paper roads on the Greenhills estate, says that Leader pointed out to him the pegs he had found, but he could not swear that they had been put in as road pegs.

The evidence on the question whether at the time of Ward's survey any pegs were put or marks made on the ground which could indicate the roads is neither consistent nor satisfactory. Their Lordships would hesitate before coming to the conclusion that it had been proved that the survey made on the ground in Ward's time resulted in pegs having been put in which marked the roads. But in their Lordships' view it is not necessary to treat this as proved before coming to the conclusion that the strips in question are public roads under the respondents' control. For the Public Works Act, to be presently referred to, contains a provision sufficient to make the strips such public roads, along with the *solium* under them, if a right of way has in any manner been dedicated to the public by any person entitled to make such dedication. Their Lordships think that what has taken place is equivalent in point of law to such a dedication. They therefore turn to the reasons which have brought them to this conclusion.

The question has been dealt with by two statutes, passed in 1908 by the Parliament of New Zealand, one being the Public Works Act of 1908 and the other being the Counties Act. The latter has since been re-enacted and superseded by the Counties Act of 1920, but as the terms in which it was re-enacted do not differ in any material particulars from those of the statute of 1908, it will be convenient to refer to the two enactments of the earlier year, which applied at the time, as governing the case.

The Public Works Act of 1908 consolidated the similar previous statutes and provided that all public works authorised by them should be deemed to be authorised by the Act of 1908 and continued, completed and enforced under it. Public Works were defined to include surveys and roads, and land required for these might, if it were required for any Government work, be taken by the Government, and, if required for any local work by the local authority. Compensation was to be paid, and if the land taken turned out not to be wanted it might be sold and the proceeds carried to the fund appropriated to the execution of the works in respect of which the lands had been taken. If land were taken under the Act for a road, the right to make which had been otherwise reserved to the Crown, no compensation was to be payable. Large powers of making surveys were conferred By s. 101 " road " was defined to mean a public highway, whether carriage-way, bridlepath or footway, and to include the soil of (*a*) Crown lands over which a road had been laid out and marked on the record maps, and (*b*) lands over which a right of way had in any manner been granted or dedicated to the public by any person entitled to make such grant or dedication, and (*d*) the lands over which a road had been or was in use by the public, which had been formed or improved out of the public funds, or out of the funds of any former province, or out of the ordinary funds of any local authority, for the width formed, used, agreed on, or fenced, not being more than fifty links on either side of the middle line thereof, and a sufficient plan whereof, approved by the Chief Surveyor of the land district wherein such land was situate, had been or was

thereafter registered by the District Land Registrar or the Registrar of Deeds; (*e*) lands over which any road, notwithstanding any legal or technical informality in the taking or construction thereof, had been taken, constructed or used under the authority of the Government of any former province or of any local authority, and a sufficient plan had been registered in manner provided in the last preceding paragraph. "Road," unless repugnant to the context, was to include all roads which had been or might thereafter be set apart, defined, proclaimed, or declared roads under any law or authority for the time being in force. By Section 102 all roads and the soil thereof were declared to be vested in the Crown. By Section 105 all roads in an outlying district were to be deemed to be county roads, wherever the Counties Act, 1908, was in force, and by Section 106 all powers, rights, duties and liabilities vested in and imposed on a Road Board in respect of a district road were to be vested in and imposed on the County Council. It is agreed that the roads in controversy, if laid out, were the county roads. By Section 145 any person who *inter alia* unlawfully erects a fence on any road is to be, liable to a fine not exceeding £10 for every day of the offence, and to a further sum equal to the cost incurred by the local authority in removing the obstruction.

By the Counties Act of 1908 the inhabitants of every county were made a body corporate, with a Council. By Section 153 the Council were to have the care and management of all county roads within the meaning of the Public Works Act, 1908, with full powers to construct, improve, repair and maintain the same, and might exercise such control over all such roads although the same were not formed or made. All lines of roads or tracks passing through or over any Crown lands or native land, and generally used without obstruction as roads were, for the purposes of Section 153, to be deemed to be public roads not exceeding 66 feet in width and under the control of the Council, notwithstanding that any such lines of roads had not been surveyed, laid off, or dedicated in any special manner to public use.

It is clear that under the Nelson Regulations the vital matter is only the laying down on the surveyor's map as distinguished from the land itself the reserves for roads. There is no provision in the regulations, analogous to that in Section 101(*a*) of the Public Works Act of 1908, pointing to the necessity of the road being laid out on the land itself.

If the requirements under the regulations were carried out, then the effect of Section 153 of the Counties Act of 1908 is to place the road so constituted under the care and management of the County Council, and that even if the line of the road had not been surveyed, laid off, or dedicated in any more particular or special manner to public use.

As the title to maintain and control the road is under this section given to the County Council, and as Section 145 of the contemporaneous Public Works Act makes anyone who without

their written permission interferes with their control by erecting a fence on the road liable for the cost, within a certain limit, incurred by the County Council in removing the obstruction, their Lordships are of opinion that the respondents were entitled to bring the present action, and that the joinder of the Attorney-General as representing the Crown was not necessary. The effect of the statute is to give to the local authority the remedy which the law attaches to a right for its enforcement, and which is quite different from the general remedy of the public as such. They are also of opinion that it makes no difference to the rights of the respondents, if their purpose is in reality as alleged, to compel a purchase from the respondents rather than to open up the roads.

The result is that the judgments in the Courts below are, in the view taken by their Lordships, right in their conclusion. For reasons which have already been given, they will humbly advise His Majesty that the appeal should be dismissed with costs.

In the Privy Council.

HENRY SNUSHALL

v.

THE CHAIRMAN, COUNCILLORS AND INHABITANTS OF THE COUNTY OF KAIKOURA.

DELIVERED BY VISCOUNT HALDANE.

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