*1264 Trevelyan v Secretary of State for the Environment, Transport and the Regions

Positive/Neutral Judicial Consideration

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Court of Appeal

Lord Phillips of Worth Matravers MR, Simon Brown and Longmore LJJ

2001 Jan 30; Feb 23

Highway—Right of way—Definitive map—Map showing bridleway—Landowner claiming right of way never existed and seeking deletion of bridleway from map—Power of inspector to confirm order for deletion—Whether evidence to justify inclusion of bridleway on map to be presumed—Standard of proof required to establish way marked on map by mistake— Wildlife and Countryside Act 1981 (c 69), s. 53, Sch. 15

Landowners across whose land a bridleway was shown on the definitive map applied to the county council under section 53(5) of the Wildlife and Countryside Act 1981 [1] for deletion of part of the bridleway from the map on the ground that it had never been a right of way. The council considered that there was insufficient evidence of use by horse riders to justify its designation as a bridleway but sufficient evidence of use on foot for it to be included on the definitive map as a footpath and refused to make an order for deletion. The Secretary of State allowed an appeal by the landowners and directed the council to make an order deleting the relevant part of the bridleway from the map. The order was duly made but could not take effect until confirmed by the Secretary of State, who had to consider any objections or representations made. Objections having been made, the Secretary of State appointed an inspector to hold a local inquiry and decide whether the order should be confirmed with or without modifications. The inspector concluded that no right of way existed over the relevant part of the bridleway, and accordingly ordered its deletion with a minor modification. Further objections caused the holding of a further inquiry after which the inspector upheld his original decision. The judge dismissed an application by the applicant under paragraph 12 of Schedule 15 to the 1981 Act for the order to be quashed.

On appeal by the applicant—

Held , dismissing the appeal, (1) that, where, in the course of an inquiry to consider objections or representations concerning a proposed order to modify the definitive map under section 53 of the 1981 Act, facts came to light which persuaded the inspector that the definitive map should depart from the proposed order, it was open to him under Schedule 15 to the Act to make an order modifying the proposed order accordingly, subject to any consequent representations and objections; and that

the inspector had therefore had power to confirm the order deleting part of a bridleway subject to a modification substituting a footpath (post, pp 1273B–C , 1278D).

(2) That, in considering whether a right of way marked on a definitive map did in fact exist, there was an initial presumption that it did and, in the absence of evidence to the contrary, it should be assumed that the proper procedures had been followed in compiling the map and thus that such evidence existed; that the standard of proof required to justify a finding that no right of way existed was no more than the balance of probabilities, but there had to be evidence of some substance to outweigh the initial presumption that the right of way existed; that the more time that elapsed the more difficult it would be to adduce positive evidence establishing that a right of way had been marked by mistake on the definitive map; and that, accordingly, since the ***1265** inspector had correctly directed himself on the evidential effect of the definitive map and made a finding of fact which manifestly satisfied the test required to justify a finding that the bridleway in question had been marked on the map in error, he had been entitled to reach the decision that he did (post, pp 1276B–D , 1277D–E , 1278D).

Decision of Latham J affirmed.

The following cases are referred to in the judgment of Lord Phillips of Worth Matravers MR:

R v National Assembly for Wales, Ex p Robinson (2000) 80 P & CR 348
R v Secretary of State for the Environment, Ex p Burrows [1991] 2 QB 354; [1990] 3 WLR 1070; [1990] 3 All ER 490, CA
R v Secretary of State for the Environment, Ex p Hood [1975] QB 891; [1975] 3 WLR 172; [1975] 3 All ER 243, CA
Rubinstein v Secretary of State for the Environment (1987) 57 P & CR 111

The following additional cases were cited in argument:

Morgan v Hertfordshire County Council (1965) 63 LGR 456, CA
Parry v Secretary of State for the Environment (unreported) 8 June 1998 , Sedley J
R v Secretary of State for the Environment, Ex p Billson [1999] QB 374; [1998] 3 WLR 1240; [1998] 2 All ER 587
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995] 2 All ER 636, HL(E)

APPEAL from Latham J

By a notice of appeal dated 12 April 2000 the applicant, John Trevelyan, suing on behalf of himself and all other members of the Ramblers Association, appealed with the leave of Laws LJ from the order of Latham J made on 24 January 2000 dismissing with costs his application dated 3 June 1999 for an order quashing the decision of the respondent, the Secretary of State for the Environment, Transport and the Regions, given by the inspector appointed by him for the purpose by letter dated 1 April 1999, whereby the Lancashire County Council (Definitive Map and Statement of Public Rights of Way) (Definitive Map Modification) (No 7) Order 1996 deleting part of bridleway no 8, Sawley, was confirmed. The grounds of appeal were: (1) in determining whether to make (or confirm) a definitive map modification order deleting a way from the definitive map pursuant to section 53(2)(b) and (3)(c)(iii) of the Wildlife and Countryside Act 1981 a surveying authority (or the Secretary of State or an inspector appointed by the Secretary of State) had to carry out an exercise in evaluating "relevant evidence". That evidence included the evidence for the existence of the way afforded by its original inclusion on the definitive map. The judge erred in law in his approach to the manner in which the Secretary of State's inspector carried out that exercise; (2) the approach which the judge ought to have adopted was (a) that the original inclusion of a way on the definitive map pursuant to section 27 of the National Parks and Access to the Countryside Act 1949 (the predecessor legislation to the 1981 Act) meant that the relevant surveying authority had to have been satisfied that a right of way as so shown subsisted, or at least was "reasonably alleged" to subsist, at the relevant date, and that accordingly there had to have been evidential material to support that allegation and to so satisfy the authority; (b) the onus was on the applicant for a definitive map modification order under section 53(2) and (3)(c)(iii) of the 1981 Act deleting the way to prove (if he ***1266** could) that there was not or could not have been such evidential material available at the time, and there was no onus on the objector to prove that there was such evidential material available at the time or what it was; (c) the mere absence at the time when the application to delete

came to be considered of positive evidence of what evidential material was available at the time to support the allegation that the right of way subsisted at the relevant date did not rebut the inferences in (a) or warrant an inference that there was no or insufficient such material; (3) had the judge adopted that approach, he would have held that the decision under challenge could not stand because the inspector (a) failed to attach any weight at all to the fact of the original inclusion of the part of bridleway no 8 the subject of the modification order on the definitive map,the evidential significance of which inclusion was strengthened by the actions of Mr and Mrs Hindley and Mr Fernie (successively owners of the affected land during the definitive map preparation process) from which it was to be inferred (in the absence of evidence to the contrary, of which there was none before the inspector) that they too accepted the existence of a public right of way over it and had to have had evidential grounds for so doing, (b) did not ask himself whether the applicants for the order had discharged the onus of proving that there was or could have been no or no sufficient evidential material available at the time to support the allegation that at the relevant date bridleway rights (or rights on foot) subsisted over the part of bridleway no 8 or to entitle the surveying authority to conclude that allegation to be reasonably made, (c) did not find, and could not on the evidence before him have found, that the applicants for the order had discharged that onus, (d) none the less failed to consider the evidence against the background that there had been (albeit no longer available) additional evidential material for the existence of bridleway rights (or rights on foot) over the part of bridleway no 8 sufficient to satisfy the surveying authority that the allegation of their existence was reasonable, (e) wrongly left altogether out of account in evaluating the evidence for and against the existence of a public right of way over that part of bridleway no 8 (whether on foot and on horseback or on foot alone) the evidence for its existence afforded by its original inclusion on the definitive map and the inferences to be drawn from that coupled with the part played by the landowners in the definitive map preparation process; (4) the judge erred in law in adopting the approach that (a) no weight was to be given to the original inclusion of a way on the definitive map as evidence of its existence unless positive evidence was adduced of what evidential material was available at the time to support its inclusion and there was shown to have been significant probative material for that purpose, (b) there being no such positive evidence adduced before the inspector, the inspector was therefore entitled to give no weight to the inclusion of that part of bridleway no 8 on the definitive map (either of itself or coupled with the participation of the then owners of the affected land in the definitive map preparation process) as evidence of its status as a public highway, (c) the judge, like the inspector, thus mistakenly reversed the onus of proof; (5) the inspector's decision failed to explain or justify how the deletion claimed could stand with the retention of (i) the remainder of bridleway no 8 and/or (ii) footpaths 28 and 29; and the judge erred in law in failing to quash the decision on that additional basis.

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The facts are stated in the judgment of Lord Phillips of Worth Matravers MR.

Representation

George Laurence QC and Rhodri Price Lewis for the applicant.
John Hobson QC for the Secretary of State.

LORD PHILLIPS OF WORTH MATRAVERS MR

23 February. The following judgments were handed down.

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 1 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 LJ, 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 10 August 1973. It was prepared pursuant to the provisions of the National Parks and Access to Countryside Act 1949 . 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 ***1268** alleged to have subsisted, at the relevant date. For the purposes of the present case, the relevant date was 22 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:

"(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 subsection (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 subsection (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 subsection (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 subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of application under this subsection."

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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 Rural District Council 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 three 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 **1270* 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, no 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 10 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. None the less, 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, *Rubinstein's* case was overruled by the *Court of Appeal in R v Secretary of State for the Environment, Ex p Burrows [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, ***1271** who allowed the appeal on 21 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 18 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 1 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 18 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 to the 1981 Act, which provides, in so far 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.

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"(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 to 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 subsection 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 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 paragraph 8(1)(b) in that it showed a way not shown in the order.

22. For the Secretary of State, Mr Hobson 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 ***1273** 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, ***1274** 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 R v Secretary of State for the Environment, Ex p Burrows [1991] 2 QB 354* 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 ***1275** 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 none the less existed. Mr Laurence invoked a statement by Lord Denning MR in *R v Secretary of State for the Environment, Ex p Hood [1975] QB 891* , 899-900: "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 p Robinson (2000) 80 P & CR 348* . He said, at p 356:

> "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 and Richards JJ 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:

> "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 tendered document, the status of the person by whom and the purpose for ***1276** 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 R v Secretary of State for the Environment, Ex p Burrows [1991] 2 QB 354* :

> "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 ***1277** Fisher's 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 public 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 culs-de-sac. 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.

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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 LJ

48. I also agree.

S L D

Representation

Solicitors: Brooke North, Leeds; Treasury Solicitor .

Appeal dismissed. No order as to costs. Costs order below to stand. Permission to appeal refused.

Footnotes

1 Wildlife and Countryside Act 1981, s. 53 : see post, p 1268D–H Sch 15 : see post, pp 1271H–1272C.