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LEGAL SUBMISSION

BY

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A - Parliament intended Railways to be used as Highways and Roads

1 When any legal tribunal is considering the existence of a highway, over land formerly used as a railway line, it is necessary for that tribunal to have regard to the intentions of Parliament, and the terms of the enabling act by which the railway was originally constructed. In other words, it is the meaning and the application of the law as it was then, which must be taken into consideration, rather than the state of the law as it is presumed to be today.

2 The Severn Valley Railway, was created by three inter-related statutes enacted between 1853 and 1856. These were : 16 & 17 Vict. Cap. ccxxvii (1853); 18 &19 Vict. Cap. clxxxiii (1855); 1 9 & 20 Vict. Cap.cxi (1856).

3 The 1853 Act is entitled **"An Act for making a Railway from the Oxford, Worcester and Wolverhampton Railway near Hartlebury in the County of Worcester to the Borough of Shrewsbury in the County of Salop, with a Branch to be called "The Severn Valley Railway;" and for other Purposes"**

4 Section XIX (1853) authorised two particular works :-

5 "A Railway commencing . . . . . in the Parish of Hartlebury in the County of Worcester . . . and terminating . . . . within the Parish of Holy Cross and St. Giles in the Borough of Shrewsbury".

6 "A Branch Railway or Tramway commencing . . . out of that intended railway at . . . Benthall Edge in the Parish of Benthall in the County of Salop . . . and terminating . . . in the Parish Madeley in that County".

7 When the construction of the Severn Valley Railway was authorised by Parliament it was enacted on the basis of what was referred to at that time as the "free principle". This was sometimes worded as "free liberty to use", or "entitled to use", or "open to use".

8 This principle had been in operation ever since the first canals, turnpike roads, and tramways, were constructed in the eighteenth and nineteenth centuries. It was also enshrined within the Railway Clauses Consolidation

Act (1845) 8/9 Vict. c. 20, the provisions of which were incorporated in The Severn Valley Railway Act 1853 by section 2 of the Act.

9 Section 92 of the Railway Consolidation Act (now repealed by Statute Law Revision Act 1959) stated :- **"upon payment of the tolls . . . . . all persons shall be entitled to use the railway, with engines and carriages properly constructed"**

10 Commenting upon section 92, Glen stated in 1883 : **"it does not appear to have been the intention of the legislature to give to a railway company the complete monopoly of the means of communication on their railroad, but to enable the public to run engines and carriages on it upon payment of toll [see the second report of the Committee on Railways 1839 (115, 2) pp vi, vii)] . . . . A railway is sometimes described as a highway [see R v Severn and Wye Railway Company(1819) 2 B & Ald.646]"** ('The Law relating to Highways' - see Note to page 899)

11 Glen's view had also been upheld in Great Northern Rail. Co. v Eastern Counties Rail. Co. (1852) 21 L.J.(CH) 837. It was further upheld by Wills J. in London and North Western Rail.Co. v Llandudno Improvement Commissioners (1897)1 QB p. 298 who stated **"In 1848 . . . the theory was still alive in all our railway legislation <u>that a railway was a highway, like a turnpike road,</u> to be used by the public on certain terms as to tolls and otherwise"** (my emphasis - cited by Pratt & Mackenzie 'Law of Highways' 21st Ed. page 10 note 'f').

12 Pratt & Mackenzie however, by 1967 (page 10 above), whilst acknowledging that "**Railways have sometimes been regarded as highways"** went on to state **"The opposite view is however, more accurate, and also <u>more convenient"</u>** (my emphasis)

13 Notwithstanding, the view of Pratt & Mackenzie (which was taken following the repeal of section 92 of the 1845 Act above) when the Severn Valley Railway was constructed the law at that time held that it was a highway. It was only in the following century that for reasons of 'administrative convenience' the notion of railways as highways fell into disuse.

14 Just after the Severn Valley Railway commenced running, Cairns L.J. certainly had no doubts as to the intention of Parliament. He stated **"When Parliament acting for the public interest authorises the construction and maintenance of a railway <u>both as a highway for the public and as a road</u> on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind . . . . upon the company"** (Gardner v London Chatham & Dover Rail. Co. (No.1) (1867) 2 Ch App. 201 at 212 - my emphasis)

15 However, as the century turned the judiciary began to have second thoughts. In the matter of Great Central Railway v Midland Railway (1912)

1Ch 206 [affirmed (1914) AC 1] Farwell L.J. said (at p.217) **"It is true that section 92 gives a right to all the world to use the railway of any company very much as it were an ordinary high road; but the section was passed . . . when the working of railways was not understood and it is quite impractical and no court would enforce its provisions by either injunction or mandamus"** (my emphasis)

Note - The two cases cited above are taken from an Opinion prepared on the subject of the "free formula" by Conrad Dehn QC and Mr Ainger of counsel for British Coal in 1987 when the Aire and Calder Navigation Bill (1990) was being prepared for Parliament for enactment in 1992.

16 To return to the Seven Valley Railways Acts. These Acts embodied the said "free principle". They incorporated section 92 of the Railway Clauses Act, and also, for the avoidance of doubt, included a specific clause, at section 93(1855) to this effect (see below).

17 These Acts also allowed any person to use the railway with their own carriages, just like any other highway or turnpike road. If the carriages belonging to the company were used to transport passengers or animals there was an extra charge for the facility. The toll paid by passengers was also for the use of the engine for pulling the carriages which was provided by the company.

18 Section 42 of the 1853 Act enacts **"That the Company may demand and take any Tolls . . . .** (and) **. . .In respect of Passengers and Animals conveyed in Carriages . . .**(and) **. . .For every Person conveyed in or upon any such Carriage . . .** (twopence per mile)**. . . and if or conveyed on or upon any Carriage belonging to the Company** . . . (threepence per mile) . . . (and) **. . For every horse . . .** (threepence or fourpence per mile) **"**

19 Section 43 (1853) further enacts **"That the Toll which the Company may demand for the Use of Engines for propelling Carriages . . .**(one penny per mile)"

20 The 1855 Act at sections 82 and 83 re-enacted the said two clauses of the 1853 Act. The Act further confirmed that the "free principle" applied to the Severn Valley Railway. Section 93(1855) enacts **"All . . . . persons . . . . shall . . . . be entitled to the Use and Benefit of the Railways . . . . upon . . . . Payment of the . . . . Tolls, Rates and Charges"**

21 The "free principle" enshrined by section 93 (1855) remained on the statute books even when section 92 of the Railway Clauses Consolidation Act was repealed by the Statute Law Revision Act 1959 (c. 68)

22 Therefore, when the Severn Valley Railway opened in 1862 all persons were entitled to use the railway with or without their own carriages. The railway was in essence both a **"highway for the public and a road for the company"** (to quote Cairns L.J. above)

B - The effect of the discontinuance of the railway service in 1963

23 The Seven Valley Railway from Shrewsbury to Bewdley was "discontinued" in 1963. On the 16th August 1963, the 'Shrewsbury Chronicle' published a Public Notice, dated the 9th July 1963, signed by the Ministry of Transport and the British Railways Board stating that the passenger service from Shrewsbury to Bewdley was to be discontinued. The notice also stated that "Alternative passenger road services are already in operation" (and a 'Bus timetable' was attached to the notice)

24 The Public Notice did not give notice that the public rights over the railway line were to be extinguished. The word used was "discontinued". Thus the passenger service between Shrewsbury and Bewdley along the Seven Valley Railway was discontinued.

25 It seems that this word was carefully chosen. Its ordinary meaning being **"to leave off"; "to stop"; "to put an end to"; "to cease".** However, the word "discontinued" does not necessarily mean permanently discontinued. Something may be discontinued but then followed by a revival or resumption (see Donovan J. in Postill v East Riding of Yorkshire Council 2 All ER 685 at 688 - as cited in 'Words and Phrases Legally Defined' - 2nd Edition)

26 The word "discontinue" is therefore to be distinguished from the word "extinguish" (i.e. to destroy) as used in section 118(1) Highways Act 1980.

27 It is my submission that the statutory discontinuation of the railway was, in effect, simply to take away that which was authorised by section 43 (1853) i.e. **"the Use of Engines for propelling Carriages on the Railway"**.

28 Therefore, although the means of carrying passengers was discontinued, there was no Public Notice to the effect that the public rights over the railway line itself (as a highway) were also to be extinguished.

29 The presumption therefore arises that these rights, originally granted by section 93 (1855), remained intact in 1963 following the notice of discontinuance.

30 I leave it for others to plead, or the inquiry to find, that when the railway line was abandoned by the Railway Board all public rights over the railway track ceased.

C - Did the public establish new rights once the lines were removed ?

31 The evidence indicates that soon after the metal lines were removed horses and riders passed along the track (see summary of recorded users).

32 I also understand from Mrs Pritchard and from the above summary, that certain riders were using a way alongside the railway (but within its boundary) even before the trains stopped running. This was not an unusual practice. In my experience, in many parts of the country little used branch lines often had an accompanying way used by local inhabitants as 'a way of necessity'. Such practices were accepted by the Railway Companies as long as users did not trespass upon the actual railway lines.

33 I direct the inquiry's attention in particular to the three users of the Iron Bridge to Coalport section (M Gwynne; W Gwynne; W Whitaker) who were using the way from the late 1950's to the year 2000.

34 The presumption therefore arises, that either 'new' public rights were established immediately after the metal lines had been removed, or, existing rights were 're-confirmed'. For there is no evidence that any steps were taken by anyone at that time to deter public user.

35 Therefore, unless it can be proved that all public rights were indeed extinguished in 1963 (in addition to the railway service being discontinued) the inference is that those rights remained, and any public user along the disused track was as of right.

36 It is ancient and well tried common law that, if a man makes a street and leaves it open to any members of the public who have occasion to use it, whilst at the same time making no effort to prevent such use, in a short space of time it is considered to be a dedication of the way as a highway.

37 In the case of Sir John Lade v Shepherd (1735) 2 Strange1004 (as reported in 'The Justice of the Peace and Parish Officer' Burn 16th Ed. (1788) Vol. 2 page 483) it was pleaded by Shepherd **"That by the plaintiff making it a street, it was a dedication of it to the public".** The Court held that - **"it is certainly a dedication to the public, so far as the public has occasion for it"**

38 Therefore, even if no public rights existed, or continued to exist, after the railway closed, the actions of the Railway Board (by not actively preventing public use immediately after 1963) gave rise to the inference that the way had been dedicated as a bridleway.

39 Certainly, such use by horses was not unlawful. Therefore, the only way to prevent horses and riders from passing along the old track was to physically stop them by erecting barriers and obstacles.

40 There is no evidence before the inquiry that any barriers to prevent use by horses were in position before the land was sold in 1974. Nor is there any evidence that the Railway Board intended such use by horse riders to cease. Indeed, the contrary position seems to have been the case, because the land was sold to the Development Corporation **"Subject to all rights of way whether public or private"** (see below re the matter of "overriding interests" within a conveyance)

D - The right to deviate around gates upon the land of the same owner

41 It may be claimed that the erection of the gates upon the disused railway line (which obstructed public user on horseback) served to defeat any later claim that the way was dedicated as a bridleway.

42 Any such claim would be ill-founded. For it is also well established law that a traveller upon an existing public thoroughfare may deviate, upon the land of a person who has obstructed the way, in order to continue his journey. Furthermore, those outlets become, almost immediately, part and parcel of the highway as long as those obstructions remain.

43 As Mrs Justice Hallet said in the 'Maisemore Case' at para 72 of her judgment **"Where the landowner has allowed the usual track to become foundrous and impassable, it is plain the public may deviate onto his adjoining land for as long as that state of affairs persists, even if it is a matter of years"**

44 She further added at para 74 **"No authority has been cited to me where the right to deviate has been held to exist other than on the land of the defaulting owner responsible for the obstruction or foundrous state of the way"** (R on the Application of Gloucestershire County Council v Secretary of State for the Environment, Transport and the Regions(2001) 82 P & CR 15) - - - (see also "A Moving Right of Way' Colin Seymour(2006) published by 'Byway and Bridleway Trust' on its website under 'The Seymour Papers')

45 There is no evidence that the Development Corporation intended to prevent horses from using the 'Way'. Any gates erected by successor owners must be considered to be obstructions to the purpose of the route as intended by the Corporation when it purchased the railway track.

46 Furthermore, there is also no evidence that the gates were intended to prevent use by horses. It is more likely than not that the gates were intended to prevent motor vehicles from using the 'Way'. Otherwise, why would the owner have left adequate access for horses at the side of the gate, if not to continue free passage ?

47 I note that in his comments on the evidence the Rights of Way Officer takes a similar view regarding the gates and the free access available around them.

48 On the evidence before it, it would not be unreasonable for the inquiry to find that the route is a public bridle way but subject to the limitations of gates erected to prevent vehicular use. Such deviations from the track being lawfully held to be part and parcel of the highway.

E - "Overriding Interests" are protected in any conveyance of land

49 When the Railway Board sold the land to the Corporation in 1974 the conveyance included all "overriding interests" in that land as per section 70(1)(a) of the Land Registration Act 1925. These interests comprise **"Rights of common . . . .customary rights (until extinguished) . . . . public rights . . . . . rights of way . . . . ."** (my emphasis)

50 'Emmet on Title' states that **"The expression 'overriding interests' means all those interests, incumbrances, rights and powers which are enforceable against a proprietor of registered land even though not mentioned on the register and subject to which registered dispositions necessarily take effect"** (16th Ed. pages 184 -185)

51 Therefore, when the land was conveyed in 1974 it included any **"public rights and rights of way"** which already existed over the former railway bed. Indeed, the Railway Board may have recognised the possibility of the existence of such rights as the 'Charges Register' confirms (Deed No. SL71147) : **"Subject to all rights of way whether public or private"**

52 When the land was later transferred from the Corporation to the Commission in 1991, and then transferred from the Commission to the Wrekin District Council in 1993, these "overriding interests" passed with each transfer.

53 Therefore, any public rights or rights of way which existed over the railway track in 1974 still exist today, whether mentioned on the Register or not.

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