

Privy Council Appeal No. 69 of 1924.

The Attorney-General of New South Wales on the relation of Magrath *Appellant*

v.

The Railway Commissioners for New South Wales - - - *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 17TH FEBRUARY, 1925.

Present at the Hearing :

LORD WRENBURY.

LORD PHILLIMORE.

LORD CARSON.

[*Delivered by* LORD WRENBURY.]

This is an appeal from a judgment by which Mr. Justice Street, the Chief Judge in Equity of the Supreme Court of New South Wales, dismissed an information brought at the relation of one Wm. Geo. Magrath against the respondents (who may be called the railway company) operating the Great Western Railway, a line which runs from Penrith to Blackheath in New South Wales. The relief claimed by the information is an injunction restraining the railway company in respect of their management and control of a level crossing over the railway line at the Emu Plains Station, near Penrith.

The railway was authorized and constructed under statutory powers contained in the New South Wales Government Railways Act, 1858 (22 Vict., No. XIX). That Act provided that, before beginning any railway, levels and surveys should be taken and made of the lands through which it was to be carried, with a map or plan of the line and a book of reference. The railway was constructed between the years 1862 and 1867. The book of reference is not

now forthcoming. The map or plan has been produced, and from this it appears that at the place in question there was a public highway, known as the Old Bathurst Road, and that the railway was to cross (as, in fact, it does cross) the highway not at right angles but at a certain angle, and that gradients up to and down from the level at which the railway line was to run were to be constructed on the highway. This is all the information which these documents afford. There have also been put in evidence certain contractors' plans, and these disclose types of gates intended to be used for level crossings. These specimen gates are of three proposed dimensions, the longest being 15 feet in length.

The Act requires that the map, plan and book of reference shall be approved by the Governor and the Executive Council, and that certain advertisements shall be issued and opportunity given for objections to be advanced, and that any such objections are to be considered by the Governor and Executive Council, and after consideration the maps or plans and book of reference are to be confirmed either with or without alteration and notice of confirmation is to be published in the Gazette.

Section 88 of the Act requires that in the case of a level crossing the proposed plan and mode of crossing and the approaches and all other necessary works and the provisions to be adopted for the protection of the public using the same shall have been notified and approved of in the manner provided in respect of the opening of new lines of railway.

Beyond that which is stated above nothing is now known or at any rate is disclosed in evidence as to what was the construction made at this level crossing in the years 1862 to 1867, or whether and how that which was done was approved. The earliest knowledge is that in 1891 there was across the railway a level crossing 12 feet wide, and that the approaches were closed by two gates each 12 feet in width, one on each side of the railway track. Their Lordships are of opinion that in this state of things Mr. Justice Street rightly held that he was entitled to act upon the maxim *Omnia præsumuntur rite et solemniter esse acta*, and to assume without formal evidence that the level crossing established in or about 1867, and found in existence in 1891, and which has been in existence ever since, was constructed after due compliance with the provisions of the Act and in particular with Section 88.

The Old Bathurst Road was a public highway, and the appellant starts with the proposition—a proposition well founded in law—that over every part of a public highway the public have the right to pass and repass without obstruction. But this right may, of course, be affected by statute, and the first step is to ascertain what statutory rights were conferred upon the respondents in the matter.

After giving power to construct and maintain the railway and providing, as above mentioned, for the map or plan and book of reference, the most material sections of the Act are the following :—

Section 10 is the principal empowering section. It empowers the Commissioners (or in other words the railway company) to enter upon lands and to appropriate such lands as may be necessary for making and using the railway and all other works and conveniences in connection therewith and to construct across any roads such temporary or permanent roads as shall be considered necessary and to divert or alter temporarily or permanently the course of any road or to raise or sink the level of any road, and from time to time to alter any of the works.

Sections 88 to 91 are the sections dealing with public and private level crossings. Of these section 88 is the most important. Its effect has been already stated.

An amending Act was passed in 1912.

By section 34 of that Act, viz., the New South Wales Government Railway Act, 1912, as amended by the Government Railways (Amendment) Act, 1916, it was provided that whenever for the purpose of maintaining the traffic on a line it appeared to the Commissioners to be necessary that any addition to or extension of any bridge, viaduct or other work or any other repair or alteration of any work vested in them should be made, they should undertake and carry out the work so far as may be required for the purpose. And by section 64 (29) the Commissioners were empowered to make bye-laws for regulating private or public traffic across the railway on the level thereof.

Under the power given by Section 64 (29) a bye-law was made that "unless special authority be given to the contrary the gates must always be kept shut across the roadway and locked at night except when required to be opened to allow the line to be crossed."

The effect of these statutory provisions is that the railway company were authorized to obstruct the highway to the extent and in the manner authorized by the Act. The appellant first argued (but faintly) that formerly he was entitled to enjoy the total width of the highway, and that although gates, etc., might be erected, they must be such as to give, when opened, a way of that total width. This contention fails because, under section 88 of the Act of 1858, a place and mode of crossing with approaches and other necessary works were authorized by the statute if previously notified and approved in manner provided by the Act. It is an extravagant contention that the crossing must have gates such as to open to the total width. The gates must give a reasonable and proper way. What that is is to be determined by the approved plan and mode of crossing.

He next contended that the existing gates were not adequate. The facts here are that in 1867 some gates were erected, but their width is not known, although from the contractor's plans it may be inferred that it did not exceed 15 feet. That which is known is that in 1891 the gates were 12 feet in width, that in 1907 a system of lever control of the gates was introduced, and that on

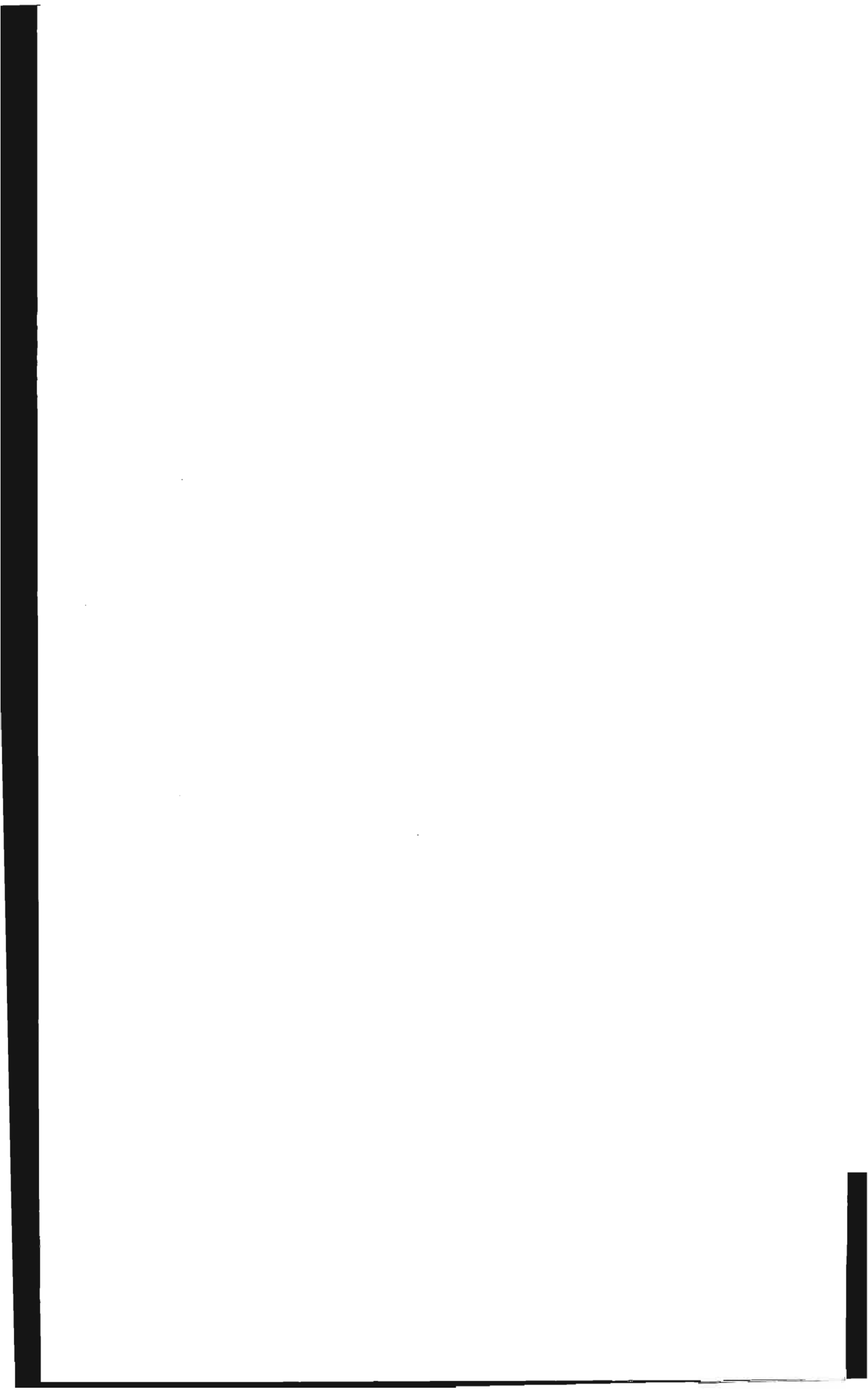
each side of the line two gates were erected, one 14 feet 6 inches and the other 19 feet 3 inches in length, that on the 1st May, 1918, the lever control of the gates was discontinued, the 14-foot 6-inch gate was made a fixture, and the 19-foot 3-inch gate was made to open not across the railway, but outwards to the road and was operated by hand.

There is no evidence that a gate 19 feet 3 inches in width is not adequate. It is, in fact, 7 feet 3 inches wider than the 12-foot gate of 1891. It gives a clear 15 feet for traffic across the railway. The evidence is not that the width is insufficient, but that there is delay by the respondents in opening the gates for traffic.

The means of calling the attention of the respondents' servants to a request for opening the gates has varied. At one time the public had to call out to attract attention. At another time an electric bell was attached to the gates. When the information was filed on the 22nd August, 1919, the bell had been discontinued. The bell was installed again and the delay has since not been great. The evidence is to the effect that the attention of the defendants' servants to their duty as regards the gates has, in the view of the relater and other members of the public, been unsatisfactory. It is, of course, the duty of the railway company to pay adequate and courteous attention to the requirements of the public in opening the gates. Their Lordships do not find that the company have ever repudiated or questioned their duty in this respect. The correspondence shows that every complaint that has been made has received the attention of the railway company, and if as may be the case a porter in charge of the gate has been dilatory or discourteous, this forms no ground for an injunction such as is asked. The defendants have not been deaf to remonstrances as to this matter, and have taken steps to put an end to any cause of complaint. For instance, on the 10th February, 1920, the Secretary writes that the staff at Emu Plains have been informed that people must not be subjected to avoidable delay, and in May, 1921, a porter named Thompson, between whom and the public some friction had probably arisen, was removed from the Emu Plains Station.

The appellant's counsel could refer to no case in which an injunction has been granted, the effect of which would be practically to substitute the Court for the railway company in the management and control of a part of the railway undertaking. An injunction in the present case is, in their Lordships' opinion, out of the question.

For these reasons their Lordships are of opinion that this information was rightly dismissed and that this appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.



In the Privy Council.

THE ATTORNEY-GENERAL OF NEW SOUTH
WALES ON THE RELATION OF MAGRATH

o.

THE RAILWAY COMMISSIONERS FOR NEW
SOUTH WALES.

DELIVERED BY LORD WRENBURY.

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