[HIGH COURT OF AUSTRALIA.]

MUNICIPAL DISTRICT OF CONCORD . APPELLANTS; CAVEATORS,

AND

COLES . . . . . RESPONDENT. APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1905.

SYDNEY, *Sept.* 18, 19, 21.

Griffith C.J. Barton and O'Connor JJ.

Real Property Act (*N.S.W.*), *No.* 25 *of* 1900, *sec.* 24*—*Application to bring land under the Act—Public road—Right of municipal council to lodge caveat—Estate or interest in land—Municipalities Act* (*N.S.W.*), *No.* 23 *of* 1897, *sec.* 175.

It is only a person who has or claims a legal or equitable interest in land, partaking of the character of an estate or equitable claim, who can lodge a caveat under sec. 24 of *Real Property Act* 1900. A municipal council has not such an estate or interest in land dedicated to the public as a road as will entitle it to lodge a caveat under that section.

Tierney v. *Loxton*, 12 N.S.W. L.R., 308, approved.

Decision of the Supreme Court, *In re Coles*; *Municipal District of Concord* (*Caveators*), (1905) 5 S.R. (N.S.W.), 259, affirmed.

APPEAL from a decision of the Supreme Court of New South Wales.

The respondent made an application under sec. 14 of the *Real Property Act* 1900, to bring under the provisions of the Act certain land within the appellant municipal district.

The appellants lodged a caveat in the following terms:—"Take notice that the Municipal District of Concord claiming estate or interest under and by virtue of the *Municipalities Act* 1897 and by virtue of notifications contained in Government Gazettes dated &c., such Gazettes notifying the dedication and alignment as a

*Sec. 24 of the *Real Property Act* (N.S.W.), (No. 25 of 1900), is as follows: "24. Any person having or claiming an interest in any land so advertised as aforesaid, or the attorney of any such person, may within the time limited by the Registrar-General for that purpose, lodge a caveat with the Registrar-General in the form of the Third Schedule hereto, forbidding the bringing of such land under the provisions of this Act, and every such caveat shall particularise the estate, interest, lien, or charge claimed by the caveator, and the caveator shall if required deliver a full and complete abstract of title."

public street of Ada Street situated in the said Municipal District portion of such street being part of lands" described in detail "do hereby forbid the bringing of the said land under the provisions of the said Act so far as respects such portion as forms part of Ada Street aforesaid."

On motion by the respondent, the Supreme Court ordered the removal of the caveat, on the ground that the Municipal District had not an estate or interest in the road such as would entitle it to lodge a caveat under sec. 24 of the Act: *In re Coles*; *Municipal District of Concord (Caveators)* (1).

From this decision the present appeal was brought by special leave.

Dr. Cullen K.C., (with him *Loxton*), for the appellants. The municipality has an estate or interest in the land within the meaning of sec. 24 of the *Real Property Act*. "Land," as defined in sec. 3, is wide enough to include easements and ways, and "estate" in any Act includes a "charge, right, title claim, demand, lien, or encumbrance at law or in equity;" by virtue of sec. 21 of the *Interpretation Act* 1897 (No. 4). Sec. 42, sub-sec. (*b*) of the *Real Property Act* shows that rights-of-way and easements must be shown on a certificate, thereby implying that the owner of any such right may object to the issue of a clean certificate in respect of the land subject to the right. Sec. 113 requires that roads must be shown on the plan lodged with the Registrar-General. The highway could be noted on the certificate, and no difficulty could arise under sec. 47 by reason of there being no dominant tenement registered under the Act: [He referred to *In re Houison* (2), followed in *In re Paul* (3).] The right of the municipality to lodge a caveat arises under the *Municipalities Act* (No. 23 of 1897). Sec. 175 of that Act confers upon the municipality an interest in the land of roads, which is inconsistent with the ownership of private individuals. Sec. 180 gives power to restrain encroachments; but if the council were to proceed under that section against a person for encroaching upon a road, it might, if the respondent's contention is correct, be met by a clean certificate

(1) (1905) 5 S.R. (N.S.W.), 259. (2) 18 N.S.W. L.R., 300.
(3) 19 N.S.W. W.N., 114.

H. C. OF A. 1905.

MUNICIPAL DISTRICT OF CONCORD v. COLES.

of title to the land over which the road lay. The powers conferred by secs. 189 and 190 show that the municipality has a beneficial interest in the soil of the roads, as well as an obligation in respect of it. The same applies to sections 234 and 240, giving power to make use of the soil, and to establish tolls and ferries, &c. These are clearly rights which cut down the beneficial interest of the private ownership of the land, and should therefore be noted on the certificate. The word "easement" is large enough to cover them. [He referred to *Cooke* v. *Union Bank* (1); *Saddington* v. *Hackett* (2).] *In re Innes* (3), dealt only with the question whether an individual member of the public had the right to lodge a caveat against bringing a road under the Act. It is not an authority for the contention that the right of a municipality is one which cannot be tried under the Act. *Tierney* v. *Loxton* (4) is similiarly limited, and it recognizes that the question of highway or no highway is one which may be so tried, as it is a question affecting the paramountcy of the title. Lodging a caveat is a defensive proceeding, and any person in the position of a defendant should be allowed to set up the existence of a highway, as a defendant could in an action for trespass.

As to the nature of the easement. The right to make a river navigable is an easement: *The King* v. *Mersey and Irwell Navigation Co.* (5). That is analogous to the right to make roads traversable. A statutory right such as this is in the nature of an easement: *per Kennedy J.* in *Escott* v. *Newport Corporation* (6). The public right of highway has been termed an easement: *Harrison* v. *Duke of Rutland* (7). If noted on the certificate it would bind the registered owner. The mere fact that it might be difficult to note some easements on the certificates is no reason why they should not be noted where possible. This right to the roads would be an interest in land under the Statute of Frauds: *Webber* v. *Lee* (8).

In *Municipal Council of Sydney* v. *Young* (9), the council claimed compensation on the ground that the roads were "vested"

(1) 14 N.S.W. L.R. (Eq.), 281.
(2) 1 N.S.W. L.R., 155.
(3) 12 N.S.W. L.R., 180.
(4) 12 N.S.W. L.R., 308.
(5) 9 B. & C., 95.
(6) (1904) 2 K.B., 369.
(7) (1893) 1 Q.B., 142, at p. 154.
(8) 9 Q.B.D., 315.
(9) 19 N.S.W. L.R., 41; (1898) A.C., 457.

in them. The appellants claim no such right; they rely on the sections of the *Municipalities Act* to establish the existence of an "interest." That contention is quite consistent with the decision of the Privy Council in the above case. The rights of occupation conferred by the *Municipalities Act* may not imply such a beneficial ownership as would justify a claim for compensation, but they represent an interest which is, if anything, greater than an easement. [He referred to *Rangeley* v. *Midland Railway Co.* (1).] Restrictive covenants which run with the land confer an interest in the land: *Rogers* v. *Hosegood* (2). They would have to be noted on the certificate. *A fortiori* the rights of a municipality over a road should be so noted. If not noted, there is a possibility that the highway may be extinguished. It has been held that a Statute can extinguish a highway by necessary implication: *Corporation of Yarmouth* v. *Simmons* (3). The *Real Property Act* makes the certificate a record, and provides that it shall be conclusive. If the Court sees that the words of the Act are wide enough to enable a municipality to lodge a caveat in respect of a road, that construction should be adopted as consonant with the general tenor of the Act, and adding to its utility.

Canaway, for the respondent. The Registrar General, having been satisfied that the land was granted to the respondent's predecessor by the Crown, and that nothing has been done since to take away the title, is bound to register the respondent as proprietor under the Act. The Registrar can only inquire into questions affecting title. The question of highway or no highway is not one of title. The Acts 4 Will. IV. No. 11 and No. 5 of 1897, consolidated in No. 95 of 1902, do not prevent the respondent's enjoyment of the right of property conferred by the Crown grant. There was no reservation of roads in the grant, and therefore any resumption for roads would necessitate compensation. The appellants rest their claim on an alleged dedication, but there has been no user, and dedication without user is unavailing; the gift of a road cannot be forced on the public against its will: *Cubitt* v. *Lady Caroline Maxse* (4). The description of land as bounded

(1) L.R., 3 Ch., 306.
(2) (1900) 2 Ch., 388, at p. 405.
(3) 10 Ch. D., 518.
(4) L.R., 8 C.P., 704, *per Brett* J., at pp. 714, 715.

H. C. OF A. 1905.

MUNICIPAL DISTRICT OF CONCORD v. COLES.

by a road is no stronger than a dedication. There was only a notification under the Act 4 Will. IV. c. 11. That is merely the preliminary step necessary to empower the Surveyor-General to lay out the road. [He referred to secs. 1, 2, 3, 6, and 12 of that Act.] That the property in the soil of the road is not affected by this process is shown by the provisions in the Act No. 5 of 1897, for closing roads (sec. 19). [He referred also to *Encyclopædia Britannica*, vol. VI., p. 185, sub-cap. "Ownership of the soil—Highways."] Nothing, therefore, has divested the respondent of the land, and the municipality has no right to insist that he should be put to the expense of litigation before having his title registered. A person must have something in the nature of a proprietary interest in the land to entitle him to lodge a caveat: *Tierney* v. *Loxton* (1). That decision should not be interfered with now, subsequent legislation having adopted the construction there put upon the original Act: *Saunders* v. *Borthistle* (2). The provision for lodging of caveats is one of a group designed to bring to light and test any beneficial interests which may exist, before bringing the land under the Act. These provisions come under three heads: First, those dealing with applications by persons claiming the fee simple, &c., secs. 14-16; second, provisions for search by the department and publication of notices, secs. 17-23; and third, invitations to parties interested to lodge caveats, and provisions for trying the issues between the rival claimants, secs. 24-28. Sec. 42 throws a light on the meaning of sec. 24. It provides that certain rights, if not noted, will be extinguished by the certificate. The inference, therefore, is that a caveat may only be lodged in respect of those interests which, if not noted, will be extinguished. But an exception is made of rights-of-way and other easements. If the appellants' contention is correct that their right is an easement, it does not fall within the class of interests which may be made the subject of a caveat. Sec. 42 speaks of estates or interests existing "in any person." That inferentially excludes roads, because no single person can own a road. It is in its nature public. There is nothing in the Act to affect the principle, once a highway always a highway; the certificate has no effect

(1) 12 N.S.W. L.R., 308. (2) 1 C.L.R., 379, at p. 390.

on such public rights as that of highway. [He referred to *In re Schmid and Field* (1); *Martin* v. *Cameron* (2); *Chadwick* v. *Smith* (3); *Watson* v. *Gardiner* (4).] *In re Houison* (5), which decided that a person claiming a right-of-way under the particular circumstances of the case was entitled to lodge a caveat, did not lay down any general principle: *Municipal Council of Sydney* v. *Young* (6) is in favour of the respondent, to this extent that it shows that the council has no "estate or interest" in the soil of a road which will entitle it to compensation for resumption. [He referred also to *Ex parte Jeanneret* (7).] The *Municipalities Act* 1897 merely gives councils licences to do a number of things which are ordinarily incidents of ownership, but it confers no proprietary rights, nothing which will justify the Registrar-General in noting it on the certificate as a blot on the title: *Ex parte Smart* (8). [He referred to sec. 72 of the *Real Property Act* 1900.] If the right of highway was one affecting title, such as should be noted on a grant or certificate, there would have been an absolute answer to the plea of highway in *Turner* v. *Walsh* (9). The plaintiff could have alleged a grant, without reservation, to himself. The contention that roads may be destroyed by the issue of certificates of title is a dangerous one, because there are many roads which, being unknown to the authorities or unnoticed, might be easily so destroyed. The rights of the municipality cannot be brought within the meaning of "easement." Certain rights-of-way may be easements, but in this case the right of the council is not the right-of-way, but the power to do certain things in and upon the soil of land subject to a right-of-way enjoyed by the public. A municipal council is not competent to litigate such questions on behalf of the public: *Vestry of Bermondsey* v. *Brown* (10); *Wallasey Local Board* v. *Gracey* (11); *Behrens* v. *Richards* (12). It is *ultra vires*. The Municipalities Acts give them the care control and management of the roads and streets within the municipality, but no

(1) 15 S.A. L.R., 48.
(2) 12 N.Z. L.R., 769.
(3) 9 S.C.R. (N.S.W.), 196.
(4) S.M.H., May 17th, 1892.
(5) 18 N.S.W. L.R., 300.
(6) 19 N.S.W. L.R., 41; (1898) A.C., 457.
(7) Foster's District Court Prac., Appendix p. 275.
(8) 6 S.C.R. (N.S.W.), 188.
(9) 1 N.S.W. L.R., 83; 6 App. Cas., 636.
(10) L.R., 1 Eq., 204.
(11) 36 Ch. D., 593.
(12) 21 T.L.R., 705.

H. C. OF A. 1905.

MUNICIPAL DISTRICT OF CONCORD v. COLES.

power to litigate questions of title. Such litigation would be quite inconclusive. If the municipality were to be unsuccessful, the Attorney-General might afterwards move on behalf of the public. The mere power to enter upon and remove portions of the soil cannot imply a beneficial interest upon which a caveat may be based, for, if it did, the municipality, having power to go on any private lands adjoining roads to dig and remove materials for road construction, could prevent any lands adjoining roads from being brought under the Act. [As to the meaning of "proprietor," and the nature of an "interest" in land he referred to *Attorney-General of New South Wales* v. *Holt* (1); *Staples & Co. Ltd.* v. *Corby and District Land Registrar* (2).]

Loxton, in reply. The respondent is not now entitled to contend that there was no road in fact. It was practically admitted in the Court below. He has in effect demurred to the caveat on the ground that the existence of a road does not entitle the appellants to lodge a caveat.

[GRIFFITH C.J.—He is in the same position as a defendant in an action for nuisance who demurs to the declaration. He may show that the plaintiff is not entitled to sue, having no *locus standi*, and also that the declaration discloses no cause of action.]

A grant of land from the Crown, with reservation of roads, conveys a fee simple only in so much of the land as is not required for the roads. The grantee never acquires the fee simple in the roads. [He referred to *Cooper* v. *Stuart* (3).] Sec. 19 of the *Public Roads Act* shows that the grantee, even if he ever had a proprietary interest in the road, is divested of it by the dedication, because it provides that on the closing of a road the rights of highway shall cease, and the lands shall either "vest" in the adjoining owners, or become Crown lands to be subsequently granted or disposed of as the Crown may think fit. A certificate of title would therefore be conclusive evidence of the extinguishment of the road, because it is clear that roads may be destroyed and the soil regranted, and therefore that proof of prior existence of a road would be quite consistent with its having been destroyed

(1) 28 C.R. (N.S.W.) (N.S.), Eq., 37, 44.
(2) 19 N.Z. L.R., 517.
(3) 10 N.S.W. L.R., Eq., 172.

by or prior to the grant or certificate. The rights of a member of the public over a road are an "interest" within the meaning of sec. 24, and *Tierney* v. *Loxton* (1), so far as it is inconsistent with that, was wrongly decided; it cannot be that an abstract of title is always necessary. The rights of the council are permanent and cannot be treated as mere licences. As the law stands they are irrevocable. The Act which was in question in *In re Schmid and Field* (2) is different in terms from our Act. By it rights-of-way or easements "now or hereafter enjoyed by the public" are preserved. In New Zealand, before the decision in *Martin* v. *Cameron* (3) an Act was passed declaring that roads were not to be affected by a certificate. *Staples & Co. Ltd.* v. *Corby and District Land Registrar* (4) was before *Rogers* v. *Hosegood* (5), or it would probably have been decided differently. [He referred also to secs. 12, 49, 114, of the *Real Property Act* 1900; *Hogg on Australian Torrens System*, p. 818; *Canaway on Real Property Act*, p. 202; *Rangeley* v. *Midland Railway Co.* (6).]

Cur. adv. vult.

Sept. 21.

GRIFFITH, C.J. This is an appeal from a judgment of the Supreme Court of New South Wales ordering a caveat lodged by the appellants in the Registrar-General's Office to be removed. The respondent made application to bring land under the provisions of the *Real Property Act*, and the appellants, who are the Municipal District of Concord, lodged a caveat, claiming an estate or interest in the land by virtue of the *Municipalities Act* of 1897, and of notifications in the *Gazette* having the alleged effect of resuming the land for a road and dedicating it as such. Application was made to remove the caveat on the ground that the appellants had no such interest in the land as would authorize them to lodge it. The question raised is of considerable importance, and many questions were argued before us of considerable difficulty, but, in the view we all take of the case, it is not necessary to decide many of them. The right of the appellants to lodge a caveat depends upon the construction to be put upon sec. 24 of

(1) 12 N.S.W. L.R., 308.
(2) 15 S.A. L.R., 48.
(3) 12 N.Z. L.R., 769.
(4) 19 N.Z. L.R., 517.
(5) (1900) 2 Ch., 388.
(6) L.R., 3 Ch., 306.

H. C. OF A. 1905.

MUNICIPAL DISTRICT OF CONCORD v. COLES.

Griffith C.J.

the *Real Property Act* 1900, which provides:—"Any person having or claiming an interest in any land so advertised," in an application to bring it under the Act of 1895, ". . . may . . . lodge a caveat . . . forbidding the bringing of such land under the provisions of this Act, and every such caveat shall particularise the estate, interest, lien, or charge claimed by the caveator, and the caveator shall if required deliver a full and complete abstract of his title."

The appellants claimed that they had an interest in the land within the meaning of that section, and founded their claim substantially on two provisions of the *Municipalities Act* of 1897, secs. 97 and 175. The latter section provides that the council shall within the boundaries of the municipality have the care control and management of public roads other than the main roads of the colony. This is such a road, if it is a road at all. They also say that, as under the former section they are entitled to employ their corporate funds for the purpose of constructing gas-works, and, in that case, are entitled to the privilege of laying gas-pipes through streets, they have, under one or other of these sections, an interest in the soil of the land alleged to have been dedicated as a highway. It is, of course, of very great consequence that land which is a highway should not cease to be such. It was argued before us that, upon one possible construction of the *Real Property Act*, where land which has been really dedicated as a highway is nevertheless included in a clean certificate of title, the person who gets the certificate of title has a good title to the land to the exclusion of the rights of the public over the highway, and they say that that follows from the provisions of sec. 42 of the Act, which provides that, except in cases of fraud, the registered proprietor of land holds it absolutely free from all estates or interests except those specified, and that the only exception which could affect this case is with regard to the alleged misdescription of a right-of-way or an easement through the land which terms, they say, do not apply to a highway.

Now, as was pointed out by Lord *Cairns* L.C. in the case of *Rangeley* v. *Midland Railway Co.* (1): "There can be no such thing according to our law, or according to the civil law, as what

(1) L.R., 3 Ch., 306, at p. 311.

I may term an easement in gross. An easement must be connected with a dominant tenement. In truth, a public road or highway is not an easement, it is a dedication to the public of the occupation of the surface of the land for the purpose of passing and repassing, the public generally taking upon themselves (through the parochial authorities or otherwise) the obligation of repairing it. It is quite clear that that is a very different thing from an ordinary easement, where the occupation remains in the owner of the servient tenement subject to the easement." The term easement, therefore, not being applicable to the case of a highway, sec 42 of the *Real Property Act*, it is said, has no application to this case. It is said, on the other hand, that there is nothing in the Act to authorize the extinction of the rights of the public over a highway. Whether there is or not is a question of considerable difficulty. It has been held in New Zealand, under an Act in not exactly the same terms, that the rights of the public over a highway are not extinguished by the issue of a clean certificate of title. It may be contended that, unless the legislature intervenes, the issue of a clean certificate in New South Wales does exclude the rights of the public over a highway, and under the circumstances it would be very desirable if the law were made clear. But arguments as to the desirability of making the law clear are arguments to be addressed to the legislature, and not to a Court charged with the interpretation of the Statutes which the legislature has thought fit to pass. In the present case, if the contentions of the appellants are correct, this land in question is not the land of the applicant at all, any more than that it had been conveyed by him and the conveyance had been registered. By a provision in the Act of 4 Will. IV. c. 11 land resumed for a highway becomes the property of the Crown, and, if a conveyance to the Crown in such a case were registered, there would be no danger of a title being issued in respect of the highway, except by inadvertence of the Registrar-General's officers in failing to make a proper search. If the appellants' allegations are true the applicant is not entitled to this land, but it does not follow that they are entitled to lodge a caveat.

I make these preliminary observations for the purpose of adding

H. C. OF A. 1905.

MUNICIPAL DISTRICT OF CONCORD v. COLES.

Griffith C.J.

that the Registrar-General is not bound to give effect to an application if he has information from some trustworthy source that the statements of the applicant are not true in fact. On the contrary, it is the duty of the Registrar-General, if he has reason to believe that giving effect to the application in compliance with its terms would do an injustice to the public or to an individual, to stay his hand until the matter is properly investigated. That is not only what he is justified in doing, but what he is bound to do. And I would add that, whether a certificate can be granted over a highway or not, and whether or not the effect of granting it would be the extinction of the highway, I think that whenever the Registrar-General knows there is a highway, he would be certainly justified, and, in my opinion, bound, to indicate it on the face of the certificate of title. This is an extra-judicial opinion, but which I have thought it right to express in view of the arguments addressed to us as to the great public inconvenience that might arise if nothing could be done to prevent a highway from being registered as the property of an individual.

But in this case we are concerned merely with the interpretation of the Act. The terms of sec. 24 of the *Real Property Act* were interpreted by the Supreme Court in 1891, fourteen years ago, in the case of *Tierney* v. *Loxton* (1). In that case a caveat was lodged by a person who owned land bounded by what was said to be a highway. An application was made to bring land including the soil of the highway under the *Real Property Act*, and the adjoining owner lodged a caveat. The Supreme Court held that he had no authority to lodge it. The judgment was a considered one, having been reserved for three months, the Court consisting of the Chief Justice and *Sir William Windeyer* and *Sir George Innes* JJ. *Sir William Windeyer* delivered the judgment of the Court, and, after referring to several sections of the Act, he said (2): "The question is whether a person owning land under a title derived from a Crown grant adjoining what is known as a Government road, that is, a road marked or laid out by the Crown, and described in the grant under which he owns his land as bounding the land granted, has an interest in the soil of the Government road. After a very anxious consideration of the

(1) 12 N.S.W. L.R., 308.

(2) 12 N.S.W. L.R., 308, at p. 314.

words of the section and of the whole Act, we have come to the conclusion that the intention of the legislature in using the word 'interest' was that only a person having, or claiming to have, some legal or equitable interest in the land partaking of the character of an estate, or of an equitable claim upon the land, can be a caveator. This inference is to be drawn not only from the way in which the word 'interest' is used in the latter part of the section in connection with the words 'estate, lien, or charge,' which points to the conclusion that the interest is to be one *ejusdem generis*, and, therefore, one which gives the caveator a legal or equitable claim to or upon the land itself, but also from the concluding words of the section under which the caveator may be required to deliver a full and complete abstract of his title."

I do not myself attach much importance to the words "full and complete abstract of title," but as to the rest of the reasoning, even if we did not concur in it, I think it would require a very strong case indeed, after the lapse of so many years, during which a great many caveats must have been withheld, and a great many certificates must have been issued as a consequence of that decision, to justify the Court in over-ruling it. For myself, I confess I can see no way of escaping from the reasoning in that case, and I am therefore of opinion that it is only a person who has a legal or equitable interest in land, partaking of the character of an estate in it or equitable claim to it, who can lodge a caveat.

Then, has a municipal council such an interest? The interest spoken of by the Supreme Court in that case was in the nature of a proprietary interest. So far as the claim rests upon the words that the corporation has the care, control and management of the road, the point is practically concluded by the case of the *Municipal Council of Sydney* v. *Young* (1), decided by the Privy Council, on appeal from the Supreme Court of New South Wales. The kindred words in the *Sydney Corporation Act* of 1879 are stronger in form than those of the *Municipalities Act*, which merely charge councils with the care, control and management. The *Sydney Corporation Act* provides that all public ways in the city now or hereafter to be formed shall be vested in the council,

(1) (1898) A.C., 457.

H. C. OF A. 1905.

MUNICIPAL DISTRICT OF CONCORD v. COLES.

Griffith C.J.

which has power to make the necessary repairs for maintaining the streets. The Privy Council were of the opinion that these words did not vest in the council any proprietary right, and that consequently they were not entitled to claim compensation when a part of the road was resumed by the Government for public purposes. If, under the words of the *Sydney Corporation Act* the council had no proprietary rights, *à fortiori*, a municipality has no such proprietary rights. Then does the power to construct gas-works and lay pipes through the streets make any difference? It appears to me that those provisions were not intended to give any proprietary right in the land to the council, but to give them just the same rights that would be given to a private corporation which was authorized by a private Act to lay gas mains through the streets. The right given would be in the nature of a licence or a privilege to occupy the street for the purpose of carrying out a commercial undertaking; and, unless it can be asserted that a gas company would be entitled to lodge a caveat against the bringing of land under the Act on the ground that it was a street through which they could lay pipes, the municipal council cannot claim any right on that ground. It seems to me quite clear that an ordinary trading corporation would have no such right. Their right is given to lay pipes through streets, and they have no power to litigate the abstract question whether a particular place in which they do not propose to lay pipes is a street.

The lodging of a caveat is really in the nature of the initiation of litigation, and only those persons should be entitled to initiate litigation who are entitled to litigate the matter of the dispute which is set up by the caveat. The case of *Vestry of Bermondsey* v. *Brown* (1), decided in 1866, has, I think, ever since been accepted as an authority for the proposition that a municipality is not entitled to maintain an action in its own name, without the Attorney-General, for nuisance to a street. The same principle applies to say that a municipal corporation is not entitled to litigate the abstract question whether a particular piece of land is or is not a street. If it is a highway, then it falls within their jurisdiction, but there is no authority to say they are entitled to

(1) L.R., 1 Eq., 204.

litigate such a question in the abstract. For these reasons, I am of opinion that the decision of the Supreme Court is correct.

BARTON J. I also am of the opinion that the judgment of the Supreme Court should be affirmed. In this case the caveat is entered under sec. 24 of the *Real Property Act* 1900, which enacts that any person, having or claiming any interest in any land the subject of an application, may lodge a caveat, and the caveat shall particularise the estate, interest, lien, or charge claimed, &c. It is not sufficient merely to allege that the thing claimed is an estate or interest. The subject of the claim must be itself a legal or equitable interest, as *Windeyer* J. said in *Tierney* v. *Loxton* (1), "partaking of the character of an estate, or of an equitable claim upon the land." That case, in my opinion, ought now to be regarded as law, from the course of time during which it has been accepted as a correct decision, under which no doubt proceedings have since been regulated. But as I think it was correctly decided, I quote from the judgment of *Windeyer* J. at p. 316: "The object of the Statute, as stated in its preamble, is to provide for the declaration of titles to land, and to facilitate the transfer of land; and there is nothing to be found in any section of the Act which points to the conclusion that the legislature ever intended that questions as to the existence of a highway or right of public user of land should be contested under its provisions. It is true that in the cases of *Saddington* v. *Hackett* (2) and *Re O'Brien* (3), questions were tried as to the right of the applicant to enclose lands which it was contended had been dedicated to the public; but in these cases the applicants seem to have acquiesced in the proceedings taken to have the question at issue decided under the provisions of the Act, and the objection as to the caveator having no *locus standi* was in no way raised. We cannot, therefore, regard these cases as in any way deciding the point now raised, and whilst we are not insensible to the advantage to the public which there would be in allowing such cases to be tried under the provisions of the Act, we are somewhat reluctantly driven to the conclusion that the Act does not con-

(1) 12 N.S.W. L.R., 308. (2) 1 N.S.W. L.R., 155.
(3) 2 N.S.W. L.R., 301.

H. C. OF A. 1905.

MUNICIPAL DISTRICT OF CONCORD v. COLES.

Barton J.

template the trial of questions of that kind." I have come to the conclusion that a public right of highway is not an estate or interest in the land, and that conclusion is fortified by the circumstance to which *Windeyer* J. points, that is to say, the collocation in sec. 24 of the words "estate, interest, lien, or charge." One would infer from that collocation that the "interest" here spoken of would be an interest of the same sort as "estate, lien, or charge," that is, a proprietary interest in the land. The case of *In re Houison* (1) is said to conflict with *Tierney* v. *Loxton* (2). It was the case of a claim of an easement appurtenant to the caveator's land, and the Crown grants of the adjoining lands the subject of the application reserved a passage sufficient to admit a horse or cart to the adjoining allotments. The easement was a mere way of access. Even on the assumption that a caveat may be rightly lodged in respect of an easement, that case is quite distinguishable from the present and from *Tierney* v. *Loxton* (2).

The caveat here is an endeavour to set up as an easement or an interest in the land the right of public passage. The right to pass and repass along a highway in this country is, in my opinion, not an easement in the individual, which is a privilege, but is a public right enjoyed by one member in common with all other members of the public. Mr. Gale, at p. 6 in the 7th edition of his work on Easements, defines an easement as follows: "An easement may be defined to be a privilege without profit, which the owner of one neighbouring tenement hath of another, existing in respect of their several tenements, by which the servient owner is obliged 'to suffer or not to do' something on his own land, for the advantage of the dominant owner."

It is said that this case comes within that definition, but it is obvious that the right in question has nothing whatever to do with any particular tenement. In addition to the Chief Justice's quotation from the case of *Rangeley* v. *Midland Railway Co.* (3), I would refer to these words of Lord *Cairns* (4): "It is true that in the well-known case of *Dovaston* v. *Payne* (5), Mr. Justice *Heath* is reported to have said with regard to a public highway

(1) 18 N.S.W. L.R., 300.
(2) 12 N.S.W. L.R., 308.
(3) L.R. 3 Ch., 306.
(4) L.R. 3 Ch., 306, at p. 310.
(5) 2 Sm L.C., 132, 6th ed.; 2 H. Bl., 527.

that the freehold continued in the owner of the adjoining land subject to an easement in favour of the public, and that expression has occasionally been repeated since that time. That, however, is hardly an accurate expression." These remarks immediately precede those which His Honor quoted.

It seems to me that the entire passage disposes of the claim that the right set up can be regarded as anything in the nature of an easement. The right asserted on the part of the council is that it has the care, control and management of the streets in the municipality, and also certain rights to lay gas pipes under the streets. I am clearly of opinion that under the definition given by Mr. Gale (*supra*), and under the very clear words of the late Lord *Cairns*, the authority of which will not be disputed, these claims do not constitute an easement at all. The position of a municipal council seems to me to be this: It has a public trust, but it has no property, in the ordinary sense, in the soil of the road. It cannot block or stop a road from traffic and have the exclusive possession of it, unless there is something in the Statute (the *Municipalities Act*) giving it the power to interfere with the right of the public to pass and repass. So far as this council is concerned, it has certain rights given to it by Statute, and it is confined to the exercise of those rights; it has no exclusive possession whatever of the soil, albeit it may under certain circumstances be empowered by Statute to take temporary or occasional possession of part of it for the sole purpose of carrying out repairs or other duties. So that the position of the council is that it has public duties to perform coupled with such statutory licences as are requisite to enable it to perform those duties, and the mere statement of the position seems to involve a negation of the assumption that, in the ordinarily understood sense and in the sense of the provisions of this Act, it has any proprietary rights. I am therefore of opinion that the right claimed by the council under this Act is not a proprietary right, either in respect of the road or of the licences given by Statute to the municipality, such as would justify the claim that it can lodge a caveat for an estate or interest in land the subject of an application under the Act.

H. C. OF A. 1905.

MUNICIPAL DISTRICT OF CONCORD v. COLES.

Barton J.

In the case of *In re Innes* (1), it was held that an individual claiming the right of highway in common with the public at large had no right to lodge a caveat to prevent land from being brought under the Act. This is a decision which remains unquestioned to the present day, and which I cannot see any reason to question. It deals not only with the position set up by the municipality, if one may as suggested treat it as a member of the public claiming under a caveat in respect of a highway, but there is another and important branch of the case, and that is the question, supposing such a right can be asserted by caveat, whether it can be set up by an individual, or by a municipal council, which in respect of such matters has no better or greater rights than an individual. In his judgment His Honor *Sir Frederick Darley* C.J., said (2): "The estate or interest mentioned in this section must be an estate or interest known to the law and must be claimed in respect of the land which is sought to be brought under the Act. In this case the caveator claims no interest in any of the applicant's land, but claiming as one of the public says in effect that the applicant is seeking to obtain a title to what is really a public road. As a member of the public having no private interest in the land this is a course which he cannot in my opinion pursue." I entirely follow His Honor in that view.

It is clear that a municipality is in no better position than a private citizen to litigate such questions on behalf of the public. The case of *The Vestry of Bermondsey* v. *Brown* (3) already referred to by the Chief Justice is, I think, quite sufficient to sustain that proposition. In that case the vestry brought a suit to restrain interference with a public right of way in their own name, being expressly authorized by an Act of Parliament to indict any person interfering with a right-of-way in the parish of Bermondsey. It was held that the vestry of a parish could not sustain a suit to restrain the infringement of a public right-of-way, except as relators on an information by the Attorney-General, even though they were expressly authorized by Act of Parliament to indict any person stopping a right-of-way within the parish, "and to take such other proceedings for the opening

(1) 12 N.S.W. L.R., 180.
(2) 12 N.S.W. L.R., 180, at p. 183.
(3) L.R. 1 Eq., 204.

thereof as to them should seem expedient." In his judgment *Sir John Romilly*, M.R., said (1): "I thought at the time, and further examination of the Acts of Parliament tends to confirm that view, that it was not intended by those Acts, or by any clauses to be found in them, to delegate to the commissioners named in the first Act, or to the Vestry, who have now delegated to them the powers conferred on the commissioners, any powers or authorities previously vested in the Attorney-General, and that, accordingly, if the Vestry indict anyone under that Act, they must proceed in the name of the Queen before a grand jury, who must find a bill before it can be tried; and if they apply to a Court of Chancery it must be with the name of the Attorney-General as plaintiff on an information." In the same judgment His Lordship said (2): "A dedication to the parish by the owner of the soil cannot be presumed: a dedication from user can only be presumed in favour of the public generally, and not in favour of the inhabitants of a particular parish. This is laid down in *Poole* v. *Huskinson* (3), and is unquestionable law."

That seems clear enough to establish that, in respect of an alleged public road, a municipality has no right to lodge a caveat here. In respect of the statutory rights supposed to be conferred upon it separately, it has not, I think, a proprietary interest. So that, in either view of the case, I am of opinion that the caveat must fail, and that it should be removed. The consequences, as His Honor the Chief Justice has said, are for the legislature and not for us. I completely concur in His Honor's remarks as to the duties of the Registrar-General, and am glad that he has expressed that opinion, which, I hope, is likely to be followed.

O'CONNOR J. For the purposes of this case I will assume that the road in question was properly proclaimed and dedicated and aligned under the provisions of the *Public Roads Act* (4 Will. IV. No. 11), and that the road was within the municipality of Concord. The question raised is whether under these circumstances the municipality have such an interest in the land the subject of the application as to entitle them to enter a

(1) L.R. 1 Eq., 204, at p. 212. (2) L.R. 1 Eq., 204, at p. 215.
(3) 11 M. & W., 827.

H. C. OF A. 1905.

MUNICIPAL DISTRICT OF CONCORD v. COLES.

O'Connor J.

caveat under sec. 24. That depends entirely upon the interpretation to be placed upon the words "interest in the land advertised," and in regard to that question of interpretation I adopt the reasoning of the Supreme Court of New South Wales in *Tierney* v. *Loxton* (1). It appears to me there is no escape from that reasoning having regard to the context in which the word "interest" is found in sec. 24, and to secs. 26, 28, and 42.

But the more difficult question is whether the municipality has, under the circumstances, such an interest as was described by Mr. Justice *Windeyer* in his judgment in *Tierney* v. *Loxton* (1), as the kind of interest referred to in sec. 24 of the *Real Property Act*. It is clear that a caveat is merely the first step in a proceeding for determining the facts necessary to enable the Real Property Commissioners to issue a certificate of title conclusive against the world. That certificate, as is evident from sec. 42, is only intended to be conclusive in so far as it deals with titles which can be litigated and established in regard to the land in question. It does not purport to make the certificate of title conclusive except on those matters which persons interested have an opportunity to litigate. Therefore we must read secs. 26 and 42 together. Looking at sec. 26, the caveator, after the lapse of a certain time, must take proceedings in any Court of competent jurisdiction to establish his title to the estate, interest, lien or charge therein specified. And the question arises at once whether it is possible that the municipality can in this case establish a title to the interest they claim in such a way as to enable the Commissioners to issue a certificate conclusive under sec. 42? That certificate, of course, must be conclusive as to both parties. If it is decided at the trial of the issue that there is no road there, and a clean certificate issues, then that must be a certificate that would prevent the public for all time from claiming a road there. If the trial of the issue between the municipality and the applicant does not finally settle that question, but leaves it in such a position that any member of the public could afterwards raise the same question notwithstanding the issue of a certificate, then it is quite clear that that cannot be one of those matters which are within the provisions of sec. 26. Now, what is the position of

(1) 12 N.S.W. L.R., 308.

the municipality with regard to this interest, and what do they claim their interest to be? They claim that their interest arises under the power given them to have the care, control, and management of public streets in the borough, and to exercise certain rights in them, but it is clear that it is a condition precedent to the accruing of any of those rights that there must be a public street. Their rights are given only over public streets. Of the authorities referred to by my learned brothers, that of the *Vestry of Bermondsey* v. *Brown* (1) is the leading one, and it establishes beyond all question that the title to a public road cannot be litigated by an individual. The right of highway is the right of the public, and no one member of the public can have a right to litigate that question in a way which is conclusive. It may be conclusive against him, but not against the public. The municipality, if such an issue were raised and tried under sec. 26, could not represent the public. They have no power to represent more than the ratepayers of the municipality. A public road is dedicated, not to the ratepayers of the municipality only, but to the public, and, if the caveat of the municipality in this case went on for trial, the issue would be whether they, not the public, could establish title to this highway. They could do no more than establish their own title to the highway, assuming it were legally possible to do that. On the other hand, if the applicant for the land succeeded, and established as against the municipality that there was no highway, that decision would not be binding on the public, and the Attorney-General might come in next month and, notwithstanding the decision on the issue of highway was against the municipality, and in favour of the applicant, the matter might be litigated again by the Attorney-General on behalf of the public. That appears to me to show conclusively that this question is, therefore, not one which can be litigated under sec. 26. The interest which the municipality have here is not one of those interests in regard to which litigation can take place in such a way as to enable the Commissioners to issue a conclusive certificate.

For these reasons, in addition to what has been already said, I am of the opinion that the interest of the municipality is not such

(1) L.R. 1 Eq., 204.

H. C. OF A. 1905.

MUNICIPAL DISTRICT OF CONCORD v. COLES.

O'Connor J.

as to enable them to lodge a caveat and so prevent the issue of a title to the applicant. With regard to the observations of my learned brothers as to the duty of the Registrar-General, I think it clear that, if he is of opinion that there was a public highway or road dedicated properly, and that the applicant has taken a step which might put the municipality and other persons who wish to use the road in a difficulty with regard to the use of it by the issue of a certificate, he has power under sec. 12 of the *Real Property Act* to enter a caveat. That caveat would, of course, only be issued after the issue of the certificate, but it could be done then. It appears to me that it is a very wise provision to vest power in the Registrar to prohibit the dealing with land in any case in which it appears an error has been made by misdescription of the land or otherwise in any instrument of title, and to prevent fraud or any improper dealing. I do not mean to say that in this case there has been any improper dealing with this land, but, if the case did arise, it is quite clear that there would be power in the Registrar-General to intervene on the suggestion of a municipal council, and I have no doubt that, in the proper discharge of his duties under the Act, he would do so. For these reasons I am of opinion that the appeal from the decision of the Supreme Court should be dismissed.

Appeal dismissed with costs.

Solicitors, for appellants, *Lawrence & Macdonald.*
Solicitor, for respondent, *H. C. E. Rich.*

C. A. W.