[HIGH COURT OF AUSTRALIA.]

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) . . DEFENDANT, } APPELLANT;

AND

THE ATTORNEY-GENERAL FOR NEW SOUTH WALES AND THE COUNCIL OF THE MUNICIPALITY OF CARRINGTON . . . . . INFORMANT AND PLAINTIFFS, } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1909.

SYDNEY, Nov, 25; Dec. 8, 9, 10.

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

Resumption of land—Public Works Act 1900 (*N.S.W.*) (*No.* 26 *of* 1900), *secs.* 36-40, 80*—*Local Government Act* 1906 (*N.S.W.*) (*No.* 56 *of* 1906), *secs.* 75, 83—*Public Roads Act* 1902 (*N.S.W.*) (*No.* 95 *of* 1902), *secs.* 19, 20—*Resumption of public highway—Substituted road—Liability of Constructing Authority—Road wholly in resumed area.*

The Governor has power, under secs. 36 and 37 of the *Public Works Act* 1900, to resume a public highway, and upon resumption the public right of way over the land is extinguished.

* Sec. 80 is as follows :—If, in the exercise of the powers hereby granted, it is found necessary to cross, cut through, raise, sink or use any part of any road, whether carriage road, horse road, tram road or railway, either public or private, so as to render it impassable for, or dangerous, or extraordinarily inconvenient to passengers or carriages or to the persons entitled to the use thereof, the Constructing Authority shall, before the commencement of any such operations, cause a sufficient road to be made instead of the road to be interfered with and shall, at the public expense, maintain such substituted road in a state as convenient for passengers and carriages as the road so interfered with or as nearly so as may be.

H. C. OF A. 1909.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Sec. 80 of the *Public Works Act* 1900 provides that, if in carrying out the authorized work the Constructing Authority interferes with any road so as to render it impassable, he shall, before commencing operations, cause another sufficient road to be made in place of the road interfered with.

Held, that this section has no application to roads which are wholly within a resumed area, or to the resumption of portion of a road, where before resumption the portion of the road resumed gave access only to land vested in the Constructing Authority, and where, after the resumption, the whole of the frontage to the portion of the road resumed is Crown property.

Held, also, that sec. 83 of the *Local Government Act* 1906 refers only to the closing of roads in pursuance of the *Public Roads Act* 1902, and does not restrict the powers of resumption conferred by the *Public Works Act* 1900.

Decision of *A. H. Simpson* C.J. in Eq. : *Attorney-General* v. *Chief Commissioner for Railways and Tramways*, (9 S.R. (N.S.W.), 412; 26 W.N. (N.S.W.), 79), reversed on the first point, and affirmed on the second point.

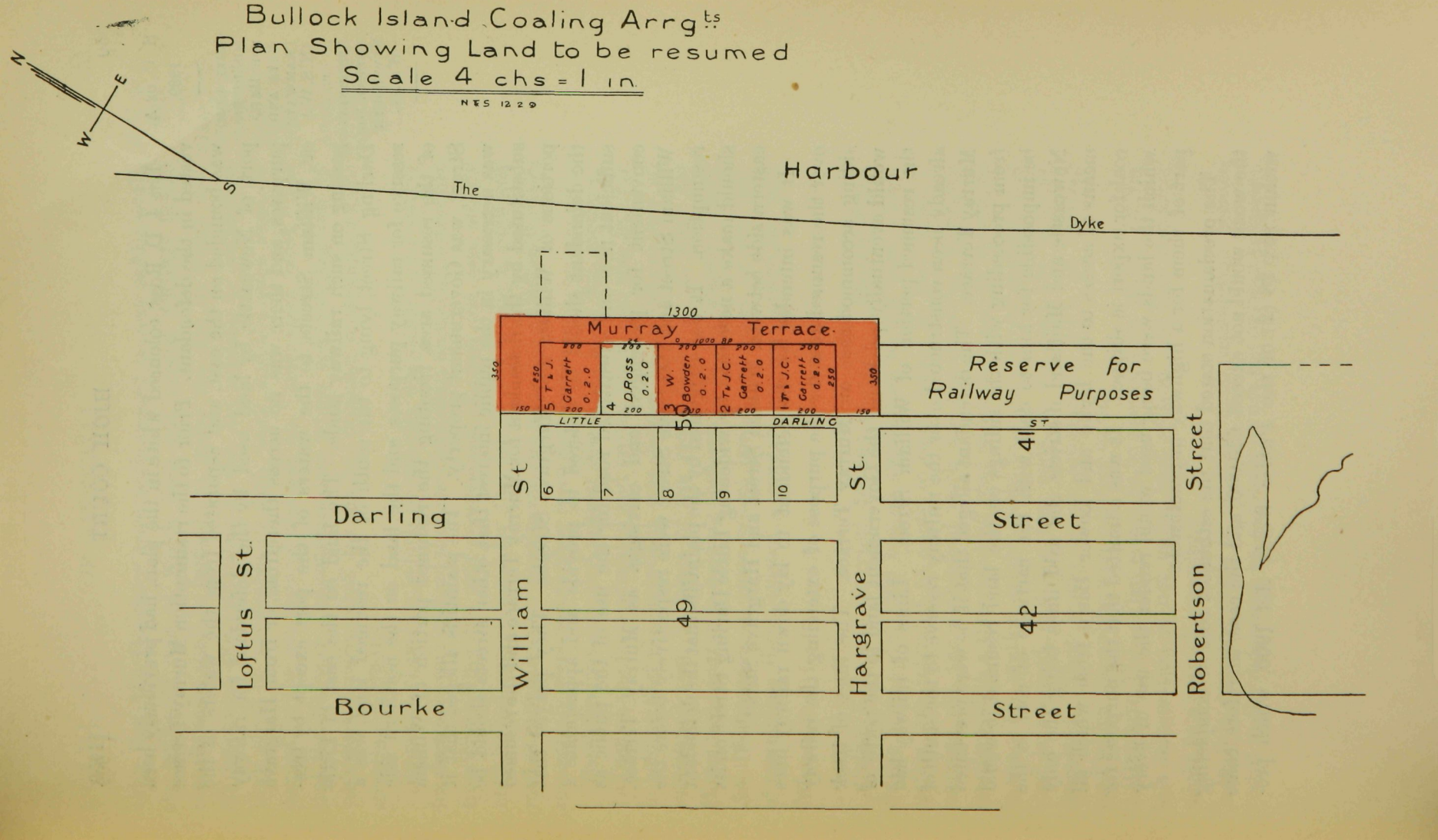
APPEAL from the decision of *A. H. Simpson*, Chief Judge in Equity of the Supreme Court of New South Wales.

This was a suit in which the Attorney-General for New South Wales was informant, and the Council of the Municipality of Carrington were the plaintiffs, and the defendant was the Chief Commissioner for Railways and Tramways.

The information and statement of claim alleged that certain public roads in the said municipality called Murray Terrace, William Street, and Hargrave Street, were vested in the plaintiffs under the *Local Government Act* 1906. By proclamation, dated 23rd February 1909, the whole of Murray Terrace and portions of William and Hargrave Streets were resumed under the *Public Works Act* 1900, for the purpose of railway extension, and were vested in the defendant as the Constructing Authority for the purposes of the *Public Works Act* 1900 for an estate in fee simple in possession, freed and discharged from all trusts, obligations, estates, interests, contracts, charges, rates, rights of way, or other easements whatsoever, and to the intent that the legal estate therein, together with all powers incident thereto, or referred to by that Act, should be vested in the defendant as trustee. The land resumed by this proclamation is the portion coloured pink in the plan printed on the next page.

Bullock Island Coaling Arrg.ts
Plan Showing Land to be resumed
Scale 4 chs = 1 in.

N E S 12 2 9



H. C. OF A. 1909.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Lot 4, D. Ross, coloured white in the plan, had previously been vested in the defendant. Prior to the resumption Murray Terrace was bounded on the east, and separated from the waters of the port of Newcastle, by land used by the defendant for railway purposes, and there was no access therefrom, or from Hargrave or William Streets, to the waters of the port except by trespassing on such railway lands. The land on the east of Little Darling Street, lying to the south of the resumed land, was a reserve for railway purposes, and the land on the northern side of the resumed area, fronting the resumed portion of William Street, was Government property. The plaintiffs alleged that it was necessary in the public interest that other streets should be substituted by the defendant for Murray Terrace and the resumed portions of William and Hargrave Streets. They prayed that the defendant should be ordered to provide and appropriate a sufficient new and substituted road for the use of the public as convenient for passengers and carriages as Murray Terrace, William Street and Hargrave Street were respectively before the resumption. It was suggested by the plaintiffs that the defendant should make a new road by widening Little Darling Street on its eastern side between William Street and Hargrave Street.

It was intended by the defendant to lay down railway lines over the resumed area for the purpose of extending the railway siding accommodation at Murray Terrace. The lines of track would eventually pass over the Government land to the north of the resumed portion of William Street. Lines of railway had already been constructed over the railway reserve to the south of Murray Terrace. The defendant alleged that if he were prevented from proceeding with the sidings on the land resumed it would be impossible for him to deal with the carriage of coal in the Newcastle and Maitland districts, the said lines being the only means of access to the Dyke and Lower Basin from which all coal for export is shipped. It was admitted that the purposes for which the lands were being used would render the use of every part of them for a highway impracticable.

The proclamation stated that the estimated cost of completing the work would not exceed £20,000, and the case, therefore, came within sec. 28 (2) of the *Public Works Act* 1900, which pro-

vides that the Governor may with regard to any public work, the estimated cost of which does not exceed £20,000, direct that the same shall be carried out under the Act, in which case all the powers and provisions of the Act relating to authorized work shall be applicable to such work, and the same shall be deemed for the purposes of the Act an "authorized work," and that the Railway Commissioner on whom the carrying out of such work devolves shall for the like purposes be deemed a Constructing Authority.

By notice of motion, which by consent was turned into motion for decree, it was ordered that the defendant should be restrained from committing the acts complained of upon the said streets until he had appropriated for the use of the public a sufficient road as convenient for passengers and carriages as the said roads respectively were before they were resumed.

The defendant appealed against this order upon the grounds: 1. That on the facts admitted and proved his Honor was in error in holding that the appellant was bound to provide a new or substituted road in place of the roads resumed; 2. That his Honor was in error in holding that sec. 80 of the *Public Works Act* 1900 applies to cases where land, over which at the date of resumption there existed a road, is resumed under the said Act.

Cullen K.C., and *Harriott*, for the appellant. Sec. 80 of the *Public Works Act* 1900 has no application to this case. That section was intended to apply to cases where in the course of carrying out the authorized work the Constructing Authority interferes with a then existing road which some person is entitled to use. The section might apply to a case where portion of a road is resumed, and the two ends of the road are left unconnected. That would be an interference with an existing road which the public were entitled to use.

[GRIFFITH C.J.—That seems to be provided for by sec. 79, but this information is not under that section. In that case there might be a way of necessity.]

In this case the roads in question upon resumption became vested in the defendant as absolute owner for railway purposes.

H. C. OF A. 1909.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

He is, therefore, not interfering with a road within the meaning of sec. 80, but simply using his own land for authorized purposes. There is no one now entitled to use Murray Terrace or the resumed portion of William Street or Hargrave Street. All the frontages to the portion of the roads resumed belong to the defendant or are Government property. The land to the east of Murray Terrace, to which there was formerly an access by way of William Street or Hargrave Street, is the property of the defendant. These two last mentioned streets formerly led to the defendant's land. The only difference now is that persons using these streets get to the defendant's land sooner than they did before the resumption. The provisions of sec. 80 refer to operations of the Constructing Authority upon excluded roads which are temporarily obstructed. They do not refer to roads included in the resumed area, which by virtue of the resumption have ceased to be highways: *Tanner* v. *South Wales Railway Co.* (1). If the contention of the respondents is right, the Governor would have no power to resume a public highway. By sec. 33 of the *Public Works Act* the Governor may take any land required for authorized works. If this does not include power to resume a road the object of the Act cannot be attained. "Land" in this section means land of any kind to the exclusion of any right of possession or user by any person: see definition of land in the *Interpretation Act* 1897, No. 4, sec. 21 (*e*). It gives power to vest the soil of a highway in the Constructing Authority. It may be said that the fact that there is no provision for compensation in such cases to the local authority is an argument against such a construction of the section. But this is not a case for compensation. It is simply the taking of land which is being used for one public purpose for another public purpose. A public right of way may be extinguished by necessary implication as well as by express words: *Corporation of Yarmouth* v. *Simmons* (2). The prohibition against the closing of a road, without the consent of a Council, in sec. 83 of the *Local Government Act* 1906, applies to the closing of unnecessary roads under the *Public Roads Act* 1902. Sec. 75 of the *Local Government Act* also refers only to existing roads, otherwise the Council could prevent the

(1) 5 El. & Bl., 618.

(2) 10 Ch. D., 518.

resumption of a road by the Governor under the *Public Works Act*.

Wise K.C., and *Rich*, for the respondent Council. The contention of the respondents is that the Constructing Authority cannot close up a highway without constructing another. In this case the Council are entitled to a road from Hargrave Street to William street, as convenient as Murray Terrace. This could be constructed along the east side of Little Darling Street. In considering what is a road under sec. 80, the material time is the date of resumption. At that date the roads resumed were existing roads. The words, "If, in the exercise of the powers hereby granted," in sec. 80, refer to the power of resumption, as well as to the powers of carrying out the authorized works after resumption has taken place. In *Attorney-General* v. *Barry Docks and Railway Co.* (1), it was held that sec. 53 of the *Railways Clauses Consolidation Act* 1845 applies to a permanent as well as to a temporary diversion of a road. It is true that the words in sec. 53, "If in the exercise of the powers hereby conferred" refer to the powers in the *Railways Clauses Act* or the special Act, but the powers which in England would be included in the special Act are here contained in the *Public Works Act*. This Act provides the whole of the machinery necessary for the acquisition of land, and also the powers necessary for carrying out the authorized work: see secs. 28 (2), 144. No power to do the work authorized is conferred upon the appellant by the *Government Railways Act* 1901, No. 6.

[GRIFFITH C.J.—Sec. 80 says the Constructing Authority shall cause a sufficient road to be made "before the commencement of any such operations." That fixes the time at which the obligation arises]. Dec. 10.

"Powers hereby granted" refer to the power of acquiring the land, and should not be restricted to power to go on adjacent land after resumption has taken place. The resumption did not vest the highways in the Constructing Authority. Sec. 37 is merely a conveyancing section. The word "easement" in that section does not include a public highway: *Hawkins* v. *Rutter* (2); *Gale*

(1) 35 Ch. D., 573.

(2) (1892) 1 Q.B., 668.

H. C. OF A. 1909.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

on Easements, 7th ed., p. 13. It was held in *Municipal Council of Sydney* v. *Brownen* (1) that sec. 37 does not operate to discharge land resumed from future municipal rates. If sec. 37 is more than a conveyancing section, sec. 80 must be read as a proviso to it, and is introduced to give protection to the public for the loss of the highway. The Act contains no provision for compensation in such cases. In construing sec. 80 the heading of Part VI. of the Act should be given effect to: *Williams* v. *Permanent Trustee Co. of N.S.W.* (2). This shows that it refers to every case where land is taken under the Act.

[ISAACS J. referred to *Toronto Corporation* v. *Toronto Railway Co.* (3)].

The provisions of secs. 75 and 83 of the *Local Government Act* 1906 apply to this case.

[They also referred to *Barnard* v. *Great Western Railway* (4); *Attorney-General* v. *Great Northern Railway Co.* (5); and *Richards* v. *Swansea Improvement and Tramway Co.* (6).]

Cullen K.C. in reply. "Powers hereby granted" do not refer to the power of resumption, but to the powers to be exercised in carrying out the authorized work.

GRIFFITH C.J. The question for determination in this case rests on the construction of sec. 80 of the *Public Works Act* 1900, which confers large powers upon the constructing authorities of public works. Sec. 80 is as follows:—[His Honor read the section and continued:]

The question arises in respect of certain roads in the municipality of Carrington at Newcastle. Certain land was resumed by the Governor by proclamation under the powers conferred by the *Public Works Act*. The position of the land resumed may be described in this way: In the port of Newcastle is what is called the Dyke, which is a water frontage along which ships lie for the purpose of loading coal for export, and runs nearly north and south. The land immediately to the west of the Dyke is Government land, and is in the occupation of the appellant.

(1) 2 S.R. (N.S.W.), 244.
(2) (1906) A.C., 249.
(3) (1907) A.C., 315.
(4) 86 L.T., 798.
(5) 4 DeG. & S., 75.
(6) 9 Ch. D., 425.

Between three and four chains to the west of the Dyke there ran, in February last, a short street called Murray Terrace, 1 chain in width and 13 chains in length, having on its eastern side the Government land. On the western side of this street were five blocks of land, which had been alienated from the Crown. One of these blocks had been purchased by the appellant; the others had not. On the eastern side of that block of five allotments was Murray Terrace. On the north of the block ran a street called William Street, which ran east and west, and terminated on the eastern side of Murray Terrace. The south side of the block was bounded by Hargrave Street, which also terminated at Murray Terrace. On the west was Little Darling Street, which ran parallel to Murray Terrace on the western side of the five blocks of land, and was apparently about half a chain in width.

By a proclamation by the Governor in Council dated 23rd February 1909 it was declared "that the Crown and private lands comprised within the descriptions set forth in the schedule hereto have been respectively appropriated and resumed for the public purpose hereinbefore expressed"—that is to say, for the purpose of constructing a railway siding upon the land. The word "appropriated" is an apt word in respect to Crown lands set apart for public purposes. The word "resumed" is an apt word in respect of the appropriation of private land.

The block taken is a block bounded by the east side of Murray Terrace on the east, the northern side of William Street on the north, the southern side of Hargrave street on the south, and the eastern side of Little Darling Street on the west. The result was that the whole of that area, including Murray Terrace and the two ends of William Street and Hargrave Street, became the property of the appellant, and a further result was that Little Darling Street formed the boundary between the alienated land in that neighbourhood and the land of the Commissioner. The ends of Hargrave Street and William Street and Murray Terrace were entirely included within its boundaries, and there was no place to which they gave access except the Commissioner's own land.

It was suggested that persons used to travel past Murray Terrace and the ends of William Street and Hargrave Street to

H. C. OF A. 1909.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Griffith C.J.

the Dyke. If they did, that might in some circumstances have been evidence that there was a right to cross the Government land in those places, but by the law of New South Wales there is no dedication of Crown lands as a highway by user. There was no evidence that there was a highway extending into the Government land. If there was such a highway it does not cease to be a highway, and the case is expressly provided for by sec. 79, which provides that "if the authorized work crosses any public highway or carriage road, then such authorized work shall not be carried across, over or under such road, unless the proposed place and mode of such crossing and the immediate approaches thereto, and all other necessary works connected therewith, and the provisions to be adopted for the protection of the public using the same have been previously notified, and have been approved by the Governor."

These being the circumstances, the statement of claim was filed by the Attorney-General on the relation of the municipality of Carrington, praying that the appellant may be restrained from utilising Murray Terrace and the two ends of Hargrave Street and William Street until he has, in the words of sec. 80, caused "a sufficient road to be made instead of the road to be interfered with," and the learned Chief Judge in Equity granted the relief claimed.

The appellant contends that in the circumstances of the case sec. 80 is not applicable. It is contended, first, that the section does not apply at all to land which is altogether taken by the Crown for the purpose of a public work. That raises the question whether the Crown can, under the general powers of the *Public Works Act*, resume or appropriate public highways. It was not seriously contended that it can not. In fact, of necessity, such a power must exist, for land might be taken for a public work that is intersected by public streets, which would become absolutely useless if the whole block is taken by the Crown. Then it is said that, in those circumstances, the section does not apply, and on that two cases were cited: the case of *Tanner* v. *South Wales Railway Co.* (1); and *Attorney-General*

(1) 5 El. & Bl., 618.

v. *Barry Docks and Railway Co.* (1), in which different opinions were expressed.

I do not think it necessary to express any opinion on the subject. I think that, if a highway were taken by the Crown which was the only means of access to alienated land, it might well be said that there was a way of necessity over the land, and that there was an obligation imposed upon the Constructing Authority to construct another road in place of the road resumed. But such a case is very unlikely to arise. It is almost inconceivable that the Government would take a highway which was the only means of access. But, assuming that the section might apply in certain circumstances, does it apply in the present case? On examining the land in question I think it is clear that the road, for which a substituted road is asked to be made, is one which after resumption will not be required for use by any persons who were previously entitled to use it. The facts show there is no one living who can be entitled to use the road. The piece of road within the appellant's boundary leads to nowhere beyond. It is simply an entrance at one end of his fences, returning thence to his boundary at another point. It is precisely the same as a *cul de sac*, except that in this case it cannot be called a *sac*, as it would be open at each end. The frontage to Little Darling Street will still have a frontage to Little Darling Street. Persons entitled to use William Street and Hargrave Street to go on to the appellant's land will still use those streets until they reach his land.

It appears to me that to require another road to be made under these circumstances would be absurd, and I do not think that the section, construed literally, requires anything of the sort. The conditions are that the user of the road is of such a nature as to render it "impassable for, or dangerous, or extraordinarily inconvenient to passengers."

I think that this assumes there are some persons entitled to use the road, but there are now no persons entitled to use it. It becomes part of the curtilage of the appellant, and no one else is entitled to use it except persons who are permitted by him to do so. I think therefore, that the plaintiffs have failed to establish

(1) 35 Ch. D., 573.

H. C. OF A. 1909.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Griffith C.J.

any right to relief under sec. 80, unless it can be shown that a highway cannot be closed under any circumstances.

It was also suggested that, even if the *Public Works Act* gives power to the Governor to resume highways and appropriate them as Crown lands, that power is negatived by sec. 83 of the *Local Government Act* 1906, which provides that "no road or part of a road shall be closed, nor shall the position of a reserved road within an incomplete purchase from the Crown or conditional lease be altered within an area in pursuance of the *Public Roads Act* 1902 unless the consent in writing of the Council of the area has been first obtained."

In my opinion that section refers entirely to the closing of roads in pursuance of the *Public Roads Act.* That is the grammatical construction of the section if a comma is inserted after the word "altered." But the section does not interfere with the exercise of the powers conferred by the *Public Works Act.* Therefore the action taken by the Governor in resuming the land was lawful, and the conditions prescribed by sec. 80 did not arise. I think, therefore, that this suit is misconceived, and should have been dismissed.

BARTON J. An injunction was sought against obstructions to Murray Terrace, William Street and Hargrave Street, which are public roads within the plaintiff municipality, until the substitution of a sufficient and equally convenient alternative road, the obstructions having blocked these roads to traffic, and rendered them founderous and dangerous. The motion having been turned by consent into a motion for a decree, an injunction was granted by the Chief Judge in Equity on certain terms. The whole contention for the appeal is based on sec. 80 of the *Public Works Act* 1900. The plaintiff respondents urge that this section applies to the crossing, cutting through, raising, sinking or using of the whole or any part of any public road included within an area resumed for an authorized work. The whole case rests on this attempted construction. I am of opinion that the section does not apply to resumed land which at the time of resumption has been a road, at any rate if the resumption includes the whole of such road as in the case of Murray Terrace. It may perhaps

apply to the resumption of part, where the remainder of the road is left. I do not say that it does, but if it does then only in such a case can it be urged that there is an interrupted traffic to be provided for. I do not think the section touches such a case as this, where the resumption of the whole of one road, namely, Murray Terrace, includes as a physical necessity the butt end of another road running at right angles to the resumed road, which included end leads solely to and abuts on land previously vested in the Constructing Authority, the limits of which are extended by the resumption of the wholly resumed road. Neither Hargrave Street nor William Street has, in my judgment, been shown by the Council of Carrington to have run through the railway land to the water-side at the Dyke as a public highway. There is no dedication of the lands of the Crown by user in this State, and the land over which this access to the water-side is claimed has never ceased to be State property. As the only traffic of William Street and Hargreave Street beyond the intersection of Little Darling Street (which is left intact) had as its terminus, apart from mere sufferance, the boundary of the railway lands, it cannot be said that the extension of those lands in the manner shown has interfered with any traffic that existed of right.

I have no doubt that the powers of resumption under the *Public Works Act* extend to public roads and highways though the Commissioner has power given him by sec. 74 at any time, if the necessities of the public appear to dictate it, to dedicate part of any land vested in him as a highway, or an addition to or extension of an existing highway.

As to the point raised by Mr. *Wise* under the *Local Government Act* (sec. 83) and the *Public Roads Act* (secs. 19 and 20), I agree entirely with what has been said by the learned Chief Justice. I am of opinion that this claim fails, and that the appeal should be allowed.

O'CONNOR J. As to the objection taken to the action of the Government in resuming the land including the road, on the ground that the provisions of the *Local Government Act* were not complied with, I do not think it necessary to say more than that

H. C. OF A. 1909.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

O'Connor J.

I agree in that respect with the decision of the learned Judge of first instance, and with the observations of my learned brother the Chief Justice. The substantial point in the case turns upon the construction of sec. 80, and its application to the circumstances which have arisen in this case. Before reverting to the section it may tend to clearness if I refer to the scheme of the Act, and I shall do so with special reference to two questions which have been raised in the course of the argument. First, is there power to resume land on which there is a public road? Section 36 enables the Government to resume all land which may be required for public purposes. "Land" is the widest expression that could have been used. In its ordinary meaning it would include land with a road on it. It is clear, also, from the necessity of the case that it must be taken to do so where the road stands in the way of the carrying out of the public work in respect of which the resumption is made. Immediately on resumption all estates and interests in the land, by virtue of sec. 37, vest in the Constructing Authority, and all other estates and interests come to an end. That section expressly sweeps away all other estates, interests and easements, including private rights of way. It does not expressly refer to public rights of way. But express words are not necessary for the statutory extinction of a public right of way. That is illustrated by Mr. Justice *Fry's* judgment in *Corporation of Yarmouth* v. *Simmons* (1), where a public right of way was held to be extinguished by necessary implication from the provisions of a Statute. The continued use of the land as a public road would render the exercise of the powers expressly conferred on the Constructing Authority impossible. It follows, therefore, that by necessary implication the rights of public way must be taken to have been extinguished by the resumption. It is pointed out by the respondents that, though there are directions for assessing and paying compensation to all other persons interested in the land resumed, no mention is made of compensation to the public for the loss of the public right of way. But surely that is not necessary. The public as a whole lose nothing. The Government is authorized merely to substitute one public use of the land for another. It is for that purpose that

(1) 10 Ch. D., 518.

the resumption of the land is authorized. But in the carrying out of the work it may become necessary for the public authority to enter upon, use, and generally "interfere with," to quote one of the words used in the Act, other lands than those resumed, and also roads other than those included in the land resumed. Ample powers for that purpose are given by various sections in Division V., which begins at sec. 73, and it is to be observed that sec. 80 is one of the group of sections in that Division which deals with these powers. Amongst other things, sec. 73, sub-clause (d), enables the Constructing Authority when carrying out the work to divert, alter, raise, or lower any public road which it may become necessary to deal with in carrying out the authorized work. That is the only one of these powers which is, I think, relevant to the interpretation of sec. 80. In the latter section we find that the very condition of things which sub-sec. (*d*) of sec. 73 has in contemplation is dealt with. Any right which the respondent municipality may have, if it has any, must be founded upon sec. 80, and it cannot succeed in this case unless it shows that the circumstances have arisen to which sec. 80 applies. Now the section marks out very clearly the conditions which must arise before it becomes the duty of the Government to make the substituted road which is claimed by the municipality. It enacts that if in the exercise of the powers granted it is found necessary to cross, cut through, raise, sink, or use any part of any road so as to render it impassable, or dangerous, or extraordinarily inconvenient to passengers or persons entitled to use it, the Constructing Authority must cause a sufficient road to be made instead of the road to be interfered with.

One thing very obvious is that these provisions are not applicable to a road which is part of the resumed land, and which has been absorbed and put an end to by the resumption. The whole of the section shows that the road referred to is a road which continues and is being lawfully used by the public notwithstanding the resumption. But, as I have pointed out already, it is impossible consistently with the resumption that the road included in the resumed land should continue open to public use. It is therefore difficult to escape the conclusion that the road, interference with which by the Constructing Authority gives persons

H. C. OF A. 1909.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

O'Connor J.

specially inconvenienced a right to call upon the Government to make a substituted road, must be a road outside the land resumed.

In *Tanner* v. *South Wales Railway Co.* (1), sec. 53 of the *Railway Clauses Consolidation Act* 1845 was under consideration. It is substantially identical with sec. 80 of the *Public Works Act*, which I am now examining. The facts were somewhat different, but the principle of construction adopted in that case is equally applicable in this. It was there held that the road, interference with which by the railway company made it incumbent on them to provide another road, must be a road not within but outside the land taken, and the observations of the learned Judges support the construction of sec. 80 which I have indicated should be adopted.

Under these circumstances, it is to my mind clear that the conditions have not arisen which would entitle the respondent municipality to the remedy against the Railway Commissioner which it claims. In expressing that view I assume of course that the facts were such as appeared in the judgment of the learned Judge of first instance: that it was established that the public had no access to the Dyke by way of any of the streets resumed. If there had been such access the case would have presented a different aspect, but one which it is unnecessary to consider here. On the whole case, therefore, I have come to the conclusion that no liability under sec. 80 or otherwise has been established against the Commissioner, that the judgment of the Chief Judge in Equity cannot be supported, and that this appeal must be allowed.

ISAACS J. read the following judgment:—By proclamation the Governor of New South Wales notified, in accordance with sec. 36 of the *Public Works Act* 1900, that certain land, upon which then existed public highways, should be appropriated and resumed for the public purpose of extending railway siding accommodation. The legal effect of that notification is enacted in sec. 37. The land was thereupon vested in the Chief Commissioner, as Constructing Authority on behalf of the King, for the purposes of the *Public Works Act* in fee, "freed and discharged from all trusts,

(1) 5 El. & Bl., 618.

obligations, estates, interests, contracts, charges, rates, rights of way, or other easements whatsoever, and to the intent that the legal estate therein, together with all powers incident thereto, or conferred by this Act, shall be vested in such authority as a trustee."

The legislature has therefore thought fit by that section to state in express terms what rights shall be vested in the Constructing Authority, and consequently it is not necessary, and as I think not open to me, to apply any rule of implication arising from the dedication of the land to the public purpose. The result of doing so would, however, probably be the same, and I do not differ from the view that, if resort must be had to implication, the highway would be necessarily incompatible with the railway purpose. In my opinion, however, sec. 37 embraces every possible right, public or private, which existed in respect of the land prior to the notification. The reference to rates is enough to show beyond doubt that municipal claims were not to stand in the way; and as to the expression "right of way" there are various reasons for attributing to it the largest meaning it can bear. The object of the enactment is to free the land from every possible clog which could interfere with its complete dedication to the public purpose for which it is appropriated or resumed.

Crown lands are expressly mentioned, and a right of way over Crown land could have little meaning except as a public right of way. Looking at sec. 38, it will be seen that, in respect of Crown land, all other public purposes, dedications, and reservations, cease in favour of the purposes notified, and as the section says, "for the estate limited in the last preceding section"—a potent phrase to indicate that the legislature had not left the measure of the Chief Commissioner's rights in respect of the land to implication. Again the expression "right of way" is found in sec. 81, and as to that the case of *Llewellyn* v. *Vale of Glamorgan Railway Co.* (1) is instructive. Speaking of the corresponding English enactment of sec. 55 of the *Railway Clauses Consolidation Act* 1845, for all material purposes in the same terms, *Chitty* L.J. speaking for the Court of Appeal said :—"The 55th section applies to a public road and a private road without distinction, and all persons,

(1) (1898) 1 Q.B., 473, at p. 477.

H. C. OF A. 1909.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Isaacs J.

whether landowners or not, who are entitled to a right of way, or of passing over the road (whichever be the right expression), can recover the amount of the special damage sustained, whether the road be public or private, and quite irrespectively of the penalty." And indeed the phrase "public right of way" is a well known mode of expressing the right of the public to pass from one public place to another: see *per* Lord *Cranworth* L.C. in *Campbell* v. *Lang* (1); and *Bourke* v. *Davis* (2).

These considerations lead me without hesitation to think that on the notification the public right of way was instantly by force of sec. 36 extinguished, and the land placed in the hands of the Chief Commissioner unaffected by any rights whatsoever, public or private, except those declared by the proclamation,

And sec. 37 carries it still further. When it says "to the intent that the legal estate therein, together with all powers incident thereto, or conferred by this Act, shall be vested in such Authority as trustee," it means that the Commissioner is to have the fullest ownership known to the common law, unhampered by any servitude or adverse right of any kind, and also such further rights as are conferred by the Act, and as trustee.

Now that was the position when the proclamation issued. The resumption was complete—the highways absolutely gone, the Chief Commissioner the absolute owner in trust, free from encumbrances of any kind, the ownership a *tabula rasa*, and he could proceed with the extension in accordance with any powers he might possess.

He accordingly proceeded to place railway lines along a portion of the land which had before the proclamation been a public highway, and to occupy the whole width of it for some distance. I accept the view that for ordinary pedestrian or vehicular traffic it would henceforth be extraordinarily inconvenient and even dangerous, and for some traffic impassable, and on this basis I consider whether the respondent Attorney-General is entitled to maintain his injunction. He contends—really the municipality contends—that the acts complained of were done in the exercise of the powers granted by the Act, because one of the powers, namely, appropriation and resumption contained in sec. 36, was exercised,

(1) 1 Macq. H. L. Cas., 451, at p. 453. (2) 44 Ch. D., 110.

and that was only the first step in the proceeding culminating in the obstruction of the highway. But the powers referred to in sec. 80 are the "powers" contained in Division V.: see *Toronto Corporation* v. *Toronto Railway Co.* (1). This *fasciculus* is headed "Powers and Duties of the Constructing Authority." They do not arise until after the Governor, who is not the Constructing Authority, has exercised his power—not so called in the Act but a power nevertheless—of providing the Constructing Authority with land to operate on and a work to do, and then, and only then —resumption being completed with all its effects, including the obliteration of the highway—do the "powers" of the Constructing Authority begin. He could not obstruct a road, because at the instant the land became his the road was effaced. His power then to construct a line upon that land did not depend on any power granted to him by the *Public Works Act*, but by sec. 38 of the *Government Railways Act* 1901, and his common law right as owner of the land, and that in itself places the case outside the operation of sec. 80 of the *Public Works Act*. And the same facts make the section for another reason inapplicable, because, at the time the acts complained of were done, it could not be said they were done on any road.

It was strenuously contended by Mr. *Wise* that "road" meant whatever was a road immediately before resumption, but that seems to me an impossible construction. If it were correct, a private road, the complete ownership of which had been taken and paid for years before, would be equally the groundwork of an injunction unless another private road as convenient were provided. No distinction is made by the section between public and private roads, both of which are specifically included, and the Court cannot create any. The whole scheme of road provisions, from sec. 79 to sec. 83 inclusive, as well as the language in which the group is enacted as "interfered with" will be found opposed to the respondents' argument. Sec. 79 provides for the case where the railway simply crosses a public road, and there is no extraordinary inconvenience, but some protection is necessary. Sec. 80 is where in crossing or altering or using

(1) (1907) A.C., 315, at p. 324.

H. C. OF A. 1909.

CHIEF COMMISSIONER FOR RAILWAYS AND TRAMWAYS (N.S.W.) v. ATTORNEY-GENERAL FOR NEW SOUTH WALES.

Isaacs J.

any road—public or private—it is rendered impassable, dangerous or extraordinarily inconvenient.

Sec. 81 allows special damage for failure to comply with sec. 80. Sec. 82 deals with the alternative case of a road being capable of restoration compatibly with the function of the railway, and the case of a road that cannot be restored, in other words, a road physically destroyed but still legally existent. And, finally, sec. 83 applies where the work crosses a highway (except a public carriage way) on the level. All the roads referred to are roads legally existing at the time the obstructing operations are conducted; and, therefore, the case of land that had up to resumption been a road, and had then ceased in law to be a road, is outside the purview of sec. 80.

One case, the *Attorney-General* v. *Barry Docks and Railway Co.* (1), was relied on by counsel for the respondents as assisting his argument that sec. 80 applied to an obstruction of a formerly existing road extinguished by resumption.

I have carefully examined that case, and can find in it no support whatever for the contention. The action was brought, as the report states, to restrain the company from using a part of their railway on the site of a part of the Llantwist Road where it had been diverted for the purpose of the defendant's railway until, &c. There is not a word in the case to indicate that the company had become the owner of the soil, or that the public right of way had been extinguished. Two or three references will, I think, place the matter beyond controversy. The article on railways in the *Encyclopædia of the Laws of England*, vol. 11, p. 202, clearly shows how distinct are the two powers. The plans to be laid before Parliament describe the lands proposed by any projected railway company to be taken compulsorily, and as a separate thing must also show the course and extent of any proposed diversions of roads, navigable rivers, canals, or railways.

It is impossible to suppose that mere diversion of a navigable river, canal, or other railway means compulsory acquisition with consequent extinguishment of public rights, and for this purpose rivers, canals and railways are in no different position from roads.

(1) 35 Ch. D., 573.

Besides, a perusal of the following cases, among others, will show very plainly that diversion is a separate power, and quite apart from mere acquisition of title to the soil, and does not connote extinguishment of public right of way: *Pugh* v. *Golden Valley Railway Co.* (1), and *Hertfordshire County Council* v. *Great Eastern Railway Co.* (2). The clause, as given in the last mentioned case, empowers the company for the purpose of making a railway to enter on lands, and, among other things, "to divert or alter the course of any roads or ways or to raise or sink any roads or ways in order the more conveniently to carry the same over, under, or by the side of said railway." This must refer to lands not the property of the railway company. There is substantially the same provision in sec. 73 (*d*) of the *Public Works Act* in relation to roads and rivers.

I agree with what has been said by the learned Chief Justice as to the effect of sec. 83 of the *Local Government Act* 1906.

For the reasons I have given I concur in allowing this appeal.

Appeal allowed.

Solicitor, for appellant, *J. S. Cargill.*

Solicitors, for respondents, *Sparke & Millard,* Newcastle, by *A. P. Sparke.*

C. E. W.

(1) 15 Ch. D., 330.

(2) (1909) 2 K.B., 403, at p. 409.