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17 January 2020

Helen Sparks
The Planning Inspectorate
3G Hawk Wing
Temple Quay House
2 The Square
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BS1 6PN

Dear Ms Sparks

ROW/3209564

Swindon Borough Council: Highworth Rural District Definitive Map and Statement

Footpath 44 Wanborough Modification Order 2017

I am writing in response to your letter dated 10 December 2019 to advise you that The Ramblers wish to object to the modification proposed by the Inspector in the interim decision issued on 29 November. We understand that Swindon Borough Council have also objected and we support that objection.

Although we were not a party to the inquiry I attended on all three days and am therefore familiar with the evidence presented.

We understand the reasoning for the Inspector's proposed modification and recognise that, as the Council have acknowledged, the line of the path shown on the Order map does not entirely match the route used by the public during the relevant 20 year period. We therefore agree that the Order needs to be modified. However, considering all of the evidence and the Inspector's other findings we believe that an alternative modification would be more appropriate. We have formed this belief for the following reasons.

Firstly, we are of the opinion that all mapping is to some extent diagrammatical and unlikely to be 100% precise. The Inspector refers to the technical limitations of computer mapping in para 34 of her decision.

Secondly, the Inspector has concluded that a route across the land now occupied by the

Suters Lane development – referred to at the inquiry as "the cut-off path" - was used by the public for the requisite period of 20 years. That route was shown on older maps and photographs presented at the inquiry and we believe that there is no dispute between the parties as to the route which was actually used.

Thirdly, we believe that the termination points of the "cut-off path" are also not in dispute. The courts have held that certainty as to the location of the termination points should be a key factor in determining whether or not a right of way should be found to exist across a piece of land. In *Wimbledon and Putney Commons Conservators v Dixon* (1875) 1 Ch 362, overturning a decision at first instance, James LJ said:

". . . I am unable to agree with the [Master of the Rolls'] view that there could be no right of way at all in respect of what are called the tracks over the common. I am not at all prepared to assent to that as a true statement of the law of this country. If from one terminus to another, say from the gate here to the end of a road 200 yards off, persons have found their way from time immemorial across a common, although sometimes going by one track and sometimes by another, I am not prepared to say that a right of road across the common from one terminus to the other may not be validly claimed, and may not be as good a sign as any formed road ..."

Mellish LJ added:

" . . . I do not, any more than [James LJ] agree with what was thrown out by the Master of the Rolls as to the consequences of the track not being a perfectly definite track over the common, but being a track going in various lines previously to the time when the new road was made. No doubt if a person has land bordering on a common, and it is proved that he went on the common at any place where his land might happen to adjoin it, sometimes in one place and sometimes in another, and then went over the common sometimes to one place and sometimes to another, it would be difficult from that to infer any right of way. But if you can find the terminus *a quo* and the terminus *ad quem* the mere fact that the owner[1] does not go precisely in the same track for the purpose of going from one place to the other, would not enable the owner of the servient tenement to dispute the right of road...."

While the facts of the *Wimbledon and Putney Commons* case are different, in that it concerned private rights across a common where there was no single defined route, we believe the same principle is applicable.

We note that, in paras 37 to 39 of her decision, the Inspector concludes that it would be inappropriate for her to use her discretionary powers of modification to correct the inaccuracies in the Order. However, the courts have confirmed that where inaccuracies do come to light during an inquiry it is entirely proper for such modifications to be made. In *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001] EWCA Civ 266, Lord Phillips MR said, at para 23:

"In my judgment, the scheme of the procedure under Schedule 15 is that if, in the course of the inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order, he should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry."

For the above reasons, The Ramblers ask the Inspector to confirm the Order with such modifications to section A-B-C-D as are necessary to accurately reflect the line and width of the used route, and not to delete any part of the Order.

[1] I.e, of the dominant tenement—the person claiming the right of way.

Yours sincerely

Peter Gallagher

Peter Gallagher
Footpaths and Walking Environment Officer
Ramblers Swindon and North East Wiltshire Group

Lord *Abinger* is cautious in the way in which he lays down the rule. He says (1): "If a road has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shews a user for one purpose, or for particular purposes only, an inference of a general right would hardly be presumed." If he has used it only for purposes connected with the occupation of the land in its existing state, that may be considered to be a user for particular purposes, and I have a doubt whether Baron *Parke* really intended the contrary, for if the facts in *Cowling* v. *Higginson* are looked at it will be found that the mines had been opened, and therefore, though they had not been worked for seventy years, it was a property with existing mines in it. The way, it is true, had not been used for those mines, but as the property was a property within which there were opened mines, it might fairly be inferred that the right extended to using the road for the purposes of the mines, the working them being a reasonable use of the land in the condition in which it was. But however that may be, in my opinion the true rule is that stated by Lord Chief Justice *Bovill*, that when a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Mr. Justice *Willes* evidently agrees with that view.

That being the rule, what are the purposes for which, according to the ordinary and reasonable uses to which this land might be applied, according to its state at the time of the grant or supposed grant, this road may be used. When *Warren Farm* was first inclosed we do not know, but at whatever time it may have been inclosed, one cannot suppose that anybody thought of its being used for general building purposes, though no doubt the owner of the farm must always have required, first of all, the way to the *Kingston Road* in one direction, and then a way to *Wimbledon*, which lies in another direction. Is there any such evidence of user for purposes beyond what was necessary, and beyond what was reasonably required for the occupation of the land in its existing state, as that

(1) 4 M. & W. 256.

other in which he was to go in using the right of way. If the owner of the servient tenement does not point out the line of way, then the grantee must take the nearest way he can. If the owner of the servient tenement wishes to confine him to a particular track, he must set out a reasonable way, and then the person is not entitled to go out of the way merely because the way is rough, and there are ruts in it, and so forth. In my opinion the bill has properly admitted that the Defendant has a right of way for some purposes.

Then comes the question, what is the extent of that right of way? That depends partly on a question of law and partly on a question of fact, but mainly on a question of law. When the question of law is settled there is no great difficulty in arriving at a proper conclusion in point of fact. The question of law is this: Assuming that it is made out that Mr. *Draw* and his tenants have used this way, not exclusively for agricultural purposes, but for all purposes for which they wanted it, in the state in which the land was at the time of the supposed grant—at the time when the way first began—and assuming that there has been no material alteration in the premises since that time, does that entitle Mr. *Draw* to alter substantially and increase the burden on the servient tenement by building any number of houses he pleases on this property and giving to the persons who inhabit those houses a right to use the way for all purposes connected with the houses. I certainly was under the impression when this case was opened that the owner of the dominant tenement could not increase or alter the burden on the servient tenement in any such way as that. Mr. *Miller* called our attention very pointedly to the language of Mr. Baron *Parke* in *Cowling* v. *Higginson* (1), which certainly raised some doubt in my mind as to what the true rule of law is. But now that the other cases have been cited, I doubt whether Baron *Parke* had the question now before us present to his mind, and I am of opinion that the true rule is that laid down by Lord Chief Justice *Bovill* and Mr. Justice *Willes* in the case of *Williams* v. *James* (2), and substantially assented to by Baron *Parke* himself in the case of *Henning* v. *Burnett* (3). In *Cowling* v. *Higginson* (4)

(1) 4 M. & W. 245.
(2) Law Rep. 2 C. P. 577.
(3) 8 Ex. 187.
(4) 4 M. & W. 245, 256.

from one terminus to the other may not be validly claimed, and may not be as good as a right over any formed road, but I fully concur in all that the Master of the Rolls has said as to there being no right to use the way further than for all purposes according to the ordinary and reasonable use of the land in the state in which it formerly was. It probably, however, would be better that the words in the order, "except for the ordinary farming purposes of the said camp and lands respectively," should be altered into some such expression as "except for the purposes to which the land has been heretofore applied."

MELLISH, L.J.:—

I am of the same opinion. The question is whether Mr. *Draw* and his tenants are entitled to use this right of way for the purpose of turning the land into building land, for erecting new buildings upon it, and then, after the buildings are erected, for the purposes of those buildings. It is admitted in the bill, and proved in point of fact, that the right of way did exist for some purposes, and I do not, any more than the Lord Justice, agree with what was thrown out by the Master of the Rolls as to the consequence of the track not being a perfectly definite track over the common, but being a track going in varying lines previously to the time when the new road was made. No doubt if a person has land bordering on a common, and it is proved that he went on the common at any place where his land might happen to adjoin it, sometimes in one place and sometimes in another, and then went over the common sometimes to one place and sometimes to another, it would be difficult from that to infer any right of way. But if you can find the terminus *a quo* and the terminus *ad quem*, the mere fact that the owner does not go precisely in the same track for the purpose of going from one place to the other, would not enable the owner of the servient tenement to dispute the right of road. Suppose the owner of this common had granted by deed to Mr. *Dixon* the right to go from the gate leading out of *Cæsar's Camp* to the highway by the National School with carriages and horses at his free will and pleasure, I cannot suppose that the grant would fail in point of law, because it did not point out the precise definite track between the one terminus and the

The evidence practically comes to this, that the r t o ay has been exercised for all purposes connected with the use of the farm for residential or agricultural purposes.

We have then to consider whether the character of the property can be so changed as substantially to increase or alter the burden upon the servient tenement. I said when this case was first opened, that I was strongly of opinion that it was the settled law of this country that no such change in the character of a dominant tenement could be made as would increase the burden on the servient tenement. The *dicta* and observations, which are entitled to very great weight, of Lord *Abinger* and Mr. Baron *Parke* in the cases which have been referred to, inclined me at first to think that the opinion I had formed was wrong. But when we consider those remarks in connection with the very clear language of the Court of Queen's Bench in *Allan* v. *Gomme* (1), and of the Lord Chief Justice *Bovill* and Mr. Justice *Willes*, in the case of *Williams* v. *James* (2), I am satisfied that the true principle is the principle laid down in these cases, that you cannot from evidence of user of a privilege connected with the enjoyment of property in its original state, infer a right to use it, into whatsoever form or for whatever purpose that property may be changed, that is to say, if a right of way to a field be proved by evidence of user, however general, for whatever purpose, *quâ* field, the person who is the owner of that field cannot from that say, I have a right to turn that field into a manufactory, or into a town, and then use the way for the purposes of the manufactory or town so built. I therefore think that the Master of the Rolls was right in the result at which he arrived.

But I think it right to say, as the judgment of the Master of the Rolls has been read to us, that I am unable to agree with the view which apparently he formed, that there could be no right of way at all in respect of what are called the tracks over the common. I am not at all prepared to assent to that as a true statement of the law of this country. If from one terminus to another, say from the gate here to the end of a road 200 yards off, persons have found their way from time immemorial across a common, although sometimes going by one track and sometimes by another, I am not prepared to say that a right of road across the common

(1) 11 A. & E. 759. (2) Law Rep. 2 C. P. 577.

The question betwe th arties is whether Mr. *Dixon* is entitled to convert a piece of land forming part of an estate or farm called *Warren Farm*, and hitherto uncultivated, into sites for several houses, and to use, for the purpose of bringing materials for their erection, and for all purposes connected with the houses when built, a right of way which the owners and occupiers of the farm have from time immemorial enjoyed over land of the Plaintiffs. The right which Mr. *Dixon* claims under his landlord, Mr. *Draw*, is an unlimited right of way for all purposes over the Plaintiffs' land to and from every portion of the land constituting the *Warren Farm*, after the whole of the farm has been laid out for building purposes and turned into a town, if he should be minded and able so to convert it. As far as we have any evidence before us, the farm in respect of which this right is claimed has been substantially in its present state from time immemorial, during which it is to be assumed that the right of way has been exercised, that is to say, there were a farmhouse, farm lands, and a piece of woodland. The only alterations of which we have any evidence in the state of the property, have been an enlargement of the farm-house to a small extent, the change of a mud cottage into a brick cottage, and probably the erection of another cottage—whether an erection or change I am not quite sure. But those are the only changes which are alleged to have taken place in the property. Now, that those changes may be material, and may be to some extent evidence of such a general right as is claimed, it is probably difficult to deny; but whether they amount to evidence sufficient to justify the inference of fact that such a right existed, is another question. I am of opinion that the mere fact that over a common some building materials were taken for the purposes I have mentioned, is not sufficient to justify the inference of fact that the right of way belonging to the house and property was to be an unlimited right of going to and from the land for all purposes, to whatever purposes the land might be applied. The way has also been used for ordinary agricultural purposes—for sporting, which seems to me the same thing as an agricultural purpose, and for taking gravel from a gravel pit in one of the fields. That is insufficient, as it seems to me, to enable us to draw the inference of fact that the extended right claimed by Mr. *Dixon* ever existed.

Chitty, Q.C., and *W. R. Fisher*, for the Plaintiffs.

We admit a right of way for farm purposes, and that we have never disputed. The onus lies on the Defendant to shew that he is entitled to anything more.

[MELLISH, L.J.:—The case you have to meet is that the road has been used for every purpose for which the owners of the dominant tenement wanted it, which *Parke*, B., in *Cowling* v. *Higginson* (1), appears to consider sufficient evidence of a general right of way.]

Williams v. *James* (2) lays down the rule applicable to the case. User is evidence only of a right to use the way for all purposes reasonably incident to the property as it stood, not to the property when artificially altered into something quite different. *Cowling* v. *Higginson* was cited in that case. In *Allan* v. *Gomme* (3) the rule seems to have been laid down somewhat too strictly as to the dominant tenement remaining exactly in the same condition, and probably *Parke*, B., only meant to object to this. In that case (4) *Jackson* v. *Stacey* (5) was cited with approbation. *Skull* v. *Glenister* (6) affirms the same rule.

[JAMES, L.J., referred to *Henning* v. *Burnet* (7).]

A reasonable amount of variation in the use of the dominant tenement is allowed, but the burden must not be substantially increased: *Baxendale* v. *McMurray* (8). In *Dare* v. *Heathcote* (9) it might well be found that changing the farm from an ordinary farm to a cattle farm was only a reasonable change of the use of the property in its existing state.

Miller, in reply.

JAMES, L.J.:—

I am of opinion that, subject to a slight alteration in the words of the injunction, the order of the Master of the Rolls ought to be affirmed.

(1) 4 M. & W. 245.
(2) Law Rep. 2 C. P. 577.
(3) 11 A. & E. 759.
(4) Page 771.
(5) Holt, N. P. 455.
(6) 16 C. B. (N.S.) 81.
(7) 8 Ex. 187, 194.
(8) Law Rep. 2 Ch. 790.
(9) 25 L. J. (Ex.) 245.

erection of houses or other buildings, other than ordinary farm buildings, upon *Cæsar's Camp*, or any part thereof, or upon any of the lands then or then lately forming part of the *Warren Farm*, and in which the Defendant claimed to be entitled under his agreement with Mr. *Draw*, except for the ordinary farming purposes of the said camp and lands respectively; and from otherwise using the said *New Road* as a means of access to the said camp and lands in excess of the user to which it was liable as a road made in substitution for ancient tracks across *Wimbledon Common*. The Defendant appealed.

Miller, Q.C., and *Bush*, for the Appellant:—

The injury to the Plaintiffs is too slight to make a case for an injunction.

[MELLISH, L.J.:—But must we not determine whether you have the right you claim?]

We have enjoyed a right of way from time immemorial, and it has been used for all purposes for which we had occasion to use it. A right of way for all purposes across a common may be established by slighter evidence than across a private field. *Cowling* v. *Higginson* (1) and *Dare* v. *Heathcote* (2) shew that a user for all purposes for which the owner has required to use the land, shews a general right of way for all purposes. The case of *United Land Company* v. *Great Eastern Railway Company* (3) supports our case. The quantum of inconvenience is the test: *Gale* on Easements (4); and to the owner of a common there is no sensible inconvenience in a right of way for all purposes. The grant, therefore, which is presumed from immemorial user is to be supposed a general one. The *Wimbledon Common Act* (34 & 35 Vict. c. cciv.) s. 107, helps us, the words being "enjoyed and used" without saying "entitled."

[MELLISH, L.J.:—That is only a saving clause.

BRAMWELL, B.:—You wish to turn "shall not prejudicially affect" into "shall beneficially affect."]

(1) 4 M. & W. 245.
(2) 25 L. J. (Ex.) 245.
(3) Law Rep. 10 Ch. 586.
(4) Ed. 1868, p. 330.

thereupon filed their bill, praying that the Defendant might be restrained from drawing along the *New Road* leading from *Workhouse Lane* to the entrance to *Cæsar's Camp*, or any part of it, any building materials for the erection of houses or other buildings on *Cæsar's Camp*, or on any part of *Warren Farm*, and from otherwise using the *New Road* as a means of access to the camp and lands in excess of the user to which it was liable as a road made in substitution for the ancient tracks across the common.

It was not disputed by the Plaintiffs that the occupier of *Warren Farm* and the other lands mentioned above had from time immemorial enjoyed the right of using the way for all ordinary agricultural purposes connected with the farm and adjoining land. *Cæsar's Camp* was much resorted to by visitors, who, when they wished to enter it in a carriage, used to send for the key of the gate, which was kept on the farm, the gate usually being locked. The Defendant, however, claimed a right of way for all purposes, and in proof of the road having been used by the occupiers of the farm for all purposes, he adduced evidence to the following effect: That about thirty years ago, when a wing was added to the farmhouse and a new stable built, the materials were carted along the road through the gate into *Cæsar's Camp* and thence to the farm; that about the year 1855 buildings were being erected on *Wimbledon Hill*, and that for several weeks large quantities of sand and gravel were dug out of the ground which afterwards was the site of the above-mentioned three messuages, and carted along the road past *Camp Cottage* and through the gate into the camp and thence to *Wimbledon Hill*; and that about the year 1859 *Warren Cottage* was altered from a clay tenement into a brick-built cottage, and the materials carted to it by the same way; and that the road was used by persons having the right of shooting on the farm. There was also some evidence as to another cottage having been built on the farm and the materials brought along the new road.

The Master of the Rolls granted a perpetual injunction restraining the Defendant from drawing, or causing to be drawn, along the *New Road* leading from *Workhouse Lane* to or towards the entrance to *Cæsar's Camp*, or along any part of the said *New Road*, any bricks, stone, or other building materials to be used in the

being nearly at right ar[illegible]s the *New Road*. The most westerly of these two cross-roads was at the western end of the *New Road*, and at a distance of about sixty yards from *Cæsar's Camp*.

Cæsar's Camp, the sites of the above three messuages, and the farm and lands on the southerly and westerly sides of them, known as *Warren Farm*, *Shadwell Wood*, and *Warren Cottage*, were the property of Mr. *Drax*, and *Cæsar's Camp* formed part of the farm. Before 1867, access for horses and carriages to these lands was obtained by an old private road running from *Workhouse Lane* to a cottage, called *Camp Cottage*, adjoining the north-east corner of the most easterly of the above three messuages, and by several old tracks over the common, leading from the end of the road near *Camp Cottage*, to a gate which formed the eastern entrance to *Cæsar's Camp*. This user was admitted to have been immemorial.

In 1867 Mr. *Drax* let to the Defendant the site of the three above-mentioned messuages. The Defendant negotiated with Earl *Spencer* for a right of way to them. No grant of a right of way was ever made, but Earl *Spencer* made the *New Road* and the two cross-roads at his own expense, making a complete road up to the most westerly of the cross-roads. There was some conflict of testimony as to whether the *New Road* was carried completely to the gate of the camp, but the result appeared to be that a finished road was made up to the cross-road, and that from that point to the gate little was done, but that something like a road existed. It appeared that up to *Camp Cottage* the *New Road* was nearly identical with the old private road mentioned above. Until the passing of the Act the Defendant paid Earl *Spencer* £10 a year for the use of the roads.

In 1872 the Defendant became tenant to Mr. *Drax* of part of *Cæsar's Camp* and some adjoining land, and made preparations for building a house within the camp. The Plaintiffs thereupon gave him notice that they recognised no right of access to the camp over *Wimbledon Common*, except along the existing road or track to the gate of the camp for the purposes of agricultural occupation only. The Defendant replied, asserting his right to use the roads for access to any houses he might build, but did not proceed any further till 1875, when he commenced building operations. The Plaintiffs

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Nov. 26;
Dec. 1, 2.

WIMBLEDON AND PUTNEY COMMONS CONSERVATORS *v.* DIXON.

[1875 W. 90.]

Right of Way—Road for all Purposes—Change in the Use of Dominant Tenement.

The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property, does not establish a right of way for all purposes in an altered condition of the property where that would impose a greater burden on the servient tenement. Where a road had been immemorially used to a farm not only for usual agricultural purposes, but in certain instances for carrying building materials to enlarge the farm-house and rebuild a cottage on the farm, and for carting away sand and gravel dug out of the farm:—

Held (affirming the decision of *Jessel*, M.R.), that that did not establish a right of way for carting the materials required for building a number of new houses on the land.

Semble, the fact that the occupiers of the farm, in passing with carts from a particular point to a certain gate over a common on which no definite road was marked out, did not keep to one line, but used several tracks, did not prevent their acquiring a right of way between that point and the gate.

THIS was an appeal by the Defendant from a decree of the Master of the Rolls granting a perpetual injunction.

By the *Wimbledon and Putney Commons Act*, 1871, the fee simple of *Wimbledon Common*, including the roads hereinafter mentioned, became vested in the Plaintiffs. Up to that time, it had been vested in Earl *Spencer*, as lord of the manors of *Wimbledon* and *Battersea* and *Wandsworth*, or one of them.

Adjoining the south side of the common was an ancient earthwork known as *Cæsar's Camp*, inclosing about fifteen acres. On the eastern side of *Cæsar's Camp* were three messuages built in or soon after the year 1867, and adjoining the south side of the common. Access to these houses was obtained from the east by a road called the *New Road*, which ran westwardly over the common near its southern boundary, from a public road called *Workhouse Lane*, and by two short roads running southwards out of the *New Road* to the entrance gates of the messuages, these short roads

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we can find that the right extends beyond that? I agree, if we found that several houses had been built from time to time, and that the owner had carried the materials over this road, and the occupiers of the new houses had used the road, we might infer that the right of way was not to be confined to those particular houses, because that was not the original grant, but that the parties contemplated building generally at the time of the original grant, and intended to include in it a right of way to all future houses. I will not say that there is no evidence here of such a right, but there is not sufficient evidence for us to act upon, or to lead us to say that there is a right beyond what is necessary and reasonable for the occupation of the premises as a farm. The enlargement of *Warren Farm-house* does not carry the right beyond a right for farming purposes. It would be a very narrow construction to say that where a small farm-house with some small buildings was erected 200 or 300 years ago the right of way to it did not include a right of carting materials to enlarge the farm buildings so as to adapt them to the present state of agriculture.

Then with regard to the changing a mud cottage into a brick cottage. That is very weak evidence, if it is evidence at all; because if a mud cottage becomes unfit for human habitation, and is rebuilt with brick, although there is the carrying of bricks for the time, the burden is not permanently increased, for going to the brick cottage after it is once built is no greater burden than the going to the mud cottage. The other users that occurred of taking away gravel, of going there for the purposes of shooting, are users reasonably connected with the occupation of the premises, as they have been during the whole time that the right of way has existed, as far as we know. I am therefore of opinion that it is not made out that there is any right to use this road for the purpose of erecting entirely new buildings, and then, after those buildings are erected, to use the road for the purpose of those buildings. I agree, therefore, that the appeal must be dismissed.

BAGGALLAY, J.A.:—

I am of the same opinion. It appears to me that there are two

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questions for decision in this case. First, what is the extent of the right of way which is proved by the evidence in the case, and, secondly, if a right of way is established limited to particular purposes, whether it can be extended consistently with the rules of law applicable to questions of the like kind. I think the judgment of Mr. Baron *Parke* in the case of *Cowling* v. *Higginson* (1) has been interpreted so as to extend its application beyond what that learned Baron intended. It is true that in one part of the judgment he uses this expression: "If it is shewn that the Defendant, and those under whom he claimed, had used the way whenever they had required it, it is strong evidence to shew that they had a general right to use it for all purposes, and from which a jury might infer a general right." Those words taken by themselves point in the direction of Mr. *Miller's* argument; but I think those wide words are qualified by this further statement: "If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, then they might be warranted in finding a way for all." Now let us take the case of an agricultural district where there had been a right of way to certain land exercised for agricultural purposes only for a length of time, and then it appears that there is valuable gravel on the estate, and the gravel is raised and sold from time to time, and carried over the way previously used for agricultural purposes alone; if afterwards other mineral produce is found and raised, and the way is used for carrying that away, and then the way is used for a variety of other purposes that from time to time arise in the course of the occupation of the land, I can understand that if the case went to a jury, with user for all this variety of purposes established, the jury would or might infer that the original grant was a grant for all purposes. No such case arises here. If it is not proved by evidence—as I think it is—it is admitted that the right of way was used for agricultural purposes from time immemorial. In addition to that, two or three users are suggested as going beyond agricultural purposes, but do not appear to me to do so, such as building a new barn, adding a wing to the house, and the shooting. Then we have two slight circumstances—the replacing a mud cottage upon a portion of

(1) 4 M. & W. 256.

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the property by a more substantial building, and the taking gravel and carting it away. We have no evidence of user for any purposes beyond the purposes I have referred to. If the case came before me as a juryman to say whether I would infer a right to use the way for all purposes, I should answer "No." It is not like a general user for all purposes, such as Baron *Parke* contemplated. Therefore the first question must be answered that the right of way extended to the purposes for which it has hitherto been enjoyed, and no further.

Then the second question is, whether the right to use this way being limited to the particular purposes, as to which there has been actual proof, can be extended to the purposes for which the Defendant desires to use it. I think he cannot do that consistently with the rules of law which have been from time to time enunciated, and particularly in the case of *Williams* v. *James* (1), that you must neither increase the burden on the servient tenement, nor substantially change the nature of the user. Answering the questions that arise in this case in the way I have suggested, it appears to me that the judgment of the Master of the Rolls is correct; and, subject to the modification which has been mentioned by the Lord Justice, there must be an injunction.

BRAMWELL, B.:—

I agree. I have nothing to add.

Solicitors: *Horne & Hunter; Ward & Letchworth.*

(1) Law Rep. 2 C. P. 577.

Case No: 2000/0392/C

Neutral Citation Number: [2001] EWCA Civ 266
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
(Mr Justice Latham)

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday: 23rd February 2001

IN THE MATTER OF THE WILDLIFE AND COUNTRYSIDE ACT 1981
AND IN THE MATTER OF THE LANCASHIRE COUNTY COUNCIL (DEFINITIVE MAP AND STATEMENT OF PUBLIC RIGHTS OF WAY) (DEFINITIVE MAP MODIFICATION) (No.7) ORDER 1996

B e f o r e :

MASTER OF THE ROLLS
(LORD PHILLIPS)
LORD JUSTICE SIMON BROWN
and
LORD JUSTICE LONGMORE

- - - - - - - - - - - - - - - - - - - -

JOHN TREVELYAN — Appellant
(suing on behalf of himself and all others members of the Ramblers Association)
- and -
THE SECRETARY OF STATE FOR THE ENVIRONMENT, TRANSPORT AND THE REGIONS — Respondent

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Mr George Laurence, QC and Rhodri Price Lewis (instructed by Brooke North for the Appellant)
Mr John Hobson, QC (instructed by The Treasury Solicitor for the Respondent)

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Judgment

LORD PHILLIP, MR :

1. This is an appeal from the Queen's Bench Division, Crown Office List against the Judgment of Latham J.

2. Some 20 years ago, for the benefit of those who enjoy walking in the countryside, the Lancashire County Council designated as a long distance footpath the Ribble Way, which follows the course of the river of that name. In so doing they followed rights of way depicted as such on the relevant definitive map. So long as a right of way is shown on that map, its existence is conclusively demonstrated. Legislation provides, however, a procedure that can lead to the deletion from a definitive map of rights of way that have been marked on it in error. Mr and Mrs Lord live in Sawley Lodge in the parish of Sawley and own the land around it. They bought their home in 1976. The Ribble Way passes through their land along bridleway 8. This proved unwelcome, for some who walked along this bridleway trespassed from it and committed acts of vandalism. Mr and Mrs Lord then discovered evidence which led them to conclude that bridleway 8 had been marked on the definitive map in error where there was, in fact, no right of way. In 1985 they began the appropriate procedure to get deleted from the definitive map that part of bridleway 8 which crossed their land. I shall describe this part from now on simply as 'bridleway 8', although in due course I shall have to address the fact that it did not include the easternmost section of bridleway 8. The procedure that Mr and Mrs Lord put in train followed a course more tortuous and lengthy than the Ribble Way, but culminated in an order made by the Respondent on 1st April 1999 deleting a large part of bridleway 8 from the definitive map. Mr Trevelyan, the appellant, was until recently the Deputy Director of the Ramblers Association. He appealed to Latham J. to have the Respondent's order quashed. That appeal failed. He now appeals to us with the permission of Laws L.J. who rightly took the view that the case raises a point of principle as to the correct approach to be adopted when considering whether a right of way should be deleted from the definitive map.

The facts

3. I shall adapt the clear statement of the relevant facts and statutory provisions set out by Latham J. in his judgment, for these are not contentious.

4. The definitive map in question was published on 10th August 1973. It was prepared pursuant to the provisions of the National Parks and Access to Countryside Act 1949 (the 1949 Act). Section 27 required the relevant authority, in this case Lancashire County Council, to survey land over which a right of way was alleged to subsist and to prepare a map showing such a right of way whenever in its opinion such a right of way subsisted, or was reasonably alleged to have subsisted, at the relevant date. For the purposes of the present case, the relevant date was the 22nd September 1952. In order to carry out this duty, Section 28 required the County Council to consult with Rural District Councils. Section 29 then required a draft map to be prepared and advertised, and made provision for objections and determination by the County Council of such objections. In the light of such objections, the County Council was empowered to modify the map. A right was then given by Section 29(5) for objections to any such modification to be dealt with by way of appeal to the Secretary of State, who was, in turn, empowered to hold a local inquiry under Section 29(6). At the completion of that process, Section 30 provided for the preparation of a provisional map; and Section 31 entitled any person aggrieved to appeal to quarter sessions. By Section 32, the County Council was then obliged to prepare the definitive map. By Section 32(4), designation of a right of way on such a map was deemed to be

conclusive evidence that there was at the relevant date the right of way so designated. Section 33 required the County Council to keep the definitive map under review, and provided for amendment by way of addition or modification but not deletion.

5. The relevant authorities were first given power to delete a right of way in limited circumstances by schedule 3 to the Countryside Act 1968. The power to delete with which this appeal is concerned was however given by Section 53 of the Wildlife and Countryside Act 1981 which provides as follows:

> "(2) As regards every definitive map and statement, the surveying authority shall:
>
> (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in sub-section (3); and
>
> (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.
>
> (3) The events referred to in sub-section (2) are as follows:
>
> ...(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows:
>
> (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies;
>
> (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or
>
> (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.
>
> (5) Any person may apply to the authority for an order under sub-section (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of sub-section (3); and the provisions of schedule 14 shall have effect as to the making and determination of application under this sub-section."

6. Schedules 14 and 15 to the 1981 Act make complicated provision for the procedures to be adopted in the event of any issues arising under Section 53. By Schedule 14, an authority to whom any application is made for an order under Section 53 is to investigate the matter and come to a determination. If the authority decides not to make an order, the applicant may appeal to the Secretary of State who is to give such directions as appear to him necessary in the light of his decision on the appeal. By Schedule 15, where an authority has made an order, but there are objections, the order is to be submitted to the Secretary of State, who may appoint an inspector to hold an inquiry and to determine whether or not to confirm the order. In circumstances which I shall consider in greater detail in due course, it is open to the inspector to confirm an order with modifications. If the order is confirmed, but with modifications, and there are objections to the modifications, the Secretary of State is again required to hold a local inquiry or give the objectors an opportunity to be heard by an inspector before coming to a final decision. Paragraph 12 of the Schedule entitles any person aggrieved by the confirmation of an order on the grounds that it is outside the powers of Section 53 or 54, to appeal to the High Court. This is the jurisdiction invoked in the present proceedings.

7. The right of way in question was not delineated on any maps before the coming into force of the 1949 Act. The survey of the relevant area for the purposes of that Act was carried out by Mr W Proctor, who was the Sawley parish representative on the Bowland Rural District Council, which was responsible for the survey on behalf of the Lancashire County Council. This was done between December 1950 and February 1951. Information supplied by Mr Proctor led the Bowland RDC to record a right of way for those on foot or horseback running from the public highway in Sawley, along the drive leading to Sawley Lodge, and then across open fields, generally following the line of the River Ribble, through woods, eventually returning to the public highway. Its length was approximately 3 miles. It was identified on the definitive map as bridleway 8. The survey form delineating the route of the right of way did not include any explanation as to the nature of the evidence supporting the claim.

8. The land over which it ran had originally formed part of the Sawley Estate, which had, until 1949, been owned by Mr Fattorini. After his death it was split up. The land over which the western half of the claimed bridleway passed was purchased in August 1950 by Mr and Mrs Hindley. When, as a result of the survey, the County Council produced the draft definitive map in 1953, including bridleway 8, Mr and Mrs Hindley objected to the map on two grounds. First they objected to the alignment of bridleway 8, on the grounds that it should have been shown running closer to the river; second, they objected to the inclusion of part of another bridleway, bridleway 20. These objections were accepted by the County Council; and, eventually, the requisite amendments were duly recorded in 1965 in the notice given by the County Council of proposed modifications to the draft definitive map.

9. In 1967, Mrs Fernie bought Sawley Lodge; and in 1970 Mr Fernie bought the remainder of the land which had been owned by Mr and Mrs Hindley across which part of the claimed bridleway ran. In July 1970 the provisional map was published, retaining the modification to bridleway 8 to which I have already referred. Mr Fernie applied to quarter sessions under Section 31(1) of the 1949 Act on the grounds that there was no public right of way along part of bridleway 8, and another bridleway, number 16. He also applied on the same grounds in relation to parts of two footpaths, numbered 11 and 17. He withdrew his objection in relation to bridleways 8 and 16; and the County Council accepted that there was no right of way over the relevant parts of the two footpaths, which were deleted. The definitive map was accordingly published on the 10th August 1973, including bridleway 8.

10. In 1976, Mr and Mrs Fernie sold the land to Mr and Mrs Lord. The latter became concerned about the bridleway when it was included on the first Ordnance Survey Map published after the definitive map, in 1979. The use of the bridleway increased, with instances of trespass and vandalism. They complained to the County Council in 1980. The County Council, however, had in mind their plan for the Ribble Way, which, it was proposed, should include bridleway 8. It was concerned that walkers would be put at risk by the use of the bridleway by horse riders, and suggested that the right of way be downgraded to a footpath. Mr and Mrs Lord were not prepared to agree. Nonetheless, they reluctantly accepted the positioning of Ribble Way signs along bridleway 8, on the understanding that that would be entirely without prejudice to their contention that no public right of way of any description existed along the route.

11. In 1985 Mr and Mrs Lord applied to the Lancashire County Council under Section 53(5) of the 1981 Act for an order deleting bridleway 8 from the definitive map on the grounds that it had never been a right of way. The County Council considered that there was insufficient evidence of use by horse riders to justify its designation as a bridleway, but that there was sufficient evidence of use on foot to justify it being included on the definitive map as a footpath. The applicants appealed to the Secretary of State for the Environment. Before the appeal was considered, Taylor J. in Rubinstein v Secretary of State for the Environment (1987) 57 P&CR 111 held that because of the conclusive nature of inclusion of a right of way on the definitive map as at the relevant date, Section 53(3)(c)(iii) could only involve consideration of evidence relating to matters after the relevant date, for example the physical destruction of the land over which the right of way was said to exist. The Secretary of State accordingly dismissed Mr and Mrs Lord's appeal

12. However, the decision in Rubinstein was overruled by the Court of Appeal in R v Secretary of State for the Environment ex parte Burrows and Simms [1991] 2 QB 354. The Court held, in effect, that if evidence came to light to show that a mistake had been made in drawing up the definitive map, then such a mistake could be corrected in either of the three ways envisaged in Section 53(3)(c) of the 1981 Act. The objective of these provisions was to ensure that the definitive map provided as accurate a picture as possible of the relevant rights of way.

13. Mr and Mrs Lord were advised that they could submit a new application to delete bridleway 8, which they did. The County Council, on considering the evidence, again concluded that a right of way existed, but that it was a right of way on foot and not on horseback. Mr and Mrs Lord exercised their right of appeal under Schedule 14 to the Secretary of State, who allowed the appeal on the 21st December 1994 and directed the County Council to make an order to delete bridleway 8 from the definitive map.

14. At this point complications ensued which it is unnecessary to recount. Suffice it to say that an order was made in due course by the County Council which complied with the Secretary of State's direction. Under the relevant procedure, this order could not take effect until confirmed by the Secretary of State. Before confirmation, the Secretary of State had to consider any representations or objections duly made in relation to it. Objections were made and the Secretary of State exercised his statutory power to appoint an inspector to hold a local inquiry into the matter. This had the effect of delegating to the inspector the task of deciding whether or not the order should be confirmed, with or without modifications.

15. Despite the decision of the Secretary of State, the County Council remained of the view that, while no bridleway existed, the evidence demonstrated that there was a right of way in the form of a footpath. Accordingly at the inquiry they urged the inspector to confirm the Secretary of State's order, subject to a modification that would replace the deleted bridleway with a footpath. The Ramblers Association objected to the order, contending that the bridleway was properly marked on the map and should not be deleted or modified. Alternatively, they supported the modification proposed by the County Council. The South Pennine Packhorse Trails Trust also objected to the order on the ground that it could not be demonstrated that there had been any error in depicting bridleway 8 on the definitive map.

16. The inspector, after a seven day inquiry, gave his first decision on the 18th December 1997. In this he concluded that there was no right of way of any description along bridleway 8, save for a stretch from the public highway along Sawley Lodge Drive to the junction with another bridleway, bridleway 16. He therefore proposed to make the order with a modification so as to leave this short stretch of bridleway 8 on the map. This triggered the right to make further objections, which were considered at a further public inquiry, as a result of which the inspector upheld his original decision in a letter of the 1st April 1999. Although the latter was the final order, against which the Appellant applied to Latham J, the relevant reasoning was contained in the original decision letter of the 18th December 1997.

The options open to the inspector and the decision that he reached

17. The order challenged before the inspector directed that bridleway 8 should be deleted from the definitive map. It was undoubtedly open to the inspector to confirm the order, or alternatively to decide that the order should not be confirmed. He was in doubt, however, as to whether it was open to him to accede to the submission of the County Council that he should modify the order by substituting a footpath for bridleway 8.

18. The powers of the inspector were derived from Schedule 15 of the 1981 Act, which provides, insofar as relevant:

> "*Opposed orders*
>
> 7. (1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.
>
> (2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall either-
>
> (a) cause a local inquiry to be held; or…
>
> (3) On considering any representations or objections duly made and the report of the person appointed to hold the inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications.
>
> *Restriction on power to confirm orders with modifications*
>
> 8. (1) The Secretary of State shall not confirm an order with modifications so as-

(a) to affect land not affected by the order;

(b) not to show any way shown in the order or to show any way not so shown; or

(c) to show as a highway of one description a way which is shown in the order as a highway of another description,

except after complying with the requirements of sub-paragraph (2)."

19. Sub-paragraph 2 makes provision for representations and objections to the proposed modification and a further public inquiry to consider these.

20. The inspector, acting on behalf of the Secretary of State, was rightly satisfied that he could and should act pursuant to paragraph 8(1)(b) in confirming the order subject to a modification which left on the definitive map the portion of bridleway 8 which followed the course of Sawley Lodge Drive. His doubts as to his power to make the modification proposed by the County Council were expressed in the following passage of his decision letter:

> "The County Council were, nevertheless seeking to modify the Order to show the Order path as a footpath to the north of the junction with bridleway 16. Their justification for this was that the Secretary of State's decision requiring the Order to be made, with which they disagreed, was only part of the procedural process of Schedules 14 and 15 of the 1981 Act leading to the testing of all the available evidence both written and oral at a public inquiry. However, it does not seem to me, that an Order, which as written, quotes Section 53(3)(c)(iii) and states 'that there is no public right of way over land shown in the Map and Statement as a highway of any description' and does not proceed with the alternative wording of the sub-section, can be modified to show a public right of way, other than for the retention of parts of bridleway 8. I regard this as fundamental in this case."

21. On behalf of Mr Trevelyan, Mr Laurence Q.C., submitted that the inspector had erred in concluding that it was not open to him to confirm the order subject to a modification which substituted for bridleway 8 a footpath. He accepted that this could not be done under paragraph 8(1)(c) because there was no "way which is shown in the order" for which a footpath could be substituted. He argued, however, that the proposed modification fell within 8(1)(b) in that it showed a way not shown in the order.

22. For the Secretary of State, Mr Hobson Q.C., supported the conclusion of the inspector. He argued that to depict a footpath in place of bridleway 8, when the order directed that the bridleway should be deleted, could not be described as *confirming* the order subject to modification. It was making a fundamentally different order.

23. If Mr Hobson's submission is correct, the consequence, as he accepted, was that, if the inspector had been satisfied that there was a right of way on foot along the course of bridleway 8, but that this was the limit of the right of way, he would have been bound to decide that the original order should not be confirmed, leaving on the definitive map a bridleway that should not be there. This would be a manifestly unsatisfactory state of affairs. In my judgment, the scheme of the procedure under Schedule 15 is that if, in the course of the inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order, he should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry. To fetter his power to do this by a test which requires evaluation of the modification to see whether the inspector can truly be said to be *confirming* the original order would be undesirable in principle and difficult in practice. Accordingly I consider that Mr Laurence was correct to challenge the decision of the inspector as to the ambit of his powers.

24. This might have been of some moment, for the inspector stated that he regarded his conclusion as "fundamental in this case". It does not, however, appear to me that his conclusion had any effect on his decision. The inspector decided that the evidence was clearly inconsistent with the right of way depicted as bridleway 8 ever having existed as such. His decision letter then continued:

> "The question remains as to whether an error in recording a path as a public bridleway which, by definition, includes public footpath rights of way, reads across to those rights. I take the view that the error was in the recording of a right of way of whatever rights and consequently find myself persuaded that the provisions of Section 53(3) (c)(iii) have been satisfied in relation to the order path apart from the very southernmost part between point A and the junction with bridleway 16."

25. It seems to me, and Mr Laurence did not gainsay this, that the inspector found in terms that it would be erroneous for the definitive map to portray a right of way of any kind along the course of what had been depicted as bridleway 8.

The reasons for the inspector's decision

26. The inspector received a substantial body of evidence as to the nature and extent of the user made of the path depicted as bridleway 8, both before and after 1952. There was no positive evidence that it had ever been used by horses, nor any clear evidence that such user would even have been a physical possibility. There was considerable evidence of its use as a footpath, but the evidence conflicted as to whether this was under license or in assertion of a public right of way. Latham J. summarised this and other evidence in his judgment. I do not find it necessary to repeat that exercise for this reason. Mr Laurence conceded that he could not contend that the inspector's decision was perverse. He accepted that there was evidence which might have supported the decision reached by the inspector even had he applied himself correctly to its consideration. Mr Laurence submitted, however, that there were two errors of principle in the inspector's approach. But for those errors he might have reached a different decision. It followed that his decision should be quashed.

27. I propose now to consider in turn each of the alleged errors.

The effect of the definitive map

28. Under the scheme set out in the 1949 Act the depiction of a right of way on the definitive map was intended to establish conclusively, once and for all, the existence of that right of way. The Court of Appeal in Burrows and Simms decided, however, that Parliament had had second thoughts. Mr Laurence has reserved the right to challenge that decision should he have the opportunity in the House of Lords. In this Court he accepts, as he must, that the 1981 Act provides for the removal of rights of way from the definitive map if it is shown that they were depicted on it by mistake.

29. Mr Laurence submits that, although the definitive map is to that extent no longer conclusive as to the existence of a right of way, it is cogent evidence of the existence of any right of way shown on it. His primary challenge to the inspector's decision is that the inspector attached no weight at all to the fact that bridleway 8 had been entered on the definitive map when he should have treated this as highly material evidence of the existence of a right of way.

30. The inspector found that there was no reason to doubt that the proper statutory procedures were carried out in relation to the depiction of bridleway 8 on the definitive map. Mr Laurence showed us what those procedures must have involved.

31. They involved a parish survey of the relevant area by Councillor Proctor, a meeting of Sawley Parish Council, and the provision by Councillor Proctor of details of rights of way, including bridleway 8, to the Clerk to Bowland Rural District Council. The Clerk signed a form on which the details of bridleway 8 that had been provided by Councillor Proctor were set out. That form had a space for insertion of the reasons for believing that the bridleway was public, but nothing was entered in this space. The Rural District Council in its turn passed the information on to the West Riding County Council, which was then the Surveying Authority. The entry by the County Council of bridleway 8 on the definitive map showed that they were satisfied, if not that it subsisted, at least that it was reasonably alleged to subsist. Thereafter, there were opportunities to challenge the draft map, but in so far as bridleway 8 was concerned, such challenges as were made were subsequently compromised or abandoned. When the definitive map was finally published in August 1973, all involved anticipated that it would conclusively and permanently establish the existence as a right of way of bridleway 8. It was in the light of this history that Mr Laurence submitted that the very fact of the depiction of bridleway 8 on the definitive map should have carried very significant evidential weight with the inspector.

32. Latham J., at paragraph 23 of his judgment, accepted that the fact of the inclusion of the right of way on the definitive map was "obviously some evidence of its existence" but continued:

> "The fact of the inclusion of the right of way on the definitive map is obviously some evidence of its existence. But the weight to be given to that evidence will depend upon an assessment of the extent to which there is material to show that its inclusion was the result of inquiry, consultation, or the mere ipse dixit of the person drawing up the relevant part of the map. In the present case, there was nothing to suggest that any significant probative material existed at the time to support Mr Proctor's survey;"

33. Mr Laurence submitted that the Judge's approach to the definitive map erred in principle. It was wrong to discount it simply because there was no evidence of the basis upon which bridleway 8 had been entered on it. It was of the nature of things that such evidence might be lost with the passage of time, in which event an assumption should be made that such evidence had nonetheless existed. Mr Laurence invoked a statement by Lord Denning M.R. in R. v. Environmental Secretary, ex parte Hood [1975] 1 QB 891 at p.899:

> "The definitive map in 1952 was based on evidence then available, including, no doubt, the evidence of the oldest inhabitants then living. Such evidence might well have been lost or forgotten by 1975"

34. Latham J's decision in the present case was recently followed by Richards J. in R. v. National Assembly for Wales, ex parte Robinson. (2000) 80 P.&CR 348. At p.356, he said:

> "The factual position in Trevelyan was materially identical to that in the present case. Mr Proctor's survey form delineating the route of the right of way did not include any explanation as to the nature of the evidence supporting the claim. That is equally true here. I have already referred to the fact that the relevant section on the survey record card is blank. A passage at the end of paragraph 39 of the decision letter suggests that the National Assembly took the view that there could have been more evidence of public use at the time of inclusion of the footpath on the definitive map than exists now. Any such view would be pure speculation. There is nothing to show that reliance was placed at the time on anything beyond the mere existence of the footpath. That being so, no weight could properly be attached to the mere fact that the footpath was included on the definitive map. By attaching weight to the fact of inclusion, the National Assembly fell into error."

35. Mr Laurence submitted that this passage compounded the error of approach of Latham J.

36. I consider that the approach of Latham J. and Richards J. to the weight to be given to the definitive map was, as Mr Laurence has submitted, wrong in principle. In the course of argument the Court drew the attention of Counsel to section 32 of the Highways Act 1980, which does not appear to have featured in discussion below. This provides:

> "32. A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the rendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."

37. Both Counsel agreed that this provision was applicable by analogy to the weight to be attached to the definitive map in the context of the inspector's task of considering whether, having regard to all the available evidence, he was satisfied that the right of way depicted as bridleway 8 did not exist.

38. Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake.

39. These considerations are reflected in guidance published by the Secretary of State for the Environment (Circular 18/90) and the Secretary of State for Wales (Circular 45/90) after the decision of the Court of Appeal in Burrows and Simms:

> "...in making an application for an order to delete or downgrade a right of way, it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map is in error by the discovery of evidence, which when considered with all other relevant evidence clearly shows that a mistake was made when the right of way was first recorded.
>
> Authorities will be aware of the need, as emphasised by the Court of Appeal, to maintain an authoritative map and statement of the highest attainable accuracy. The evidence needed to remove a public right from such an authoritative record, will need to be cogent. The procedures for identifying and recording public rights of way have, in successive legislation, been comprehensive and thorough. Whilst they do not preclude errors, particularly where recent research has uncovered previously unknown evidence, or where the review procedures have never been implemented, they would tend to suggest that it is unlikely that a large number of errors would have been perpetuated for up to 40 years, without being questioned earlier."

The inspector's approach

40. The approach of the inspector to the standard of proof appears from the following passages of his decision letter, which followed a detailed assessment of all the evidence:

> "Looked at in the context of the evidence of the persons working on or for the estate or those holding exclusive rights such as the Yorkshire Fly Fishers' Club, a clear impression builds up of a situation in which it seems to me to be beyond the bounds of credibility to accept that a public right of way existed over the Sawley Estate to the north of the junction with the Dockber Road in the first half of the century.
>
> I agree that the evidence needed to remove a public right of way from the Definitive Map and Statement needs to be clear and cogent and demonstrate that a mistake had been made in the original claim and

recording. I have noted all the representations and objections on the matter but I am not persuaded, on the balance of the evidence that a public bridleway existed from the junction with bridleway 16, northwards to point N and the junction with footpath 18, on the line of the order route, or the route originally claimed, prior to 1952. I am consequently, persuaded that a mistake was made during the Sawley parish survey and that the order path was recorded in error as a public bridleway."

41. I would make the following comments in relation to these passages:

42. The statement "I am not persuaded, on the balance of the evidence, that a public bridleway existed..." is unhappily worded. Taken in isolation, those words suggest that the inspector considered that he should confirm the order unless satisfied on balance of probabilities that there was a bridleway. But it is not right to take those words in isolation. The inspector directed himself that clear and cogent evidence was necessary to remove a public right of way from the definitive map and that it had to be demonstrated that a mistake had been made. This was necessarily, albeit implicitly, a recognition of the evidential effect of the definitive map. The finding by the inspector that it was, on the evidence, "beyond the bounds of credibility to accept that a right of way existed" over the material portion of bridleway 8 was a finding of fact that, unless demonstrated to be perverse, manifestly satisfied the test required to justify a finding that the bridleway had been marked on the definitive map as a right of way in error. For these reasons, I would reject the first ground of challenge made by Mr Laurence to the decision letter.

Anomalies

43. As an independent ground of challenge to the inspector's decision, Mr Laurence contended that he failed to take into account the fact that the order deleting bridleway 8 resulted in a number of anomalies on the definitive map. Two footpaths, numbers 28 and 29 linked with bridleway 8. The removal of the bridleway had the result that these ended in cul-de-sacs. Furthermore bridleway 8 continued for half a mile or so to the east of the land affected by the order. The result of the order was, so Mr Laurence contended, to end this section in a cul-de-sac.

44. The inspector referred to the fact that confirmation of the order would produce anomalies in relation to the two footpaths, but Mr Laurence submitted that this reference failed to accord to them their proper significance. The inspector should have given more detailed consideration to whether the order could be reconciled with these anomalies. I do not agree. The inspector's reference demonstrates that he did apply his mind to the significance of the two footpaths. He clearly considered that they did not outweigh the import of the other evidence. It was open to him so to conclude.

45. Mr Laurence also complained that the inspector made no reference to the anomaly created by the isolated eastern section of bridleway 8. It is true that the inspector did not refer to this when dealing with anomalies. He had, however, given consideration to this section of the bridleway earlier in his decision letter. In the course of considering the significance of an early map, OS 1908/09, he commented that he found it particularly significant that the map showed

a bridlepath on the line of the eastern section of bridleway 8 that crossed by a ford to the north side of the Ribble rather than continuing along the course of the disputed part of the bridleway. This was a matter that the inspector could properly weigh against any suggestion that there was no explanation for the eastern section of bridleway 8.

46. Latham J. was not impressed by the argument based on anomalies. He pointed out that the eastern section of bridleway 8 did not fall within the area of the map that the inspector was required to consider. Had he considered the evidence in relation to it, he might have concluded that the eastern section of the bridleway had also been depicted in error. I share his conclusion that the fact that the order produced the anomalies identified by Mr Laurence does not invalidate the inspector's decision. I would dismiss this appeal.

SIMON BROWN LJ

47. I agree.

LONGMORE J

48. I also agree.

ORDER:

1. Appeal dismissed
2. No order as to costs. Costs order below to stand.
3. Leave to appeal to the House of Lords refused

(Order does not form part of approved Judgment)