think, therefore, that the rule should be absolute to reduce the damages to a nominal sum.

Rule absolute.

Solicitors for plaintiffs: *Stocken & Jupp, for Radcliffe & Layton.*
Solicitors for defendant: *Ridsdale and Craddock.*

BAILEY AND ANOTHER *v.* JAMIESON AND OTHERS. *Jan.* 26.

Highway—Access becoming impossible.

A way ceases to be a "public highway" where the access to it at either end has become impossible by reason of ways leading to it having been legally stopped up.

THE first count of the declaration alleged that the defendants broke and entered land of the plaintiffs at Bothal village, and broke down fences, and destroyed the herbage, &c. The second charged similar trespasses in Bothal Wood; and the third in Welbeck Wood.

Pleas,—1. Not guilty,—2, 3, and 4, a denial that the land, fences, and herbage in the first and second counts respectively mentioned belonged to the plaintiffs,—5. To the first count, a claim of a right of way,—6. To the first count, that the plaintiffs had unlawfully erected barriers, and the defendants removed them,—7 and 8. Similar pleas to the second and third counts,—9. Leave and licence. Issue.

The cause was tried before Pollock, B., at the last Newcastle spring assizes. There was evidence that there had formerly been a public foot-way, though not a very convenient or much frequented one, through certain woods held by Bailey under the Duke of Portland, called respectively Welbeck Wood and Bothal Wood, leading from a place called Sheepcot Rectory to Bothal village; but that, in consequence of other ways which led to it having been stopped by orders of the quarter sessions in September, 1873, and March, 1874, there ceased to be any access to either end of it.

Upon this evidence a verdict was entered for the plaintiffs, damages 40*s.*, upon each count, with leave to the defendants to

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move to enter the verdict for them, if the Court should be of opinion that, notwithstanding the impossibility of access to it, the way still continued to be a public highway.

A rule nisi having been obtained,

Herschell, Q.C. (*Gainsford Bruce* and *Ridley* with him), shewed cause. Although doubts have been entertained as to whether the lawful stopping up of one end of a road which has been long used as a thoroughfare, destroys its character of a public highway,—see *Wood* v. *Veal* (1); *Rex* v. *Downshire* (*Marquis*) (2),—it has never been suggested that, where a road has been lawfully stopped up at *both* ends, it remains still a public highway.

Crompton and *Littler* were called upon. It is admitted that the place in question was formerly a public highway through Bothal Wood. "It is an established maxim," says Byles, J., in *Dawes* v. *Hawkins* (3), "once a highway always a highway; for, the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of ad quod damnum, or by proceedings before magistrates under the statute." There are several cases in which the effect of the stoppage of one end of a highway has been discussed; but this is the first time that the question has arisen with reference to the case of both ends being stopped. A highway is defined in Hawk. P. C. Book 1, c. 76, to be a way leading from town to town, which is common to all the king's subjects. "A way to a market, a great road, &c., common to all passengers, is a highway:" Per Hale, 1 Vent. 189; cited, Com. Dig. Chimin (A. 1). In *Reg.* v. *Burney* (4), it was held that a man might be indicted for a nuisance upon a public path which had been stopped at one end by the authority of an Act of Parliament, for that it was still a highway, although it had become a cul de sac. Blackburn, J., there says: "There are dicta of Patteson, J. (5), and other judges,

(1) 5 B. & Ald. 454.

(2) 4 Ad. & E. 698.

(3) 8 C. B. (N.S.) 848, 858; 29 L. J. (C.P.) 343.

(4) 31 L. T. (N.S.) 828.

(5) "It has been held that, where there never was a right of thoroughfare, a jury might find that no public way existed: but it has never been settled that, where there had been a public right of passing through, the right of way was abolished by stopping one end of the passage:" Per Patteson, J., in *Rex* v. *Downshire* (*Marquis*), 4 Ad. & E. 698.

that a cul de sac may be a highway, and there is authority that new openings may be made into a highway from the adjoining lands. Although this piece of unused road may be of little value, its obstruction cannot be absolutely no possible injury to any member of the public. The finding of the jury that the road is of no public utility should be an important consideration in deciding upon the punishment of the defendant, but it is not sufficient to justify him in depriving the public of a right." And Lush, J., says: "There is a public right over all or any part of a public highway; and, when a highway is stopped by sessions order or by Act of Parliament, the public are not deprived of any more of their right than the order or statute expresses."

[LORD COLERIDGE, C.J. Blackstone, vol. 2, p. 35, speaks of the king's highway, "which leads from town to town."]

Though now obstructed, can the Court say that this path has ceased to be a highway, though it possibly may become so again by new openings being made into it? In *Gwyn* v. *Hardwicke* (1) Alderson, B., says: "If the question were whether, when an Act of Parliament gave the power to stop up part of a public way, the other part is destroyed, I should say not; it may remain as a cul de sac. . . . Then, if there be no absurdity in construing the words of this Act literally, why should we not do so, and say that the part of the footpath which is not stopped up will remain a public footway?" "An ancient highway cannot be changed without an inquisition found on a writ of ad quod damnum that such change will be no prejudice to the public:" Bac. Abr. Highways (C); or by Act of Parliament: *Rex* v. *Flecknow.* (2) In *Bateman* v. *Bluck* (3) it was held that a public highway may in point of law exist over a place which is not a thoroughfare. Although the way in question has become for the present inaccessible, access to it may peradventure be opened up again through part of the land abutting on it.

LORD COLERIDGE, C.J. The question in this case is now, as far as I know, raised for the first time. It is not doubted that

(1) 1 H. & N. 49, 55; 25 L. J. (M.C.) 97.

(2) 1 Burr. 461, 465.

(3) 18 Q. B. 870; 21 L. J. (Q.B.) 406. And see *Rugby Charity (Trustees)* v. *Merryweather*, 11 East. 375, n.

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the stopping of the roads by the orders of the quarter sessions was a proper act. Those orders were not appealed from. But it is said that an unexpected consequence has followed from that stoppage, and that raises the question which we have to determine. We must take it that the roads so stopped formerly opened into another road which was not in terms stopped by the justices. But, the access to both ends of that road having become impossible, it has lost its character of a highway which it had at the time of the stoppage. Now, it is admitted that there is no authority directly in point,—none at least has been found,—to shew that a track retains the character of a highway where, by an act lawful in itself, the access to it has altogether been intercepted. We are driven, therefore, to decide this case upon principle. Now, the common definition of a highway that is given in all the text-books of authority is, that it is a way leading from one market-town or inhabited place to another inhabited place, which is common to all the Queen's subjects. Although there are no cases precisely in point, there have been some which will to a certain extent assist us, where it has been argued that a road one end of which had been lawfully obstructed ceased to be a highway, as in *Wood* v. *Veal* (1) and *Rex* v. *Downshire* (*Marquis*). (2) The conclusion to which the Court came in those cases was that the stoppage of one end did not make a road cease to be a common highway; for, though it thereby became a cul de sac, the public still might have a right to go over it to the end and back. These cases do not decide the point now before us: still they assist us to this extent, that, to constitute a highway, there must be some notion of a passage which begins somewhere and ends somewhere, and along which the public have a right to drive or to walk from its beginning to its end. Here, that notion is entirely absent. By proper authority this way has become inaccessible at both ends. It remains a track which no member of the public can legally get upon, and therefore the defendants have failed to justify their presence there. If the defendants had a right to be there, though they got there by an act of trespass, they would not be trespassers for being there. It is necessary, therefore, to determine whether or not it remains a highway. I am of opinion that it does not. Its character of a

(1) 5 B. & Ald. 454. (2) 4 Ad. & E. 698.

public highway is altogether gone. The rule to enter a verdict for the defendants will therefore be discharged.

DENMAN, J. I am of the same opinion. The great difficulty here seems to arise from the familiar dictum "once a highway always a highway," and from the necessity of now for the first time placing a limitation upon it. But I think we are compelled to hold that this is a case where that which formerly was a highway, but which, though it has not been stopped by statutory process, has, by reason of legal acts at either end of it, ceased to be a place to which the Queen's subjects can have access, loses its character of a highway. The cases cited, and others to the same effect, shew that where a public highway has, by reason of an Inclosure Act, or by other lawful means, been stopped at one end, and so converted into a cul de sac, it does not therefore cease to be a highway. But, where both ends are stopped, so that no one can have access to any part of it without committing a trespass, I see no difficulty in holding that it is no longer a highway. Dealing as we are with a short piece of foot-path, I do not think the arguments ab inconvenienti which have been urged by the defendants' counsel should weigh with us, so as to prevent us from coming to the logical conclusion that this way has ceased to be a public highway.

LINDLEY, J. I am of the same opinion. Mr. Herschell's argument amounts in substance to this, that there cannot be a public highway public access to which has lawfully been stopped at either end. I agree to that. At the same time I am desirous of guarding myself against being supposed to suggest that a public highway can legally be destroyed without resort to the proper statutory means.

Rule discharged.

Solicitors for plaintiffs: *Bailey, Shaw, Smith, & Bailey, for G. & F. Brumell, Morpeth.*

Solicitor for defendants: *Brownlow, for Keenlyside & Forster, Newcastle.*

Neutral Citation Number: [2012] EWHC 1976 (Admin)

Case No: CO/2453/2012

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN MANCHESTER

Manchester Civil Justice Centre
1 Bridge Street,
Manchester M60 9DJ

Date: 19/07/2012

Before :

MR JUSTICE HICKINBOTTOM

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

Between :

Kumar Shamrao Kotegaonkar

Claimant

- and -

(1) The Secretary of State for Environment, Food and Rural Affairs
(2) Bury Metropolitan Borough Council

Defendants

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

(Transcript of the Handed Down Judgment of
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Stephen Sauvain QC (instructed by **Jubilee Law**) for the **Claimant**
Tim Buley (instructed by **the Treasury Solicitor**) for the **First Defendant**
The **Second Defendant** not appearing.

Hearing dates: 28 June 2012

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Judgment
As Approved by the Court

MR JUSTICE HICKINBOTTOM:

Introduction

1. This claim raises this question: can a way which is not connected to another public highway, or to some other point to which the public have a right of access, itself be a public highway?

Legal Background to the Claim

2. Under section 53(2)(b) of the Wildlife and Countryside Act 1981, a surveying authority has a duty to prepare and keep under continuous review a "definitive map and statement" recording public rights of way within the administrative area for which it is responsible, and to modify that map and statement where events listed in section 53(3) occur which appear to the authority to require such a modification. Those events include:

> "(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path…
>
> (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 on 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 such that the land over which the right subsists is a public footpath…".

3. Schedules 14 and 15 set out a procedure by which a member of the public can apply to the authority for a modification of the map and statement. If, upon investigation, the authority is satisfied that a ground for amendment is made out, then it may make an order of modification. However, if an objection to that order is lodged within the specified time period, then the order does not take effect unless and until it is confirmed by the Secretary of State, who may (and usually does) appoint an inspector under paragraph 10 of schedule 15 to make the appropriate decision.

4. Schedule 15 of the 1981 Act and the Rights of Way (Hearings and Inquiries Procedure) (England) Rules 2007 (SI 2007 No 2008) provide the procedure for the inspector to follow. He may decide to confirm the order, with or without modifications (paragraph 7(3) of schedule 15); or not confirm the order, in which event the order does not take effect (paragraph 2 of schedule 15). The inspector must give reasons for his decision (rules 14(2) and 26(2) of the 2007 Rules).

5. By paragraph 12 of schedule 15, if a person is aggrieved by an order which has taken effect, then he may apply to the High Court which may, if satisfied that the order was not made within the powers of the Act, quash the order or the relevant part of it.

Other than by that procedure, the validity of an order "shall not be questioned in any legal proceedings whatsoever" (paragraph 12(3)).

Factual Background to the Claim

6. In the late 1990s, the Claimant Dr Kumar Kotegaonkar wished to purchase a plot of land in Mill Lane, Bury ("the plot of land"), between the Mile Lane Health Centre and a parade of shops, from the Second Defendant ("the Council"). The health centre is privately owned by the Bury Primary Care Trust ("the PCT"). The shops are privately owned by the Claimant and a third party, jointly.

7. Because a route of paving stones was visible, from the health centre car park across the plot of land to the forecourt of the shops, during the negotiations for the sale and purchase of the plot of land, the Claimant's solicitors wrote to the Council, as vendor, to enquire about it. Having earlier noted that no such path was shown on the definitive map, on 24 June 1999 the Council Solicitor wrote to the Claimant's solicitors:

> "In respect of the paving stones which have been laid across the site I have received confirmation from the Borough Engineer that the Health Centre Manager was verbally given permission to place the paving stones along the Council's land and therefore there is no possibility of prescriptive rights being acquired as the Council's consent was initially sought…".

8. The sale and purchase of the plot of land proceeded to completion in 2002.

9. In April 2008, the Claimant sought planning permission from the Council to develop the plot of land for sheltered housing. There was some opposition to this development; but planning permission was granted on 7 August 2008.

10. On 15 August 2008, an anonymous letter accompanied by 30 right of way user forms was submitted to the Council, claiming a public right of way over the plot of land from the health centre car park to the forecourt of the shops. On 16 February 2009, a formal application was made to the Council as the relevant surveying authority under schedule 14 of the 1981 Act for recognition of the claimed path as a public footpath, by a modification order to add the path to the definitive map and statement. The claimed path was from Watling Street (a public highway), over the land on which the health centre stands, and then along the line of paving stones across the plot of land to the forecourt of the shops.

11. The Council duly made an order (the Metropolitan Bury (Public Footpath Number 181, Bury) Order 2010, "the Footpath Order"), but limiting the route of the path to where it left the health centre land, on the basis that there was no identifiable specific route across that land. The public footpath was consequently restricted to the crossing of the plot of land.

12. The Claimant objected to the Footpath Order and, under the provisions of the 1981 Act to which I have referred, the Secretary of State appointed an inspector, Ms Susan Doran ("the Inspector"). Following investigation, she found that the footpath was dedicated both under the provisions of section 31(1) of the Highway Act 1980 (to

which I shall turn shortly), and at common law. She dismissed the objection, and confirmed the Footpath Order; a decision which, effectively, disenables the Claimant from proceeding with the development of the plot of land in accordance with the planning permission he has obtained.

13. In this claim, he seeks to quash the Inspector's decision.

Highways

14. Curiously, "highway" is not defined in any of the Highways Acts, nor does it appear to be defined in any other relevant statute. Even the interpretation provisions of the main statute (now section 328 of the Highways Act 1980) do not define the term: they merely provide that it includes "the whole or part of the highway". Consequently, for the definition of "highway", recourse must be had to the common law.

15. In the words of Wills J in Ex parte Lewis (1888) 21 QBD 191 at 197, a highway is:

> "… a right for all Her Majesty's subjects at all seasons of the year freely and at their will to pass and repass without let or hindrance."

Whilst later cases may have used less flamboyant language, that definition is uncontroversial, well-settled and is adopted as the definition of "highway" in Halsbury's Laws of England, Vol 55, "Highways, Streets and Bridges", 5th Edition (2012).

16. At common law, a "highway" is therefore a public right of way, defined by reference to a number of essential characteristics, namely:

i) The passage must be as of right, not mere permission.

ii) The right must be a right to pass at will.

iii) Although the right may be for a limited purpose - such rights of passage may be for vehicles (i.e. a road), or for pedestrians and animals (i.e. a bridleway), or for pedestrians only (i.e. a footpath) – it must be a right owned by the whole of the public, not merely a portion of the public.

iv) The right must be over a defined route: the common law did not recognise a right to stray or wander over land.

v) The right must be permanent: a highway cannot be extinguished at common law except by way of complete physical destruction, hence the maxim, "Once a highway, always a highway". Short of physical destruction, extinguishment relies upon statutory provisions.

17. Before the Highway Act 1835, the creation of a highway was also dependent upon the common law, which identified two essential elements: dedication by the owner of the land, and acceptance by the public of the way. Each element was important. For a landowner, the dedication of a highway over his land meant that he divested himself forever of the right to exclude members of the public from using the dedicated land for the purposes for passing and repassing. For the public, the dedication of a

highway meant the adoption of a burden as well as a benefit: for example, liability for the repair of almost all highways fell upon the public in the form of the parish in which the highway was situated. It is therefore unsurprising that the common law required an intention both on the part of the landowner permanently to divest himself of some of his proprietorial rights, and on the part of the public to accept the utility of the way.

18. Dedication by a landowner could be by way of express act or declaration; but, even in the absence of clear evidence of such an express intention, it could be inferred from usage by the public and acquiescence in that use by the landowner. Although sometimes referred to as a "presumption", there was no presumption of dedication at common law: the common law simply accepted that a conclusion that dedication by the owner had occurred at some time in the past could be inferred from evidence as to the manner and length of usage (although, at common law, no particular length of time of usage was either necessary or sufficient). Such a conclusion, however, could only be based upon a finding, express or implicit, that the usage of the route in the past had been as a highway.

19. Therefore, for the route to become dedicated as a highway the past usage had to be by the public, and not a mere section of the public: the inference would therefore be thwarted by a restriction of the persons enabled to use the way, e.g. to the inhabitants of a particular parish (Poole v Huskisson (1843) 11 M & W 827). Further, the previous use had to be as of right, and not, e.g., by way of permission of the landowner: so that the inference might also be thwarted by evidence of signs placed on the way making clear that the landowner granted permission for the public to use the route over his land.

20. The common law rules remain important, as will soon become apparent. However, the creation of highways is now the subject of statute.

21. The current provisions are found in the Highways Act 1980. These provisions cover creation by (for example) construction, agreement, declaration and order. In addition, whilst the common law required actual dedication by a landowner (whether express or implied), section 31(1) of the 1980 Act creates a statutory presumption of dedication of a route as a highway, in the following terms:

> "Where a way over any land, *other than a way of such character that use of it by the public could not give rise at common law to any presumption of dedication*, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it" (emphasis added).

Unlike the common law, that provision does create a true legal presumption. If the conditions of the provision are satisfied, then, as a matter of law, dedication is deemed to have occurred; although the presumption is expressly rebuttable, by evidence that there was no intention during that period to dedicate it.

22. As can be seen, this statutory provision retains common law concepts. By virtue of the emphasised words, there can be no deemed dedication of a highway under section 31 if the way over which such dedication is alleged is of such a character that, at common law, use of it could not give rise to a inference of dedication. As I have already indicated, there was no presumption of dedication known to the common law (see paragraph 18 above): "presumption" here clearly means "inference". Additionally, the statutory requirements retain such common law concepts as enjoyment of the way by the public as of right.

The Inspector's Findings and Decision

23. The Inspector found as follows:

i) The health centre land and the land on which the shops are situated – which are joined by the footpath over the plot of land – are in private ownership, and there is no public right of way over either of them. In so far as members of the public enter either piece of land (e.g. to get to the footpath), they do so as licensees. The Inspector dealt with that issue thus:

> "13. There is no legal requirement that a public right of way must lead to publicly owned land, and clearly many public rights of way cross private land. I agree with the Council that the shopping parade is a place to which the public would wish to go (it presently contains amongst other facilities a supermarket and Post Office), indeed I consider the public would have a reasonable expectation to go there. The Health Centre car park may also be considered to be a place to which the public may wish to resort.
>
> ….
>
> 16. On balance I consider that in connecting two places to which the public resort the [path] is not precluded from existing as a highway.
>
> ….
>
> 37. It was suggested that if the Order were to be confirmed, the PCT could fence off their land at point B [i.e. where the path meets the PCT land]. However, this is not a matter relevant to my consideration of whether or not the tests have been met and a right of way subsists."

In the light of those extracts, I should perhaps say, for the avoidance of doubt, that, even if a public right of way did not exist across the plot of land, members of the public could very easily walk from the health centre to the shops, along Watling Street and Mile Lane (both public highways), although the walk may be a few yards longer. The path would do no more than effectively cut off the short corner made by those two public highways.

ii) The relevant date for "calling into question" the existence of the footpath was 2008, so that, for the purposes of section 31, it was necessary for the proponents of the footpath to show uninterrupted use of the path as of right by the public in the 20 year period from 1988.

iii) There had been a "longstanding short cut across the [plot of] land, as reflected by the Order" which had been used, uninterruptedly, by members of the public for the relevant 20 year period.

iv) The key issue was whether the public use of the footpath had been with the permission of the landowner. It had not.

v) There was no evidence to rebut the presumption of dedication consequently arising under section 31.

24. There is no challenge to these findings of fact. On the basis of them, the Inspector found that the footpath was deemed to have been dedicated to the public as a highway, under section 31.

25. In the alternative, she held that an implication of dedication arose under the common law. However, before me, it was common ground that, if dedication could not be deemed under section 31, then it could not be inferred at common law. The alternative ground for confirming the Footpath Order therefore adds nothing of substance; and I need not deal with it further.

The Issue

26. The Inspector's findings of fact set out above satisfy many of the requirements of section 31: they amount to findings that the way over the plot of land had been enjoyed by members of the public without interruption for a period of 20 years, and there was insufficient evidence of intention not to dedicate it during that period.

27. However, there is a caveat to section 31, namely that the relevant way must not be "a way of such character that use of it by the public could not give rise at common law to any presumption of dedication". In this case, Mr Sauvain QC for the Claimant submitted that this path was such a way; because, at common law, a route that is inaccessible to the public as of right cannot be a public highway: a highway has the essential characteristic of being open to passage and repassage by all members of the public at will, and a way to which the public has no right of entry at either end or at any point along its length cannot be a public highway at common law, as a matter of law.

28. Mr Buley for the Secretary of State submitted that it could. He accepted that the fact that a route was inaccessible to the public as of right may be relevant to the question of whether the landowner had an intention to dedicate – or, in the terms of section 31, whether the landowner could rebut the presumption of dedication after 20 years usage. However, he submitted that the common law does not say that, as a matter of law, a route that is inaccessible to the public as of right cannot be a public highway.

29. There is an additional claim, that the Inspector's reasons were deficient – but that is not a claim of substance, because, whatever her reasons, the Inspector was either right

or wrong in proceeding on the basis that a route that is inaccessible to the public as of right is capable of being a public highway.

30. It is that issue upon which this claim falls to be decided.

The Characteristics of a Highway

31. The common law, coyly and somewhat surprisingly, does not appear to have any authority directly on this issue; and the authorities to which I was referred are, in the main, old and of limited assistance. The submissions of Mr Sauvain and Mr Buley were consequently based largely upon general principles, as, inevitably, is this judgment.

32. As a matter of principle, in my judgment, the concept of an "isolated highway" (i.e. a highway that is unconnected to any other highway, either directly or via land over which the public have a right of access) is incongruous, because such a way does not have all of the requisite essential characteristics of a highway, for it is not a way over which there is "a right for all Her Majesty's subjects at all seasons of the year *freely and at their will* to pass and repass without let or hindrance".

33. Where, as here, the only people who can lawfully pass or repass along the relevant route are those with a licence to enter and cross other land, the public do not have a right to pass over that route "freely and at their will". They can only do so at the will of the owners of the land over which they have to exercise a license to get to the way. As a matter of law, those owners may, if they wish, withdraw the licence at any time; or, in more practical terms, physically block access to the way by walls, fences or other hindrances, with the result that the way is unusable by all or possibly any members of the public. A highway, once in existence, has the additional characteristic of permanence, in the sense that it cannot cease to exist at common law, short of physical destruction. Where access to the way might lawfully be blocked at any time by adjacent landowners, the public's ability to pass along the way is not as of right and is of such fragility that it simply does not and cannot have the necessary characteristics of a highway.

34. The fact that, in practice, the owners of the land at either end of the path may not have put any restrictions on those who are allowed to cross their land, either currently or in the recent past, is not to the point. The definition of a highway is determined by the nature of those who use the way; they must have a right, practically enforceable, to do so.

35. The position would of course have been different in this case if there was additionally a public right of way over the health centre land and/or the land on which the shops are situated, joining one or both ends of the route over the Claimant's land to the public highway; but the Inspector made an express finding that that was not the case.

36. In the terms of section 31, in my judgment a way to which the public has not had access from another highway or from other land over which the public have access as of right fails to meet the statutory criteria because, on a true analysis of the common law principles upon which the statutory criteria are founded, (i) it has not been enjoyed "as of right" for the requisite (or, indeed, any) period; and (ii) it is a "a way of such character that use of it by the public could not give rise at common law to any

presumption of dedication". These are not, in truth, distinct deficiencies; but rather two reflections of the fact that an essential characteristic of a highway is that it must be a way enjoyed by the public as of right.

37. There is good justification for that principled approach. A public highway, once in existence, imposes burdens on the public, including keeping the way free from obstructions and, often, the burden of repair and maintenance. There seems to me no good reason why the common law would or should impose such burdens on the public, unless the public has the legal right, practically enforceable, to use the way without any let or leave. If a philanthropic landowner wishes to allow people to cross his land, in circumstances falling short of those necessary to create a public highway, then he may do so by other legal means, such as a licence, with possibly a wide scope of beneficiaries, and possibly of long-standing if not indefinite duration. However, he cannot, for example, dedicate a route across his land as a public highway if its use is restricted to a portion of the public, or if the route is insufficiently defined. He cannot create a public highway, with the obligations that that imposes on the public, if that which he wishes to give away falls short of the criteria required by law for a highway to exist.

38. If that is the direction that principle points, are there any authorities that point another way?

39. I should at the outset thank Mr Sauvain and Mr Buley for their assiduous and helpful research, and their submissions on the cases they have found. I am confident that they have missed none of relevance.

40. I appreciate that the point appears never to have been directly in issue; but it is noteworthy that in none of these cases has a way that is unconnected to any other highway, either directly or via land over which the public have a right of access, been found to be a public highway; nor, in my judgment, do any suggest that such a way might, as a matter of law, be a public highway.

41. The authorities grapple with (and, in my respectful view, occasionally confuse) two issues, namely (i) the essential characteristics of a highway (a question of law), and (ii) the intention of the landowner to dedicate (essentially a question of fact, for determination on the available evidence). The two issues of course are interrelated, because some factors (such as permission) are relevant to both, and the nature of the route may generally be evidence for or against its earlier dedication as a highway: as I have indicated, a finding of dedication can only be based upon a finding, express or implicit, that the usage of the route in the past had been as a highway with all the necessary characteristics that that entails.

42. However, the issues are nevertheless analytically discrete; they have different bases (the former being a question of law, and the latter a question of fact); and, in some circumstances, it may be important to consider them separately. For example, whatever a landowner's intention, as I have indicated, he cannot dedicate (expressly or by implication) a route as a public highway, if that route does not have the necessary attributes to be a highway.

43. I have set out above (paragraph 16) the essential characteristics of a highway. Most of the cases to which I was referred considered whether there was a further such

characteristic, namely whether, as a matter of law, a highway must have a *terminus a quo* and a *terminus ad quem*, i.e. a public terminus at either end.

44. Early cases suggested that that might be a legal requirement for a highway. However, by 1925, it was well-established that a cul-de-sac could be a public highway. In Moser v Ambleside Urban District Council (1925) 89 JP 118 at page 120, having approved a passage from another passage from Wills J in Eyre v New Forest Highway Board (1892) 56 JP 517, Atkin LJ said:

> "It has been suggested that you cannot have a highway except insofar as it connects two other highways. That seems to me that too wide a proposition. I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same highway…".

45. Two points are worthy of note from that passage. First, the reference to "a place of popular resort" marks the difficulty of proving that a landowner intended to dedicate a way for public use over his land, where that way is from a place where the public have a right to be (such as public highway) to a place where the public have no right to be. The case makes clear that that is not a legal bar, but only an evidential challenge to the person asserting that a highway has been created; but it may be a substantial challenge in a case concerning a cul-de-sac in a rural place (see, e.g., Attorney General v Antrobus [1905] 2 ChD 188, especially at pages 206-7). It will be easier to prove if the cul-de-sac goes to "a place of popular resort", such as a local beauty spot.

46. Second, Atkin LJ did not suggest that a way without any connection to a highway or other land to which the public have a right of access might be a highway; indeed, he referred specifically in the case of the cul-de-sac to the ability "to return on your tracks by the same *highway*" (emphasis added).

47. The other main authority to which I was referred, at some length, was Bailey v Jamieson (1875-76) LR 1 CPD 329, an old and far from easy case. It was refreshing to see that the case, to show cause on a rule nisi made by Pollock B at the Newcastle Spring Assize, was heard in a single day by a Divisional Court of Common Pleas of three judges (Lord Coleridge CJ, Denman and Lindley JJ), with each judge giving judgment in a single paragraph that same day. It is on the other hand dispiriting that, over 130 years later, academic writers still debate what the case decided, a debate which, by virtue of this case, has now spread to this court.

48. The facts, at least, were straightforward. The case concerned a public highway in the form of a footpath from Sheepcote Rectory to the village of Bothal, in Northumberland. However, as a result of stopping up orders properly made by the local quarter sessions in respect of other highways, there ceased to be any access to the footpath from a highway, or any other land to which the public had access. That the earlier stopping up orders had left this isolated footpath appears to have been an error: if a stopping up order had been sought in respect of this footpath also, it seems inevitable that it would have been granted. However, it was not sought. The evidence was that the defendants had no permission from any adjacent landowners to be on

their land; so that they could only access the footpath by trespassing on the adjacent land to get to it.

49. The defendants relied upon the common law maxim, "Once a highway, always a highway". They submitted that the public footpath could only be extinguished by a stopping up order or other device provided by statute. However, the court discharged the rule, holding, as the headnote says:

> "A way ceases to be a 'public highway' where the access to it at either end has become impossible by reason of ways leading to it having been legally stopped up."

50. Mr Buley submitted that this case supported his submission that, as a matter of law, at common law a way isolated from a highway or other land to which the public had a right of access could be a highway, the difficulty for the proponent of such a highway being not legal, but evidential. Where a way is isolated from highways and other land over which the public have the right of passage or access, for obvious reasons it may be evidentially difficult to show that there was an intention to dedicate the land for public passage.

51. In support of that proposition, and in support of his interpretation of Bailey v Jamieson, he relied on two passages from Mr Sauvain's own book, "Highway Law", 4th Edition (2011). At paragraph 1-18, the author says:

> "The existence of a public right of passage across land implies some reason for the public to exercise the right of way. Traditionally, highways have been links between towns and villages. Thus, the need for a public terminus at either end (a *terminus a quo* and a *terminus ad quem*) has been considered in the past as a necessary characteristic of a highway. This must, however, be considered with some caution. Certainly it has been held, probably as a rule more of convenience than of legal principle, that if access to a highway is cut off at both ends, as a result of stopping-up orders, the remaining section, to which the public could only have access by trespassing over private land, ceases to be a highway… Essentially, the existence of a public terminus is an important element in the evidence to prove a highway: "It is always a strong observation to a jury that the way leads nowhere" (per Crompton J in Bateman v Bluck (1852) 18 QB 870…). However, there is certainly no rule of law that a cul-de-sac may not be a highway, whether it be in a town or in the country. In the latter case, however, a practical evidential problem may arise in establishing some reason for the creation of the public right of way."

52. He then refers to Moser v Ambleside Urban District Council and Eyre v New Forest Highway Board, before proceeding:

> "Where no obvious reason for public use of a cul-de-sac appears, then other evidence (for example, of repair) will

> assume greater importance in establishing that the road is a highway…".

53. The second passage is from the chapter on "Extinguishing and Diversion of Highways". Having indicated that the common law did not recognise any concept of abandonment of a highway, except where the route had been physically destroyed, the text continues (at paragraph 9-05):

> "A more difficult point is whether a highway, which becomes isolated through the physical destruction or legal stopping up of all its connecting highways, remains a public right of way even though the public no longer have access to it. In Bailey v Jamieson it was held that a highway, connected at both ends to a highway which was then stopped up, itself ceased to be a highway. In that case the highway had become isolated and there was no question of any other land being served by the highway and the decision seems to emphasise the maxim that a highway needs a *terminus a quo* and a *terminus ad quem*. However, that maxim is most commonly applied to the need for evidence of public utility in order to establish public user, and is not an essential attribute of a highway. The extent of the principle in Bailey v Jamieson, which seems on its facts to have been based on pragmatism, must be uncertain."

54. A footnote then continues:

> "A case for stopping up such a highway on the grounds that its retention is unnecessary would seem, however, to be unanswerable."

55. Mr Sauvain is, thankfully, still alive and well; and Mr Buley relied upon those passages, not for their inherent authority, but for the reasoning they deploy.

56. Unfortunately, I do not accept that reasoning; nor do I accept the premise that Bailey v Jamieson supports the Secretary of State's cause. Indeed, in my view, it substantially undermines it.

57. The judgments in Bailey v Jamieson are short; but each makes clear that the footpath in question, having been isolated from other highways in the manner I have described, ceased to be a highway because it ceased to have all of the essential characteristics of a highway. The Lord Chief Justice said (at page 332-3):

> "It is necessary, therefore, to determine whether or not [the footpath] remains a highway. I am of opinion that it does not. Its character of a public highway is altogether gone."

Denman J agreed, and added that, despite the dictum, "Once a highway, always a highway":

> "… I think we are compelled to hold that this is a case where that which formerly was a highway, but which, though it has

> been not been stopped by statutory process, has, by reason of legal acts at either end of it, ceased to be a place which the Queen's subjects can have access, loses its character of a highway."

Lindley J also agreed, adding:

> "[The plaintiff's] argument amounts in substance to this, that there cannot be a public highway public access to which has lawfully been stopped at either end. I agree to that."

58. Each judgment was therefore apparently firmly based on the premise that a way which is not connected to another public highway, or to some other point to which the public have a right of access, cannot itself be a public highway because it lacks an essential characteristic of a highway.

59. Mr Buley made two submissions in respect of that.

60. First, he submitted that this case was distinguishable from Bailey v Jamieson, because in that claim the defendants could not get to the footpath without trespassing over adjacent land, whereas in this case members of the public could get to the footpath, from either end, by exercising a licence granted to them to do so by the owners of the land at either side. Indeed, the Inspector appears to have found that the public had exercised such a licence at one end of the path or the other or both for over 20 years, although not such as to create a public highway over either the health centre land (express finding of no public right of way) or the land on which the land was situated (no finding either way).

61. However, this difference between the cases is immaterial. As I have already indicated, the public have no *right* to access the footpath in this case, over either parcel of adjacent land. They may lawfully be prevented from going onto the health centre land or the shopping parade today. It is certainly not fanciful to suggest that the licences might be withdrawn: before the Inspector, both landowners objected to the right of way over the plot of land. On the other hand, in Bailey v Jamieson the defendants or others could have been granted a licence by adjacent landowners to access the path in that case. But those circumstances cannot affect the legal status of the relevant footpath, which is dependent upon the public having a *right* of access to it. In neither Bailey v Jamieson nor this case, irrespective of licences that may or may not have been given to members of the public to cross the adjacent land, was there any such right.

62. Second, Mr Buley relied upon the judgment of the Lord Chief Justice in Bailey v Jamieson, with which the rest of the court agreed, that the relevant characteristic of a highway that was missing in that case was the fact that the footpath did not have a *terminus a quo* and a *terminus ad quem*. He said (at page 332):

> "… [T]o constitute a highway, there must be some notion of a passage which begins somewhere and ends somewhere, and along which the public have a right to drive or to walk from its beginning to its end. Here, that notion is entirely absent."

63. That is a reference to the early cul-de-sac cases (see paragraphs 43-46 above), and, submitted Mr Buley, it is now accepted that, in the cul-de-sac cases, the absence of a terminus is not legally fatal for the proponent of the footpath; it is merely an evidential challenge. In this case, on the evidence, the Inspector found that the owners of the plot of land had intended to dedicate the land to the public. That finding is not challenged.

64. I accept that, in his judgment, Lord Coleridge relied upon old cases which suggested that it was a necessary requisite for a highway to have a *terminus a quo* and a *terminus ad quem*; and that, at least since 1925, that has not been a legal requisite (see paragraph 43 above). However:

i) That quoted passage has to be considered in the context of the Lord Chief Justice's judgment as a whole. He said of the cul-de-sac cases:

> "The conclusion to which the court came in those cases was that the stoppage of one end did not make a road cease to be a common highway; for, though it thereby became a cul-de-sac, the public still might have the right to go over it to the end and back."

When read as a whole, the full judgment makes it clear that the prevention of the right of access to the public at either end of a way *does* deny that way the attributes necessary for it to be a public highway.

ii) In any event, although they agreed with him, the other two judges of the court made it abundantly clear that it was that missing characteristic that prevented that way being a highway.

65. Nor am I impressed with a number of suggestions in Mr Sauvain's book, relied upon by Mr Buley. I do not agree that Bailey v Jamieson emphasises the now outdated proposition that a highway must have a *terminus a quo* and a *terminus ad quem*. Rather, in my view, the judgments when read as a whole, properly emphasise the need for a highway to be connected to another highway, or to other land to which the public have a right of access. Nor do I consider that, when properly construed, Bailey v Jamieson is at all focused on the evidential challenge for those seeking to show that a way has been dedicated as a highway. Nor do I consider that the decision is based upon pragmatism, rather than principle. Nor do I agree, so far as Mr Sauvain's book or Mr Buley's submissions suggest, that Bailey v Jamieson is wrong.

66. When properly interpreted, in my judgment, the decision in Bailey v Jamieson is authority for the common law principle that a way which is not connected to another public highway, or to some other point to which the public have a right of access, cannot itself be a public highway because it lacks an essential characteristic of such a highway namely a right for the public to pass and repass over the route at will.

67. Mr Buley relied upon two other authorities with which, for the sake of completeness, I should deal.

68. First, he relied upon the only authority in which Bailey v Jamieson appears to have been cited, namely Great Central Railway Company v Balby-with-Hexthorpe Urban

District Council [1912] 2 ChD 110. The case concerned various sections of a highway, one issue being whether the extinguishment of public rights of way over one section (the yellow section) resulted in the extinguishment of such rights in another section (the red section). Joyce J said (at page 123):

> "[The railway company] say reasonably, I think, by reason of the case of Bailey v Jamieson, that if both ends of a piece of land, which is subject to a public right of way, are closed, and there is no access to the intervening piece for the public, then the latter as a matter of fact is also closed, although perhaps, technically there may still be some public legal rights existing in respect of it."

69. Mr Buley submitted that this suggested that Bailey v Jamieson was decided on the basis that the absence of any connection with land to which the public had access was one factor taken into account in respect of the question of fact as to intention to dedicate, not in respect of the question of law as to the essential characteristics of a highway. However:

i) Although the passage I have quoted is not unambiguous, I am not at all sure that that was Joyce J's understanding of Bailey v Jamieson; because he immediately continued:

> "I think, however, that if the rights of way are extinguished over the yellow, then, on the authority of this case of Bailey v Jamieson, the railway company would have established that the public rights over the red and yellow were gone."

That suggests that they would have "gone" as a matter of law.

ii) In any event, his comments appear to have been *obiter dicta*; and, in so far as they suggest that Bailey v Jamieson did no more than indicate that, in assessing whether a landowner had an intention to dedicate a way to the public the court had to take into account all circumstances including the fact that a way was isolated, then I respectfully consider them to be wrong.

70. The second authority was the recent case of Newhaven Port and Properties Ltd v East Sussex County Council [2012] EWHC 647 (Admin). This concerned the registration of West Beach, Newhaven, as a village green under the Commons Act 2006. The Commons Act concerns the rights of "a significant number of inhabitants of any locality… [to indulge in] lawful sports and pastimes on the land for a period of at least 20 years." One issue in the case – there were many – was whether such a right could exist in respect of land to which the public had no right of access. Ouseley J considered that the absence of any right of access was not determinative of the issue as to whether there was a right to perform sports and pastimes: it would be merely evidence that there was no such right (see [163]-[164]).

71. I can deal with the case shortly. Although of course there are some parallels between the scheme for creation and recognition of highways, and that for the creation and recognition of village greens, the schemes have obvious differences. In particular, as

I have explained, for a way to be a highway, it must have certain essential characteristics. One, retained by section 31, is that it must be available to the whole of the public as of right. A village green certainly does not have to have the same characteristics. The comments of Ouseley J about the intention to dedicate on the part of landowners in each scheme does not bear on the question of whether access to a highway or other land to which the public have a right to access is a necessary characteristic of a highway. For those reasons, I do not consider the Newhaven case to be of any material assistance to me.

Conclusion

72. Therefore, as a matter of law, on principle and authority, I do not consider that a way to which the public has no right of entry at either end or at any point along its length can be a public highway at common law.

73. The Inspector, in directing herself that it was capable of being a public highway, misdirected herself in law. She was not referred to Bailey v Jamieson; and I am afraid that, understandably but erroneously, she misconstrued the relevance of the "place of public resort" in the context of cul-de-sac cases, and wrongly applied it to this case. In my judgment, to be a highway, it is insufficient for a way to be linked to a place to which "the public would have a reasonable expectation to go" or "a place to which the public may resort", as the Inspector considered to be the case: a highway, by definition, requires to be linked to a highway or to other land to which the public have a right of access.

74. For the reasons I have given, the Inspector unfortunately erred; and, as a result, I am satisfied that the Footpath Order was not made within the powers of the 1981 Act.

75. I consequently allow the claim, and quash that Order.