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BRITISH TRANSPORT COMMISSION *v.* WESTMORLAND COUNTY COUNCIL.

BRITISH TRANSPORT COMMISSION *v.* WORCESTERSHIRE COUNTY COUNCIL.

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[HOUSE OF LORDS (Viscount Simonds, Lord Morton of Henryton, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm), March 4, 5, 6, 11, May 14, 1957.]

Highway—Dedication—Footpaths over and under railway—Presumption of dedication—Whether dedication incompatible with objects of statutory corporation—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 20), *s.* 16.

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A bridge over a railway and a bridge under a railway were constructed by statutory railway undertakers at about the time of the construction of the railways. The bridges afforded accommodation crossings over and under the railways and were constructed under statutory obligation for the convenience of the owners and occupiers whose lands were severed by the

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railways, but there were no public or private rights of way at the crossings when they were constructed. Subsequently, members of the public so used the crossings and paths leading thereto and therefrom as to justify the inference of dedication of public rights of way if the railway undertakers and their successors in title had capacity to dedicate. The footpaths over and

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under the railways by means of the bridges were marked on provisional maps by both the respondents pursuant to their obligations under the National Parks and Access to the Countryside Act, 1949. The appellants, who were the successors in title to the railway undertakers, sought declarations that no public rights of way existed over or under the bridges in question.

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Held: the test whether a statutory corporation, such as the appellants, could validly dedicate to the public a right of way over their land was whether the dedication was compatible with the statutory purposes for which the corporation had acquired the land; the question of incompatibility was one of fact to be determined by a consideration of the probabilities reasonably foreseeable or of the likelihood whether the right of way would

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interfere with the adequate fulfilment of the statutory purposes, and, in the present cases, the dedication of the rights of way was not incompatible with the appellants' statutory purposes.

R. v. *Inhabitants of Leake* ((1833), 5 B. & Ad. 469) and *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* ([1926] A.C. 355) applied.

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Ayr Harbour Trustees v. *Oswald* ((1883), 8 App. Cas. 623) and *Paterson* v. *St. Andrews Provost* ((1881), 6 App. Cas. 833) distinguished.

Dictum of SIR GEORGE JESSEL, M.R., in *Mulliner* v. *Midland Ry. Co.* ((1879), 11 Ch.D. at p. 623) disapproved (see, particularly, p. 365, letter F, post).

Semble: the question whether the grant of a right of way was in fact incompatible with a corporation's statutory purposes should be determined at the date when it is before the tribunal of fact (see p. 361, letter H,

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to p. 362, letter C, p. 365, letter A, p. 369, letter H, and p. 372, letter A, post).

Decision of the COURT OF APPEAL ([1956] 2 All E.R. 129) affirmed.

[As to capacity of statutory corporations to dedicate the surface land vested in them for use as a highway, see 16 HALSBURY'S STATUTES (2nd Edn.) 222, para. 268; and for cases on the subject, see 26 DIGEST 290-292, *225-243*.

For the Railways Clauses Consolidation Act, 1845, s. 16, see 19 HALSBURY'S STATUTES (2nd Edn.) 603.]

Cases referred to:

(1) *R.* v. *Leake (Inhabitants)*, (1833), 5 B. & Ad. 469 (110 E.R. 863); 2 Nev. & M.K.B. 583; 26 Digest 290, *225.*

(2) *Ayr Harbour Trustees* v. *Oswald*, (1883), 8 App. Cas. 623; 11 Digest (Repl.) 103, *5.*

(3) *Grand Junction Canal Co.* v. *Petty*, (1888), 21 Q.B.D. 273; 57 L.J.Q.B. 572; 59 L.T. 767; 52 J.P. 692; 26 Digest 290, *226.*

(4) *Foster* v. *London, Chatham & Dover Ry. Co.*, [1895] 1 Q.B. 711; 64 L.J.Q.B. 65; 71 L.T. 855; 11 Digest (Repl.) 123, *151.*

(5) *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.*, [1896] 2 Q.B. 439; 65 L.J.Q.B. 625; 75 L.T. 239; 11 Digest (Repl.) 139, *210.*

(6) *Taff Vale Ry. Co.* v. *Pontypridd Urban District Council*, (1905), 93 L.T. 126; 69 J.P. 351; 26 Digest 291, *228.*

(7) *South Eastern Ry. Co.* v. *Cooper*, [1924] 1 Ch. 211; 93 L.J.Ch. 292; 130 L.T. 273; 88 J.P. 37; 19 Digest 108, *687.*

(8) *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.*, [1926] A.C. 355; 95 L.J.Ch. 587; 134 L.T. 673; 90 J.P. 77; Digest Supp.

(9) *Mulliner* v. *Midland Ry. Co.*, (1879), 11 Ch.D. 611; 48 L.J.Ch. 258; 40 L.T. 121; 43 J.P. 573; 11 Digest (Repl.) 122, *145.*

(10) *Paterson* v. *St. Andrews Provost*, (1881), 6 App. Cas. 833; 26 Digest 292, *241.*

(11) *R.* v. *Wycombe Ry. Co.*, (1867), L.R. 2 Q.B. 310; 36 L.J.Q.B. 121; 15 L.T. 610; 31 J.P. 197; 11 Digest (Repl.) 112, *73.*

(12) *Pugh* v. *Golden Valley Ry. Co.*, (1880), 15 Ch.D. 330; 49 L.J.Ch. 721; 42 L.T. 863; 30 Digest (Repl.) 218, *607.*

(13) *Emsley* v. *North Eastern Ry. Co.*, [1896] 1 Ch. 418; 65 L.J.Ch. 385; 74 L.T. 113; 60 J.P. 182; 11 Digest (Repl.) 146, *252.*

(14) *Great Western Ry. Co.* v. *Solihull Rural District Council*, (1902), 86 L.T. 852; 66 J.P. 772; 26 Digest 290, *227.*

(15) *Great Western Ry. Co.* v. *Talbot*, [1902] 2 Ch. 759; 71 L.J.Ch. 835; 87 L.T. 405; 19 Digest 111, *714.*

(16) *South Eastern Ry. Co.* v. *Warr*, (1923), 21 L.G.R. 669; 26 Digest 291, *232.*

(17) *Great Central Ry. Co.* v. *Balby-with-Hexthorpe Urban Council, A.-G.* v. *Great Central Ry. Co.*, [1912] 2 Ch. 110; 81 L.J.Ch. 596; 106 L.T. 413; 76 J.P. 205; 26 Digest 292, *240.*

(18) *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers (1900), Ltd.*, [1910] 1 Ch. 12; 79 L.J.Ch. 150; 101 L.T. 865; 74 J.P. 21; 19 Digest 26, *112.*

(19) *Midland Ry. Co.* v. *Gribble*, [1895] 2 Ch. 827; 64 L.J.Ch. 826; 73 L.T. 270; 19 Digest 81, *490.*

(20) *A.-G.* v. *London & South Western Ry. Co.*, (1905), 69 J.P. 110; 26 Digest 292, *239.*

(21) *Caledonian Ry. Co.* v. *Turcan*, [1898] A.C. 256; 25 R. (Ct. of Sess.) 7; 35 Sc. L.R. 404; 11 Digest (Repl.) 195, *489.*

(22) *Edinburgh Magistrates* v. *N.B. Ry. Co.*, (1904), 6 F. (Ct. of Sess.) 620; 41 Sc. L.R. 492; 12 S.L.T. 20; 26 Digest 281, *177r.*

Appeals.

Consolidated appeals by the British Transport Commission from orders of the Court of Appeal (SINGLETON, JENKINS and HODSON, L.JJ.), dated Mar. 22, 1956, and reported [1956] 2 All E.R. 129, affirming orders of the Queen's Bench Divisional Court (LORD GODDARD, C.J., STABLE and ASHWORTH, JJ.), dated Jan. 23, 1956, and reported [1956] 1 All E.R. 321, on Cases Stated by justices for the County of Westmorland and justices for the County of Worcester, respectively. The facts in *British Transport Commission* v. *Westmorland County*

Council are set out in the opinion of VISCOUNT SIMONDS, p. 356, letter A, to p. 357, letter C, post. The facts in *British Transport Commission* v. *Worcestershire County Council* are set out in the report of the Divisional Court (see [1956] 1 All E.R. at pp. 323, 324).

Sir Andrew Clark, Q.C., Sir Frank Soskice, Q.C., and *J. P. Widgery* for the appellants.

Michael Rowe, Q.C., Harold Williams, Q.C., and *E. S. Temple* for the respondents.

The House took time for consideration.

May 14. The following opinions were read.

VISCOUNT SIMONDS: My Lords, these consolidated appeals, in which the British Transport Commission are appellants and the Westmorland County Council and the Worcestershire County Council respectively are respondents, raise a question of general importance. It will be sufficient to state the facts and contentions in regard to the appeal in which the Westmorland County Council are respondents. The same conclusion must be reached in both cases.

The appeal in the *Westmorland* case is brought from an order of the Court of Appeal whereby that court unanimously dismissed an appeal from a decision of the Divisional Court of the Queen's Bench Division which had been given on a Case Stated by Quarter Sessions of the Peace for the County of Westmorland. The Case Stated was consequent on an order of sessions dismissing an application by the appellants for a declaration that no public right of way existed over a bridge spanning certain lines of railway owned and occupied by the appellants in the Borough of Kendal in the same county.

The jurisdiction of quarter sessions arises in this way. By s. 27 of the National Parks and Access to the Countryside Act, 1949, the council of every county in England and Wales are required to carry out a survey of all lands in their area over which a public path is alleged to subsist and to prepare a draft map of their area showing such footpath whenever, in their opinion, such a right of way subsisted, or is reasonably alleged to have subsisted, at the relevant date as therein defined. The council are then required* to publish in the prescribed manner a notice of the preparation of the draft map and of the places where it may be seen and to hear objections as to anything contained in or omitted from it. Having made a determination on any such objection, the council are next required† to make a provisional map incorporating its determination and to advertise the preparation thereof and the places at which it may be inspected. At any time‡ within twenty-eight days of the publication of such notice the owner, lessee or occupier of any land on which the map shows a public path or a road used as a public path may apply to quarter sessions for a declaration that at the relevant date there was no public right of way over the land and, unless quarter sessions are satisfied that at that date such a right of way did exist, they must make a declaration accordingly. By s. 31 (7) of the Act, provision is made for an appeal to the High Court by way of Case Stated on a point of law.

Pursuant to their obligations under this Act, the respondents, the Westmorland County Council, prepared a provisional map of the Borough of Kendal and showed on it a footpath numbered 29 which crossed certain lines of railway owned and occupied by the appellants by means of an overbridge, which I will presently describe. The relevant date for the purpose of the Act was Aug. 1, 1952. On Nov. 12, 1954, the appellants applied to the justices of the County of Westmorland

* By ibid., s. [illegible].

† By ibid., s. 30.

‡ See ibid., s. 31 (1) (a), (3).

sitting as an Appeal Committee of Quarter Sessions for the county for a declaration that on Nov. 1 no public right of way existed over the overbridge. This application was heard on Apr. 5, 1955, and was refused, and in due course a Case was, pursuant to the Act, stated for the opinion of the High Court. A

It is necessary that I should recite the facts precisely as they are found in the Case Stated. After reference to the application, the Case proceeded as follows: B

" 2 (A) The said lines of railway were constructed in or about the year 1847 by the appellants' predecessors in title under powers contained in the Kendal and Windermere Railway Act, 1845.

" (B) At the date of the construction of the said railway no public right of way existed on or near to the line of the said way numbered 29.

" (C) The said bridge was constructed by the appellants' predecessors in title at or about the time of the construction of the said railway in order to facilitate access between the land on either side of the said railway which was severed by the construction of the same. C

" (D) The said bridge was constructed solely as a private accommodation crossing for the benefit of the owners and occupiers of lands so severed as aforesaid and no express dedication to the public of the way thereover has at any time been made. D

" (E) Since the construction of the said railway members of the public have used the said way numbered 29 and the said bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a highway if the owner of the soil were capable of such dedication. E

" (F) The owners from time to time of the soil of the said way, other than the appellants and their predecessors in title as owners of the said railway, have at no time been under such a disability as would render them incapable of dedicating the said way as a highway and have made no application to quarter sessions for such a declaration as was sought by the appellants in these proceedings nor has such an application been made by any lessee or occupier (other than the appellants) of the soil of the said way. F

" (G) If and when the appellants cease to be bound to maintain the said bridge for the benefit and convenience of the owners or occupiers of the lands severed by the said railway for whose benefit and convenience the same was originally constructed, by reason of the rights of the said owners and occupiers having been released by agreement or abandoned or having otherwise ceased to be exercisable, the appellants would demolish and discontinue the said bridge, it being their practice so to deal with accommodation works as opportunity arises. G

" (H) There is no likelihood of the appellants wishing to construct additional lines of rails under the said bridge or its approaches unless substantial new industrial development takes place in the area served by the said railway. There is no prospect of any such development. H

" (I) The continued existence of the bridge will not cause any danger to the running of the appellants' trains and the operation of the railway.

" (J) The bridge is a strong and durable edifice likely to last indefinitely with comparatively small repairs. The cost of demolishing it would be at the very least £700. It has not been repaired for at least eight years and if it is to remain it will require repairs within the next two or three years which we estimate will cost £250 and thereafter maintenance at a cost which we estimate at £150 in every period of ten years. Accordingly we find that the annual cost of maintenance capitalised would be appreciably less than the cost of demolition. In every case the costs referred to are calculated at present day prices. I

A "(K) In so far as it is a matter of fact, the expenditure involved in the maintenance of the bridge is quite compatible with the present and future execution of the purposes for which the land is vested in the appellants."

By way of amplification of the facts as stated it should be added that the Kendal and Windermere Railway Act, 1845, incorporated (inter alia) the Lands Clauses Consolidation Act, 1845, and the Railways Clauses Consolidation Act, 1845. B Section 68 of the latter Act required the railway company to make and at all times thereafter maintain for the accommodation of the owners and occupiers of lands adjoining the railway (inter alia) so many bridges over the railway as might be necessary for the purpose of making good any interruptions caused by the railway to the lands through which it was made. The bridge over which the footpath numbered 29 runs (which has been called "the overbridge") was con- C structed pursuant to this section.

Section 16 of the same Act was strongly relied on by the appellants. It provided that, subject as therein mentioned, it should be lawful for the company, for the purpose of constructing the railway, or the accommodation works connected therewith, as thereinafter mentioned, to execute any of the works therein mentioned, that is to say, they might construct on, across, under, or over any D lands described in the plans such embankments, bridges and fences as they should think proper, and (this is the relevant power) they might "from time to time alter, repair, or discontinue the beforementioned works or any of them, and substitute others in their stead" and further they might "do all other acts necessary for making, maintaining, altering, or repairing, and using the railway."

E These being the facts the contentions of the parties may now be stated. It was contended by the appellants that the dedication of a public right of way over the said bridge would be incompatible with the purposes of their railway undertaking in that: (A) It would commit the appellants in perpetuity to all such expense in the maintenance of the said bridge as might from time to time be necessary which expense could be avoided if the same were demolished. (B) It F would fetter the appellants' powers to expand their said railway undertaking by the construction of additional lines of rails if and when they might require to do so. (C) It would deprive the appellants of their statutory powers to discontinue the said bridge and crossing pursuant to s. 16 of the Railways Clauses Consolidation Act, 1845.

G It was contended by the respondents that—(A) there having been user of the said way numbered 29 and the said bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a highway if the owner of the soil were capable of dedication, dedication ought to be presumed to have taken place; (B) the user of the bridge by the public as a public footpath was not inconsistent with the operation of the railway and the execution H of the purposes for which the bridge and adjoining railway land is and was vested in the appellants and their predecessors; (C) the dedication of a public right of way over the bridge would only be incompatible with the execution of the functions of the appellants and their predecessors if it were to involve the appellants in a material increase in expenditure and, on the facts, the appellants would not be involved in any increase in expenditure whatever; (D) section 16 of the I Railways Clauses Consolidation Act, 1845, did not have the effect contended for it by the appellants; otherwise its effect would be that railway undertakers as a matter of law could in no circumstances dedicate a right of way across any part of their railway; this proposition was not supported in any decided case.

On these facts and contentions the justices were of opinion that there had been dedication, and accordingly refused to make the declaration sought by the appellants. The question they submitted for the opinion of the High Court was "whether on the facts aforesaid a dedication of the alleged public right of way

was incompatible with the statutory objects of the appellants." As I have already said, the Divisional Court and Court of Appeal in turn dismissed the appellants' appeal. In effect, both courts answered the question submitted to them in the negative.

I must for a moment recur to the appellants' contentions as they appear in the Case Stated. Contention (A) is no longer advanced as a separate contention. Contentions (B) and (C) may fairly be said to be directed to the general question submitted by the justices, but learned counsel for the appellants found it convenient to argue the case on the alternative pleas: (A) that the dedication of public rights of way in the circumstances of the case would amount to a repeal of the appellants' statutory power to discontinue the bridge in certain events and would thus be ultra vires; and (B) that such dedication would have been incompatible with the public or statutory purposes for which the appellants and their predecessors held their lands. It is, however, clear that the two pleas interlock: for one aspect of incompatibility might consist in such a surrender of power as to debar the performance of the statutory purpose. I propose, therefore, to examine the case on the footing that the real question is that which was submitted by the justices, not, however, closing my mind to the aspect of the question to which I have just referred. Before I refer to the authorities, which are numerous, it is, perhaps, desirable to state that, in my opinion, they are by no means irreconcilable, as has been suggested, but that the single difficulty is to ascertain from them what is the test of incompatibility which is to guide the court in determining whether an act proposed to be done by a railway or other statutory company is incompatible with the statutory purpose for which it was authorised to acquire and acquired its land.

Any examination of this question must begin with *R.* v. *Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469), which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of PARKE, J., in that case (ibid., at p. 478):

> " If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."

Here a principle is laid down which is supported not only by a great weight of succeeding authority but by its inherent reasonableness. For, though on the one hand it would be improper that commissioners or other persons having acquired land for a particular statutory purpose should preclude themselves from using it for that purpose, on the other hand, if consistently with its user for that purpose it can be used for some other purpose also, I see no impropriety in such secondary user. If the usefulness of a parcel of land is not exhausted by its user for its statutory purpose, why should it not be used for some other purpose not incompatible with that purpose?

This, at least, is the view which has been consistently taken for over one hundred years, and I do not doubt that any departure from it would be fraught with most serious consequences to assumedly well-established public rights. Amongst the cases to which reference might be made, some have a particular value because they were later in date than *Ayr Harbour Trustees* v. *Oswald* (2) ((1883), 8 App. Cas. 623), on which the appellants strongly relied, and were decided in the light of that binding decision. I may mention such cases as *Grand Junction Canal Co.* v. *Petty* (3) ((1888), 21 Q.B.D. 273); *Foster* v. *London,*

Chatham & Dover Ry. Co. (4) ([1895] 1 Q.B. 711); *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439); *Taff Vale Ry. Co.* v. *Pontypridd Urban District Council* (6) ((1905), 93 L.T. 126); *South Eastern Ry. Co.* v. *Cooper* (7) ([1924] 1 Ch. 211); *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. 355). If, in *Mulliner* v. *Midland Ry. Co.* (9) ((1879), 11 Ch.D. 611), there are to be found observations by SIR GEORGE JESSEL, M.R., which do not conform with this long line of authority, they cannot be given the weight which is usually accorded to the decisions of that very learned judge. They have, in fact, been the subject of judicial criticism and explanation: see, e.g., *Gonty's* case (5) and *Petty's* case (3).

It was, however, on the *Ayr* case (2) that counsel for the appellants mainly relied, suggesting, if I understood the argument, that a proper understanding of that case must lead to a decision in his favour. I think, on the contrary, that this contention is based on a radical misunderstanding of it. For it appears to me that in the *Ayr* case (2) it was plain that the proposed agreement by the statutory body, which had acquired land for a particular purpose, that they would not use it so as to interfere with the access from other property of the vendor to the sea, was regarded as incompatible with the statutory purpose. It was, in fact, an example of incompatibility, not a decision to the effect that incompatibility does not supply a test. This was clearly the view of LORD SUMNER in the *Birkdale* case (8). Similar observations may be made on *Paterson* v. *St. Andrews Provost* (10) ((1881), 6 App. Cas. 833), which gives equally little support to the appellants.

If I am right in saying that the principle of *Leake's* case (1) must be applied here, I must next consider what is the test of incompatibility, which, as I have already said, appears to me to be the real difficulty in the case. This is a question of fact. It can be nothing else and it has been so treated, and expressly so treated, in many of the cases to which I have referred. But to say this does not completely solve the problem. For the jury or tribunal of fact must still be properly directed what is the test, and it is to this point that counsel for the appellants directed his attack. He urged that there could only be compatibility if it could be proved that in no conceivable circumstances could the proposed user at any future time and in any way possibly interfere with the statutory purpose for which the land was acquired. If he is right, it is clear that the justices in the present case did not ask themselves the right question or ascertain the relevant facts.

My Lords, I am satisfied that this argument is misconceived. In the first place in none of the relevant cases, neither in those that I have already mentioned nor in those, far more numerous, that I have examined, has anything of the kind been suggested. PARKE, J.'s use of the word "never" in *Leake's* case (1) was clearly not intended to have so dramatic an effect. But, in the second place, to give to incompatibility such an extended meaning is, in effect, to reduce the principle to a nullity. For a jury, invited to say that in no conceivable circumstances and at no distance of time could an event possibly happen, could only fold their hands and reply that it was not for them to prophesy what an inscrutable providence might in all the years to come disclose. I do not disguise from myself that it is difficult to formulate with precision what direction should be given to a jury. But after all we live in a world in which our actions are constantly guided by a consideration of reasonable probabilities of risks that can reasonably be foreseen and guarded against, and by a disregard of events of which, even if we think of them as possible, we can fairly say that they are not at all likely to happen. And it is, in my opinion, by such considerations as these, imprecise though they may be, that a tribunal of fact must be guided in determining whether a proposed user of land will interfere with the statutory purpose for which it was acquired. At an earlier stage of this opinion I set out at length

the facts found by the justices in order that it might be seen how far they had correctly directed themselves in reaching their conclusion that there had been a dedication of the way in question. In para. 2 (H), (I), (J) and (K) of the stated Case they find the facts as they are now and as they are in their view likely to be. I do not think that there is any sin of commission or omission to be found in them, or that it can be said that, on the basis that I have attempted to lay down, they were not well entitled to reach their conclusion.

I should, on this part of the case, add that there was some discussion whether a tribunal of fact must look at the facts as they are at the date when the matter arises for determination or, disregarding the present, try to look at them as they existed when the dedication was presumed to be made. It is possible, my Lords, that a case may arise in which it becomes relevant to decide this question, but, inasmuch as a presumption of dedication arises after user for a number of years but there is no presumption of the date of dedication and in the present case the justices adopted the course most favourable to the appellants by looking at the facts as they are today and can today reasonably be foreseen, I do not think it necessary to say any more on this question

My Lords, I come now to that part of the argument for the appellants, which, though it is comprehended in the broad question of incompatibility, was treated as an independent plea. It was to the effect that, in the circumstances of the present case, the dedication of a right of way over the overbridge in question would amount to a repeal of the appellants' statutory power to discontinue the bridge, and would thus be ultra vires. This plea looks back to s. 16 of the Railways Clauses Consolidation Act, 1845, to which I have already referred, and it is stated in a way which gives it a superficial attraction. But it is not accurate to say that, if a statutory body puts it out of its power to act in an authorised manner in a particular case, that amounts to a repeal pro tanto of the Act of Parliament. This appears to me to be involved in the larger conclusion that I have already reached that land acquired for a particular statutory purpose may yet be used for another purpose which is not incompatible with it. The argument here, too, could be that user for another purpose precludes user for the statutory purpose and, therefore, pro tanto amounts to a repeal of the Act. But such an argument is rejected because the statutory purpose is not defeated so long as the secondary user is compatible with it. A fortiori, where the question is not of the main purpose of the undertaking but of the exercise of a power under s. 16, the question is whether its non-exercise, or such an act as will preclude its exercise, is consistent with the statutory purpose for which the land was acquired. The answer must be precisely that which has already been given. It is consistent: it is not incompatible. The single new fact which might in some other case be of importance is that the continued existence of a bridge, which the appellants would in other circumstances demolish, might involve them in certain costs of maintenance. But in the present case it was disclaimed as a separate ground of incompatibility, and I have been unable to discern its relevance in any other way. Nor do I think it necessary to consider what may be the respective obligations of the appellants and the local authority in the event of the bridge being no longer required as an accommodation work but being still necessary to support the public way. This is a question which has not arisen and may never arise.

Reference was made in the course of the argument before the House to s. 1 of the Rights of Way Act, 1932, sub-s. (7) of which provides:

> " Nothing in this section contained shall affect any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate any such way where such way would be incompatible with such public or statutory purposes."

I agree with SINGLETON, L.J., and HODSON, L.J., that the sub-section does not help the appellants but, on the contrary, by preserving the existing law and recognising that incompatibility of a public way with statutory purposes is the test, confirms the view that the principle of *Leake's* case (1) prevails.

For these reasons, which shortly adopt the judgments of the Divisional Court and the Court of Appeal, I am of opinion that both appeals should be dismissed. I cannot conclude without saying how much I have owed in preparing this opinion to the careful and exhaustive judgment of the late SINGLETON, L.J.

LORD MORTON OF HENRYTON: My Lords, I shall deal only with the *Westmorland* case as that was the only case argued before your Lordships and it is agreed that the same question arises in each of the two consolidated appeals.

The bridge over which the alleged public right of footway runs was constructed by the predecessor in title of the appellants solely as a private accommodation crossing for the benefit of the owners or occupiers of lands severed by the construction of the Kendal and Windermere railway. Since the construction of that railway members of the public have used the bridge in such manner and for such period as to give rise to a presumption that the same had been dedicated as a public footpath if the owner of the bridge were capable of such dedication. See finding (E) in para. 2 of the Case Stated.

Counsel for the appellants submitted that neither the appellants nor the railway company which was their predecessor in title, were capable of such dedication. His reasons were (i) that a dedication of a public right of way over the bridge would prevent the undertakers from exercising at any time a statutory power, namely, the power to discontinue the bridge, which is conferred by s. 16 of the Railways Clauses Consolidation Act, 1845. That Act is incorporated with the special Act, the Kendal and Windermere Railway Act, 1845; (ii) that such a dedication might, at some future time, hamper the undertakers in carrying out to the best advantage the purposes of the special Act.

My Lords, in my opinion, the only rule applicable to the present case is that a statutory company has no power to grant a public right of way the enjoyment whereof by the public is incompatible with the statutory objects of the company. This rule was established as a rule of law by a long series of cases, starting with *R.* v. *Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469), and has been recognised by this House in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. 355).

It is common ground between the parties that the question of incompatibility is a question of fact, but there is a vital difference in the views put forward on behalf of each party as to the proper question to be put to the tribunal of fact. Counsel for the appellants submitted that the question should be

> " whether the existence of the alleged right of way might, in any possible circumstances, at any future time, hamper the undertaker in carrying out to the best advantage the purposes of its special Act ";

counsel for the respondent council submitted that the question should be

> " whether at the date when the question is considered by the tribunal of fact, there is any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties."

My Lords, I can find no decision, in the long line of authority cited in argument, which is clearly in favour of counsel for the appellants' version, and I find several cases in which the court appears to have acted on the view that counsel for the respondents' version is the right one. As examples, I would mention *Grand Junction Canal Co.* v. *Petty* (3) ((1888), 21 Q.B.D. 273), and *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439).

I do not find this result surprising, for, if counsel for the appellants' version is correct, it would, I think, be impossible ever to presume dedication of a public right of way by a statutory railway company over any part of the land which it had acquired for the purposes of its Act. A right of way is a burden on the land. I cannot think that it would be possible for a tribunal of fact honestly to find that the existence of such a right could never at any time, and in any possible circumstances, hamper the undertaker; yet there are many cases in which a dedication of a public right of way has been presumed against a statutory railway company.

I, therefore, accept counsel for the respondents' submission, and turn to consider whether, on the facts found in the Case Stated, there is any likelihood that the existence of a public right of way over the bridge would interfere with the adequate and efficient discharge of the appellants' statutory duties.

It is first to be borne in mind that the bridge is an accommodation crossing and there is no evidence that it has ceased to be required for the purpose for which it was erected. Indeed, it cannot be said with certainty that a time will ever come when it is no longer required for that purpose, for the land on each side of the line may remain indefinitely in one ownership and there may never be any agreement with the owner that the bridge may be discontinued.

Next, there is, of course, no obligation on the appellants to exercise the power to discontinue the bridge, even if the time comes when it is no longer required for accommodation purposes.

Finally, the findings of fact (H), (I), (J) and (K) in para. 2 of the Case Stated make it clear that it is extremely unlikely that the appellants will ever find it necessary to discontinue the bridge for the purposes of their undertaking. I use the word " necessary " because it has been held that each one of the powers conferred by s. 16 of the Railways Clauses Consolidation Act, 1845, can be exercised only when it is necessary for making, maintaining, altering or repairing and using the railway. See *R.* v. *Wycombe Ry. Co.* (11) ((1867), L.R. 2 Q.B. 310), approved in *Pugh* v. *Golden Valley Ry. Co.* (12) ((1880), 15 Ch.D. 330), *Emsley* v. *North Eastern Ry. Co.* (13) ([1896] 1 Ch. 418).

I add that I am by no means satisfied that it would be impossible to discontinue the bridge, either under the statutory power or at common law, if it were no longer required as an accommodation way and if a public right of way existed over it. I find it unnecessary, however, to deal with this question, in view of the findings of fact to which I have just referred.

For these reasons, my Lords, I am of opinion that the question which I have posed should be answered in the negative. It follows that I would dismiss the appeal.

LORD RADCLIFFE: My Lords, I agree that these appeals ought to be dismissed. I should not say more but for the fact that the principles of law which bear on their subject appear to me to stand so curiously related that I do not want to part with the appeals without saying something as to what I conceive to be involved in the decision now proposed. It means, I think, that we must cut down two very far-reaching general propositions of law, valuable in themselves, to proportions that are manageable in relation to the particular set of circumstances with which we are now confronted. Both these general propositions support the appellants' argument. One proposition is that laid down by SIR GEORGE JESSEL, M.R., in *Mulliner* v. *Midland Ry. Co.* (9) ((1879), 11 Ch.D. 611 at p. 623). It is to the effect that a railway company, which operates under statutory powers of managing its railway conferred on it for the furtherance of the public interest, is devoid of legal capacity to grant any easement or right of way over land acquired by it unless expressly authorised by statute so to do. It has not, generally speaking, the full capacity of disposition enjoyed by a private owner of land. The other proposition, which is distinct

from the first, is that no body, corporate or unincorporate, which holds property or rights under powers conferred on it for the public benefit can make a disposition or agreement effective in law by which it abdicates its freedom to exercise those powers at any time in the future. The second proposition rests principally on two decisions of this House in Scottish cases, *Paterson* v. *St. Andrews Provost* (10) ((1881), 6 App. Cas. 833); *Ayr Harbour Trustees* v. *Oswald* (2) ((1883), 8 App. Cas. 623).

Mulliner's case (9) was decided in 1879. It has been referred to again and again in other cases, both in argument and in judgments of the court. It has certainly never been overruled; on the contrary, SIR GEORGE JESSEL'S statement of the law has twice been made the very foundation of unanimous decisions in the Court of Appeal—see *Great Western Ry. Co.* v. *Solihull Rural District Council* (14) ((1902), 86 L.T. 852) and *Great Western Ry. Co.* v. *Talbot* (15) ([1902] 2 Ch. 759). More than that, part of his reasoning (though not directly his reasoning on this point) was quoted with approval by LORD BLACKBURN when making the first speech in this House in the *Ayr Harbour* case (2) (8 App. Cas. at p. 635). In any ordinary combination of circumstances one would say that the legal principle laid down in *Mulliner's* case (9) was firmly established. On the other hand, it is equally certain that for many years there has been a tendency to treat *Mulliner's* case (9) as having stated the law in terms different from those actually employed. It has been subjected to a process of judicial explanation. Few authorities can have been explained so often with such little fidelity to the original source. In 1888, in *Grand Junction Canal Co.* v. *Petty* (3) ((1888), 21 Q.B.D. 273), the court treated *Mulliner's* case (9) as being a decision in which (21 Q.B.D. at p. 275) " the facts of the case . . . pointed to a different conclusion of fact from that on which the decision in *R.* v. *Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469) was founded." In *South Eastern Ry. Co.* v. *Cooper* (7) ([1924] 1 Ch. 211) SIR ERNEST POLLOCK, M.R., referred to *Mulliner's* case (9) as (ibid., at p. 223) " a case . . . of a very special character " and WARRINGTON, L.J., in the same case, similarly discounts the significance of SIR GEORGE JESSEL'S intended proposition of law by describing it as made (ibid., at p. 232) " . . . in reference to the facts of that case . . ." That, I suppose, could be said with as much or as little force about all judgments. Yet two things at least are plain from a reading of *Mulliner's* case (9), first, that there was nothing special about the facts—they related to a purported grant of a right of way through arches forming the substructure of a station—and, secondly, that SIR GEORGE JESSEL rested his decision on what he himself called " the general law ". The question that he put and answered in the negative was (11 Ch.D. at p. 619): Has a railway company power by law to alienate, either for value or without value, any portion of the land actually used for the railway or works, except so far as express provision to that effect is made in its regulating Act? From that he deduced, as was pointed out and approved by RIGBY, L.J., in *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439 at p. 450), that the grant of any easement was similarly forbidden.

Gonty's case (5) is yet another Court of Appeal case in which *Mulliner's* case (9) was commented on. The case itself amounted to a decision that, in considering whether part of a building could be severed from the rest " without material detriment thereto ", that being the only condition on which a railway company could effect the severance under a special statutory power, it was legitimate to treat the railway company as having legal power to grant a right of access over the portion proposed to be taken, and to assess compensation accordingly. I have not sufficient ingenuity at my command to be able to say how this decision can be good law in the face of *Ayr Harbour Trustees* v. *Oswald* (2), in which it was decided by this House that, in assessing compensation for injurious affection of land retained arising from compulsory acquisition

of other land previously part of the same holding, it was not legitimate to treat the undertakers as having legal power to grant a right of access over the land acquired. However that may be, in *Gonty's* case (5), LORD ESHER, M.R., appeared to regard *Mulliner's* case (9) as being inconsistent with the view that the undertaker could grant the right of access but as being an authority which he was not prepared to follow. A. L. SMITH, L.J., said ([1896] 2 Q.B. at p. 447) that he was not going to controvert *Mulliner's* case (9), but thought that, if it were to be "cited as a case which says that the railway company cannot give an easement through its own embankment from one side to the other", he could not agree with it. Unfortunately, the learned lord justice did not say what, in his view, *Mulliner's* case (9) could be cited for if not for that, and his illustration of the power or duty of a railway company to create an accommodation access through its embankment, when it severs land, does nothing to clear up the matter since, of course, in such a case there is a statutory obligation to provide just such accommodation. RIGBY, L.J., as I have said, thought (ibid., at p. 450) that *Mulliner's* case (9) did decide that no perpetual right of way could lawfully be created by a railway company over land taken and required for its purposes. "That . . . is all that case was intended to decide, and the case has no bearing on that before us." For completeness, I ought to add that there have been further comments on or proffered explanations of *Mulliner's* case (9) in *Taff Vale Ry. Co.* v. *Pontypridd Urban District Council* (6) ((1905), 93 L.T. 126) and in *South Eastern Ry. Co.* v. *Warr* (16) ((1923), 21 L.G.R. 669). Neither, I think, enables one to say with any confidence just how far it stands as an authority today or for what proposition.

How flickering is the illumination which these authorities throw on the main principle of law can be seen if one compares the decision of JOYCE, J., in 1912 in *Great Central Ry. Co.* v. *Balby-with-Hexthorpe Urban Council* (17) ([1912] 2 Ch. 110) with the decision of SWINFEN EADY, J., in 1909 in *South Eastern Ry. Co.* v. *Associated Portland Cement Manufacturers (1900), Ltd.* (18) ([1910] 1 Ch. 12). In the former, the learned judge, after referring to *Mulliner's* case (9) and *Gonty's* case (5), held it to be clear law that a railway company could not grant or dedicate a right of way over its lines of rails. In the latter, the learned judge, after referring to the same two cases, thought ([1910] 1 Ch. at p. 25) that there was "nothing whatever in that point" that a railway company "could not grant to somebody else the easement of tunnelling under" its line.

In my opinion, the root of the trouble lies in the fact that the courts have not truly accepted the validity of SIR GEORGE JESSEL'S proposition that a railway company lacks legal capacity to grant an easement over railway land "except with a view to the traffic of their railway." Side by side with this proposition and without explicitly rejecting it, they have, in fact, been accepting and working on a different rule for statutory undertakers, viz., that they can grant easements over their land so long as the exercise of such easements is not inconsistent or incompatible with the fulfilment of the statutory purpose. This rule is regarded as being derived from *R.* v. *Inhabitants of Leake* (1). I do not think it profitable to inquire at this date whether that case, fairly considered, did amount to a decision of the court embodying any such rule. If we were reviewing it for the first time today, I should feel much doubt about that. But I think that we are bound to recognise that for very many years and on many occasions courts have taken as their test the words of PARKE, J. (5 B. & Ad. at p. 478):

> "if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power",

A and have treated this test as a pragmatic one, to be answered according to the facts ascertainable at the time when the question arises. Some of the cases which recognise this test as the governing rule have been referred to in the speech of the noble and learned Viscount on the Woolsack. As he says, there are others.

Such a rule has many drawbacks. It means that the validity of any easement B must depend on the state of facts ascertained or reasonably foreseeable at the time when it is challenged in legal proceedings; and no one can tell in advance on what occasion a challenge will arise. It is very hard to know what measure of foresight or what extremity of prudence to allow to the judge of fact. It leads to what may well be, I think, misleading comparisons between different statutory undertakers and their works—railway lines, reservoirs, canals, tow- C paths, drains and bridges. It has led to much confusion between the voluntary grant or dedication of a right de novo, the provision of accommodation ways or works under statutory obligation, and the voluntary enlargement of rights of way existing before the creation of the works and, therefore, necessarily preserved. Each of these classes may involve different considerations. When the distinctions have all been allowed for, I think that it is accurate to say that, D although the test derived from *R.* v. *Inhabitants of Leake* (1) has often been accepted and propounded, it has never yet resulted in a finding that the voluntary grant by a railway company of a right of way over its lines on the level of the lines is an effective grant. A possible exception is *South Eastern Ry. Co.* v. *Cooper* (7); but the judgments delivered by the Court of Appeal in that case E are not so expressed as to enable me to say with any certainty what was the ratio decidendi that formed the ground of their decision.

Nevertheless, I think that the accepted rule, with all its defects, is better than no rule at all. The construction of railways, at any rate, drove steel barriers over many hundred miles of the English countryside. To hold that at no time, at no point, and in no circumstances could a railway company grant de novo F even a footway over, across, or under its lines would be a grave impediment to public amenity. In my opinion, therefore, we ought to say that *Mulliner's* case (9) cannot stand today as a binding decision, in so far as it laid down the proposition that a railway company lacks legal capacity to grant a right of way over or under its railway lands, including the site of the permanent way. I think, myself, that the error in the reasoning of that case lay in treating any G grant of an easement as equivalent to an alienation for this purpose. Technically, as a matter of conveyancing, such a grant is, no doubt, a form of alienation. But, in the context of the powers of a railway company over the whole extent of the railway lands, a grant of an easement and an outright sale may amount to very different things. It seems to me better to say baldly that, on this H occasion, a great judge laid down a proposition of law in terms that are too comprehensive to be maintainable than to continue to explain his decision in language that he did not use to justify conclusions which contradict his expressed opinion.

Now the other proposition which fortifies the appellants' arguments is that laid down in the two cases, *Paterson* v. *St. Andrews Provost* (10) ((1881), 6 App. I Cas. 833) and *Ayr Harbour Trustees* v. *Oswald* (2). *Paterson's* case (10) is the earlier in date, though *Oswald's* case (2) is, I think, the one more often referred to. Both cases related to the question whether bodies holding land for purposes beneficial to the public interest could abdicate the potential exercise of certain powers over part of the land by ceding rights in it to other persons or to the public. In *Paterson's* case (10), the land concerned was the links at St. Andrew's which were held by the magistrates of the burgh for behoof of the inhabitants, subject to the obligation of preserving them for the purposes of the game of

golf and for the recreation and amusement of the inhabitants. What the magistrates were proposing to do was to construct a macadamised road along the boundary of the links. The learned Lords who heard the appeal, assisted by a volume of evidence from those skilled at golf, were evidently satisfied that there was no reason to fear that the addition of this feature would " interfere with the due prosecution of the game ". LORD SELBORNE, L.C., said (6 App. Cas. at p. 843):

> " . . . such variation in the state of the ground as it would introduce, would, in the event of balls finding their way there, rather add to than detract from the interest of the game . . .";

while LORD WATSON, speaking with something like levity, observed (ibid., at p. 853) that

> " . . . really the speculation as to whether it is better to have a road with ruts in it, or a metalled road, or a piece of rough grass with hollows and heaps, is after all rather a matter of fancy than a question having any substance in it."

It followed that there was nothing in law to prevent the magistrates from making up their road and allowing people the use of it.

On the other hand, it was the clear view of all the members of the House who took part in that decision that it was not within the power of the magistrates to abdicate any part of their control of the site of the road or, consequently, to dedicate it as a public highway; and the judgment approved by the House was worded accordingly. The whole point of the decision was to establish the distinction between the competence of the magistrates to make a road and allow passage over it and their incompetence to grant to the public or to individuals, or to allow them to acquire, any title to a right of way over it. Their opinion on this point is, I think, contained in the following words of LORD WATSON (ibid., at p. 853):

> " . . . such a change may come over St. Andrews that it may become necessary in the due exercise of their administrative powers for the town council to take away this right of road. One cannot anticipate that such a thing will immediately occur, but it may, and those who have the right to take recreation, and to play golf upon the links, are quite entitled to have a judgment which will prevent the magistrates from making such an alienation at the present moment as may come at any future period into collision with their rights over this piece of land . . ."

That imposes a very stern test. It does not depend on evidence. It looks to possibility, not to any standard of reasonable probability.

The facts of *Oswald's* case (2) are so familiar that I do not need to set them out. The Harbour Board had acquired part of his land, and the question arose what amount of compensation they ought to pay him for injurious affection of the remainder. To reduce the damage, and so his compensation, they were ready to secure him a right of permanent access to that remainder over the part they had taken. There was no evident reason why they should not so lay out the projected wharves and roads as to leave space for access by this means. They did not have to fill up the land taken with buildings. Nevertheless this House decided that they had no power to grant Oswald any permanent right over that land, because to do so would amount to depriving the present trustees and their successors of the discretion which their Act had vested in them, the power of using that land as the site of buildings if at any time the needs of their undertaking should require it. That would be to renounce " a part of their statutory birthright ", as LORD SUMNER said in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8)

([1926] A.C. 355 at p. 372). Striking as the phrase is, it does not seem to me to offer much help in deciding which are the cases in which the principle of *Paterson's* case (10) and *Oswald's* case (2) is to be applied, where as he says (ibid.), " the very nature of the grants or the contract itself " provides the answer, and which are those many other cases in which the test to be applied is the humbler one of incompatibility proved by evidence. The birthright of a statutory corporation includes all those powers and rights with which it is thought proper to invest it at its creation; and I do not think it easy for a court of law to decide merely by the nature of the thing which of those powers are inalienably entailed and which can be disentailed and disposed of by ordinary grant.

In my opinion, we are bound to recognise that the principle of these two cases cannot be applied in all circumstances and on all occasions to all statutory corporations and public bodies. That, indeed, has already been recognised by the decision of this House in the *Birkdale* case (8), in which the electric supply company had certainly made a contract which deprived themselves and their successors of power at any future time to raise the charges for their supply beyond a fixed limit, however much the needs of their undertaking might require it. It is of some importance to remember, when searching for a dividing line, that the two cases which " spoke for themselves " were both concerned with defined areas of land of no great extent, and the possible consequence of renouncing powers over such areas could be stated as a matter of practical observation. But nothing like the same observation can be brought to bear when the factors of the problem are, on the one hand, all the general powers derived by a railway company from the Railways Clauses Consolidation Act, 1845, and, on the other hand, many miles of railway line covering great varieties of setting. In such cases what I have called the pragmatic test is, I think, to be preferred.

That consideration derives some support from the fact that we are dealing here with under- and over-bridges constructed as accommodation ways provided on severance. Such structures are not imposed on the railway line ab extra by voluntary initiative of the railway undertakers themselves. On the contrary, their creation and maintenance for an indefinite period are conditions subject to which the undertakers are required to operate their line. Moreover, s. 68, which imposes this condition, itself adds the proviso

> " . . . the company shall not be required to make such accommodation works in such a manner as would prevent or obstruct the working or using of the railway . . . "

But, if so, I cannot feel that there is much substance in the argument that the company had no power to grant a public right of way over such works because their existence is a natural defect to the best working of the line which ought to be removed as soon as the accommodation purpose is itself exhausted.

LORD COHEN: My Lords, I need not restate the facts. It is sufficient to say that it is common ground that (i) the facts found by quarter sessions in the *Westmorland* case would raise a presumption of dedication of the footpath in question as a public right of way provided that it was not ultra vires for the appellants or their predecessors in title so to dedicate it, and (ii) there is no material distinction between the *Westmorland* case and the *Worcestershire* case. Quarter sessions, the Divisional Court and the Court of Appeal have all held that dedication was not ultra vires. LORD GODDARD, C.J., delivering the judgment of the Divisional Court, adopted the test laid down by PARKE, J., in *R.* v. *Inhabitants of Leake* (1) ((1833), 5 B. & Ad. 469 at p. 478) as follows:

> " If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway, I should have thought that such

trustees would have been incapable in point of law, to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."

The Lord Chief Justice pointed out ([1956] 1 All E.R. at p. 325) that that case had been followed again and again and went on to say that the question of incompatibility must be a question of fact to be decided by jury or judge, whichever in the particular case be the tribunal of fact. After distinguishing *Ayr Harbour Trustees* v. *Oswald* (2) ((1883), 8 App. Cas. 623), he held that on their findings of fact quarter sessions came to a correct decision. In the Court of Appeal, each of their Lordships delivered a judgment. They adopted the same test as that which I have already cited from the judgment of the Lord Chief Justice and held that, on the facts found by quarter sessions, they were bound by authority to uphold the decision of the courts below.

Before your Lordships, counsel for the appellants did not dispute that *R.* v. *Inhabitants of Leake* (1) was rightly decided on its facts, but, after a careful and helpful review of the authorities, he submitted that—(i) it had no application to a case where, as here, dedication would involve the voluntary release or abandonment or modification of a power conferred on a statutory undertaker by a special Act, or by any Act incorporated therewith relating to the manner in which the statutory undertaker may deal with land acquired for the purposes of the Act; (ii) *R.* v. *Inhabitants of Leake* (1) did not lay down as the test of incompatibility whether there was any likelihood of the dedication of a right of way materially hindering the statutory undertaker from an adequate and efficient discharge of his duties. The test laid down, said counsel, was whether the grant of an easement over the land might in any possible circumstances at any future time hamper the undertaker in carrying out to the best advantage the purposes of its special Act.

The first of these submissions is founded on s. 16 of the Railways Clauses Consolidation Act, 1845, which Act was, by s. 1 of the Kendal and Windermere Railway Act, 1845, incorporated in the last-mentioned Act. Section 16 sets out the various works which a railway company may execute and the section applies both to works for the construction of the railway and to accommodation works. The provision relied on by counsel was a provision that the company might from time to time alter, repair or discontinue the works and substitute others. This provision is followed by a provision conferring power to do all other acts necessary for making, maintaining, altering or repairing and using the railway. I pause here to observe that it has been held that this last limb of s. 16 is in reality a proviso on the whole section, and that the works authorised by the section must be works necessary for making, altering, repairing or using the railway. See *Emsley* v. *North Eastern Ry. Co.* (13) ([1896] 1 Ch. 418, per A. L. SMITH, L.J., at p. 434).

Counsel argued that, since it has been held that the obligation on a railway company to provide an accommodation way when its line severs a landowner's property remains in force only so long as the property on the two sides of the railway is in common ownership (see *Midland Ry. Co.* v. *Gribble* (19), [1895] 2 Ch. 827), the effect of dedicating a right of way over the accommodation bridge might be to prevent the exercise of this power of discontinuing the bridge. This he said amounted to the abandonment or modification of the statutory power. Dealing with this argument, the Lord Chief Justice said ([1956] 1 All E.R. at p. 325):

"If this contention be right, it is indeed strange that it has never before been the subject of a decision or even mentioned in any of the judgments on the subject. There does seem to be a trace of an argument on this point in *A.-G.* v. *London & South Western Ry. Co.* (20) ((1905), 69 J.P. 110), but it

A can hardly have been pressed, as the judgment of FARWELL, J., does not refer to it. If the point had been taken in *Taff Vale Ry. Co.* v. *Pontypridd Urban District Council* (6) ((1905), 93 L.T. 126), it would have afforded a short and complete answer."

With these observations I respectfully agree.

B Counsel for the respondents countered counsel for the appellants' argument based on s. 16 by two propositions. (i) First he said that s. 16 does not confer a bare power to discontinue but only a power to discontinue and substitute another work. He admits that the company could discontinue without substituting another bridge, but he says that it would do so not under the section but in exercise of the power which any landowner would have if by discontinuance he C disturbs no existing right. Section 16, the argument ran, is directed to conferring on a railway company a power which merely qua landowner it would not have, i.e., a power against the will of the person entitled to the accommodation way to discontinue it and replace it by another accommodation way, paying, if necessary, compensation under the relevant provisions of the Act. Counsel submitted that, since counsel for the appellants' argument connoted discontinuance without D substitution, s. 16 had no relevance. (ii) Counsel submitted that, since the power to discontinue conferred by s. 16 is ancillary to the power to make, alter, repair or use the railway (see *Emsley's* case (13)), it would be incredible that the existence of this ancillary power can prevent dedication in a case where, as here, on the facts it is held that the dedication of the right of way is not incompatible with the main purpose of the railway.

E I agree with the second submission and do not, therefore, find it necessary to express a concluded opinion on the first. For the reasons I have given, I would reject the first of counsel for the appellants' reasons for distinguishing this case from *R.* v. *Inhabitants of Leake* (1). If his second reason were well founded, it is difficult to conceive of a case in which a tribunal of fact could arrive at the conclusion that the dedication of the right of way was compatible with the objects F prescribed by the Act. I doubt whether it could ever be said that in no possible circumstances at any future time could a railway company desire, for example, to widen its track. Counsel for the appellants, however, says that his proposition is supported by the language of PARKE, J., in *R.* v. *Inhabitants of Leake* (1) (5 B. & Ad. at p. 481), where he says,

> G "But I think, that if it is quite clear that such works would never be required, the commissioners, whether special or general, might give the right to the public."

Counsel stresses the word "never". The sentence, divorced from its context, lends some support to his argument, but, reading the judgment as a whole and having regard in particular to the next following paragraph thereof, I think it is H clear that PARKE, J., regards the question as one of fact, to be determined, no doubt, not merely in the light of the position on the date of trial but in the light also of the probable future requirements of the company in the fulfilment of its railway purposes.

Counsel also relied on the language of SIR GEORGE JESSEL, M.R., in *Mulliner* v. *Midland Ry. Co.* (9) ((1879), 11 Ch.D. 611), where he said (ibid., at p. 623):

I

> "It appears to me quite impossible that the railway company can have a right either to sell, grant, or dispose of this land, or of any easement or right of way over it, except for the purpose of their Act, that is to say, with a view to the traffic of their railway."

The dispute in that case was as to a right of way granted by the railway company under one of the arches on which one of the company's railway stations was built. The evidence clearly established that the existence of the right of way

would interfere with the company's railway undertaking and the grant was held to be ultra vires. The correctness of the decision has never been challenged, but the dictum to which I have referred, if divorced from the facts of the case, in my opinion goes too far. This view is supported by the observations of the members of the Court of Appeal in *Grand Junction Canal Co.* v. *Petty* (3) ((1888), 21 Q.B.D. 273), and in *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439). In the former case it was held that the dedication of land as a public footpath was not inconsistent with its use by the canal company as a tow-path, and in the latter it was held that the giving of a private right of way over certain lands of the railway company was not inconsistent with the purposes of the railway company. In the former case, LORD ESHER said (21 Q.B.D. at p. 275) that he did not think that in *Mulliner's* case (9) the late Master of the Rolls meant to decide anything in contravention of what was decided in *R.* v. *Inhabitants of Leake* (1).

Counsel for the appellants also relied on the decision of this House in *Ayr Harbour Trustees* v. *Oswald* (2). This case had been relied on by Sir Frank Soskice before the Divisional Court. LORD GODDARD, C.J., dealing with his argument said ([1956] 1 All E.R. at p. 326):

> " In our opinion, that case has no application to the present case. The harbour trustees were empowered by statute to acquire compulsorily an area of land for the purpose of their undertaking on payment of compensation to the owner of the land acquired. They sought to reduce the amount of compensation by offering to enter into a covenant with the dispossessed owner restricting themselves from building on, or using, a considerable portion of the land which the Act permitted them to take. To this the owner objected, and claimed that he was entitled to be compensated for what he had lost, and that the company had no power to sterilise the land, to use a convenient expression, and to covenant not to use that which the statute authorised them to acquire. It was held, to use LORD SUMNER'S expression in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. 355), that the company could not thus dispose of their statutory birthright. Here the dedication does not prevent the use of the land by the railway though it burdens it, as must always be the case where there is dedication."

With these observations I respectfully agree, and would only add that the very fact that the land the user of which it was proposed to restrict was included in the schedule connoted that its acquisition was then in the eyes of the legislature required for the purpose of the undertaking.

It is also to be observed that LORD HERSCHELL did not regard the decision in *Ayr Harbour Trustees* v. *Oswald* (2) as inconsistent with the line of authorities following *R.* v. *Inhabitants of Leake* (1), for in *Caledonian Ry. Co.* v. *Turcan* (21) ((1898), 25 R. (Ct. of Sess.) 7), he said (ibid., at p. 18):

> " In my view, without expressing any opinion upon the decision in that case [*Gonty's* case (5)], it does not conflict, as has been supposed, with the case of *Ayr Harbour Trustees* v. *Oswald* (2)."

The last case to which I need refer is *Paterson* v. *St. Andrews Provost* (10) ((1881), 6 App. Cas. 833). It was not cited in either of the courts below, but counsel for the appellants submitted that it was really conclusive in his favour. The question at issue was as to the powers of the corporation in relation to the links, the property in which was vested in the corporation, subject to the obligation admitted to have subsisted from time immemorial of preserving the links for the purposes of the game of golf and for the recreation and amusement of the inhabitants. The case is somewhat remote from the present case, but, properly

understood, it seems to me to support the respondents' case. I would refer to a passage from the speech of LORD WATSON where he says (ibid., at p. 851):

> " Now, my Lords, although they hold it subject to these rights on the part of the inhabitants, the magistrates and council remain undivested to any further extent of their proprietary rights, and are therefore entitled either to make or to sanction any other uses to which the property is convertible so long as those uses are not inconsistent with the due enjoyment by the burgesses of the rights vested in them by law. What uses they may so sanction will depend to a very great extent upon the amount of population and the amount of the golf played or recreation taken. Uses which would be perfectly legitimate and proper in a thinly populated burgh may become very illegitimate and very improper, and may constitute invasions of the burgesses' rights, when practised where there is a large population.
>
> " My Lords, what the magistrates and town council were proposing to do at the time when this action was raised appears to me to have been this, they were acting upon the assumption that it was within their competency to confer upon the public at large a right of way over a portion of the ground which it was their duty to preserve for purposes consistent with the rights of the inhabitants; and they justified their position upon the ground that as matters stood at that date, no right of the inhabitants would be invaded thereby. I think that was a mistaken view of the law and of the extent of their power, because they would thereby have vested in others a right which might become inconsistent with the rights of the inhabitants at some future time.
>
> " The appellants brought this action no doubt with a view to stop the threatened proceedings, but they did not limit the conclusions of their summons to the actual proceedings which the council were threatening to take, but made them so wide that, if given effect to, they would establish this proposition, that wherever a right of golfing or of recreation exists the magistrates cannot give a comfortable or convenient right of passage over the ground reserved for that purpose, although the so giving it may not interfere to the smallest extent with the rights of the burgesses."

I read that passage as laying down that it was a question of fact whether what the corporation proposed to do would interfere with the rights of the burgesses. LORD WATSON no doubt stressed that, in reaching a conclusion on that issue of fact, the court must have regard not only to the position as it was at the moment of trial but also to what was likely to happen in the future, but I find nothing in *Paterson's* case (10) disapproving of the statement of the law by PARKE, J., in *R.* v. *Inhabitants of Leake* (1), or of the application of that statement of the law in the many cases to which reference was made in the course of the argument.

Paterson's case (10) was referred to by LORD BIRKENHEAD in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. at p. 364), and he did not suggest that it conflicted with *R.* v. *Inhabitants of Leake* (1). In the same case, LORD SUMNER referred with approval to *R.* v. *Inhabitants of Leake* (1) and (ibid., at p. 372), explained the *Ayr Harbour* case (2) as being a case where the res ipsa loquitur maxim applied and the question of competence did not depend on a proved incompatibility between statutory purposes and the proposed user. It was in this case that LORD SUMNER used the picturesque phrase " statutory birthright " and explained the *Ayr Harbour* case (2) as being one in which the trustees were proposing to renounce a part of their statutory birthright. It is, however, plain from his speech that he considered that the question whether a company was renouncing or seeking to renounce its statutory birthright would normally be a question of fact to be decided on the evidence. Reading his judgment as a whole, I think he was approving the decision in *R.* v. *Inhabitants of Leake* (1), and stating in other language the principle there laid down by PARKE, J., that the question whether there is power to dedicate a right of way

depends on whether the user by the public of that right of way would be compatible with the object prescribed by the statute appointing commissioners or creating the statutory company as the case might be. The question remains as to the test of compatibility. On that I cannot usefully add anything to what has been said by my noble and learned friend on the Woolsack and by LORD MORTON OF HENRYTON. I agree with the test they propose. As I read the Case Stated, that was the test applied by quarter sessions in the present case.

For these reasons I agree that the appeal should be dismissed.

LORD KEITH OF AVONHOLM: My Lords, I agree and, but for the fact that certain Scots authorities were referred to and stressed in the argument for the appellants, I would have had nothing to add. No differences that exist between the laws of the two countries in the matter of constitution of public rights of way affect, in my opinion, the principles on which these cases fall to be decided. The law of Scotland is certainly no less favourable to the constitution of a right of way in circumstances such as the present than the law of England.

The Scottish case nearest in its facts is *Edinburgh Magistrates* v. *N.B. Ry. Co.* (22) ((1904), 6 F. (Ct. of Sess.) 620). LORD KINNEAR in that case held that the necessary user to establish a public right of way over a railway within the confines of Edinburgh had not been established. He expressed, however, an alternative ground of judgment which is stated in the headnote to the case as:

> " *Opinion* that a public right of way cannot be acquired by user over lands held by a railway company for the purposes of the railway, and that it makes no difference that the lands have been acquired by private agreement, and not by the exercise of compulsory powers."

If LORD KINNEAR was intending to lay down as a matter of law that in no circumstances could the public acquire a right of way over railway property, I think, with all respect to the great authority of that eminent judge, that such an opinion is not consistent with the train of authority to which your Lordship on the Woolsack has referred. There are, however, in LORD KINNEAR'S opinion passages that suggest he was perhaps influenced by the fact that, in the circumstances of that case, a public right of passage was incompatible with the conduct of the traffic on the railway, and if that was the ground of his opinion, it was entirely consistent with English authority.

Ayr Harbour Trustees v. *Oswald* (2) ((1883), 8 App. Cas. 623) creates no difficulty. That was a very plain case of ultra vires. It did not turn on any question of conflict of rights, but on whether harbour trustees had any power to sterilise land which they proposed to acquire compulsorily by binding themselves and their successors not to use it for the statutory purposes for which alone it could be acquired. LORD SUMNER in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. 355) covers such a case where he says (ibid., at p. 370) " . . . in default of proof of incompatibility in the present case, some other consideration of a cogent kind must be found." Another consideration of a cogent kind existed in the *Ayr Harbour Trustees* case (2), as LORD SUMNER himself recognised. I would only add that the observations of LORD WATSON and LORD HERSCHELL in *Caledonian Ry. Co.* v. *Turcan* (21) ((1898), 25 R. (Ct. of Sess.) 7) do not suggest that they thought the creation of a right of way over land acquired under statutory powers was so obviously impossible that it could be condemned out of hand. They leave the decision in *Re Gonty & Manchester, Sheffield & Lincolnshire Ry. Co.* (5) ([1896] 2 Q.B. 439) not, it is true, approved, but at least undisturbed.

Paterson v. *St. Andrews Provost* (10) ((1881), 6 App. Cas. 833) was much relied on by appellants' counsel, but I doubt whether it is apt as an authority in the territory with which the present appeal is concerned. The magistrates of St. Andrews held certain land for the enjoyment by the inhabitants of St. Andrews of

A golfing and recreation thereon. They were, in effect, trustees of the land for these purposes. The point at issue was focussed by LORD WATSON in the following passage (ibid., at p. 851):

> ". . . they [the magistrates and town council] were acting upon the assumption that it was within their competency to confer upon the public at large a right of way over a portion of the ground which it was their duty to
B preserve for purposes consistent with the rights of the inhabitants; and they justified their position upon the ground that as matters stood at that date, no right of the inhabitants would be invaded thereby. I think that was a mistaken view of the law and of the extent of their power, because they would thereby have vested in others a right which might become inconsistent with the rights of the inhabitants at some future time."

C That the magistrates could do no positive act that was in breach of their duty to the inhabitants is clear. But it does not follow that by tacit acquiescence, indifference, or neglect, they might not have allowed a public right of way to be established over the golf links. I know of no authority or principle which would have prevented the public, by appropriate use of a path over the golf links
D from one public place to another for an uninterrupted period of forty years, from establishing the existence of a public right of way. The principle of presumed dedication has no place in the law of Scotland and, accordingly, it is not possible, in my opinion, to build up on *Paterson's* case (10) any argument favourable to the appellants.

On the facts proved here, the assumed inconsistency of the existence of a
E right of way with the subsidiary powers conferred on the appellants by s. 16 of the Railways Clauses Consolidation Act, 1845, seems to me unreal. Whether the appellants could at some future time remove the bridges does not at the moment call for consideration. Even if they could, and did, it does not follow that the right of way would disappear, nor has it been shown that the exercise of the right of way would then become incompatible with the running of the
F railway. Incompatibility is a question of fact, not a question of law, and where the facts are such as would be sufficient to presume dedication to the public of a right of way in all other respects it is, in my opinion, for the statutory undertaker to prove incompatibility, and not for those asserting the right to prove compatibility. The speech of LORD SUMNER in *Birkdale District Electric Supply Co., Ltd.* v. *Southport Corpn.* (8) ([1926] A.C. at p. 367), though given in a somewhat
G different kind of case, contains passages to the same effect and in this matter I think no distinction can be taken between the two cases.

I would dismiss these appeals.

Appeals dismissed.

Solicitors: *M. H. B. Gilmour* (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Clerks of the Worcestershire and Westmorland County Councils* (for the respondents).

[*Reported by* G. A. KIDNER, ESQ., *Barrister-at-Law.*]