

MARGARET MAYHEW v. SECRETARY OF STATE FOR THE ENVIRONMENT

QUEEN'S BENCH DIVISION (Potts J.): July 10, 1992

Highways—Wildlife and Countryside Act 1981—Reclassification of footpaths to by-ways open to all traffic—Evidence now relied upon was available at time of previous classification—Whether evidence within section 53(3)(c)—Whether Secretary of State for the Environment had power to call in decision to confirm order after inspector appointed to hold inquiry and determine appeal

The Wildlife and Countryside Act 1981 imposed a duty on the Hampshire County Council as a surveying authority to reclassify roads used as public paths. Three such roads were shown on the 1964 edition of the definitive map as footpaths. After a review of the documentary evidence, the Hampshire County Council concluded that the three paths were ancient highways. No action was taken until 1985 when the council considered a submission from the Horndean Parish Council that the footpaths should be upgraded to bridleways. The council disagreed, but took the view that they should be reclassified as by-ways open to all traffic and that the earlier classification of 1952 when they had been classified as footpaths was wrong. The council therefore made the Hampshire (East Hampshire District No. 2) (Parish of Horndean) Public Path Modification Order 1986 dated October 21, 1988. It was opposed. Accordingly, the Secretary of State for the Environment directed an inspector to hold a public inquiry and subsequently directed that the appeal be determined by him instead of by the inspector. An inquiry was held. The applicant was one of several objectors. It was accepted by all parties at the inquiry that the evidence relied on to support the order had existed for some time and no fresh evidence had been found recently. The failure to pick up the facts at the earlier reviews was inexplicable. The inspector was satisfied that vehicular rights existed over the footpaths and recommended that the order be confirmed. The Secretary of State accepted the recommendation and confirmed the order. The applicant applied to the court questioning the validity of the order.

Held, the word "evidence" in section 53(3)(c) of the Wildlife and Countryside Act 1981 must be given its full and natural meaning and should not be restricted to "new evidence" or to "evidence not previously considered." The "event" in the subsection is concerned with the finding out of some information which was not known to the surveying authority when the earlier definitive map was prepared. In the 1981 Act, the power of the surveying authority under section 53(2) is not to make such modifications as may appear to it to be desirable. It is to make such modifications to the map and statement as appear to be requisite in consequence of the occurrence of any of the events specified in subsection (3). Section 53 limits the modifications which ought to be made in consequence of the occurrence of a relevant event to those which would give effect to the rights of way which are found to exist rather than those which might be thought to be suitable or desirable. The Act recognises three categories of way only. If vehicular rights over a way are "ascertained" by the "discovery of evidence," the surveying authority must modify the map so as to show that way as a by-way open to all traffic. Regrading is not the conversion of a cartway into a motorway but rather the recording of vehicular rights of passage. Vehicular use changes over the years. The particular mode of propulsion of the vehicle is not relevant. The criticisms of the confirmation of the order were misconceived and it was therefore within the powers of the Act. The application failed.

Legislation construed:

Wildlife and Countryside Act 1981, section 53 and Schedule 15. These provisions are set out at page 347, *post*.

Cases cited:

- (1) *Fowler v. Secretary of State*, unreported, November 20, 1991.
- (2) *Kain v. Norfolk* [1949] 1 Ch. 163.
- (3) *Ladd v. Marshall* [1954] 1 W.L.R. 1489.
- (4) *R. v. Secretary of State, ex p. Riley* (1989) J.P.L. 921.
- (5) *R. v. Secretary of State, ex p. Burrows, R. v. Secretary of State, ex p. Simms* [1991] 2 Q.B. 354.

Application by Margaret Mayhew under paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981 to question the validity of the Hampshire (East Hampshire District No. 2) (Parish of Horndean) Public Path Modification Order 1988 dated December 30, 1986, and its confirmation. The ground of challenge was that the confirmation of the order was misdirected by law. In particular, that:

- (1) the Secretary of State had no jurisdiction to confirm the order himself;
- (2) the county council failed to comply with certain statutory formalities; and
- (3) the evidence relied on when making the order did not fall within section 53(3)(c) as it was not fresh evidence.

The applicant in person.

N. Fleming, Q.C. for the respondent.

J. Howell appeared as *amicus curiae*.

POTTS J. In 1969 Horndean Parish Council wrote to the Hampshire County Council querying the status of various footpaths shown on the 1964 edition of the definitive map of Hampshire. The parish council expressed the view that the correct status of footpath 13 (Ham Lane), footpath 47 (Coldhill Lane) and footpath 48 (Tagdell Lane) appeared to be that of: "roads used as public paths (R.U.P.P.s)."

After a review of documentary evidence, the county council concluded that the three paths were ancient highways. In 1982 an individual claim, supported by claim forms, was submitted to the county council requesting the upgrading of footpath 13. No action was taken until 1985 when the county council considered a further submission by the parish council that footpaths 37, 47 and 48 should be upgraded from footpaths to bridleways. The county council did not accede to this submission. It took the view that the available historical evidence, namely, the consistent portrayal of the lanes in reputable topographic mapping, from 1810 onwards, the enclosure map of 1816, the Tithe map of 1838 and the Award of 1843, on a balance of probabilities, justified the classification of the paths as by-ways open to all traffic and that the earlier classification of 1952 when they had been classified as footpaths was wrong:

A by-way open to all traffic means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used. (Section 66(1) of the Wildlife and Countryside Act 1981.)

Thus, on December 30, 1986, the county council made:

The Hampshire (East Hampshire District No. 2) (Parish of Horndean) Public Path Modification Order 1986,

the effect of which, if confirmed without modification, would be to modify the definitive map and statement by regrading Horndean footpaths 13, 47 and 18 (the Horndean footpaths) as by-ways open to all traffic because it appeared:

to the Hampshire County Council (hereinafter called the Surveying Authority) that the Hampshire National Parks and Access to the Countryside Act 1949—section 33 Second Review of the Definitive Map and Statement (dated 1st January 1964) requires modification in consequence of the occurrence of an event specified in section 53(3) of the Act namely:

That the Highways shown on the Definitive Map and Statement as Horndean Footpaths Nos. 13, 47 and 48 ought to be there shown as By-ways open to all Traffic.

The order was opposed. Accordingly, the Secretary of State directed Major General Sexton to hold a public local inquiry pursuant to paragraph 10(1) of Schedule 15 to the Wildlife and Countryside Act 1981 to hear representations relating to the order. By a letter dated February 20, 1989, in the purported exercise of his powers under paragraph 10(2) of Schedule 15 to the Act he directed that the appeal: "shall be determined by the Secretary of State instead of by an inspector" in view of the complex legal issues raised by the case.

The inquiry was held on February 21 and 22, 1989. There were seven objectors, including the present applicant, Mrs. Mayhew, and one supporter. The county council was represented and submitted that the evidence relied on to support the order had:

existed for some time and no fresh evidence had been found recently. The failure to pick up the facts at the reviews was inexplicable. The county council, however, had to deal with about 6,500 rights of way (although there was some duplication in this total because of different numbering at parish boundaries) and some 3,100 route miles of path. In consequence heavy reliance was placed on the work of parish councils.

This submission appears to have been accepted on all sides at the inquiry. The present application has proceeded on the basis that the documentary evidence relied on by the county council to make the modification was at all relevant times within the council's archives. The inspector heard evidence from Mr. Lamb, Deputy Council Archivist, and it was common ground at the inquiry and in this court, that consideration was not given to this documentary material until after 1969.

Having heard evidence and submissions, the inspector was satisfied that vehicular rights existed over the footpaths and recommended that the Modification Order be confirmed. The Secretary of State (letter dated December 20, 1989) accepted this recommendation:

Accordingly, the Secretary of State having carefully considered the Inspector's findings and recommendation finds that he agrees with the Inspector that, despite the lack of user evidence, the weight of docu-

mentary evidence strongly indicates that the right of vehicular passage exists on each of the rights of way included in the order. Consequently, the Secretary of State accepts the recommendation of the inspector and he hereby confirms . . . the Order.

Mrs. Mayhew was and is a person aggrieved by the order. She has applied to the court questioning the validity of the order under the provisions of paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981. The court may only quash an order if it is:

satisfied that the order is not within (the powers of sections 53 and 54 of the Act) or that the interests of the applicant have been substantially prejudiced by a failure to comply with (the requirements of Schedule 15).

Sections 53 and 54 are to be found in Part III of the Wildlife and Countryside Act 1981 (the 1981 Act). Part III is concerned with "Public Rights of Way" and sections 53 to 58 relate to "Ascertainment of public rights of way." Section 53 is material to the present application. It imposes a duty on the surveying authority (here the Hampshire County Council) to: "keep (the) definitive map and statement under continuous review."

Section 53 provides:

- (1) In this Part "definitive map and statement," in relation to any area, means, subject to section 57(3),—
 - (a) the latest revised map and statement prepared in definitive form for that area under section 33 of the 1949 Act; . . .
- (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—
 - (a) the coming into operation of any enactment or instrument, or any other event, whereby—
 - (i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended;
 - (ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or
 - (iii) a new right of way has been created 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 path;
 - (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 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.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to—

(a) the position and width of any public path or by-way open to all traffic which is or is to be shown on the map; and

(b) any limitations or conditions affecting the public right of way thereover.

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appears 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 applications under this subsection.

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other order under subsection (2).

Paragraph 10 of Schedule 15 to the Act is also relevant:

10(1) A decision of the Secretary of State under paragraph 6, 7 or 8 shall, except in such classes of case as may for the time being be prescribed or as may be specified in directions given by the Secretary of State, be made by a person appointed by the Secretary of State for the purpose instead of by the Secretary of State; and a decision made by a person so appointed shall be treated as a decision of the Secretary of State.

(2) The Secretary of State may, if he thinks fit, direct that a decision which, by virtue of subparagraph (1) and apart from this subparagraph, falls to be made by a person appointed by the Secretary of State shall instead be made by the Secretary of State; and a direction under this subparagraph shall state the reasons for which it is given and shall be served on the person, if any, so appointed, the authority and any person by whom a representation or objection has been duly made and not withdrawn.

The nature of the applicant's case is to be found in paragraphs 2 and 3 of her grounds. It is right that I should set out those grounds in full:

There are three "green lanes" at Horndean. They have been recorded

by the Hampshire County Council on the definitive map for many years as "Footpaths" with no right of way for vehicles. They have never been used by vehicles within living memory. The County Council are now engaged in a reclassification of country lanes. Their officers have looked into old maps and have made a Modification Order by which they have upgraded these lanes so as to become "By-ways open to all traffic." This Modification Order has been confirmed by the Secretary of State. It opens the lanes up to use by motor-cyclists and four-wheel drives. The Horndean Parish Council challenge this Order and its confirmation. They say that, on the re-classification, the lanes should be recorded only as "bridleways" for walkers and riders but not for vehicles.

In making the Modification Order the Hampshire county council misdirected themselves in law and were supported afterwards by an inspector in his report and by the Secretary of State.

In a statement read to this court the applicant said:

My main concerns at the present interpretation of the law are that:

(a) Peaceful walks in the countryside are under threat on these public rights of way.

(b) Such lanes are usually very ancient and should be protected and respected environmentally. Many have been severely damaged already, *e.g.* The Ridgeway, as well as local paths.

(c) B.O.A.T.s fall between highway and rights of way law to their detriment. Road Traffic Orders have been offered as a solution. They are not. In the case of Ham, Tagdell, Coldhill and Crouch Lane, the Rights of Way Committee has dismissed the need for Road Traffic Orders. There is concern at the cost and difficulties of implementation. They have been used in only six or so of the 540 lanes in Hampshire. The Rights of Way Department has a budget of £50,000 for the County and has recently been given responsibility for repair. One lane alone is costing £26,000. It cost £4000 to implement a Road Traffic Order and another £1500 if gates and signs are needed. Landowners are not always happy to have signs erected. The County officers have to liaise with the police to provide supervision and it is difficult for them to supply manpower.

(d) There is no clear legislation to protect or repair surfaces (though I understand that in the last month the Rights of Way Department, with their limited budget, has been given responsibility, in Hampshire at least).

(e) No distinction is made at present between the types of vehicular traffic which may use such lanes. This means that any vehicle of any weight may use them.

(f) There is a real danger to walkers and horseriders for traffic on such narrow, unsurfaced lanes.

(g) Rallies involving up to 12 vehicles at any time of day or night are legal providing they do not involve racing. (This has happened locally at 2 a.m.)

The present interpretation of the law seeks to give rights to modern-day traffic on what are essentially rights of way to be used mainly as footpaths and bridleways. In seeking to do so an imbalance has been created and too little consideration given to the concerns I have men-

tioned, and to the "main" users. I hope that this present case will result in a redress of the balance.

The applicant makes certain specific complaints. The first relates to paragraph 10 of Schedule 15 to the Act. It is said that it was for the inspector himself to confirm or refuse to confirm the Modification Order, that by his letter of December 20, 1989, the Secretary of State himself purported to confirm the Order and that he had no jurisdiction to do this. In my view, paragraph 10(2) is clear in its terms and gave the Secretary of State power to call the decision in. He did so by the letter dated February 20, 1989, because: "of the complex legal issues raised by the case." He was fully entitled to take this course and determine the Order himself. The complaint is without substance.

Next, it is suggested that the county council failed to comply with the statutory formalities. Paragraph 11 of the inspector's report is cited. It is in these terms:

Formalities

Hampshire County Council confirmed that all the statutory formalities had been complied with.

No points were raised.

The applicant states:

But we presume that the Inspector is there referring to the statutory requirements in section 53 that have to be satisfied before the County Council can make a modification order. These are not "formalities" at all, but conditions precedent to the making of an Order.

This complaint is misconceived and results from a confusion between the formal requirements of Schedule 15 and the substantive requirements of section 53. Paragraph 11 is concerned with "formalities." This word is used by the inspector. The formalities referred to are those set out in Schedule 15 to the Act, particularly paragraph 3. Paragraph 11 does not refer to and is not concerned with the requirements of section 53. It is said that:

In paragraph 53 of his report, the inspector said "I have assumed that the Order is not ultra vires." We know nothing about ultra vires and did not raise it. We suggest that the Order would be ultra vires if the county council had not complied with the "statutory formalities." The inspector was misled into thinking they had been complied with.

Paragraph 53 of the report is perfectly clear:

I have considered the legal submissions of counsel for the principal objectors. They are matters for the Secretary of State and for the purpose of this report on the evidence for and against the existence of vehicular rights over the paths, I have assumed that the Order is not ultra vires.

At paragraphs 4, 5 and 6 of the decision letter the Secretary of State considered the legal submissions and requirements of section 53. As indicated above, he was entitled to do this. I therefore reject this complaint.

Paragraph 5 of the decision letter is in these terms:

(a) that it was for the surveying authority under section 53(2)(a), under which the order was made, to make such modifications to the

map and statement as appeared to them to be “requisite” in consequence . . . of any of the events specified in section 53(3);
(b) section 53(3)(c) provides for an authority to discover evidence not previously considered.

It is submitted that the evidence relied on by the county council when the order came to be made did not come within section 53(3)(c). The evidence relied on, it is said, was not fresh evidence; it had existed for “an inexplicable period of time” (inspector’s report, paragraph 36), and at the time of the earlier review. Consideration of it by the surveying authority in 1985/1986 did not constitute the discovery of evidence so as to require the authority to take steps to modify the map and statement in accordance with the provisions of section 53(2)(a). Mr. Howell submits that:

The purpose of section 53(3)(c) was not merely . . . a review based on a reconsideration of evidence already considered.

(1) section 53(3)(c) contemplates two categories of evidence “available” to the authority: the evidence it discovers and other relevant evidence available to it. The difference between the two is that the former is not available until its discovery: that is the event which triggers the review.

(2) Parliament intended that a review should only be triggered by “the occurrence of an event,” that is to say by something the occurrence of which was objectively identifiable. It is consistent with such an intention that the event should not be defined subjectively in terms of evidence which may have been considered by the authority (particularly given the nature of such a body) but rather in terms of evidence which the authority had. (Thus, if an authority acted on the statement of the County Archivist that he had searched his records but could find nothing of assistance, it might be impossible later to determine whether (a) he had failed to consider a particular document or (b) he had considered it but failed to appreciate its significance.)

I am unable to accept this argument. There is no authority directly on the point. In *R. v. Secretary of State for the Environment, ex p. Burrows*, *R. v. Secretary of State for the Environment, ex p. Simms* the Court of Appeal had to consider whether a definitive map was conclusive evidence that a particular right of way existed. This involved the consideration of section 53. In his judgment Glidewell L.J. said¹:

I agree with the suggestion made to us in argument, that section 53(3)(a) and (b) relate to events which have happened since the definitive map was prepared. These events may have resulted in a right of way coming into existence where none existed before, or the upgrading of an existing right of way to a right of a wider sort, *e.g.* by express dedication under paragraph (a)(iii) or by prescription under paragraph (b). Paragraph (a)(i) relates to the happening of an event which results in the extinguishment of a previously existing right of way shown on the definitive map. Since the common law maxim is “once a highway, always a highway,” such a result can only be achieved by statute, and the events to which subparagraph (i) refers as authorising

¹ [1991] 2 Q.B. 354 at pp. 387H–388E.

the stopping up or diversion of a highway can therefore only take place under statute.

On the other hand, section 53(3)(c) differs from the preceding subparagraphs in that the use of the word "discovery" suggests the finding of some information which was previously unknown, and which may result in a previously mistaken decision being corrected. This information will normally, if not always, relate to a fact or situation which already existed at the time when the definitive map was prepared. In this way, paragraph (c) is to be distinguished from its predecessors.

If I am right in my view that paragraph (c) is concerned with the correction of mistakes as a result of newly discovered information, in order to be comprehensive, the power of correction must cover three different situations: (i) the addition of a right of way not shown on the definitive map: paragraph (c)(i) achieves this; (ii) the upgrading or downgrading of rights of way shown on the map, but so shown in a wrong category: subparagraph (c)(ii) covers both these situations; (iii) the deletion of a right of way which the latest information proves should not have appeared on the map at all: subparagraph (c)(iii) by its terms achieves this.

Russell L.J. said²:

In particular I am satisfied that section 53(3)(c), with its use of the word "discovery," embraces the situation where a mistaken decision has been made and its correction becomes possible because of the discovery of information which may or may not have existed at the time of the definitive map.

These passages are relevant to the questions raised in the present case and I respectfully adopt them. In *Fowler v. Secretary of State for the Environment*, the Court of Appeal had to consider section 53. Farquharson L.J. referred to *Burrows and Simms* and cited the passages in the judgments of Glidewell L.J. and Russell L.J. quoted above. He said:

Accordingly the 1981 Act, so far from preserving the existence of a footpath in the sense that it could not be enlarged into a greater right, or alternatively deleted, specifically contemplates the possibility of it being altered in the light of fresh evidence obtained. Such evidence must be fresh in the sense that it was not available at the date of the existing definitive map, and such fresh evidence should be identified by an inspector whenever he decides it exists.

In my view, this passage must be read subject to those cited above (with which Farquharson L.J. was clearly in agreement). Given the facts of *Fowler*, the use of the expression "fresh evidence" is not inconsistent with the approach adopted in *Burrows and Simms* and the applicant can derive no advantage from the use of this expression by Farquharson L.J.

Mr. Fleming submits that the word "evidence" in section 53(3)(c) must be given its full and natural meaning and should not be restricted to "new evidence" or to "evidence not previously considered." He relied on the passages in *Burrows and Simms* cited above and on *R. v. Secretary of State for the Environment, ex p. Riley* where Macpherson J. accepted the argument that "the discovery by the authority of evidence" means exactly what

² *Ibid.* at p. 392H.

it says: the relevant words simply envisaged the "discovery of evidence triggering the right to apply for modification." Thus, Mr. Fleming submits that the brief statement of the law at paragraph 5(a) and (b) of the decision letter is correct. I agree with him and accept his submissions and reject those of the applicant and Mr. Howell. "To discover," means to find out or become aware. "Discovery," means finding out or making known (*Concise Oxford Dictionary*). It connotes a mental process in the sense of the discoverer applying his mind to something previously unknown to him. In my judgment, the "event" in section 53(3)(c) is concerned with the finding out of some information which was not known to the surveying authority when the earlier definitive map was prepared. Were it otherwise, the surveying authority or a member of the public would be unable to take steps to correct a previously mistaken decision. Such a state of affairs would be at variance with the purpose and scheme of the legislation as well as good sense.

For completeness, I should say that I have considered *Ladd v. Marshall*, an authority relied upon by Mrs. Mayhew. In my view, that case, and the principles expressed in it, has no bearing on the questions raised by the present case which turns on the construction of section 53.

I return to the decision letter. The Secretary of State concluded (paragraph 5(c)):

the Secretary of State does not consider that the word "requisite" in section 53(2)(a) implies that the authority should take into account other matters such as the practical effect of reclassification before acting on the evidence before them: he is satisfied that it is for the surveying authority to modify the definitive map and statement to reflect the occurrence of any events before that date as specified in section 53(3).

The applicant complains that the inspector and the Secretary of State wrongly ignored evidence of present-day unsuitability for vehicular traffic:

4. The county council, on the advice of their officers, held that they were bound by law to consider *only* whether the public had vehicular rights of way along the three lanes: so that they could *not* take into account the practical effect of reclassification, and the fact that the three lanes were utterly unsuitable for vehicular traffic.

In order to assess this complaint, it is necessary to refer shortly to the legislative history. Section 27(6) of the National Parks and Access to the Countryside Act 1949 made provision for and defined footpaths, bridleways and roads used as public paths. The definition and concepts of roads used as public paths proved to be unsatisfactory. Thus, by the Countryside Act 1968 (Schedule 3, Part III, paragraph 9) Parliament provided that every R.U.P.P. must be shown in the definitive map as either a bridleway open to all traffic, a bridleway or a footpath, and that the expression R.U.P.P. must not be employed in any way. This classification was re-enacted by section 54(2) of the 1981 Act. The 1968 Act laid down a test for the reclassification of R.U.P.P.s in Schedule 3, Part III, paragraph 10:

The considerations to be taken into account in deciding in which class a road used as a public path is to be put shall be—

- (a) whether any vehicular right of way has been shown to exist,
- (b) whether the way is suitable for vehicular traffic having regard to the position and width of the existing right of way, the condition and the state of repair of the way, and the nature of the soil,

(c) where the way has been used by vehicular traffic, whether the extinguishment of vehicular rights of way would cause undue hardship.

It is to be noted that, this paragraph sets out criteria limited to the reclassification of R.U.P.P.s. It is exceptional in the sense that this provision apart, the relevant legislation has been concerned only with status, that is the ascertainment of public rights of way, and not with whether the exercise of such rights is desirable in particular circumstances. This provision was repealed by the 1981 Act and not re-enacted. The considerations of suitability are not to be found in the 1981 Act.

In the 1981 Act, the power of the surveying authority under section 53(2) is not to make such modifications as may appear to it to be desirable. It is to make such modifications to the map and statement as appear to be *requisite* in consequence of the occurrence of any of the *events* specified in subsection (3). The applicant relies on the words "requisite" in section 53(2)(a) and (b) and "ought" in section 53(3)(c)(ii). But neither of these words, read in context, could permit the surveying authority to take into account other matters before acting on one of the "events" and I accept Mr. Fleming's submission in this regard. As to "requisite," the effect of the section is that the surveying authority shall make such modifications as appear to the authority to be required in consequence of the event. "Ought" was not intended to confer a general discretion but merely leads to the result that follows from the discovery and consideration of evidence.

Thus, I conclude that the inspector and the Secretary of State correctly treated section 53 as limiting the modifications which ought to be made in consequence of the occurrence of a relevant event to those which would give effect to the rights of way which were found to exist rather than those which might be thought to be suitable or desirable. Considerations of suitability were within the ambit of the surveying authority's duties in the reclassification of R.U.P.P.s under the 1968 legislation. The fact that they were left out of the 1981 Act and the terms of section 53 of that Act leave me in no doubt that Parliament did not intend surveying authorities to have such considerations in mind when (as in the instant case) they had to consider regrading footpaths as by-ways open to all traffic. The surveying authority's duty under section 53 is to ascertain public rights of way and to modify the map so that it correctly defines those rights; no more and no less. This ground of complaint unhappily confuses that duty with the repealed provisions of the 1968 Act and must fail.

By ground 10 of the Notice of Motion, the applicant complains that the inspector misdirected himself in paragraph 56 of the report:

He there relied on old maps and in particular on an enclosure map of 1816 and concluded "that vehicular rights existed at that time." He did not regard "the wide variation in widths today,—some 170 years later—as a matter of particular significance." He treated the maxim "once a highway, always a highway" as if it meant that a cartway in 1816 "ought" in law to be reclassified as a motorway in 1986. And that it "ought" to be reclassified, not as a highway repairable by the inhabitants at large, but by a B.O.A.T. repairable by no one."

This complaint overlooks the limited purpose of Part III of the 1981 Act which is of ascertainment of rights. The Act recognises three categories of way only. A way is either a footpath, a bridleway or a by-road open to all

traffic. If vehicular rights over a way shown as a footpath are "ascertained" by the "discovery of evidence," the surveying authority must modify the map so as to show that way as a by-way open to all traffic. This is the effect of Part III of the Act; in particular, sections 53 and 66(1). I accept Mr. Fleming's submission that this regrading is not the conversion of a cartway into a motorway but rather, as he put it, the recording of vehicular rights of passage. Vehicular use changes over the years. The particular mode of propulsion of the vehicle is not, for present purposes, material (see *Kain v. Norfolk*).³ This complaint must therefore be rejected.

It follows from the whole of the above that the applicant has failed to satisfy me that the order is not within the powers conferred on the Secretary of State by section 53 of the Act. I am satisfied that it is. I am furthermore satisfied that the requirements of Schedule 15 have been complied with by the surveying authority and the Secretary of State. Thus, Mrs. Mayhew's application must fail.

The inspector found that walkers and horse riders were the main users of the paths and that they would be "adversely affected by reclassification" of the paths as by-ways open to all traffic. Thus, it may be thought that this judgment will have unsatisfactory consequences. But Mr. Fleming on behalf of the Secretary of State submitted that where there is public concern as to the over use of a by-way open to all traffic by inappropriate vehicles, the solution is not to be found in an artificial reading of section 53 of the Act denying the existence of a B.O.A.T., and the recording of it in the definitive map and statement, but the making, where appropriate, of traffic regulations. Section 54(7) of the 1981 Act is in these terms:

Nothing in this section or section 53 shall limit the operation of traffic orders under the Road Traffic Regulations Act 1984 or oblige a highway authority to provide, on a way shown in a definitive map and statement as a by-way open to all traffic, a metalled carriage-way or a carriage-way which is by any other means provided with a surface suitable for the passage of vehicles.

Mrs. Mayhew is pessimistic as to the efficacy of traffic orders. But section 54(7) is clearly consistent with the scheme of the legislation as a whole, and this court's task is not to make legislation but to construe it. Once a B.O.A.T. is "ascertained" and "shown" on the definitive map and statement, Parliament empowers the highway authority to consider questions of abuse and unsuitable user, and, for example, to make an order preventing the use of the road by vehicular traffic of a kind which is unsuitable having regard to the existing character of the road or adjoining property (section 1(1) of the Road Traffic Regulations Act 1984). It is to be hoped that those responsible will recognise the existence of these powers and not hesitate to use them where necessary.

*Application dismissed. No order
as to costs.*

Solicitors—the Treasury Solicitor.

³ [1949] 1 Ch. 163 at p. 169.