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PUBLIC AND PRIVATE OCCUPATION ROADS

By Colin Seymour MA BA(Hons) Cert. Ed.

Every public road which provides access to adjoining lands serves a dual purpose as both a highway and as an occupation road. The two uses carry separate and distinct legal rights. Such a road does not cease to be a highway when used mainly for occupation purposes, and does not cease to be an occupation road when the highway is extinguished by statute. An occupation road may be for general use, or, for the restricted use of named individuals. Unless an occupation road was granted as a strictly private easement over the soil of another, or, for the specific use of a named party, there is a presumption that the road may be used for public access. This is because the use of a way as an occupation road may have arisen in the first instance simply because it already existed as a common way before the lands on either side were inclosed from the waste :

"Whilst on the one hand little weight ought to be attached to occasional user by the public of a road systematically used for occupation purposes, it is on the other hand necessary to remember that user for occupation purposes may have arisen precisely because the road was a public road, it being open to every one with a field adjoining a highway to open from the highway a gate into his field and to use the highway for his own accommodation as owner of that field" (Parker J. AG (at Relation of A H Hastie) v Godstone RDC (1912) JP 76 189)

1 Legal Definition - It is a fact that there is no legal definition of the term "Occupation Road". The matter was considered by "Justice of the Peace" : "Questions and Answers" (1877-1896) page 248 which states :-

"XV - Occupation Roads - Definition of.

Can you refer me to any legal definition of an "occupation road" as distinct from a private road on the one hand and a public highway on the other ?

ANSWER - We are not aware of any "legal definition" of the term, but we understand it to mean a road leading to private lands or premises and used by persons going to or from, or otherwise for the purpose of such land or premises. There may be a public right of way over a road which is chiefly an occupation road, but this is not because of any legal character attaching to the road as an occupation road, but because of it having been dedicated to public use [Vol. L1., 106)"

2 There is no doubt that both an occupation road and a public highway may exist over the same route. If a highway becomes used mainly for occupation purposes it does not cease to be a highway, and if an occupation way becomes used mainly as a highway it

does not cease to be an occupation way. If highway rights are extinguished by statute any existing occupation rights remain unaffected.

3 An early case concerning the use of a way as both a public right of way and as an occupation way is Allen v Ormond (1806) 8 East 4. The principle set out in this case is still relevant today. It helps to explain why Inclosure Commissioners needed to set out as "private carriage and occupation roads" ways which were clearly intended to be used and repaired by the public. As such they were regarded as being no different from any other parish highway.

4 It was held in Allen v Ormond that **"One who has a grant of an occupation way may declare in case against the owner of the land over which the way leads for obstructing it, although it be proved that the public in general had used the way without denial for the last 12 years . . . . where a party has a certain special right of way granted to him, <u>he may rest upon that title, and need not resort to a general right,</u> which may possibly be disputed by conflicting evidence; especially in a case, like the present, of a public right of way <u>growing out of an occupation way</u>"** (cited from Walsh v Oates below)

5 In 1840, the principle set out in Allen v Ormond was extended by Lord Denman CJ when giving judgment in Brownlow v Tomlinson, Walker, and Clayton (Man. & G.484 at 486). The judgment recites that in 1774 Inclosure Commissioners set out a private road, to be repaired by the inhabitants, in lieu of an ancient public way. This road was to be **"for the use and benefit of the inhabitants of, and occupiers of grounds within, the parish of Beckingham.** The awarded road thus fell within that category of road sometimes referred to as a <u>"public occupation road</u>" (see below).

6 The judgment further recites **"The evidence shows that the whole line of the road, in addition to it being an occupation way, had been used as a public road leading to a towing path along the Trent".**

7 The Lord Chief Justice then went on to hold that **"there might be both a public highway and an occupation way over the road in question, and that it did not on becoming a highway cease to be an occupation way"**

8 Lord Denman's judgment, regarding "public occupation roads", became an accepted part of the common law . The case was followed by the courts, and his words were taken to be the authority on the subject - see Shelford 1862 (page 18); Glen 1883 (pages 25 and 53), and Sauvain 1997 (para 2-56).

9 In 1877, the law was further extended by Wells v London, Tilbury and Southend Rail Co. 5 Ch.D.126. The case arose because **"The plaintiffs had been entitled from 1855 to a carriage-way to property of theirs over a railway by a level crossing. By an Act of Parliament obtained by the company in 1875, reciting that it was expedient that the rights of**

way in respect of certain footways which crossed the railway on the level should be extinguished, it was enacted that all rights of way in, over, or affecting the footways numbered 2,4,5,6,and 7 on the deposited plans should be extinguished. No provision for compensation was made. The roadway in question was numbered 5 on the deposited plans, and was thereon marked 'roadway and footway', the others being marked simply 'footway'."

10 It was held (affirming the decision of Malins V C in the court below) **"that upon the true construction of the Act, it did not interfere with private rights of way, but only with public rights of footway, and that an injunction restraining the railway company from obstructing the way had been rightly granted"** (both quotations taken from Walsh v Oates (below) at 582-583)

11 Glen (1883) considered the Wells case at page 53 and states **"And an Act of Parliament dealing with and extinguishing the public right of way only will not affect the private right of way, which may continue to be exercised notwithstanding the extinction of the public right".**

12 Wells was also considered by Pratt and Mackenzie 19th Ed page 947 note (b) re section 53 The Railway Clauses Consolidation Act 1845, who state **"A railway company cannot obstruct a private way without compensation, and an Act which enables a company to extinguish certain footways without compensation will be construed to apply to public ones only"**

13 In 1943, the principle established in Wells, which had remained good law for almost a century, was challenged by the making of an order by Halifax Quarter Sessions under section 91 Highway Act 1835. The effect of the order was to extinguish both public and private rights over the whole of the road. Walsh appealed to the County Court in 1953. The Court, relying on R v Wallace (1879) 4 QBD 641 at 644, held that the order of Quarter Sessions extinguished any private right which the plaintiff might have over the highway.

14 The matter then went before Singleton, Denning and Romer LJJ in the Court of Appeal (Walsh v Oates (1953) 1 QB 578). Singleton LJ cited 19th Ed. Pratt and Mackenzie at pages 16 and 130. He also referred to Wells (1877) but commented that because it concerned a Private Act it was not quite as useful as Allen (1806).

15 The Lord Justice dismissed Wallace (1879), relied upon by the Court below, as being distinguishable from, and therefore not relevant to, the issue before him. In that matter, Cockburn CJ, stated at 644 **"There appears to be no foundation for this objection, for the simple reason that as soon as the diversion to which the certificate of the justices has referred is established, the old road ceases to be a highway and the land reverts unencumbered by any easement, to the original owners of the soil"** (see Pratt & Mackenzie 19th page 221 note (c) re case in relation to section 91 HA 1835)

16 Denning LJ (as he was then) summed up the proceedings (at 584) by holding **"It is clear law that there may be a private right of way along a road and a public right of way existing at the same time. When an order is made under the Act of 1835 stopping up a highway, that extinguishes the public right but does not affect the private right"** .

17 In 1997, the principle established in Allen v Ormond two centuries earlier, was followed to confirm a private right, even though the public right had already been judicially decided. On the 15 August 1997 an Order was made by Hull Crown Court under section 56 HA 1980 (Seymour v North Lincolnshire Council) to repair an awarded **"Private Carriage Bridle and Drift Road"** and reinstate it back to its statutory width of 40 feet. The Council, anxious to avoid the cost of repair and reinstatement, considered extinguishing part of the statutory width. This prompted a local landowner to apply for a Declaratory Judgment (against the offending landowner) to confirm his private rights to the full width granted by the Messingham Inclosure Act and Award.

18 On the 30 September 1997, in the matter of Smith v Anderson, Scunthorpe County Court ordered **" IT IS DECLARED THAT the Plaintiff, Walter Smith, in common with all other inhabitants of the Township of Messingham, by reason of the Messingham Inclosure Act 1798 (38 Geo 3) has a right of way along Twigmoor Side Road with carriages, horses, cattle and on foot, to a width of 40 feet, without hindrance from any adjoining landowner whatsoever"**

19 <u>Occupation roads fall within six distinct categories</u> :-

(i) Those awarded for both public and private use where the public right is equal to the private right, for example as in Brownlow v Tomlinson above.

(ii) Those awarded for both public and private use where the private right is greater than the public right, for example to **"be used and enjoyed with carts and carriages for the occupation of . . . lands . . . . adjoining . . . and by all persons whomsoever on foot and on horseback"** - as in the Methley Award.

(iii) Those awarded to be repaired in the same manner as public roads, for example as in Methley above, and as awarded in the adjoining parish of Swillington in 1799. Such repair out of public funds equating with public use **"the duty to repair an ancient highway was always co-extensive with the right of passage by the public"** (Wills J. Eyre v New Forest H.B. (1892) 56 JP 517 at 519).

(iv) Those awarded to be repaired ratione tenurae, for example as in Methley. As these roads could be the subject of indictment when out of repair they were a class of public road, because only matters of concern to the general public could be the subject of indictment.

(v) Those for the use of, and repairable by, the owners and occupiers of lands within the parish, with no restriction placed upon general user and no named persons granted authority to prevent such use.

(vi) Those awarded specifically for the "sole and separate use" of named individuals, as for example a 15 feet private carriage road in the Tockwith (WR York) Award 1792.

20 Roads falling within categories (i) to (iii) were invariably named and were always thoroughfares. They were no different from public roads generally, except that, by reason of section 55 Highway Act 1773, the heavy wagons of the public carriers were confined to the turnpike roads and excluded from the private parish roads. These roads were also subject to orders made by the Quarter Sessions under section 57 HA 1773 regarding the need for extra horses up steep hills in the parish. Such orders could not have been made if the private roads were not used by the public : **"Order for additional number of Horses on private roads under the General Highway Act of 13 Geo 3"** (Kesteven Q.S. Minute Book 14 October 1822)

21 Roads repairable ratione tenurae (iv) were used by the public as thoroughfares, or, as ways to a public benefit such as common meadows, watering places, quarries or navigations. Today they fall as **"highways maintainable by reason of tenure enclosure or prescription"**, and/or as "private streets" : **"a street that is not a highway maintainable at the public expense".**

22 Roads within category (v) were invariably thoroughfares awarded in lieu of former roads running over the unenclosed commons and wastes. These ways were never intended to be restricted. The soil was not awarded to a private person, thus no one had the authority to prosecute for trespass. These roads were immediately accepted as parish highways and were, in effect, kept in repair by the same persons who paid Highway Rates towards the remainder of the parish highway network. Many of these roads are now adopted highways.

23 It is only those occupation roads, which were specifically ordered to be for the "sole and separate use" of named individuals, which can safely be said not to have both public and private rights over them. Such roads are usually cul-de-sacs. They were rarely named when awarded, as for example the Skewkirk road above, and three private 12 feet roads set out in the Wakefield Award 1805. These were not repairable by the parish, or repairable ratione tenurae. They invariably went over, or through, or across, lands already allotted to others, or, to the named recipient of the private right. They were quite separate and distinct in nature from other parochial roads.

24 Therefore, where the term “occupation road” is used in statutory documents, without a specific limitation as to user, an inference arises that the road is a parochial road for the use of the public of the locality. This is particularly so when the road is a thoroughfare connecting with other parish roads. Or, it is stated elsewhere to be a “public occupation road”, or, a “public road”. Any “private occupation road” liable to be repaired ratione tenurae, is, by definition, a highway, albeit not maintainable at the public expense.

25 “Public Occupation Road” this was a term, which was used in the 19th century, to describe a class of public road in Yorkshire and Lincolnshire,

26 In 1808, a plan was deposited with Highway Orders made at the Easter Sessions of Lindsey Quarter Sessions at Kirton in Lindsey. The Orders concerned the parish of Searby near Brigg. The road on the plan is shown as **“Public Occupation Road”.** Chris Padley (a contributor to RWLR) confirmed in 1985 that the road was awarded in 1765 as a “Public Road” and is now a maintained highway.

27 On July 19th 1843, the Inhabitants of Thorne met in Vestry to consider highway matters. It was “**Resolved that the Surveyors of the Highways be directed to have the said Sewer called Smock Dyke thoroughly cleansed and Arched over with Brick. And also relative to the repair of certain public occupation roads out of the Surplus monies arising from the agistment of Cows in the Lanes included in the aforesaid public notice”.**

28 Occupation Roads and Railway Plans - Thousands of “occupation roads” were crossed by the railway lines. As the Rights of Way Law Review points out (s.9.3 p. 24) such roads **“frequently carried public rights of way”.**

29 It is essential when considering the contents of deposited railway documents to also read the enabling Act if one was approved by Parliament. Sometimes, a way which is shown upon the Deposited Plan and Book of Reference as an “Occupation Road” is referred to in the Act as a “Public Road”. Sometimes also the status of a road shown in the Book of Reference can vary from the status shown on the line sections which were intended to deal with the statutory obligations for level-crossings or bridges.

31 The Deposited Plan and Book of Reference for the Midland Railway (Derby to Leeds) (WYAS ref. 1835/7) shows parcel No.96 within the parish of Methley as being an **“Occupation Road and Bridleway”.** Whereas the Act of 1836 (6-7 Will 4 c. cvii) confirms, at sections 72 and 92, that the road is a **“Public Carriage Road”.** This road was reinstated as such following orders by Leeds Crown Court in 1986-7 (Seymour v Leeds City Council and Others).

32 The Deposited Plan and Book of Reference for the Great Northern Railway Co. Extension (WYAS ref.1846/6) shows parcels 101,106 and 119 within the parish of Crowle as **"Occupation Road"** albeit jointly owned by named individuals and the township Surveyors and Constables. Whilst the Act of 1848 (11-12 Vict. c. cxiv), at section 11, refers to these three roads by reference to the Deposited Plan and states that they are all **"Public Roads".** The status of the road as described in the Act was regarded as compelling evidence in the Sch.14 Appeal to DEFRA (NATROW/Y2003/529A/07/52) - Inspector's Report 28 March 2008.

33 The Book of Reference for the Leeds, Castleford, and Pontefract Junction Railway (Railway No. 1) within the parish of Garforth states, re parcel 26, **"Occupation Road"** - albeit jointly occupied by named persons and the Township Surveyors. However, the line section shown on the Deposited Plan (at 3 chains) states **"Public Road".** This designation was accepted in the matter of Seymour v WYMCC and Makin (1985-86), and the road was restored to its fill awarded width, with the roadside boundary hedge also being replanted by the offending owner.

34 Therefore, railway plans alone cannot be used as conclusive evidence that no public right existed when the line was constructed. In very few instances can a way, described upon a railway plan as an "Occupation Road", be taken to mean a private and restricted way over which the public had no rights whatsoever at that time.

35 On the other hand, where the Plan or the Book shows a public way that is good evidence of the existence of a public right at that time. Section 10 Railway Clauses Consolidation Act 1845 states "**True Copies of the said Plans and Books of Reference shall be received in all Courts of Justice or elsewhere as Evidence of the Contents thereof"**

36 As the Rights of Way Law Review s.9.3 page 24 states **"Railway plans have been admitted in courts as evidence of public rights of way. . . .** (citing Vyner v Wirral RDC (1909) 73 JP 242) **. . . On the other hand , they are weak evidence of the non-existence of public rights . . . . . . The only real risk is of under recording of public rights of way, rather than over recording . . . . It is unlikely that a false claim of a public right would have been made, and if made it would almost certainly have been detected by those upon whom it placed a financial burden"**

37 Railway surveyors were always conscious of the cost of the scheme and their duty to shareholders. Railway Bills were very expensive and the omission of proper provision for both public and private rights could result in challenges to the scheme and lengthy delays in Parliament.

36 When a railway crossed a highway, the statutory requirements were expensive for the railway company. This was particularly so when public roads had to be crossed by a

tunnel, bridge, or level crossing with keeper's house. If minor highways could be subsumed within the higher provisions for private occupation roads that was a bonus for the railway company.

37 Parish highway surveyors would be unlikely to object if footpaths and bridleways were diverted by the company along occupation roads which were required to be repaired at private expense. Hence the term "occupation road" being frequently used by railway surveyors to describe ways over which both public and private rights existed, and which were jointly owned and occupied by township officers and private persons.

38 The Public as Occupiers of the Highway - The deposited documents for the railway at Crowle (above) demonstrate that Highway Surveyors and Constables were regarded at that time as "occupiers" of the said "Occupation Road" and "Public Road". However, these officers, when acting in their elected capacity as "occupiers", were in fact acting on behalf of (in the stead of) all those individual members of the public who used the road. Thus, each individual member of the public, passing along the road at any given time, was in fact "the occupier" of that "occupation road" .

39 It was held by Manchester Sheffield Lincolnshire Rail Co. v Wallis (1854) 18 JP 138, and Midland Railway Co. v Daykin (1855) 20 JP 23, that persons lawfully passing along a highway adjacent to a railway are occupiers of the highway land.

40 These two cases arose out of the proper construction of section 68 of The Railway Clauses Consolidation Act 1845. The section states **"The company shall make and at all times thereafter maintain the following works for the accommodation of the owners and occupiers of lands adjoining the railway . . . convenient gates, bridges, arches, culverts, and passages . . as shall be necessary for the purpose of making good any interruptions caused the railway to the use of the lands through which the railway shall be made" . . . etc . . . etc.**

41 Pratt & Mackenzie 19th Ed. page 955 at notes (a) and (d) state **"A highway running alongside a railway is adjoining land within this section and any person lawfully passing along such a highway is therefore in the position of an occupier of such land"** (citing Wallis and Daykin).

42 It thus follows, that any member of the public, lawfully using a public occupation road crossed by a railway, has a legitimate expectation (as an "occupier" of that road) that the railway company will make good (and maintain) any interruptions caused by the railway to the use of the road.

43 Therefore, any bridge or passage, constructed to serve both public and private occupiers of land, is still required to be maintained even when the company has bought

out the greater interests of the private occupier. There have been recent instances where Network Rail having reached agreement with private occupiers to close a bridge or tunnel, have disregarded the lesser public right because its status was still awaiting clarification.

44 Correlation between ratione tenurae roads and public occupation roads - there is a strong link between roads repairable ratione tenurae and occupation roads used by the public. All roads liable to be repaired ratione tenurae, are by their very nature, both occupation roads and public roads. The liability arising because of the occupation of certain lands. As Jacob commented in the 'New Law Dictionary' (5th Ed 1744) **"Occupation - signifies in our Law Use or Tenure; as we say such Land is in the Tenure or Occupation of such a Man".**

45 At the turn of the 19th century, in many rural townships, there were few roads repairable by the parish as public roads. In some places, maybe with the exception of the main road, all roads used by the inhabitants were occupation roads repairable ratione tenurae : **"All the roads in the township A are repairable ratione tenurae with the exception of one main road"** ('Questions and Answers : Justice of the Peace' - 30 August 1902 page 558)

46 Roads shown as Private or Occupation Road essential for public access -
The 'Plan of the City of York and Ainsty' dated 1785 covers an area of some 100 square miles and includes many individual townships. The Plan shows only three types of road : **"Turnpike Road - Private or Occupation Road - Open or uninclosed Road".**

47 Every one of the turnpike roads ended on the outskirts of the City of York and connected with a private or occupation road. Every main street of the various townships was shown as being a private or occupation road. Therefore, unless we are seriously to believe that every inhabitant of York and its surrounding townships was a prisoner in his own backyard, these roads must be construed as being used for public access.

48 Thus the very words "private and occupation road" must be re-appraised as to their meaning at that time. It is impossible to understand the 'World We Have Lost' (book by Peter Laslett) from a 21st century social construction of reality. Because, in a world where the feet of horses and men grew tired through their daily toil, it was unthinkable for an open thoroughfare not to be available for public use as a way of necessity.

49 The Ainsty Map was considered at length by those involved in a series of lengthy inquiries held at Tadcaster (FPS/P2745/7/14M). Several learned counsel were involved, along with prominent expert witnesses.

50 Mr Sleath LLB the Inspector stated at para 137 of his report **“Whilst considering the Ainsty Map (York 1785) I conclude that the representation on this map of a route described as a ‘private or occupation road’ does not necessarily mean that there are no public rights existing over it. I think this applies particularly in town or village centres where the argument of Mr Seymour supported by Dr Hodgson and Professor Kain . . . . seems particularly pertinent. I also believe that this may have other implications for other maps of this period in this particular locality”.**

51 The Inspector accepted my legal submission (which was not challenged by George Laurence QC or other counsel present) that the Law has long held that the High Street (or Town Street or Main Street) of every settlement is “common to all”. Therefore, the depiction of a High Street as a ‘private or occupation road’ is synonymous with a public right of way over that route. The ’New Law Dictionary’ (9th Ed. 1772) states at page TOR re ‘Toll Traverse’ **“A man cannot prescribe to have a Thorough toll of men passing through a vill in the high street because it is against the common law and common right; for the high street is common to all”**

52 When considering public access over occupation roads it is important to realise that all occupation roads repairable at public expense were public roads : use and repair walking hand-in-hand. Likewise, all occupation roads repairable ratione tenurae were also public roads which, like those repairable by the parish, could also be the subject of indictment. A difficulty arises however, when those occupation roads, which were awarded to be repaired by the “owners and occupiers of lands” within the parish, are the subject of inquiry. Far too often, without any supporting evidence apart from the repair liability, these roads are held to be private ways over which the public have no rights.

53 However, once it is realised that such a determination simply placed the liability for repair on the same persons as repaired the public roads within the parish the situation becomes clearer. Under 43 Eliz. (1601) c. 2 section 1 every inhabitant and every occupier of lands and houses was required to contribute towards the Poor Rate. These same persons were also required to keep the parish roads in repair, i.e. from 1555 to 1835, by performing their ‘statute duty‘, and from 1835 to 1925, by contributing towards the ‘highway rate’ (see ‘The Seymour Papers’ : ‘The Public of the Locality’).

54 Thus if these occupation roads were thoroughfares, and were part of the parochial road network, it must be presumed that the inhabitants at the time regarded them as being no different from other parish roads as far as public use was concerned These roads were therefore “public occupation roads” to be used and enjoyed by everyone.

Conclusion

55 There is no legal definition of the term “occupation road”. However, unless there is clear evidence that any particular road was granted for the sole and personal use of a named person, a presumption in favour of a public right must be inferred. Because, as case law confirms, use for occupation purposes may have arisen in the first instance simply because a public way already existed before the waste was inclosed.

56 Every public highway giving access to adjoining lands serves the dual purpose of public road and occupation road. The Law confirms that there may be both a public road and an occupation road over the same route. These dual rights are quite separate and distinct from each other. The extinguishment of the public right leaves the private right intact. Likewise, the abandonment of the private right leaves the public right unaffected.

57 There is no doubt that in the 18th century, in northern England in particular, a common type of road in the countryside was a “private and occupation road“. A large proportion of these so-named occupation roads were repairable ratione tenurae and thus were a species of public road. Certainly in the 19th century, ratione tenurae roads seem to have been far more common in rural townships than were public roads repairable by the parish.

58 The term “public occupation road” was commonly used in Yorkshire and Lincolnshire in the mid 1800’s. These roads were under the supervision of the surveyors of the highways who let out the grazing and used the money to pay for repairs to the other parish highways. They were clearly public roads.

59 The term “occupation road” when used, for example, in deposited railway documents, is not evidence that no public rights exist over that route. Indeed, the term may be supportive of public rights if the land over which the road passes was formerly common or waste over which the public had access as of right under common law.

60 There are many instances of railway documents either confirming or indicating public rights over occupation roads. For example, by either referring to those roads in the enabling Act as “Public Roads”, or, by naming the surveyors of highways as owners or

occupiers, or, by failing to name any private owner or occupier of the road in the Book of Reference.

61 Therefore, if an occupation road is a named thoroughfare; or leads from one public place to another; or is repairable either at public expense or ratione tenurae; or was granted in lieu of an ancient way running over a former common or waste; and was not granted for the sole and personal use of named persons; there is a strong presumption of a public right of way over that route.

Colin Seymour February 2010