*171 R. (On the Application of Gloucester Country Council) v Secretary of State for the Environment, Transport and the Regions

No Substantial Judicial Treatment

Court
Queen's Bench Division (Administrative Court)

Judgment Date
1 December 2000

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(2001) 82 P. & C.R. 15

Queen's Bench Division

(Hallett J.):

December 1, 2000 [1]

H1 *Real property—Extinguishment order over footpath—Length of path eroded—Council argued path not needed for public use—Public inquiry—Inspector determined that path likely to be used by the public and declined to confirm order—Whether path could deviate from defined line—Whether extinguishment order valid— Section 118 Highways Act 1980*

H2. Gloucester County Council made an extinguishment order in relation to a footpath under section 118 of the Highways Act 1980 , on the basis that it was expedient that the path should be stopped up as it was not needed for public use. The Council justified the order on the basis that a substantial length of some 100 metres had disappeared into the River Severn due to erosion and another part of the path had become virtually impassable as there was no longer a bridge linking the northern and southern banks of a small stream at the northern end of the path. The Council accepted that the path was a highway maintainable at public expense and out of repair due to the absence of a footbridge over the stream. It considered, however, that the cost of reinstatement of the path was prohibitive. The extinguishment order was opposed and a public inquiry held. The Inspector found that many people would use a riverside path if it were accessible. He further found that the public had, until quite recently, exercised the right to "pass into another line". Such rights of way, wherever they were closely associated with the use of a river, must have adapted to the new course of the river. As a result, the right continued to exist along the river bank, wherever that may be. The Inspector did not consider it necessary to make a finding on the subject of the footbridge over the stream. He declined to confirm the order on the ground that, under section 118(2) of the 1980 Act, he was not satisfied that it was expedient so to do having regard to the extent to which it appeared to him that the path would, apart from the order, be likely to be used by the public. On an application for judicial review:

H3. **Held,** allowing the application, that the Inspector was wrong to decide that the right of way existed on a different alignment. He could not find on the evidence before him that there was a path which was likely to be used by the public. In the absence of any evidence of dedication, or user, or default by a landowner, the public had no automatic right to deviate onto the nearest convenient path when that right of way was destroyed. The authorities indicated that a right to deviate existed in certain specific circumstances which did not apply in the instant case. The authorities revealed no case in which the right to deviate had been upheld in a case involving destruction of a right of way rather than obstruction. The right to deviate had only been upheld where the obstruction was temporary, albeit for up to 50 years. For a right of the public to walk along a river bank to move inland as the river bank eroded, there would have to be some additional factor of usage or new dedication, of which there was no proper evidence. There was provision in the Highways Act by which a new footpath could be created subject to a properly regulated procedure and the right to compensation. The public was not, therefore, left unprotected. Once

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the notion of the automatic or moving right of way was rejected, there was no path in **172* existence likely to be used by the public. There was no evidence, or insufficient evidence, to justify the conclusion that the highway continued to exist on a different alignment on the basis of use alone. The alignment was notional or assumed.

H4 Cases referred to:

(1) *Absor v. French (1678) 2 Show K.B. 28; 89 E.R. 772* .
(2) *Arnold v. Holbrook (1873) L.R. 8 Q.B. 96* .
(3) *Attorney General Ex rel. Yorkshire Derwent Trust Ltd v. Brotherton Sub nom: Yorkshire Derwent v. Brotherton [1992] 1 A.C. 425; [1991] 3 W.L.R. 1126; [1992] 1 All E.R. 230; [1993] Env. L.R. 79; 90 L.G.R. 15; (1992) 156 L.G. Rev. 406; [1991] E.G.C.S. 129; (1992) 89(2) L.S.G. 31; (1992) 136 S.J.L.B. 11; [1991] N.P.C. 130 HL* .
(4) *Ball v. Herbert (1789) 3 T.R. 253; 100 E.R. 560* .
(5) *Cooper v. Chitty & Blackiston (1756) 1 Burr. 20; 97 E.R. 166* .
(6) *Dawes v. Hawkins (1860) 8 C.B.N.S. 848; 141 E.R. 1399* .
(7) *Eyre v. New Forest Highway Board (1892) 56 J.P. 517* .
(8) *Henn's Case (1633) Jones, W. 296; 82 E.R. 157* .
(9) *R. v. Inhabitants of Cluworth (1704) 6 Mod. R. 163; 87 E.R. 920* .
(10) *R. v. Inhabitants of Hornsea (1854) Dears, 291; 169 E.R. 732* .
(11) *R. v. Inhabitants of Paul (1840) 2 M. & Rob. 306; 174 E.R. 298* .
(12) *R. v. Oldreeve (1868) 32 J.P. 271* .
(13) *R. v. Secretary of State for the Environment Ex p. Cheshire County Council [1991] J.P.L. 537; [1990] C.O.D. 426* .
(14) *R. v. Secretary of State for the Environment Ex p. Stewart (No. 3) (1980) 39 P. & C.R. 534; [1980] J.P.L. 175* .
(15) *R. v. Thomas Bamber the Younger (1844) 8 J.P.L. 121; (1843) 5 Q.B. 279 ; 114 E.R. 1254* .
(16) *Sandgate Urban District Council v. Kent County Council (1898) 79 L.T. 425; [1895–1899] All E.R. Rep. 1077, HL* .
(17) *Taylor v. Whitehead (1781) 2 Doug. K.B. 744; 99 E.R. 475; [1775–1802] All E.R. Rep. 332* .
(18) *Wimbledon and Putney Commons Conservators v. Dixon (1875) L.R. 1 Ch. D. 362; [1874–80] All E.R. Rep. 1218, CA* .
(19) *Young, Re (1698) 1 L.D. Raym. 726; 91 E.R. 1384* .

H5 Legislation referred to:

Highways Act 1980, section 118 .

H6. **Application** by Gloucester County Council for review of a decision of the Secretary of State for the Environment given by his Inspector in favour of the Ramblers Association. The Inspector concluded that the Secretary of State should not confirm a public path estinguishment order made by the applicant Council under section 118 of the Highways Act 1980 . The facts are stated in the judgment.

H7 Representation

Peter Wadsley and Judi Evans for the claimant.
Michael Bedford for the first defendant.
George Lawrence, Q.C. for the second defendant.

Hallett J.:

1. On July 22, 1996 the Gloucestershire County Council made an Extinguishment Order in relation to a footpath known as EMA12 under section 118 of the Highways Act 1980 . Such an order may be made:

> "Where it appears to a council as respects a footpath or bridleway in their area … that it is expedient that the path or way should be stopped up on the ground that it is not needed for public use …"

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2. The effect of the order, had it been confirmed by the Secretary of State without modification, would be, I quote: ***173**

> "To extinguish the length of public footpath EMA12 that runs generally northwards along the west bank of the west channel of the River Severn from the coal yard close west of Maisemore Bridge, along the rear of a number of properties, to the north bank of a small stream, north east of the property known as Weir Reach. The total distance is approximately 380 metres."

At this point the Severn is tidal.

3. The Council justifies the order on the basis that a substantial length of the footpath, some 100 metres or so, has disappeared into the River Severn, causing a major break in the footpath concerned. Another part of the footpath has become virtually impassable over the years because there is no longer a bridge linking the northern and southern banks of the small stream at the northern end of the footpath.

4. The order was opposed. A public inquiry was held by an Inspector appointed by the Secretary of State. Under section 118(2) :

> "The Secretary of State shall not confirm a public path extinguishment order … unless he [is] … satisfied that it is expedient so to do having regard to the extent (if any) to which it appears to him … that the path or way would, apart from the order, be likely to be used by the public …"

I do not need to read the rest of the section.

5. All counsel agree that the authorities indicate the test of need which has to be applied by the Council and the test of use, or likely use, to be applied by the Secretary of State are different. I was referred to judgments of Auld J. (as he then was) in *Secretary of State ex p. Cheshire County Council [1991] J.P.L. 537* and Philips J. (as he then was) in *Secretary of State ex p. Stewart [1980] J.P.L. 175* which make the distinction clear. The Inspector's task is to consider the extend that the path, apart from the order, is likely to be used and the broader discretionary question under section 118(2) as to the expediency of making such an order. It is when considering the question of expediency that other considerations, apart from likely use, may be brought into play.

6. At the inquiry held by the Inspector objection to the order was made by the Ramblers' Association and four individuals. Gloucestershire County Council called four people to give evidence. The Ramblers called three people to give evidence and one individual objector who attended the inquiry.

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7. The evidence before the Inspector indicated that the first record of there being concern about erosion of this footpath is dated 1983 (although there is also a record of an inspection of the path in November 1982). The Parish Council wrote to the County Surveyor in June 1983 stating their concern that the bank was eroding. The particular area of concern was where the path crossed the property known as "Weir Reach". The Parish Council proposed a diversion along The Rudge, but this was opposed by the Ramblers' Association. The Association considered that the river path, which was already obstructed to some extent at that time, should be opened up for use and that it would provide a valuable amenity for the community as a whole.

8. An informal survey of the path, in the area proposed to be extinguished, was carried out by Mr Gidman, an experienced Council footpath volunteer, in 1986. This indicated that the line of the footpath as shown on the 1923 ***174** ordnance survey map might no longer be on land where it crosses the property known as Weir Reach but was not affected by erosion further south. In 1987 discussions took place between the Council, the Parish Council, the Ramblers' Associations and the Gloucester Civic Trust about the creation of a circular walk around Maisemore Parish. A link between footpath EMA12 north of the stream that forms part of the northern boundary of Weir Reach and The Rudge was agreed. This would also link with a further path leading west beyond The Rudge. These new paths were dedicated in 1989.

9. It was agreed in 1987 that the length of foothpath EMA12 from the stream going south to the Maisemore Bridge should remain on the Definitive Map, but it was accepted that resources to open it up were not then available. The Ramblers' Association then wrote a series of letters to the County Council between 1990 and 1993 asking that the footpath be opened up. The Parish Council continued to hold the view that the path was not needed and should be extinguished. Following a survey of footpath bridges in the area the Ramblers' Association in October 1994 served formal notice on the County Council, under section 56 of the Highways Act 1980 , that the path was a highway maintainable at the public expense and out of repair due to the absence of a footbridge over the stream. The Council in turn accepted that the path was a highway maintainable by them at public expense.

10. The Council commissioned a survey of this part of the route of footpath EMA12. The survey was carried out by Sir William Halcrow and Partners in November 1994. It was apparent from that survey that significant erosion had taken place, particularly whre the path crossed the property known as Weir Reach. The cost of reinstatement would be in relative terms considerable.

11. A further meeting was held with the Ramblers' Association and the affected landowners on site in May 1995. The Council explained that in their view the cost of reinstatement was prohibitive for them and the only practical options were for extinguishment, or for a diversion across their properties and clear of the river. The landowners had no objection to extinguishment or to reinstatement of the original line of the path but stated that they were opposed to a diversion. The Parish Council maintained the view that the path was not needed but the Ramblers' Association held to their position that this was an interesting piece of the river and that the path would be used if available.

12. A report was then prepared for the Commons and Rights of Way Subcommittee of the Council. The matter was discussed at a meeting on April 19, 1996 and the members accepted the recommendation in the report that "in view of the alternative route available to the public an order should be made to extinguish that length of public footpath EMA12" that runs south from the stream to Maisemore Bridge.

13. As far as the bridge at the northern section of the footpath is concerned, very little seems to be known of it. The only entry on a map occurs on the 1902 ordnance survey map. There is also a suggestion that the bridge might still have been there in 1930, but it is not shown on the 1923 ordnance survey map. There is no evidence of what type of bridge it was. There is no trace of a bridge and nothing remains to repair. Since 1902, the stream has widened out into a pill before entering

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the main river. It is said that any bridge erected on the original line of the path would be long and, therefore, excessively expensive to build.

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14. Although the pill may be fordable, without a bridge when the water level is low the banks are steep and slippery. Thus, without a bridge, the path would not be available to many walkers. The Council now takes the view that the expense of providing a new bridge is out of proportion to the possible advantage to a small section of the public and is, thus, not a reasonable use of public funds. The Council has a limited budget for rights of way and their aim is to open up and maintain the maximum number of paths with that budget. This part of the Council's decision has not been criticised in this court.

15. The Inspector heard that the local councils believed that The Rudge, the associated connecting path to the north, and the footway of the A417 county road to the south, provide satisfactorily for the needs of walkers. They told the Inspector that The Rudge and the path to the north are well used. They supported their assertion that walkers would not use the riverside route with a statement that they would not do so, signed by 40 residents. The objectors, on the other hand, believed that a riverside path would be used, not only by local residents but by many people from further afield that enjoy longer walks beside the River Severn.

16. The Ramblers' Association consulted their local members. They sent them a form in which the Ramblers' Association, I quote:

> "… has proposed a diversion to set the right of way back mostly within the orchard (of Weir Reach)."

17. It enclosed a diagram of the proposed alternative path. A number of the members replied saying that they would use "the footpath if opened up on a suitable diverted line". Eleven local residents signed statements to similar effect saying, for example, "this right of way should not be lost"; "this right of way should be diverted through the orchard." Officers of two other walking clubs attended to say that their clubs would use "a suitable alternative path". The objectors submitted that, walkers would nearly always prefer to use a footpath rather than a road and that many would, therefore, use the riverside path if it were open, properly signed, and featured in the appropriate guide.

18. The Inspector found that many people would use a riverside path if it were accessible. He referred to Mr Gidman's survey report which showed that the path was in use in 1985/86, despite the obstructions that already existed then. He also referred to the evidence of Mr Stewart that some people were still using a route as recently as 1994. Mr Stewart said this:

> "On two subsequent days in approximately June 1995 [I interpose that may in fact be 1994] … I walked a short length of this footpath, from the coalyard adjacent to Maisemore Bridge, northwards.
>
> This involved climbing over three or four fences, one at least being of barbed wire, but all were easily surmountable with due care. At the northern end of my short walk, a side stream had created a small ravine to the riverbank, apparently tidal it was extremely muddy, but again passable with care.
>
> I saw signs that other people had also used the route. In places the grass was well trodden and fence wires sagged slightly, indicating used crossing places, where the ground was slightly worn

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> from passing feet. This did not appear to be of recent origin, and had probably accumulated through occasional use over time.
>
> The fences would deter many users and this was probably the reason the path was not more well used."

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19. The Inspector further accepted the submissions of the objectors that people would prefer a footpath to a metalled road. The Rudge, as an alternative, may be quiet but it is residential and there is no separate path.

20. Many objectors before the Inspector shared the view of the Ramblers' Association that the County Council was in some way to blame for the erosion of the river bank and for the loss, therefore, of the path. Some considerable time was spent at the inquiry on the alleged failures of the County Council to prevent the erosion and maintain the highway. It is not suggested before me that the Council has a duty to reinstate the river bank so that the original line of the path is again available. The objectors, however, blamed, and blame, the loss of the line of the path EMA12 on the negligence of the County Council. The Ramblers' Association contend, and contended, that the County Council had a duty to maintain the highway. It can only maintain the highway if it prevents erosion. It has a duty, therefore, to prevent erosion.

21. The Council, submitted the objectors, should not escape liability for ensuring the continuance of the right of way through their alleged negligence either to repair, to take legal action, or to see that the landowner took action. The County Council as a highway authority must have known, submitted the Ramblers' Association, by the mid 1980s, and possibly much earlier, that the line of the path was in danger of being lost through erosion, yet nothing was done. Section 102 of the Highways Act 1980 gives the Council the power:

> "… to provide and maintain such barriers or other works as they consider necessary for the purpose of affording to the highway protection against snow, flood, landslide or other hazards of nature."

They did not use it.

22. The County Council has never accepted it was under a duty to prevent erosion. It relied at the inquiry, as it does before me, on the three old cases of *R. v. Inhabitants of Paul (1840) 2 M. & R. 306* , *R. v. Thomas Bamber the Younger (1844) 8 J.P.L. 121* , and *R. v. Inhabitants of Hornsea (1854) 23 L.J.M.C. 59* , to establish their contention that the highway authority was under no duty to repair the banks of the river. The objectors before the Inspector submitted wrongly, as is now accepted, that these cases were instances of sudden, catastrophic events which the Council or individual concerned could not have been expected to anticipate and over which it had no control. The Inspector accepted that contention and distinguished the authorities on that basis. He went on:

> "The loss of this footpath seems to me to have been a much more gradual process and one that could have been anticipated. Remedies, physical or legal, were available to the County Council but no action was taken."

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23. Mr Bedford, on behalf of the Secretary of State, accepts, as I say, the Inspector was wrong to distinguish the cases on that basis but, he submits, a distinction can properly be drawn. The decisions in *Paul* , *Bamber* , and *Hornsea* were based quite simply on the principle that there could be no liability to repair something which had been destroyed. Here, he submits, the question for the Inspector was whether the Council was under a duty to prevent the erosion happening at all.

24. Reliance was placed at the inquiry, and before me, on the remarks of Lord Halsbury in *Sandgate U.D.C. v. Kent (1898) 79 L.T. 425, HL* : ***177**

> "Is it common sense that where the obligation is to maintain the road and keep it in repair, you can, by neglect, allow that duty to be so disregarded that in time the road may be washed away, so that your liability or obligation ceases?"

The Inspector found that this quotation was very apt in this case. He went on to say, however:

> "… it is generally agreed by all parties that the expense of restoration of the river bank to the extent that the line of the path, as shown on the 1923 OS map, is out of proportion to the importance of the right of way. If reinstatement is the only way of retaining the existence of the right of way, then the expense of it becomes a significant factor in deciding whether it is expedient to confirm the Order."

25. The Inspector was also addressed on behalf of the Council, as was I, on the general principle that a right of way or highway follows a defined route. The defined route in this case being laid down on the Definitive Map. The public may have a right to deviate from such a line but only in certain, specific circumstances, for example if it is wrongfully obstructed.

26. The objectors at the inquiry relied, as does Mr Bedford, upon a dictum of Lord Mansfield in *Taylor v. Whitehead (1781) 99 E.R. 475* that highways:

> "… are for the public service, and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line."

This implies, they submitted, a much wider interpretation of the right of the public to find a new line when they cannot follow the line on the Definitive Map. In the present case the path originated as a tow path, as such the line must have been adapted over the years before the lock and weir at the northern end of the path were built as the course of the river changed. If this had

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not been the case, the path could not have continued to perform the primary function that it then had. The Inclosure Award states that the footpath followed "the usual track along the banks of the River Severn."

27. The objectors also relied upon an article by Dr Dunn, in the Rights of Way Law Review, on the subject of the "Destruction of Rights of Way". In considering the effects of erosion of a river bank, Dr Dunn suggests the possibility that the identity of the physical strip of land to which the right applies is not crucial:

> "On this view, as a river bank or coast line are cut away, the boundaries of any public right of way running beside them will move, just like the adjacent property boundary along the bed of the stream …"

28. This has been described as the "moving right of way theory". Dr Dunn accepts in her article that despite her extremely thorough review of the authorities there is, in fact, no authority for this proposition.

29. The Inspector adopted this line of reasoning and he found:

> "there have been rights of way along river banks, for a variety of reasons, since time immemorial.
>
> It seems to me that these rights of way, wherever they are closely associated with the use of the river, must have adapted to the new course of the river. The public have followed the maxim of Lord Mansfield and the effect is as suggested by Dr Dunn. The only alternative method of retaining a public right of way along a river bank ***178** would appear to be to make a Diversion Order every time there is any significant degree of erosion. This could lead to a path having to be diverted after every series of winter storms. If each diversion led to a public inquiry, the maintenance of the path would be a continual drain on public finances and would, inevitably, lead to the Highway Authority proposing a major diversion which would take each path affected well away from the river concerned. This does not seem to me to be in the public interest or to be the intention of the law. As Lord Halsbury is quoted as saying in a different context: 'Is it common sense?'"

30. The Inspector went on to find that the public have continued to use "the path" despite erosion and other obstructions at least until 1994/1995, on the evidence of Mr Gidman and Mr Stewart. He referred to the evidence of Mr Parker of the County Council having confirmed there is still a passable route along the river bank, even if it is not an easy one. Therefore, it seemed to him "that the public right of way along this part of footpath EMA12 continues to exist".

31. As far as the bridge over the stream is concerned he found as follows:

> "The stream, at the northern end of the length of path being considered, has scoured out a small basin, or pill, since the beginning of the century. It is probable that this has rendered this part of the

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> line of the way impassable and that, as a result, the public have 'passed into another line' higher up the stream, where it is narrow, as suggested by Lord Mansfield. However, there is no evidence to say whether this is so, or whether they have forded the pill when the water level is low enough.
>
> The County Council and the objectors differ over whether or not the County Council have the duty to place a bridge over the stream, but they agreed that a bridge would make the path much more convenient to the public. If a bridge is provided, the expense of doing so will depend on where it is placed. It seems to me that the matter of the bridge is not a crucial factor in making a decision on whether or not to confirm the Order."

His conclusions were summarised as follows:

> "I consider that there is sufficient evidence to show that, apart from the Order and the obstructions to the use of the path, the public is likely to use the path to a significant extent. It is likely that it would be preferred by many walkers to the proposed alternative along the lane known as The Rudge.
>
> It seems to me that the public right of way along the river bank has not been lost due to the erosion of the bank. I consider that the public has, until quite recently, exercised the right to 'pass into another line' and that, as a result, the right continues to exist along the river bank, wherever that may be. I do not think, therefore, that the maintenance of the public right of way requires any major expenditure of public funds in reinstating a length of the river bank, nor does it seem to me that a Diversion Order is required. It does not seem to me to be necessary for me to make a finding on the subject of the footbridge over the stream. I do not consider that modifying the order in such a way that a cul-de-sac path is created is expedient in the public interest. I do not consider that the potential danger to users of this river bank path is such as to make it expedient to deny its use to the public.
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> I do not consider, therefore, that there is any single factor or combination of factors of sufficient weight to make it expedient to confirm the order, despite the significant extent to which it appears to me that the path, if available, would be likely to be used by the public. I have had regard to all other matters raised at the inquiry and the written submissions made. There is nothing in them not already mentioned that outweighs the considerations leading to my decision."

32. Mr Wadsley, on behalf of the County Council, submits there are four main issues for me to decide. Firstly, whether on the material before him the Inspector was entitled to make the finding about the likely use of the path. A 100 metres of this footpath EMA12 had disappeared into the river. It was not available for use. The footpath did not continue to exist. The right of way had been destroyed. When the Inspector made his decision on the likelihood of use, he was relying on evidence of potential users of a different footpath, namely one which swerved inward at the top of the plan into an orchard in the property known as Weir Reach. No right has been established, he submitted, to deviate along such a path. There was little or no evidence that the public had, in fact, exercised the right to pass into another sufficiently defined line.

33. Secondly, the Inspector was wrongly, or unduly influenced, by allegations of negligence or fault on the part of the Council. There was no duty in law upon them to prevent the erosion of this land. A highway ceases to exist when it has been destroyed. It does not matter how the destruction occurs, whether it be gradual or one or more catastrophic events. He relied, as I have said, upon the very early cases of *Paul* , where the inhabitants were found not liable to rebuild a sea wall washed away by the sea; *Bamber* , where the local landowner was not liable to prevent the sea encroaching on a highway and thereby making it impassable; and *Hornsea* , where there was no liability to make good something which had been washed away, namely

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part of the road which ran along a cliff top. He distinguishes the *Sandgate* case on the basis that on a proper analysis the House of Lords was dealing with the situation where a local authority had very properly exercised its powers to build a sea wall and an esplanade alongside the highway.

34. On the particular facts of that case, they were entitled to seek a contribution for their costs of maintaining the road and the wall. It was, he says, an accounting exercise between the District Council and the County Council. Nowhere, he submits, in the speeches of their Lordships does one find a suggestion that the Council was under a duty to guard against erosion and, therefore, destruction. The Lord Chancellor, Lord Halsbury, expressly stated in his speech that he did not "omit to notice cases where the road itself has been destroyed". His comments, submits Mr Wadsley, generally were directed at "neglect" rather than fault, and any propositions, if they exist, as to a general duty on a Council to prevent incursion by the sea were obiter.

35. The Council's duty, he submits, is to repair the highway and that would include any necessary structure which is properly regarded as part of the highway. However, as Lord Oliver said in *Attorney General v. Brotherton [1992] 1 A.C. 425* at page 424:

> "… there is, apart from statute or custom, no person under the obligation of keeping the banks in repair or the channel free for navigation; and if the stream dries up or becomes choked there is no right either to deviate or to trespass upon the soil in order to clear it."

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36. There are statutory duties on the highway authority under the Highways Act 1980 to maintain the highway and protect the rights of the public to use and enjoy the highway. The duty to maintain the highway, however, he submits, is limited to maintaining what has been described traditionally as the "top two spits". The duty to prevent incursion by the sea or by a tidal river was also traditionally upon the Crown. Now, by statute, it is upon the Environment Agency.

37. Mr Wadsley particularly relied upon the remarks of Wightman J. in the case of *Hornsea* . He said in terms:

> "The obligation on a parish is to make good something existing; but here the part complained of is gone by reason of the encroachments of the sea, against which the parish were not bound to guard."

38. The final nine words may be *obiter* , he says, but they have not been disapproved in subsequent decisions such as *Sandgate* , where *Hornsea* has been considered. The Council did have a power under section 102 of the Highway Act to prevent erosion by providing a barrier against floods, but they did not act unreasonably in failing to exercise that power.

39. Thirdly, we come to what Mr Wadsley described as the principal issue, the question of the right to deviate. He submitted that this question divided into two:

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(i) technically, are people as a matter of law in this case, entitled to deviate onto other land?

(ii) Even if they cannot deviate as a matter of law, has a new footpath here been developed by the acquiescence of the landowners?

40. On his second limb of the argument, Mr Wadsley submits it was not raised at the inquiry and it was not dealt with by the Inspector. The landowners and the Council have not, therefore, had the opportunity to call evidence or make representations and it is not, therefore, a submission that I should entertain.

41. As far as the rights of way and the right to deviate therefrom generally, are concerned, he submitted that the true position of common law can be stated as follows. The right to deviate here is said to have crystallised into a right of way. You create a right of way by dedicating a piece of land. He relied, *inter alia* , upon passages of the speech of Lord Oliver in *Attorney General v. Brotherton* to the effect that such a piece of land should be precisely defined. The exactness of the definition may, depending on local conditions, vary. One cannot therefore, submits Mr Wadsley, derive a new right of way from some notional or deviated line along which people might conveniently pass. He went on to submit that the right to deviate is a very restricted right. He took me through a number of authorities from which he submits one can derive the following general principles: firstly, the public may have a right to deviate onto adjoining land where a highway passes through open and unenclosed land: see *Eyre v. New Forest Highway Board (1892) 56 J.P. 517* ; see also Halsburys Laws, Vol. 21, para. 121. Halsbury laws goes on to state that "it is uncertain whether a right exists as a matter of law independently of evidence of user. It is, however, submitted that unless some evidence of a prescriptive right to deviate can be adduced the existence of such a right will not be assumed as a matter of law."

42. Secondly, Mr Wadsley contends that the right to deviate exists only where there has been some fault, namely a failure to repair or an obstruction, and ***181** then the right exists to deviate only onto the adjoining land of the defaulting landowner. In the case of failure to repair, he submitted there is support for the proposition that the right to deviate exists only where there is a prescriptive right to do so and is limited to pre-enclosure days.

43. Thirdly, the right he says is on any view subject to a number of caveats: there is the position of third parties to be considered, the character of the land, and the nature of the dedication. The dedication might be subject to an express reservation as in *Arnold v. Holbrook (1873) L.R. 8 Q.B. 96* where the landlord expressly reserved the right to plough his field.

44. Fourthly, in any event, submits Mr Wadsley, a right to deviate does not arise where the footpath has been destroyed as opposed to a temporary obstruction. One cannot impose a permanent additional burden on landowners, he contends, unless there has been the appropriate dedication by them.

45. Finally, therefore, he submits, there is no authority for the proposition that a right to deviate exists in the circumstances of this case. Whatever the position may have been in medieval, or post-medieval, times there is now a modern statutory procedure for creating diversions by which the landowner can be compensated for any additional burdens placed upon his land. I should not be tempted, therefore, to go beyond the ambit of those authorities.

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46. Turning to the moving right of way proposition. Mr Wadsley submitted this is a creature unknown at common law and there is no authority for it. No support, he contended, for the proposition can be gained from the brief reports of the decisions of Holt C.J. in *Young (1698) 91 E.R. 1384* and in *R. v. Inhabitants Cluworth (1704) 6 Mod. Rep. 163* . He was there dealing with the specific question of the rights of users of rivers. The report of *Young* has been described as too incorrect to be relied on. The major principle laid by Holt C.J. in *Young* was expressly rejected by the court in *Ball v. Herbert (1789) T.R. 253* .

47. The only way that the right of way could have moved inland, as is suggested here, when the bank was eroded, he submits, is if there had been some dedication of the land. There was no evidence of any such dedication here. There is no clear evidence in any event of what is said to be the alternative path. The. Inspector based his findings on what can only have been an assumption that the public must have used the most convenient riverside path adjacent to the definitive line. Because the issue was not dealt with at the inquiry the owners have not dealt specifically with the issue of the dedication. Far from acquiescing in any deviation all the indications are, from their attitude, that they were and are firmly opposed to any deviation. Further, he submits, there was no evidence before the inquiry of the quality of any alleged user by the public of the so-called alternative path.

48. Lastly, as far as the bridge is concerned, Mr Wadsley submitted that the Inspector decided as a fact that there was no longer a bridge over the pill and that this was not a material consideration. This, he submits, meant that the Inspector failed to take account of a highly material factor. If there was no bridge to cross the pill you cannot use the footpath. The Inspector was therefore faced with a major break in the footpath EMA12. It was, therefore, a powerful factor he should have borne in mind on the issue of likelihood of use and, in carrying out the broad balancing exercise he was obliged to do. Rebuilding the bridge would be prohibitive, therefore the whole question of the bridge must be relevant to the question of expediency.

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49. Mr Bedford, on behalf of the Secretary of State, submitted as follows. The Inspector found that the public footpath continued to exist and that its alignment had moved. It is not a case that a 100 metres of the footpath had disappeared, the case is that a 100 metres of the previous alignment of the footpath has disappeared.

50. The principle that a highway must follow a defined route must be put into context. The primary distinction he submits is between a right of passage along a route from one place to another (which may be a highway) and a right to wander at large. The general principle of a defined route is always subject to the right to deviate. A defined route may embrace more than one alignment. He referred me to the decision in *Wimbledon and Putney Common Conservators v. Dixon [1875] 1 Ch. 362* , in which the court held that the fact that people used several tracks to get 200 yards from a definite point A to a definite point B, did not prevent there being a right of way from point A to point B.

51. If the Inspector was correct, as he submits he was, that the highway could continue to exist on a different alignment, it was that highway which the Inspector found was likely to be used by the public apart from the order. Those who stated they would use the footpath if opened up on a suitable diverted line were referring, he contends, to a route which followed the river bank. The Inspector was entitled to regard this as evidence of an intention to use the river bank alignment that he found to exist.

52. As to the Inspector's findings about the highway authority's liability to repair, he submits this did not affect the final decision. The Inspector found there was a failure to repair before the erosion occurred but there was no obligation to reinstate the path. The cases relied upon by Mr Wadsley, submits Mr Bedford, merely state the obvious principle: you can have no liability to repair something which does not exist. He relied upon the decision in *Sandgate* , as I have indicated, as establishing the principle that there was on this Council a liability to guard against erosion. He reminded me that the court in *Sandgate*

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held there was a liability to repair a sea wall which was part of the highway and the highway was still in existence at the time of the complaint about failure to repair.

53. He submitted that the Inspector was right to find that the right of way had moved in this case, so as to adapt to the new course of the river resulting from the erosion. This was a consequence, he submits, of the established right to deviate where a track becomes impassable. A right of way associated with river use moves with the river at least to the extent that any new alignment does not affect new landowners. As I have indicated, he relied upon the dictum of Lord Mansfield in *Taylor v. Whitehead.*

54. There is no logic, he submits, in limiting the right to deviate from a highway to circumstances where the owner is responsible for the obstruction. Hence, he submits, the distinction drawn by Lord Mansfield in *Taylor v. Whitehead* between private rights of way and highways. Lord Mansfield held that someone who had a private right of way which had been destroyed through natural causes had no right to deviate onto adjoining land but emphasised that highways, for reasons of public policy, were in a different category.

55. Mr Bedford also relied upon remarks of Lord Jauncey in *Attorney General ex rel. Yorkshire Derwent Trust Ltd v. Brotherton* , dealing with the distinction between what constituted a right of passage over a right of way over land and passage over water. Lord Jauncey said this: ***183**

> "… if a footpath becomes impassable … the public may deviate therefrom onto adjoining land in order to circumvent the obstruction."

56. Mr Bedford poses the question: if the public may deviate around, for example, a fallen tree, only if it is the fault of the landowner that it is blocking the path how are the public to know?

57. He also submitted that there was no justification for limiting the right to deviate to temporary obstructions. A right to deviate was found to exist in the case of *Dawes v. Hawkins (1860) 141 E.R. 1399* , and to survive for something like 50 years. Temporary must, therefore, be a relative term. The law he submits recognises the special case of a way associated with the river. This path originated as a tow path following "the usual track of the banks of the River Severn".

58. He set out three propositions which he derives from the judgment of Holt C.J. in the case of *Young* :

> (1) At common law there is a right to go along the banks of a navigable river for the purposes of towing vessels etc.
>
> (2) That where such a right exists then if the river moves the right will move with it to the land next adjoining the river.
>
> (3) This latter right can be compared to the right to deviate where a way is impassable.

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59. He concedes that the first proposition is probably not good law and was certainly not followed in *Ball v. Herbert* . However, he contends, this does not affect the second proposition in cases where a right of way along the bank of a river undoubtedly exist, as here. The court in *Ball v. Herbert* , he submits, did not doubt either the second or third propositions from *Young* .

60. He further contends that Holt C.J. seems to have repeated the second proposition in *Cluworth* , which although obiter should be followed. He submits, it provides an obvious answer through the common law to what would otherwise be an inevitable problem with a fixed alignment for a right of way associated with the river, the banks of which were subject to natural processes of movement. Erosion of the river bank does not, in itself, result in the loss of the right of way, he contends, but merely in its realignment. Similarly, accretions to the river bank do not result in a right of way separated from the water edge by a potentially ever-increasing strip of land. In both cases realignment to follow the river bank enables the way to maintain its function. He finally reminds me that in this case we have no problems with any rights of way or alternative paths affecting the rights of third parties.

61. Mr Laurence, Q.C. , on behalf of the Ramblers' Association, submitted, firstly, there were three distinct impediments to the public making their way on foot along the line of the public highway A–B as shown on the Definitive Map. This case is principally concerned with the first of those impediments, namely the stretch where the path had fallen into the river, which he has helpfully called Q–R. The other two impediments were, firstly, old-fashioned obstructions such as gates, fences, and the like; and secondly, the obstruction to public passage represented by the disappearance of the bridge which used to cross the stream. Here, on the findings of the Inspector, he said sure-footed members of the public probably could have forded the stream in dry weather along the definitive line but, in practice, deviated from the definitive line in order to cross upstream where it would be easier to do so.

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62. Section 118 , he contends, requires the order making authority, the Council, to be satisfied that the footpath is, *inter alia* , not needed for public use. As a matter of construction, therefore, the section cannot apply to a case such as this, where the public right of way has been altogether extinguished in one stretch and temporarily extinguished in another. The section can only apply where there is in law and in fact a public highway.

63. I am invited to find that in this case, the fact that part of the original A–B path has fallen into the river means that there are now instead two paths: A–Q and R–B, with a gap Q–R in between. What the order making authority should have done in 1983 when it discovered that the path Q–R no longer existed is, he submits, to make an order under section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981 . This would have deleted from the Definitive Map the path Q–R on the grounds there is no right of way in existence. Assuming he said that Mr Wadsley is correct in his submission there was no alternative alignment of the right of way, the authority could then have applied for extinguishment of paths A–Q and R–B on the grounds they were no longer needed for public use.

64. However, such an application, on the facts of this case, he contends, was bound to fail. The public arguably had a right to and, in practice from 1994, did deviate and would continue to deviate over the adjoining land of the same landowners where the path had disappeared. Those landowners have made no attempt to stop the deviation. The stretches A–Q and R–B were therefore likely to be used.

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65. Mr Laurence submitted the Inspector was right to treat the bridge factor as irrelevant. With the bridge gone the public must have a right to deviate over other adjoining land belonging to the same landowner, whether or not the right to cross the stream also lay over the bed of the stream itself. Since 1994 the public must have deviated that way.

66. He submits the Ramblers' Association does not need to rely upon the findings that the public had automatically acquired a right of way along some other unspecified line, but he does support the submissions of Mr Bedford. He contends that his primary submission in relation to section 118 is sufficient for his purposes. Even if the Inspector was wrong in finding there was in existence an automatic right of way on a different alignment from that on the Definitive Map, he submits that the Inspector, having given proper consideration to all relevant factors, would have inevitably concluded that, on evidence the public must have walked along the most convenient route. It is a reasonable assumption, he submits, there had been tacit acceptance by the landowners of the public taking a different route to get from Q–R, and there was no reason to suppose it would not be continued. In law such tacit permission may still be effective even if it only operated for a relatively short time.

67. In oral submissions before me, Mr Laurence said he did not suggest the Inspector was bound to find a new dedication on the evidence before him but that there was an onus on the Council to satisfy him, there had been no dedication. The Council, he contends, failed to discharge that burden. The Inspector, he submits, was justified in all the circumstances in refusing to exercise his power to modify the order.

68. He addressed me on the exercise of my discretion. The order making authority, as he contends, made a mistake and the correct course, therefore, is to uphold the Inspector's decision and allow the order making authority to begin again with an order properly drafted. They can then ensure that the ***185** path Q–R to be deleted is described with some degree of precision and proper statutory notice can be given to all the parties and the appropriate steps taken by the Secretary of State in accordance with his statutory obligations.

69. Mr Laurence submitted, supported by Mr Bedford, that it would be wrong to remit a defective order to the Secretary of State for reconsideration with all the practical difficulties that they suggested that entails in re-opening the inquiry and ensuring all parties had proper notice in proper time of what is proposed.

70. My findings are as follows. I start with the basic principle: once a highway always a highway. The public right over a part of a highway is not lost by disuse or by unlawful obstruction, but it may be lost by physical destruction. It is also well-established that a highway should have a defined route. There may be cases where a path is literally so well-trodden over the years by the public (see *Wimbledon and Putney Common Conservators v. Dixon*) that the right of way has several tracks over a short distance from point A to point B. But, subject to such clearly established usage, the route of a highway can and should be defined with some precision. The Definitive Map of June 1, 1953 in this case is conclusive proof of the existence of footpath EMA12, as at that date, on a route which has been established with some precision by the expert surveyors, Halcrows.

71. As far as the right to deviate generally is concerned, I do not need or intend in the time available to attempt to deal with all the points raised by the parties. I shall deal with the principles and the guidance which I have derived from the authorities which I find pertinent to this application.

72. I have focused my attention on those instances where the right has been said to exist. I accept the right to deviate should be put into context. Its origins date back to a very different time and a very different countryside. Large chunks of the countryside remain uncultivated and unenclosed. Highways were not established in the way that they are today. If a man chose to enclose land he was “bound to leave a good way” (see *Henn's case (1633) 82 E.R. 157*). If he stopped up the way so that it became so

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foul as to be impassable, the public was justified in deviating onto his land (see *Absor v. French (1678) 89 E.R. 772*). Where the landowner has allowed the usual track to become foundrous and impassable, it is plain the public may deviate onto his adjoining land for as long as that state of affairs persists, even if it is a matter of years. I also accept that it is very important to maintain the rights of the public wherever possible to enjoy highways such as this along the banks of a river.

73. I do not accept that the very short obiter remarks of Lord Mansfield in *Taylor v. Whitehead* at page 477 that:

> "Highways are governed by a different principle. They are for the public service, and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line."

must be read as declaring for all time and for all purposes that wherever there is a highway there is an absolute right to deviate. His remarks must be read, in my judgment, in the context of the facts of that case. He was drawing a distinction between private rights and public rights in relation to highways. I do not accept that he thereby intended to extend the existing right to deviate from a highway in the way suggested by Mr Bedford. Had he done so, the rights of third parties would be affected. Yet, Mr Bedford accepts ***186*** third parties are in a different position. If they are in a different position, there must, in my judgment, be some correlation between the conduct of the landowner and the right to deviate. Nor do I accept that the dicta in *Absor v. French* and *Attorney General v. Brotherton* either do, or were intended to, assert the kind of broad unrestricted right to deviate argued by Mr Bedford for similar reasons.

74. Mr Bedford conceded in argument that the right to deviate is not absolute. It may depend on the character of the land. It may be affected by a restriction on the dedication, as in *Arnold v. Holbrook* . As I have indicated, he accepts it may depend on the right of third parties. No authority has been cited to me where the right to deviate has been held to exist other than on to the land of the defaulting owner responsible for the obstruction or the foundrous state of the way.

75. In the cases cited to me, there has been good reason in each to declare that the public had a right to deviate, for example the landowner had been responsible for an unlawful obstruction, or a landowner had dedicated the land without restriction to the public use and accepted their increased rights over his land. Here, none of those features are present. In *R. v. Oldreeve (1868) 32 J.P. 271* , Willes J. held that:

> "If there is a public way over a man's field, and he puts an obstruction upon it, then the public … are entitled to go round a reasonable distance into his field by the side of the way, and use that as a temporary way until he removes the obstruction. But if the obstruction is caused by the actions of the elements, then no such right accrues to the public …"

In this case the erosion was caused by the elements.

76. It is accepted that a review of the authorities reveals no case in which the right to deviate has been upheld in a case involving destruction of a right of way rather than obstruction. The right to deviate has only been held in reported cases where the obstruction was held to be temporary, albeit for up to 50 years. Mr Bedford submits there are no reported cases against him. I accept his submission that there will be occasions when, for all practical purposes, a temporary obstruction appears for all intents and purposes to be permanent one, for example when it lasts for 50 years or more. I do not find it helpful, however, to dwell on an analysis of the distinction to be made between what is temporary and what is permanent for the purposes of

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my findings in this case. The fact is this is a case of destruction of a right of way by the elements. Absent any evidence of dedication, or user, or default by a landowner, I am invited to find that the public have an automatic right to deviate onto the nearest convenient path when that right of way was destroyed.

77. Having considered the authorities with care, I reject that contention. In my judgment it flies in the face of the restrictions which Mr Bedford himself has put upon the general right to deviate. Suffice it to say, therefore, that I am satisfied that the authorities to which I have been referred in a comprehensive and helpful review of the law, by both Mr Wadsley and Mr Bedford, indicate that a right to deviate exists in certain specific circumstances which do not apply here. I turn to the question of the moving way.

78. I am not satisfied that there is such a thing as a moving right of way of a highway of the kind postulated by Dr Dunn in her excellent article on the subject. She says herself there is no authority for the proposition, and it is a proposition which could have considerable implications for all landowners, ***187** including third parties. There is, in my judgment, a clear distinction to be drawn between the decisions in *Young* and *Culworth* which related specifically to an accustomed right to go along a river bank to tow vessels and the like. The two reports are in any event extremely short, and the report of *Young* was roundly criticised as "loose and inaccurate" in *Ball v. Herbert* .

79. The first proposition in *Young* that there was a common law right to go along banks of navigable rivers to tow vessels was rejected by the court in *Ball v. Herbert* . The court held that any such right derives from usage not at common law. It is right to say that the second proposition was not itself rejected, but I find it difficult to derive assistance from propositions in a report described in *Cooper v. Chilty & Blackiston (1756) 1 Burr. 20* as too inaccurate to be relied upon as an authority.

80. I see the logic of giving people accustomed to towing their barges from the river bank the right to continue to do so and, therefore, to hold that their right moves with the river. I accept that Holt C.J. seems to have repeated that proposition in his very brief remarks in *Culworth* . I am not prepared, however, on the basis of such a very limited statement, relating specifically to the rights of those using navigable rivers, to declare that a right of the public to walk along a river bank highway automatically moves inland as the river bank erodes. In my judgment for such a right to exist there would have to be some additional factor of usage or new dedication. If such a new right should be given to the public there are now statutory powers to provide for such a situation. There is provision in the Highway Act by which a new footpath can be created subject to a properly regulated procedure and the right to compensation. The public is not, therefore, left unprotected.

81. Mr Bedford did not in fact invite me to declare such a right as a matter of policy. He submitted it existed as a matter of law. But, as I have indicated, I am in any event entirely satisfied there is today no need to extend the law to cover this situation. I turn therefore to the questions of user and dedication.

82. Having considered the evidence with care, in my judgment there was no proper evidence of user to which I shall return in a moment, and there was no evidence on the question of dedication. I see considerable force in Mr Wadsley's submission that if the issue of dedication was relevant the landowners were entitled to give evidence and make representations as to whether they had in fact or in law ever dedicated their land in this way. They may well accept a longstanding public use of a path which is some distance from their front door but not take kindly to a deviated path which brings the public within sight of their window.

83. If one rejects, as I have done, the notion of the automatic or moving right of way, there was no path in existence likely to be used by the public. There was no evidence or insufficient evidence to justify the conclusion that the highway continued to exist on a different alignment on the basis of use alone. It was a notional alignment. It was an assumed alignment. The only map

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put before the Inspector was the map indicating the possible diversion of the route proposed by the Ramblers' Association. I note that in their proposal they very fairly suggested this diversion would of course be accompanied by compensation to the landowners.

84. The map supplied by the Ramblers' Association did not purport to be an alleged new route already in existence and being used by members of the public. Those who responded to the Ramblers' form were saying not that they already used that route but that they would do so if it became available. We know that the witnesses could not have been saying they were using *188 footpath EMA12 because it was impassable in places. There were not only temporary obstructions but, vitally, the path did not exist for all practical purposes for at least two of its sections.

85. Mr Bedford relied upon the evidence of the plucky Mr Stewart in 1994/95 as evidence of the use of this alternative route, and invites me to conclude that the public must have been using a riverside path at least until that time and that the path must be the new alternative route which the Inspector said existed. Mr Stewart's evidence was (if I will be forgiven for using this expression) the high water mark of the Secretary of State's and the Ramblers' Association's case on the use of a new path.

86. I have, therefore, considered his evidence with care and set out the essential part in this judgment. I have also considered the evidence of other witnesses who said they had or would walk the path. Nowhere can I find any precision as to which path it is said the witnesses have walked or would walk. It is not clear if they chose the route proposed by the Ramblers' Association, or knowing the pill was virtually impassable whether they cut westwards straight across the land of Weir Reach to a point further inland. No maps were put before the Inspector, as Mr Laurence has suggested, which might have indicated the route of this so-called existing path. Thus, there was insufficient certainty, in my judgment, as to the line of the route claimed, and insufficient evidence of public usage of any particular path.

87. I am satisfied, therefore, that the Inspector could not find on the evidence before him that there was in existence a path which was likely to be used by the public.

88. As far as failure to repair is concerned, the Inspector found that the Council had been in some way at fault in allowing this erosion to occur. In my judgment, whether he found the Council was under a duty to repair and failed to do so, or merely that the Council had a power to repair and failed to do so when they should have done, matters not for the purposes of his and my findings. Whether I would have come to a different conclusion on the evidence also matters not, providing the Inspector's find was not perverse and providing it did not play too significant a part in the decision-making process. I accept Mr Bedford's submission that the Inspector made it clear that he did not consider there was any need to reinstate the path to the line shown on the 1923 map, and his conclusions as to the remedies open to the Council to avoid the erosion had no significant effect on his conclusion.

89. If that was the only basis for attacking the Inspector's decision therefore I would not quash it even if there is at law no duty to protect against erosion, as was submitted by Mr Wadsley. It is, I have to say, a submission I would be inclined to accept. I should need some persuading to accept the submissions of Mr Laurence as to the existence and extent of a Highway Authority's duty to guard against erosion. Had I considered it necessary to decide the point I should have called for further argument.

90. As far as the bridge is concerned, the fact there was no bridge to cross the stream was, in my judgment, a relevant consideration as to likely use and as to expediency. Part of the footpath was impassable to all but the most intrepid of walkers because the pill had developed into a basin with steep sides.

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91. We do not know whether the public had deviated to another particular line to cross the stream so that the path had changed or whether they had followed the course of the determined Mr Stewart and waded across when the water was sufficiently low. This must be a relevant consideration as far as *189 the existence of the so-called alternative route is concerned. It must affect the path taken by any member of the public seeking to walk the length of the footpath.

92. However, the Inspector plainly took into account all the evidence relating to the bridge. He did not say it was irrelevant. He said it was not a crucial factor. In the light of his other findings, I am not prepared to say the Inspector was wrong to make that finding and, on that basis alone, I would not be prepared to quash his decision.

93. Finally, as far as Mr Laurence's argument is concerned as to the application of section 118 and the effect in law of a stretch of footpath EMA12 falling into the river. On instructions Mr Wadsley did not seek to dispute Mr Laurence's interpretation. The order as drafted was defective, he agreed, in that it referred to the whole stretch from A–B. When the part Q–R disappeared for good, Mr Wadsley accepted that two new paths, A–Q and R–B, were formed.

94. Despite the very persuasive arguments of Mr Laurence, however, I am not persuaded that the decision should be upheld and the Council told to start the whole procedure over again. I am satisfied that, had the fact that this order was defective been raised at the inquiry, the Inspector would have been invited to modify the order. I am confident that sufficient precision as to the points Q–R could then have been obtained.

95. The Inspector has a broad discretion to modify. He did not decide to modify in this case but on another basis entirely. I am satisfied that the whole question of modification should be looked at afresh by him. I am not persuaded that the practical difficulties which will arise for the Secretary of State on my remitting to him for reconsideration cannot be overcome with a modicum of thought and care. There is no unfairness, in my judgment, to any party in such a course. All the matters which Mr Laurence submits could have been raised had the Council taken the alternative course under the Wildlife and Countryside Act to delete the submerged stretch from the map and all the matters which would be taken into consideration if the whole process was restarted can be properly dealt with by re-opening the inquiry. I am not persuaded that I should allow a decision to stand which, in my judgment, was based on a fundamental error.

96. Nor am I prepared to find, as invited to do by Mr Bedford, that the Inspector could have found on the evidence that a new right of way had been dedicated and I should, therefore, exercise my discretion not to quash the order. This is for two reasons. Firstly, the point was not argued before the Inspector; the landowners and the Council have not had the opportunity of addressing it. Secondly, I do not agree that the evidence amounted to a clear case of new dedication. On the contrary, the evidence Mr Wadsley submitted indicated landowners entirely hostile to the alleged new dedication.

97. In conclusion, therefore, I am satisfied the Inspector was wrong to decide that this right of way still existed on a different alignment and I shall grant the relief sought. The decision will be quashed and the matter remitted to the Secretary of State for redetermination.

98. I should just like to add this. All counsel in addressing me accepted that this was a complex area of the law. I was invited to address an issue not apparently addressed in any reported case for hundreds of years. Considering the complexity of the law to which he was referred, I am not at all surprised that the Inspector, as I have found, fell into error. It is clear from

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*190 his decision letter that he gave this matter very considerable thought. I should like to express my gratitude finally to all counsel for their extremely thorough and helpful review of the law and the issues raised by application.

H8 Representation

Solicitors— Clarke Wilmott & Clarke , Bristol; the Treasury Solicitor ; Brooke North Solicitors, Leeds.

Order

H9. *Reporter* —David Stott.

Application allowed. Matter remitted to the Secretary of State for redetermination. *191

Footnotes

1 Paragraph numbers are added by the publisher.

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