

[HIGH COURT OF AUSTRALIA.]

THE MUNICIPAL COUNCIL OF SYDNEY . APPELLANT ;
 APPLICANT,

AND

THE REGISTRAR-GENERAL OF NEW } RESPONDENT.
 SOUTH WALES }
 RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF
 NEW SOUTH WALES.

Highway—Public road—Dedication to public—Closure—Sale—Power of council— H. C. OF A.
Memorandum of transfer—Registration—Refusal by Registrar-General except 1945.
subject to notification—Sydney Corporation Act 1932-1942 (N.S.W.) (No. 58 }
of 1932—No. 11 of 1942), ss. 75, 76, 76B (1), 82 (1), 254—Real Property Act SYDNEY,
1900 (N.S.W.) (No. 25 of 1900—No. 45 of 1940), s. 121. Aug. 2, 29.

Rich, Starke,
 Dixon,
 McTiernan and
 Williams JJ.

Section 75 of the *Sydney Corporation Act 1932-1942* (N.S.W.) provides that all public ways in the City of Sydney shall be vested in and under the control, management and direction of the council, who shall have full power to alter, widen, level, divert, extend, construct, improve, maintain, repair and order such public ways ; and that no public way shall be opened, altered, widened, diverted or extended without the approval of the Governor. Section 76 (1) provides :—“ For the purpose of opening, altering, widening, diverting, extending, or closing any public way or portion of a public way in the city, the council may . . . sell any land forming part of a way which is not required for any such purpose ” &c. Section 76B (1) provides that the soil of public ways shall be vested in fee simple in the council ; that such vesting shall confer on the council the same estate and rights in the public way as a private person would have if he were entitled to the site as private land held in fee simple with full rights both as to the soil below and as to the air above ; but that “ (c) unless otherwise expressly provided nothing in this subsection shall be deemed . . . (iv) to authorise the council to grant, demise, dispose of, or alienate the public way or the soil or materials thereof.”

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.

REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Held, by *Rich, Starke, Dixon* and *McTiernan JJ.* (*Williams J.* dissenting), that s. 76 (1) is not an express provision within the meaning of s. 76B (1) (c) (iv) and confers upon the council power to sell land forming part of a public way only as incidental to the powers contained in s. 75.

Municipal Council of Sydney v. Young, (1898) A.C. 457, discussed and applied.

Decision of the Supreme Court of New South Wales (*Nicholas C.J.* in Eq.), *Municipal Council of Sydney v. Registrar-General*, (1945) 46 S.R. (N.S.W.) 79; 62 W.N. 231, affirmed.

APPEAL from the Supreme Court of New South Wales.

A summons under s. 121 of the *Real Property Act* 1900 (N.S.W.) was taken out by the Municipal Council of Sydney calling upon the Registrar-General of New South Wales to substantiate and uphold the grounds of his refusal to register a memorandum of transfer, No. D223,936, by the Municipal Council of Sydney to Australian Consolidated Industries Ltd. of part of the land comprised in certificate of title, registered vol. 5358, fol. 84, and to issue to that company a new certificate of title for the land comprised in the memorandum of transfer free from any notification in the terms or to the effect of the notification appearing on the said certificate of title, registered vol. 5358, fol. 84, or any part thereof. The council asked for relief consequent on the failure of the Registrar-General to substantiate and uphold his said grounds.

In 1940, negotiations took place between the council and the company for the closure as a public road of that part of McCarthy Place situate westerly from the intersection of McCarthy Place and Busby Lane in the City of Sydney, containing a total area of four and three-quarter perches, and for the sale of the part so closed to the company for use by it in conjunction with contiguous lands which it owned. McCarthy Place was opened as a public way in or before 1848 and has been maintained and used as such ever since.

Negotiations subsequently took place between the council, the company and the Sydney Industrial Blind Institution, the owner of certain land contiguous to the "dead end" of that part of McCarthy Place proposed to be closed. These negotiations resulted in an agreement referred to in greater detail hereunder.

In 1942, the council applied to the Registrar-General to have the land brought under the provisions of the *Real Property Act* 1900, upon the ground that the fee simple thereof was vested in the council by s. 76B of the *Sydney Corporation Act* 1932-1942. Pursuant to this application, certificate of title, registered vol. 5358, fol. 84, was issued on 1st January 1943, with a notification endorsed thereon in the following terms:—"By virtue of section 76B (1)

of the *Sydney Corporation Act* 1932-1934, this Certificate of Title is subject to the dedication of the land to the public, the rights of the Crown or of any person to minerals below the surface of the land in respect of any easement or under the provisions of any Act, and to the provisions of sub-section (1) (c) (iv) of that section."

Application for the approval of the Governor to the council's selling the land was made by a letter signed by the Town Clerk on 12th May 1943. This letter stated that "it is desired that action be taken in pursuance of s. 76 of the *Sydney Corporation Act* 1932-1942 and not s. 254 of the Act . . . as the application involves the closing of a public way." The Governor's approval was given on 2nd June 1943, and notice of the approval was published in the *Government Gazette* on 11th June 1943.

On 17th June 1943, an agreement was executed between the council, the company and the Sydney Industrial Blind Institution, which recited:—(1) that the council, by virtue of certificate of title, registered vol. 5358, fol. 84, was the registered proprietor of an estate in fee simple of a certain parcel of land in the City of Sydney subject to the provisions of s. 76B of the *Sydney Corporation Act* 1932, as thereon notified; (2) that the parcel of land consisted of that portion of McCarthy Place referred to above, and indicated on a plan annexed to the agreement, and which had been open to and used by the public for a long period of years as a public way in the City of Sydney; (3) that the council was of opinion that the portion of McCarthy Place was no longer required for the purposes of a public way and the council was accordingly desirous of closing it and selling it; (4) that the company, being the owner of the land adjoining the portion on the north and on the south respectively, was desirous of purchasing it for the sum of £683 15s., which sum the council was prepared to accept; and (5) that the Sydney Industrial Blind Institution claimed that, as the owner of the land adjoining the portion on the west, it was entitled to maintain a valid objection to this closing and sale, on the ground that the closing and sale would or might deprive it of the benefit of further access of light and air to the premises erected on its land, which benefit it alleged it had hitherto enjoyed by reason of the status of McCarthy Place as a public way.

It was stated in the agreement that the parties had agreed: (1) that the company would purchase and the council, subject to the approval of the Governor as required by the *Sydney Corporation Act* 1932, as amended, would sell the portion of land; (2) that, in consideration of the Institution consenting to the closing and sale of the portion and at the request and by the direction of the company, the

H. C. OF A.

1945.

MUNICIPAL
COUNCIL
OF SYDNEYv.
REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.

REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

council would on completion of the sale deliver to the company a memorandum of transfer of the portion excluding therefrom an area containing about one hundred square feet immediately adjacent to the land owned by the Institution, which memorandum of transfer would be accepted by the company and the council would also deliver to the Institution a memorandum of transfer to the Institution of the excluded area.

Completion under the agreement took place on 29th July 1943, all moneys due thereunder to the council being duly paid to it, and memoranda of transfer duly executed being delivered to the company and the Institution as provided in the agreement.

The memorandum of transfer delivered to the company was lodged with the Registrar-General for registration. It was accompanied by a request that a new certificate of title be issued in respect of the land without the endorsement of any notification concerning s. 76B of the *Sydney Corporation Act* 1932-1942.

After certain discussions and correspondence, the Registrar-General refused to comply with the request and, upon being required pursuant to s. 121 of the *Real Property Act* 1900 to state the grounds of his refusal, the Registrar-General, by letter dated 17th May 1944, stated them as follows: "1. I am not satisfied that the transferror corporation has power to alienate the land. 2. If the transferror corporation has power to alienate the land, I am not satisfied that—(a) the transferror corporation is freed from 'any existing right of the Crown or of any person in respect of any easement or under the provisions of any Act' within the meaning of section 76B (1) (c) (ii) of the *Sydney Corporation Act* 1932-1934; (b) the minerals below the surface of the land are comprised in the certificate of title of the transferror corporation."

Nicholas C.J. in Eq. held that the council had no power to close a public way or to sell land forming part of a public way, except as incidental to one of the powers contained in s. 75 of the *Sydney Corporation Act* 1932-1942. He accordingly dismissed the summons (1).

From that decision, the council appealed to the High Court.

Kitto K.C. (with him *Bavin*), for the appellant.

Weston K.C. (with him *Hardie*), for the respondent.

Cur. adv. vult.

The following written judgments were delivered :—

RICH J. This is an appeal from a decision of *Nicholas* C.J. in Eq., in which he held that the Municipal Council of Sydney was not empowered under s. 76 of the *Sydney Corporation Act* 1932-1942 (N.S.W.) to close a public way or to sell land forming part of a public way, except as incidental to one of the powers contained in s. 75 of that Act. In 1898, the Privy Council held that the provisions of the existing legislation, which vested public ways in the council, did not so vest them in proprietary right, but only for purposes incidental to the exercise of municipal authority. The provisions then in question were s. 67 of 43 Vict. No. 3, and s. 1, sub-s. III. of 48 Vict. No. 5. The latter read as follows :—“It shall be lawful for the Municipal Council of Sydney for the purpose of opening altering widening diverting extending or closing any public way or portion of a public way in the City of Sydney . . . (III.) To sell any land forming part of a way which is not required for any such purpose. And every portion of land acquired under the authority of this Act shall be vested in the Council as a Public Way under and subject to the provisions of the said Act.” And their Lordships considered that this did not widen the interpretation as to what was vested in them, but only related to land “to which they are really entitled as land, and which as a matter of law they have acquired, and can sell like any ordinary individual” (*Municipal Council of Sydney v. Young* (1)). In 1902, the statutes relating to the Corporation of the City of Sydney were consolidated, 2 Edw. VII No. 35. In this Act, the sections already mentioned are replaced by ss. 74 and 75 in substantially identical terms. In 1932, another consolidation statute was enacted in which these sections are renumbered 75 and 76. So far, no change had been made affecting the relevant powers of the council. But it was contended that s. 76B, inserted by the amending Act No. 9 of 1934, displaced the decision referred to. No doubt it did with regard to vesting in fee simple in the council—sub-s. 1 (a)—without, however, conferring a power to alienate. This is made clear by sub-s. 1 (c), which states that “unless otherwise expressly provided nothing in this subsection shall be deemed—(i) to affect any express or implied dedication to the public. . . . (iv) to authorize the council to grant, demise, dispose of, or alienate the public way or the soil or materials thereof.” And I cannot think that s. 76 amounts to an express provision otherwise. Thus no express power of closing or sale is conferred on the council. Sub-section 4 of s. 76B extends the provisions of the *Public Roads Act* 1902 (N.S.W.), ss. 19-22, to the closing of public

H. C. OF A.

1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.

REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Aug. 29.

(1) (1898) A.C. 457, at p. 459.

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.

REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Rich J.

ways, and sub-s. 5 confers a power of veto on the council to the closing of public ways. Even the implied power of sale conferred by s. 76 is restricted to land which the council "has acquired and can sell like any ordinary individual." The legislation throughout evinces an intention to protect the rights of the public as regards public ways. And I consider that the Registrar-General was justified in refusing the transfer by the appellant because he was not satisfied that the transferee corporation had power to alienate the land in question. For these reasons, I am of opinion that the appeal should be dismissed.

STARKE J. The question on this appeal is whether the Municipal Council of Sydney has authority under ss. 76 and 76B of the *Sydney Corporation Act* 1932-1942 (N.S.W.) to sell, with the sanction of the Governor-in-Council, portion of a public way known as McCarthy Place vested in it under the provisions of s. 76B of the Act, but which the council desired to and was prepared to close because it was of opinion that McCarthy Place was no longer required for the purposes of a public highway.

The authority contained in s. 254 of the Act to close any public way on land purchased or resumed is not applicable to the case and was not relied upon by the council.

And it was not contended that the council had any such authority as it now claims before the passing of the *Sydney Corporation (Amendment) Act* 1934 No. 9, s. 13, which enacted s. 76B now relied upon (*Municipal Council of Sydney v. Young* (1)). But the council claims that s. 76B vests in it the fee simple of the public way and a proprietary right thereto to which they were "really entitled as land, and which . . . they . . . can sell like any ordinary individual" (*Municipal Council of Sydney v. Young* (2)).

The argument is ill-founded because s. 76B itself provides that its provisions shall not, unless otherwise expressly provided, authorize the council to alienate the public way or the soil or materials. This section by itself does not therefore vest public ways in the council in such a way that they can sell like an ordinary individual; the vesting is subject to various restrictions. The council contends that it is otherwise expressly provided by s. 76, which was in force when *Young's Case* (1) was decided and is as follows:—“(1) For the purpose of opening, altering, widening, diverting, extending, or closing any public way or a portion of a public way in the city, the council may—(a) purchase any land; (b) exchange any portion of a public way vested in the council for land required by the council for any of

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

(2) (1898) A.C., at p. 459.

of the aforesaid purposes ; (c) sell any land forming part of a way which is not required for any such purpose ; and every portion of land acquired under this section shall be vested in the council as a public way under and subject to the provisions of this Act. (2) No purchase, sale, or exchange of land under this section shall be valid until the same has been sanctioned by the Governor, and notified in the Gazette."

But this section, coupled with s. 76B, does not explicitly enact that a council may close a public way vested in it by selling its land if the way is no longer required for the purposes of a public highway, but only that, for various street purposes, land forming part of a way may be sold for any of those purposes, which include the closing of any public way or portion of a way. The last mentioned purpose is used in collocation with the other street purposes and authority to sell land forming part of a way, which is not required for any such purpose, is more appropriate to the purposes of opening, altering, widening, diverting or extending than to closing a public way. To say that a way is no longer required as a public way is intelligible enough, but it is not quite so easy to follow what is meant by selling a way that is not required for the purpose of closing a way or portion thereof unless the closing be connected with street operations such as the opening of new ways or alteration &c. of old ways. The authority contained in s. 76 (1) (c) is connected with or incidental to such operations. But, in any case, it is clear, I think, that s. 76 does not " expressly provide " anything contrary to the restriction contained in s. 76B (1) (c) (iv).

The appeal should be dismissed.

DIXON J. The refusal of the Registrar-General to register the transfer by the Council of the City of Sydney is based on two grounds, with only one of which I find it necessary to deal. That ground is that he is not satisfied that the transferrer corporation has power to alienate the land.

The land is part of a lane in the City of Sydney, a public way. The soil is vested in the council by virtue of s. 76B (1) (a) of the *Sydney Corporation Act* 1932-1934, a provision passed in 1934. Contemplating the transaction to which the transfer seeks to give effect, the council obtained a certificate of title, but the Registrar-General placed upon the certificate a notification that the title is subject, among other things, to the dedication of the land to the public and to the provisions of sub-s. 1 (c) (iv) of s. 76B, which says that, unless otherwise expressly provided, nothing in sub-s. 1 shall be

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.
REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Starke J.

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.
REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Dixon J.

deemed to authorize the council to grant demise dispose of or alienate the public way or the soil or the materials thereof.

Section 76B for the first time vested the soil of all public ways in the council. The council was also enabled to obtain a certificate of title under the *Real Property Act*, as to the effect of which see the decision of Rich J. in *Vickery v. Municipality of Strathfield* (1). The legislature, however, was evidently not prepared to adopt this measure without qualification and the section contains provisions guarding against some of the consequences which might otherwise ensue. Paragraph c of sub-s. 1 for instance, contains five other sub-paragraphs besides that noted on the title, viz. par. c, and they intercept various consequences which would or might otherwise follow from the vesting.

Sub-section 4 deals specifically with the closing of public ways and makes the *Public Roads Act* 1902 applicable to the purpose. Under ss. 19 and 20 of that Act, the power of closing unnecessary roads lies with the Executive Government subject to conditions which include a right on the part of persons interested to be heard. Sub-section 5 adds the consent of the council as a condition precedent to this power of closing public ways. If, however, the power is exercised, the land forming the closed way vests in the Crown, but, if the land is sold, the purchase money falls into the funds of the council: See s. 76B (6) and (4).

The council was unwilling to invoke the foregoing provisions of s. 76B and those of the *Public Roads Act* for the purpose of closing the public way and carrying through the transaction to which the transfer now in question attempts to give effect. It preferred to rely on the effect of the vesting accomplished by s. 76B (1) when combined with the power contained in an older provision, namely, s. 76. That provision, which was originally introduced into the legislation by the *Sydney Corporation Act Amendment Act* 1884 (48 Vict. No. 5), must be considered with s. 75 which formed part of the *Sydney Corporation Act* 1879 (43 Vict. No. 3). Section 75 says that all public ways in the City of Sydney shall be vested in and under the control, management and direction of the council, who shall have full power to alter, widen, level, divert, extend, construct, improve, maintain, repair and order such public ways. It also enacts that no public way shall be opened, altered, widened, diverted or extended without executive approval. Section 76, sub-s. 1 is as follows:—"For the purpose of opening, altering, widening, diverting, extending, or closing any public way or a portion of a public way in the city, the council may—(a) purchase any land; (b) exchange any portion of a public way vested in the council for land required

(1) (1911) 11 S.R. (N.S.W.) 354, at pp. 362 *et seq.*

by the council for any of the aforesaid purposes ; (c) sell any land forming part of a way which is not required for any such purpose ; and every portion of land acquired under this section shall be vested in the council as a public way under and subject to the provisions of this Act."

Sub-section 2 provides that no purchase, sale or exchange of land shall be valid without the approval of the executive. Sections 75 and 76 have been interpreted by the Privy Council. In *Sydney Municipal Council v. Young* (1), a claim was made that s. 75 (then s. 67 of the Act of 1879) operated to vest the soil of the public ways in the council, and, in support of the claim, s. 76 (then ss. 1 and 2 of the amending Act of 1884) was relied upon. It was said that the powers to exchange and to sell given by that section necessarily implied that s. 75 operates to vest the soil in the council. In giving the judgment of the Board, Lord *Morris* spoke in reference to the two provisions (s. 75 as it then stood in the Act of 1879 and s. 76 as it then stood in that of 1884) as follows (2) :—" Then it has been said that the construction should not be given to the words ' shall be vested in the Council ' in the *Sydney Corporation Act of 1879*, which has been given to similar Acts in England, because there has been an amending Act passed which seems, as is suggested, to widen that interpretation as to what is vested in them. Their Lordships are of opinion that the amending Act does not do so. It provides that, ' It shall be lawful for the Municipal Council of Sydney, for the purpose of opening, altering, and widening, ' &c., to purchase land, to exchange land, or to sell land. That must mean to which they are really entitled as land, and which as a matter of law they have acquired, and can sell like any ordinary individual."

In the present case, the council seeks to avoid the consequences of the interpretation thus fixed upon s. 76 and to do so relies upon the vesting accomplished now by s. 76B (1). It contends that, whereas, before s. 76B (1), s. 76 (1) (c) could not operate as a power to sell the soil of public highways unless the land had been purchased or acquired by the council, now all public ways are subject to the operation of the power because s. 76B (1) vests them in the council.

To this contention two answers are made. The first answer is that, for the very purpose of preventing this result, sub-s. 1 (c) (iv) of s. 76B says that, unless otherwise expressly provided, nothing in sub-s. 1 shall be deemed to authorize the council to grant, demise, dispose of, or alienate the public way or the soil or the materials thereof.

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY

v.
REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Dixon J.

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

(2) (1898) A.C., at p. 459.

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.

REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Dixon J.

The second answer is that, on its true interpretation, s. 76 (1) (c) gives no independent power of closing a way by sale; the power it gives of selling is consequential upon or incidental to some action taken by the council for one or other of the purposes stated in the section when that action results in leaving the council with superfluous land.

An examination of s. 76 (1) shows that the power to sell is restricted to land forming part of a way which is not required for any of a list of purposes. The full list is:—"opening, altering, widening, diverting, extending, or closing any public way or a portion of a public way." The suggestion is that the section contemplates a possibility that land vested in the council as a result of purchase or other acquisition will not be required for the purpose of opening, widening, diverting or extending a public way and authorizes the council to sell it accordingly.

It is absurd to speak of land forming a way not being required for the purpose of closing the way and the absurdity is removed by supposing that, just as all three powers given are not alike relevant to each and every purpose mentioned, so the phrase "any such purpose" is a collective expression which does not necessarily require us to suppose that a distributive application to each and every "purpose" mentioned was adverted to and actually intended by the draftsman.

Nicholas C.J. in *Eq.*, from whose decision upholding the Registrar-General the appeal is brought, placed his judgment upon the interpretation of s. 76. He said:—"In my judgment the power to close a road and the power to sell are only incidental to the powers conferred by the earlier words of s. 76, and do not amount to an independent power of closing a road or of selling the land formerly subject to a road" (1).

I agree with his Honour in the view that s. 76 gives no substantive power of closing part of a public way by selling it. I think that we would not be justified in construing such confused and illogical expressions as conferring so important a power of overreaching public rights, particularly when later provisions of the legislation give carefully guarded powers over the same subject but of another kind.

But I think the first answer given is even more decisive against the appeal. Two views are put forward as to the meaning of s. 76B (1) (c) (iv). On the one side for the appellant it is said that it means no more than that the ownership of the soil of a public way with which the sub-section invested the council should not alone suffice to

(1) (1945) 46 S.R. (N.S.W.) 79, at p. 82; 62 W.N. 231, at p. 233.

enable the council to alienate the land but that it is enough to find elsewhere an express power of disposing of land owned by the council notwithstanding that it was subject to a public way.

On the other hand, the Registrar-General relies on the provision as one designed to ensure that the vesting of the soil of roads and other public ways should not operate to subject the public ways to a power of alienation otherwise inapplicable.

In my opinion, s. 76B (1) (c) (iv) has the operation contended for by the Registrar-General.

The expression "nothing in this sub-section shall be deemed to authorize the council to dispose of or alienate the public way" appears to me not merely to be directed to negating the *jus disponendi* as a right of property, but to be concerned with alienation of the highway as a possible consequence of the alteration of the law made by the sub-section. It is a provision to prevent that consequence ensuing. The words "unless otherwise provided" are not satisfied except by a provision which, by itself and without the assistance of sub-s. 1 of s. 76B authorizes the council to dispose of or alienate the way. That is a thing that s. 76, as construed in *Young's Case* (1), certainly does not do.

In my opinion, the appeal should be dismissed.

MCTIERNAN J. In my opinion, the appeal should be dismissed. I have had the opportunity of reading the reasons for judgment of my brother *Dixon* and concur in them.

WILLIAMS J. This is an appeal from an order made by *Nicholas C.J.* in Equity on 22nd March 1945 dismissing a summons filed by the appellant, the Municipal Council of Sydney, under s. 121 of the *Real Property Act* 1900 (N.S.W.) for an order calling upon the respondent, the Registrar-General of New South Wales, to substantiate and uphold his grounds for refusing to register a memorandum of transfer by the council to Australian Consolidated Industries Ltd. of portion of a public way in the City of Sydney known as McCarthy Place, the portion sold being known as McCarthy Place West (2).

The relevant facts are shortly as follows. From about the year 1848, McCarthy Place has existed as a public way in the City of Sydney, and as such became vested in the council by s. 67 of the *Sydney Corporation Act* 1879. This section is now s. 75 of the *Sydney Corporation Act* 1932-1942. Pursuant to the provisions of s. 76B (1) (a), added to this Act by the *Sydney Corporation (Amendment) Act*

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.
REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Dixon J.

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

(2) (1945) 46 S.R. (N.S.W.) 79; 62
W.N. 231.

H. C. OF A
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.

REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Williams J.

1934, the council in 1942 applied to the Registrar-General to be registered as the proprietor of an estate in fee simple in McCarthy Place West under the provisions of the *Real Property Act* 1900, and on 1st January 1943 the Registrar-General issued to the council a certificate of title registered volume 5358, folio 84, subject to the following notification:—"By virtue of s. 76B (1) of the Sydney Corporation Act 1932-1934, this Certificate of Title is subject to the dedication of the land to the public, the rights of the Crown or of any person to minerals below the surface of the land and in respect of any easement or under the provisions of any Act, and to the provisions of sub-s. (1) (c) (iv) of that section."

On 17th June 1943, an agreement was made between the council, the company, and the Sydney Industrial Blind Institution for a sale, subject to the approval of the Governor, of McCarthy Place West to the company, the company agreeing to transfer a small portion of the part sold to the Institution. The agreement was made pursuant to resolutions by the council to close this part of the Place which is a dead end adjoining the premises of the Institution on the west and those of the company on the north and south. On 2nd June 1943, the Governor approved of the sale, and his approval was published in the *Government Gazette* on 11th June 1943, but the Registrar-General has refused to register a memorandum of transfer of the land to the company except subject to the above notification.

On the hearing of the appeal, the council withdrew its objection to the action of the Registrar-General with the exception of the words subjecting the land to the provisions of s. 76B (1) (c) (i) and (iv).

The council contends that it was empowered by s. 76 of the Act of 1932 to sell and transfer the land to the company free from these provisions.

In order to determine this contention, it is necessary to examine to some extent the previous and existing legislation relating to the powers of the council over public ways. These powers are now contained in Part VIII., headed "The Regulation of Public Ways," and Part XVI., headed "Resumption," of the *Sydney Corporation Act* 1932 as amended.

Section 75 of the present Act was first enacted in the *Sydney Corporation Act* of 1879, as the first section, namely s. 67, in Part V., "Powers of Council for Regulation of Public Ways." That Part contained, in s. 72, the predecessor of the present s. 82. Section 76 of the present Act was introduced into the Act of 1879 by the *Sydney Corporation Act Amending Act* of 1884, ss. 1 and 2. The Act of 1879 as amended was repealed and consolidated by the *Sydney Corporation Act* 1902. In this Act, s. 67 of the Act of 1879 became s. 74, s. 72

became s. 79, while ss. 1 and 2 of the Act of 1884 became s. 75. These sections were all included in Part VIII., headed "The Regulation of Public Ways." The *Sydney Corporation Act* 1902 as amended was repealed and consolidated by the *Sydney Corporation Act* 1932. In this Act, s. 74 of the Act of 1902 became s. 75, s. 75 became s. 76, and s. 79 became s. 82. They are, so far as material, as follows:—"75. (1) All public ways in the city of Sydney . . . shall be vested in, and under the control, management, and direction of the council, who shall have full power to alter, widen, level, divert, extend, construct, improve, maintain, repair, and order such public ways . . . (2) No public way shall be opened, altered, widened, diverted, or extended . . . until the approval thereto of the Governor has been obtained and notice of such approval has been published in the *Gazette*. 76. (1) For the purpose of opening, altering, widening, diverting, extending, or closing any public way or a portion of a public way in the city, the council may—(a) purchase any land; (b) exchange any portion of a public way . . . (c) sell any land forming part of a way which is not required for any such purpose . . . (2) No purchase, sale, or exchange of land under this section shall be valid until the same has been sanctioned by the Governor, and notified in the *Gazette*." "82. (1) Every such public way shall, when formed and completed, be held to be for ever dedicated to the public use."

Section 67 of the Act of 1879 and ss. 1 and 2 of the Act of 1884 came before the Privy Council in *Municipal Council of Sydney v. Young* (1), when it was held that the vesting of a street or public way in the council under s. 67 vested no property beyond the surface of the street, and such portion as might be absolutely necessarily incidental to the repairing and proper maintenance of the street, and that it did not vest the soil or the land in them as owners. Lord *Morris*, delivering the judgment of the Privy Council, in reference to s. 1 of the Act of 1884, said:—"It provides that, 'It shall be lawful for the Municipal Council of Sydney, for the purpose of opening, altering, and widening,' &c., to purchase land, to exchange land, or to sell land. That must mean to which they are really entitled as land, and which as a matter of law they have acquired, and can sell like any ordinary individual" (2). The effect of this judgment was to give the council a very limited title to the public ways in the City of Sydney vested in it by s. 67 of the Act of 1879 (now s. 75 of the Act of 1932), but nothing was done to enlarge this title until s. 76B was added to Part VIII. of the Act of 1932 by the *Sydney Corporation (Amendment) Act* 1934. Section 76B provides, so far as material, sub-s. 1 (a)

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.
REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Williams J.

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

(2) (1898) A.C., at p. 459.

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.

REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Williams J.

that, except where otherwise expressly provided, every public way, and the soil thereof, and all materials of which the public way is composed, shall by virtue of this Act vest in fee simple in the council, and the council, if it so desires, shall by virtue of this Act be entitled to be registered as the proprietor of the public way under the provisions of the *Real Property Act* 1900. (b) The vesting in fee simple under this sub-section shall . . . confer on the council, subject to the provisions of this Act, the same estate and rights in and with respect to the site of the public way as a private person would have if he were entitled to the site as private land held in fee simple with full rights both as to the soil below and to the air above. (c) Unless otherwise expressly provided nothing in this sub-section shall be deemed—(i) to affect any express or implied dedication to the public . . . (iv) to authorize the council to grant, demise, dispose of, or alienate the public way or the soil or materials thereof. But although the title of the council to the land comprised in the public ways vested in it by s. 75 was left in this condition until 1934, the council, subsequently to the judgment and prior to 1934, was given extensive powers of purchasing and resuming land in fee simple for certain purposes. By the *Sydney Corporation (Amending) Act* 1900, the Act of 1879 was amended to empower the council to resume or purchase land required for the opening of new streets or public places and widening or enlarging of streets or public places in the city, and to sell or lease superfluous lands including the power to resume or purchase the whole of the land of which the council only required portion where the owner so required. Similar powers to resume and purchase land were contained in the *Sydney Corporation Act* 1902. By the *Sydney Corporation Amendment Act* 1905, as amended by the *Sydney Corporation Amendment Act* 1906, the council was given power, with the approval of the Governor, to purchase or resume all lands required for the opening of new public ways or the widening, enlarging or extending of public ways in the city, and all lands of which those required for such purposes formed part, and land required for improvements or remodelling any portion of the city or for any of the purposes of the principal Act, and s. 22 of the Act of 1905 gave the council the same powers as those now contained in pars. (a) to (g) of s. 254 (1) of the Act of 1932, but without the proviso to (g). These powers are now consolidated in Part XVI. of the Act of 1932, Division 1 of which is headed “*Acquisition and Compensation.*”

Since 1900, therefore, the council has been empowered to acquire land for public ways by purchase under what is now s. 76 of the Act of 1932, and by purchase or resumption under what is now Part XVI.,

Division 1, of the same Act and to sell such lands under the same provisions. The power to purchase, in addition to the power to resume such lands, was presumably included in the sections now found in Part XVI., Division 1, because this power authorized the council to purchase the whole of the land of which the required land formed part, and it is obvious that the power to purchase only so much of an owner's land as was required for the purpose of a public way contained in s. 76 would seldom tempt an owner to sell.

Section 254 of the Act of 1932 authorized the council in respect of any land purchased or resumed by it under the authority of the Act to (c) close, alter, widen, extend, or divert any existing way thereon; (d) construct and open any new public way thereon; (g) sell the whole or any portion of such land; (h) exchange the whole or any portion of such land with the approval of the Governor. Under this section, therefore, the council had an absolute right to sell any land that had been purchased or resumed under Part XVI., Division 1, but, by the same amending Act of 1934 which introduced s. 76B into Part VIII. of the Act, a proviso was added to s. 254 (1) (g) that this paragraph should not be deemed to authorize the sale of any land resumed by the council either before or after the date of the Act of 1934 unless the approval of the Governor had been first obtained thereto. Under these circumstances, it would be reasonable to expect that when the legislature by the Act of 1934 enlarged the title of the council to the lands comprised in the public ways vested in the council by s. 75 of the Act of 1932 into an estate in fee simple, it would give the council power to sell these lands comparable to its power to sell public ways constructed on land purchased or resumed under Part XVI., Division 1, especially when the council already had power under s. 76 to sell land which it had purchased under the powers now found in that section. The council has express power under s. 75 (1) and s. 254 (1) to alter, widen, extend or divert existing public ways. Section 75 (1) does not, like s. 254 (1), contain express power to open a new public way, although it would appear to be implied from s. 75 (2). But, as there was no power to purchase or resume land contained in the Act of 1879, it would have been difficult to open a new public way.

Section 254 (1) contains an express power to close a public way, but s. 75 does not contain such a power, either express or implied. This may be explained by the absence of a power to sell land in the Act of 1879. It is evident, however, that it was soon found that the council could not regulate the public ways in a growing city without a power to purchase, exchange and sell land for that

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.
REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Williams J.

H. C. OF A.
1945.

MUNICIPAL
COUNCIL
OF SYDNEY
v.

REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.

Williams J.

purpose, and so in 1884 the Act was amended to give the council these powers and at the same time, and indeed as necessarily incidental thereto, the opening and closing of public ways were expressly stated to be amongst the purposes for which the council could exercise these new powers.

If the land was purchased in fee simple under s. 76 in order to open a public way, then Lord *Morris's* words (1) show that such land could be sold in order, *inter alia*, to close the public way. Section 76, in my opinion, contains express power to sell and by selling to close an existing public way or portion thereof, in the site of which the council has a saleable title, which is no longer required for the purpose of a public way because, for instance, the public way or portion thereof has been diverted to some other site or it has become, as in the present case, a dead end. When s. 76B (1) enlarged the estate of the council in the public ways (other than those in which the council had acquired the fee simple by purchase or exchange or resumption) into an estate in fee simple, it gave the council, subject to s. 76B (1) (c) (iv), such a title as enabled it to sell the site of these ways for the purpose of closing them just as it could sell land purchased in fee simple and formed into a public way for that purpose.

The fetters imposed by s. 76B (1) (c) (iv) are subject to any express provision to the contrary and s. 76 contains such a provision. Section 82 applies to all public ways, whether vested in the council by s. 67 of the Act of 1879 and its successors in the subsequent Acts, or by purchase or acquisition or exchange under the provisions already mentioned, and in the context of the whole Act this section must, in order to give effect to the express powers of sale and exchange of the sites of public ways conferred by s. 76 and s. 254, be limited in its operation to the period when the subject land is vested in the council.

Section 76B, sub-ss. 4 and 5 provide that the provisions of the *Public Roads Act* 1902 shall extend to and include any public way, whether such public way was originally opened by the Crown or not, but that a public way or part thereof shall not be closed unless the consent of the council has been first obtained. These provisions apply to all public ways whether subject to Part VIII. or Part XVI. of the Act, and, therefore, do not throw any light upon the question whether the council, in order to close a public way, can sell it under s. 76 of the Act. They cannot provide an exclusive method of closing a public way because they would then have the effect of restricting the express power to close a public way contained in s. 254. In so far as they throw any light on the matter, they appear

(1) (1898) A.C., at p. 459.

to me to assist the view that the decision to close a public way rests with the council subject, in the case of s. 76, to the approval of the Governor, because, even where the machinery of the *Public Roads Act* is invoked, the public way can only be closed with its consent.

For these reasons, I would allow the appeal.

Appeal dismissed.

Solicitor for the appellant, *M. W. D. McIntyre*, City Solicitor.
Solicitor for the respondent, *A. H. O'Connor*, Crown Solicitor for New South Wales.

J. B.

H. C. OF A.
1945.
MUNICIPAL
COUNCIL
OF SYDNEY
v.
REGISTRAR-
GENERAL
OF NEW
SOUTH
WALES.