All England Official Transcripts (1997-2008)*

Skrenty and Harrogate Borough Council and others

[1999] Lexis Citation 4557

(Transcript: Association)

CHANCERY DIVISION

BERNARD J LIVESEY QC (SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION)

26 OCTOBER 1999

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E Scammell for the Claimant;

R Stockley for the Defendant

Plant, Gold & Co; The Solicitor of **Harrogate Borough Council**

BERNARD LIVESEY QC:

The claimants in this case are husband **and** wife **and** have since 1982 been the joint owners of the freehold house **and** gardens known as "Riviera", Abbey Road, Knaresborough, North Yorkshire. The house itself **and** a large part of the garden is situated on the north-west side of Abbey Road. There is, however, a smaller riverside garden on the **other** side of the road. There is no evidence to suggest that the riverside garden has been **other** than privately owned at all relevant times in its history. I have been shown recent photographs of the location from which the present state **and** layout of the land can be fairly accurately determined.

Abbey Road appears to be a fairly small, metalled, side road which is an adopted highway for both vehicular **and** pedestrian use **and** is vested in the North Yorkshire County **Council**. The first defendant exercises certain highway functions on behalf of the county **council**. These include the protection of public rights over parts of the highway. The issue in this case relates to a contention that the public has obtained certain rights over a part of the riverside garden.

It is clear from the photographs that the road is supported at its edge by a stone wall. Inserted into the wall are the posts of a fence which divides the garden from the road. I am not told who owns the wall **and** it does not matter. What does matter is that the riverside garden abuts the wall at a level somewhat below the top of the wall **and** travels downwards from that point to the river at what seems on the photograph to be a fairly distinct angle. It is clear that there is not anything which can be described as a verge **and** it does not appear that there ever was.

The road, I am told, has been shown on local maps as a highway since the early 19th century. At some point prior to 1891 some person unknown had constructed a buttress on the land which has enabled the earth upon it to be retained so as to create a fairly flat platform which is now covered in grass on which persons can stand **and** sit. The platform extends from the road edge **and** because of the fall in the land is about two foot six inches below the road surface. It is semicircular in shape **and** about seven feet in depth from the road edge to the front edge **and** approximately 10 feet in width. The height of the platform stands some two to seven feet above the level of the surrounding ground which falls away around it.

It is clear that at some time in its history there was a bench on the buttress on which persons were wont to sit in order to enjoy what was probably a fairly pleasant, but not exceptional, view over the riverside garden down to the river below. There were also steps leading down to the road level to the top surface of the buttress. This action arises out of a campaign locally which argued that the public had obtained rights of access to the riverside garden in general **and** the top of the buttress in particular from which it was being deprived by the claimants.

As a result of concessions by the defendant this case concerns only claims in respect of the buttress. The claimants are seeking a declaration against the first defendant that no part of the surface of the buttress forms part of any public highway or is otherwise subject to any public rights of access or user.

By its defence **and** counterclaim the first defendant claims that the public does have a right of access. In support of it, it avers that the buttress forms part of the highway **and**/or the buttress forms part of a public right of way which has arisen either at common law or by operation of statute, namely s 31 of theHighways Act 1980. By para 10 of the defence **and** counterclaim the first defendant relies for each of these contentions on alleged acts of user by the public, the allegation that the local **council** maintained a seat on the buttress **and** painted it between 1950 **and** 1974, **and** an allegation that the buttress was built as a platform to enable the public to enjoy a view of high amenity value to the public.

These allegations of fact were the subject of further information in answer to the claimant's request, are hotly contested by the claimant **and**, if this case proceeded to trial, the issues of fact involved would be likely to occupy the time of the court for several days. The claimant however contends that, even if the defendant successfully proves each allegation of fact, the counterclaim is as a matter of law doomed to fail.

In these circumstances Master Brack has made an order for the determination by the court as a preliminary issue whether the claimant's contentions are correct **and** it is with the trial of the preliminary issue that the present hearing **and** indeed judgment is concerned. The preliminary point as defined is as follows:

On the basis that the facts are as pleaded in paras 1, 2, 3 **and** 6 of the particulars of claim **and** para 7 of the defence **and** counterclaim, is the top of the buttress capable as a matter of law of being the subject of dedication either as a highway or part of a highway or as part of a public right of way?"

The facts which are set out in para 10 of the defence are as follows. It is said that prior to 1982 the public at large had always enjoyed unrestricted access to the buttress; that part of the stone paving adjacent to the buttress had been worn down by persistent use over the years; that the buttress provided a view of high amenity value to the public; that it was built as a platform to enable the public to enjoy the view; that the public has always had access to the buttress from both the road **and** the river; **and** that until 1974 the seat upon the buttress was maintained by the local **council** at the expense of the public. By "maintained at the expense of the public", it is said that from 1950 to 1974 the **council** had painted the seat in the same green colour as all **other** items in the urban district area **and** that there were regular acts of maintenance as **and** when required between those periods, which can be inferred from the condition of the bench throughout that period.

Consequently, in making my determination I must bear those factors in mind **and**, when I consider the photographs as I have described them in this judgment, I must mentally superimpose both the bench **and** steps which apparently are said to have led down to the buttress.

The first point to be made is this. It is clear from the physical evidence as demonstrated in the photographs that the buttress was constructed many years later than Abbey Road itself. There cannot be any suggestion that it was dedicated at the same time as the road, nor is it possible to infer that there was any verge at any time at any relevant point on the road, thus displacing any common law presumption that the dedication may be presumed to include the verges. Further, bearing in mind the fact that the top of the platform of the buttress is so far below the road surface **and** is so small, it clearly cannot be that the platform was used at any time by the public as a sort of extension of the width of the road. The question therefore is whether the public has obtained rights over it separate from those attaching to the road above it.

Secondly, it is clear that a highway may be created either by way of the common law doctrine of dedication **and** acceptance or by statutory provision. Thus a landowner is able to dedicate land as a highway. Once the dedication is accepted by the public the land becomes a highway. The dedication for such purposes may be either by express act or declaration of the landowner or implied from evidence of user by the public **and** acquiesence in that user by the landowner.

Thirdly, the common law doctrine of dedication has no application to the sanctioning of public use of private land otherwise than as a highway, that is to say for **other** purposes such as leisure **and** entertainment. Save for rights arising from ancient custom or rights exercised over commons **and** village greens, which is of course not in question here, the common law did not recognise any public right to wander across private land or jus spatiandi. There is thus no principle of law which can apply so as to entitle the public at large to use the buttress for the purposes of sitting on a seat which may have been located there for rest or the enjoyment of the view or indeed any **other** purpose.

Fourthly, for the doctrine to arise the land in question must have the physical attributes which enable it to be categorised as a highway. The physical attributes include two which are essential **and** one which is generally but not universally required. The two essential elements are (a) the land in question must consist of a way over which the public has a right of passage, **and** (b) it must follow a defined route. In addition, where implied dedication by public user is relied upon as establishing a highway, a third element (c) must generally, although it seems not universally, be shown to exist, namely there must be a terminus ad quem.

Against this background the claimant says that the size **and** location of the surface of the buttress **and** its position make it incapable of providing means of passage for members of the public. It is absurd, they contend, for the defendants to say either that it is a way or that it follows a defined route because it is so small **and** does not go anywhere. The defendant disagrees **and** submits that there is not any minimum distance which must exist before a defined route can be said to exist; that I must remember that it is alleged, **and** I am to assume as a fact, that there were in the past some steps from the road to the buttress, that the steps **and** the pace or two from the bottom step to the seat constitute the defined route to the terminus ad quem on the seat; that it is legitimate to call the seat a place of popular resort; that it matters not that, having reached the place of popular resort, the public have to return to Abbey Road by the same route by which they have arrived; see Williams-Ellis v Cobb (1935) 1 KB 310, 119-320 **and** Moser v Ambleside Urban District **Council** (1925) 89 JP118, 120.

The claimant's reply to this is that, even if the public were extended by the landowner permission to use the seat, then as a matter of inference any use of the land to get to the seat was equally subject to the same permission rather than a dedication. They drew my attention to Attorney-General v Antrobus (1905) 2 Ch 188, 205. That case was concerned with an application by the Attorney-General to secure the rights in the public over what the Attorney-General contended were highways leading to Stonehenge. A sketch plan was in evidence which showed that five tracks entered the circle around Stonehenge; none of them crossed; the

landowner disputed that they could be the subject of rights of dedication which made them a highway. In that case Farwell J at p 205 said:

No one would dream of driving across this barren triangle if the stones were not there. The inference is irresistible that the permission is not to drive simply, but to visit the stones, **and** for that purpose to drive there. The proper inference to be drawn must depend on the circumstances of each case, **and** on such circumstances will depend whether the use of the way or the enjoyment of some view or object of interest is the real inducing cause, or whether both may be inducing causes. For instance, if a landowner allowed the public to drive into his park to a ruined tower or chapel **and** to return by the same way, the inference would be plain that the ruins, not the drive, was the inducing cause, especially if the road were as bad as the tracks in the present case; but if he allowed the public to drive out at another gate, **and** this made a convenient passage between two villages, the inference to be drawn would be less clear. If, however, as in the present case, the inference is plain that the permission is to visit the stones, **and** for that purpose only to use the tracks, then such permission is one **and** indivisible, **and** no right of way can be established from user attributable to the permission to visit."

At the middle of p 208, having considered the evidence, he said:

I hold, therefore, that the access to the circle was incident only to the permission to visit **and** inspect the stones, **and** was therefore permissive only; **and**, further, that the tracks to the circle are not thoroughfares, but lead only to the circle, where the public have no right without permission, **and**, therefore, are not public ways. The action accordingly fails **and** ought never to have been brought."

The defendants rejoined by suggesting that I should not follow Antrobus but should regard it as restricted to its own facts. I do think that it might be more than a little presumptuous for me not to follow Antrobus. In any event I agree with the claimant's submissions. It is to my mind absurd to say that the physical characteristics of the buttress **and** such evidence of user or expenditure as has been attributed to it is sufficient to entitle me to infer **and** conclude that there was dedication of this buttress or any part of it as a highway. Such expenditure as might have been incurred by the local authority on painting the seat on occasions between 1950 **and** 1972 was trivial in amount. To say that the bench was a place of public resort is overstating the case, is misleading **and** in any event begs an important question. Once it is accepted that members of the public could use the bench only for such time as the landowner's permission to use it continued, it is absurd to contemplate that the landowner would have dedicated to the public the route to it in perpetuity so that, if he ever abrogated the permission to use the bench or indeed removed it, he would have been left in truth with a highway to **and** from what would then become effectively no where in particular.

In my judgment on the assumed facts I conclude that any use which the public may have enjoyed of the buttress as a way to the bench was, in the words of Farwell J in Antrobus (1905) 2 Ch 188 "one **and** indivisible" with any permission to use the bench **and** "no right of way can be established from user attributable to the permission to visit".

Accordingly, I reject the defendant's contentions in the counterclaim. It seems to me that the claimants are entitled to judgment in their favour on the preliminary issue.

Judgment for the claimant.