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Ch. 1985 B. No. 532

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Royal Courts of Justice

Tuesday, 18th July, 1989

Before
HIS HONOUR JUDGE PAUL BAKER, Q.C.
(Sitting as a Judge of the High Court)

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(1) DAVID EDWARD SIMPSON BRAND
(2) BARBARA BRAND

v.

PHILIP LUND (CONSULTANTS) LIMITED

(By original Action)

PHILIP LUND (CONSULTANTS) LIMITED

v.

(1) DAVID EDWARD SIMPSON BRAND
(2) BARBARA BRAND
(3) HUSSEY (MARRIED WOMAN)
(4) MARIAN SANDRA PERROTT

(By Counterclaim)

(Transcribed from the Official Taperecording by the Association of Official Shorthandwriters Limited, Room 392 Royal Courts of Justice, and 2 New Square, Lincoln's Inn, London WC2A 3RU)

MR. HEDLEY MARTEN, instructed by Messrs. Braby & Waller, appeared for the Plaintiffs by Original Action and First and Second Defendants by Counterclaim.

The Third Defendant by Counterclaim appeared in person.

MR. MARK BLACKETT-ORD, instructed by Messrs. Iliffes (Chesham), appeared for the Defendant by Original Action and the Plaintiff by Counterclaim.

MR. EDWARD DENEHAN, instructed by Messrs. Summers & Co. (Beaconsfield), appeared for the Fourth Defendant by Counterclaim.

J U D G M E N T
(Revised)

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THE JUDGE: On the 6th August 1981, Philip Lund (Consultants) Limited (whom I shall call "Lund Consultants"), a firm of which the principal director and shareholder is Mr. Philip Lund, completed the purchase of 56 acres of woodland lying between Bellingdon and Chesham Vale, Buckinghamshire. The vendor was a Mr. George William Harrison, who had purchased the woods as long ago as January 1941. He had cut and extracted timber during the war years and immediately after that period, but had done nothing since, so that for over thirty years the woods had been neglected. This made them attractive to Mr. Lund. He wanted to manage and exploit them commercially. As they had been neglected, Mr. Lund thought, with evident justification, that he could secure them at not too high a price. The rehabilitation of a timber plantation is a long-term project, but there is some immediate and continuous profit to be had. Some timber could be sold for immediate felling, and was. Such timber was sold standing. The purchaser fells it and takes it out. The tops and other debris can be cut up and sold for logs. As to that, during the winter seasons of 1983/84 and 1984/85 Mr. Lund entered into arrangements with two or three logging contractors successively; a Mr. Brown (e) and a Mr. Lucton were among them. A load of logs sells for about £25 to £30, of which Mr. Lund's share would be some £12 to £15 per load. Some loads he himself transported and sold. For such an operation to be profitable the contractor needs to take out about five loads during the course of a short winter's day. He would expect to operate for two days a week over five

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winter months. This rate of progress requires a convenient access route. To these woods there are three access routes, as I shall describe, the comparative convenience of each depending on which part of the wood is being worked. The most convenient access when working in the higher north-western part of the woodland goes along a roadway, leading to a house owned by the plaintiffs, Mr. David Brand and his wife Mrs. Barbara Brand. They objected to the use of the roadway for the transport of wood.

On the 1st February 1985 the writ was issued. Mr. and Mrs. Brand had two complaints. First, that they were the owners of the soil of part of the roadway and maintain Lund Consultants had no right to use vehicles along it; for that, they are seeking an injunction. Secondly, they complain that the vehicles dropped a lot of mud on the road; for th they are seeking damages. The way it is put in the statement of claim, paragraph 6, is this: "From time to time the Defendant uses Ramscote Lane as a means of access to and egress from Area D" - that is the Lund Consultants' land - "by vehicle over and and across the Plaintiffs' red strip" - that is that part of the roadway - "thereby traversing the red strip in trespass in excess of its right to use the same as a bridleway only. The said vehicles are heavy and cause damage to the red strip and to the Plaintiffs' adjoining property, Area A", and then it gives some particulars: "The red strip is unmetalled, the surface consisting of aggregate. The Defendants' use of the strip for transporting timber, by dumper trucks and land rovers with trailers,

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is damaging this surface in that pot-holes are appearing in various places and the verges are breaking down. The Plaintiffs are responsible for the upkeep of the red strip and the damage caused by the Defendant will have to be repaired. The unmetalled part of Ramscote Lane leading away from the red strip to point Y is severely rutted. Mud and earth picked up by the Defendants' vehicles, using this unmetalled part of the lane, is deposited in substantial quantities on the red strip".

I am not satisfied that the defendants, Lund Consultants, in fact caused the deposit of mud to any appreciable extent, for these reasons. First of all, as I have indicated, the timber as such was sold standing, so that it is the purchasers who would have caused any mud to be dropped. The logging was by independent contractors, for whom the defendants are not in the circumstances vicariously liable. There was some evidence of use by others, such as neighbouring farmers, and the use by the plaintiffs' own building contractors.

Mr. Lund's evidence to me on this aspect of the matter was that "Mr. Brand was not complaining about the mud but about the usage. We started trying to negotiate an agreement. His sport is driving a coach and four. He said that he could not take his coach down what is designated as a bridle-path. We spoke about it. He said that he had plans to tarmac the road, and if he did he would not want me to use vehicles. He showed me the mud. He said that when you are using vehicles for carting, the mud sticks

to the flaps on the wheels, and he showed me the mud off the flaps and said that it was my fault. I was surprised at the claim, because he had never stood in the path and said that that is the mud. If there was a nuisance, I would have done something about it, because I carried a spade". So there is a conflict of evidence there. But for the reasons I have stated I prefer the evidence of Mr. Lund on that aspect of the matter. If there was any trespass I would award nominal damages for that in the sum of £25.

But much more important to the parties and in relation to the issues in the case is the claim for an injunction in respect of the alleged trespass over the part of the roadway, the soil of which is admittedly owned by Mr. and Mrs. Brand. The defence for that is one of justification. It is said that Ramscote Lane, of which the plaintiffs' strip forms part, is a public vehicular highway. Alternatively to that, it is said that Lund Consultants enjoy a private vehicular right of way over it.

Before going any further I should describe Ramscote Lane, the rights over which are the subject of this action. For this I principally rely on a number of photographs, a full description in the report of Dr. T.M. Williamson (one of the expert witnesses), and a view of the lane, which I made in the company of counsel. A specially marked map was used throughout the case, without which it is not easy to describe the lane, but some effort must be made. It is in all about a mile and a half long, and runs roughly north-west from Chesham Vale, about three miles north of

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Chesham, Buckinghamshire, to Bellingdon. At each end it joins an undoubted public highway. I said it ran roughly, advisedly, because it has twelve right-angled or near right-angled bends in it, and it rises nearly 200 ft. between the Vale and Bellingdon, but not rising evenly throughout the whole length. The steepest rise is in the middle, where it passes through and near Lund Consultants' land. The surface is muddy in part, even in the summer, especially to the rear of Mr. and Mrs. Brand's property. The hedges are overgrown in part, restricting the width. The track, with any necessary pruning, is, however, wide enough throughout to accommodate normal farm vehicles, carts, tractors and Land Rovers.

The first section, from Chesham Vale westwards for about 350 metres, is a well-defined track leading to some new farm buildings. To this point (which was labelled B on the map I referred to) it is quite easy to drive normal motor-cars. Although enquiries have been made, it has not been proved possible to trace the owner of this section.

The second section: the track is not so good over the next section, also about 350 metres, although readily negotiable for farm vehicles. It leads to point C on the map. At point C, a branch goes off to the south, passing between Ramscote Wood and Garretts Wood, two of the woodlands owned by Lund Consultants, and leading out to the main road at Greencroft Cottages, south of Bellingdon. Lund Consultants have an undisputed private right of way for vehicles over that track.

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The third section: from point C, Ramscote Lane itself, before a diversion in 1972, went away north-westwards through open fields known as White Hawridge Bottom. At the end of this stretch, it turns due west to meet Stubbings Wood. In 1972 this section of the track was diverted to run alongside Stubbings Wood. As later mentioned, the track has been fenced so as to allow about 8 ft. width, sufficient for a bridle-way, but barely adequate for vehicles. In 1981 the track and land alongside it in these two sections (B to D) was owned by Mrs. Burns. On the 1st July 1983 she sold it to a Mrs. Jacqueline Hussey, who sold it on to Miss Marian Perrott on the 9th January 1986.

Fourth: from point D, the track passes directly into Stubbings Wood, crosses it and then turns northwards, skirting Peppers Hill Wood. The crossing section is steep and hollowed out. The woods and road are part of Lund Consultants' land. From that point (point E), the track skirts another wood - an old wood - called Oak Wood, not owned by Lund Consultants, and then goes along the back of the land owned by the Brands, which I have already mentioned. No owner of the soil of this part of the track has been traced.

For a description of this section of the track I can take Dr. Williamson's report, at page 19. He is coming out of the woods, going up. "Beyond the wood the lane continues to have all the signs of being an ancient feature. It is fairly wide - generally around 7 metres from hedge-bank to hedge-bank; it is (or was) hedged on each side;

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and it forms the boundary for the adjacent fields, rather than cutting across them. All these are features which mark it out as a common way, rather than a mere field path. Only as it passes close to Ramsey Cottage does it narrow perceptibly, to around 3.5 metres. This would still be wide enough for a cart, or indeed a car; but anyway the present width appears to be the result of progressive encroachment by hedges, mainly from the south-western side (i.e., the Ramsey Cottage side). Once again, as in section D, there are sporadic signs that attempts have been made to improve the lane's surface at various times in the past".

Now moving to the next section, that is, section 6: at the end of the rear of the Brand's property, the track turns left, along the return frontage of their property, to the entrance gate, where it turns right, along the road, giving access to the cottage. This section of the roadway is wide and in good condition, having improved by Mr. Brand, who owns the surface of it, as I have already mentioned.

Seventh: the final section of the lane, from about 200 ft. beyond the entrance to Ramsey Cottage to the outlet at Bellingdon, is an adopted road maintained by the local authority.

I return now to the section which is now owned by Miss Perrott and previously owned by Mrs. Hussey. When Mrs. Hussey owned the woods, Mr. Lund attempted to use the old way across the fields to point B. This caused great concern to Mr. and Mrs. Hussey, who had some valuable ponies

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in the field. Mr. Lund had taken down the fence to allow access from the woods into White Hawridge Bottom. Some of the ponies escaped into the woods. Mr. Hussey remonstrated with Mr. Lund. Mr. Lund claimed a right to go across the field. Mr. Hussey told me that, if Mr. Lund had asked permission to go across the wood from time to time, he would have allowed it. They were unable to reconcile their differences. Solicitors came into it, and, more significantly, Mr. Hussey caused a mound of earth to be raised at point B, thus effectively stopping vehicular access to and from the Vale. Thus Mr. Lund was effectively prevented from using Ramscote Lane in either direction, either towards Bellingdon or the Vale.

Accordingly he raised a counterclaim in the proceedings against Mr. and Mrs. Brand and against Mrs. Hussey, the then owner of the land towards the Vale - this was on the 22nd March 1985 - and sought a declaration that Ramscote Lane was a public highway, alternatively that it was a private right of way. He also sought a mandatory injunction to secure the removal of the obstruction.

After Miss Perrott bought the property in 1986, she removed the mound so far as it stood on her land, but caused fences to be erected along the line of the diverted track, as I have described. In consequence, Lund Consultants applied to join Miss Perrott as a further defendant to the counterclaim. That application was resisted, but in the event she was joined, pursuant to the order of Mr. Justice Millett, on the 20th February 1987. Against her, an order

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for the removal of the fences is sought. The injunction against Mrs. Hussey is no longer appropriate. Damages are sought against Mrs. Hussey and against Miss Perrott. Lund Consultants do not seek substantial damages against Miss Perrott, but they do against Mrs. Hussey, on the basis that, by preventing Lund Consultants from using Ramscote Lane during the winter season already mentioned, they have suffered a loss of income. In these proceedings Mrs. Hussey appeared in person. Miss Perrott was represented.

The damages are a minor issue. Again the main issue is the right. If the right is established, then the assessment of damages against Miss Perrott I would put at £25 as in the other case. I will deal with the damages as to Mrs. Hussey later, when I have dealt with the major issue, which is whether the whole of Ramscote Lane is a public vehicular highway.

That is the factual background and I must now address myself to that central issue. At common law a public right of way may be acquired by prescription, that is, user as of right from time immemorial - that is to say, since 1189 - or by dedication and acceptance. Express dedication by the owner of land over which the way passes is rare, but may be presumed from user as of right from some period subsequent to 1189. Hence while user from 1189 is sufficient, it is not essential. The length of user depends on the circumstances, and can appear at any period, for once a highway always a highway. Reliance on a period in the distant past raises obvious difficulties of proof, and hence, to simplify proof in the majority of

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cases the Rights of Way Act 1932, and now the Highways Act 1980 section 31, laid down a specific period of use which will suffice to show that a right of way exists. Such a period, however, is to be calculated next before the time when the right to use the way was brought into question. The last vehicular use of Ramscote Lane of which there is any firm evidence, before the use by Mr. Lund and his associates in 1982 or 1983 or thereabouts, took place in 1946 to 1947. Hence Lund Consultants cannot rely on the Highways Act, but have to rely on establishing a dedication and acceptance at common law.

They have indeed sought to show that this track has existed as a highway for a very long time, certainly for several centuries, if not from time immemorial.

Before leaving the post-war period - that is to say, post the 1939-1945 war - I should say that under the National Parks and Access to the Countryside Act 1949 Ramscote Lane has been designated a footpath and bridle-way. It was not designated as a roadway used as a footpath, a category available under the Act. It has not been suggested that this in any way precludes the establishment at common law of the lane as a public vehicular highway.

As already mentioned, in 1972, on the application of the then owner of the land in White Hawridge Bottom through which the track ran on leaving the woods, an order was made diverting the track so that it now runs round the edge of the wood. The order was made under the Highways Act 1959 section 111,

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which is now the Highways Act 1980 section 119. The width of the new track is stated to be 8 ft. Miss Perrott has fenced off the track from her adjoining land, allowing for that width or thereabouts. By adopting the plan in the statement of claim, Lund Consultants appear to accept the efficacy of this order as regards the route of any vehicular way it may be able to establish. I have had no argument on that particular point.

Before I come to the evidence I should deal with certain submissions of law, supported by a number of authorities which have been placed before me by Mr. Marten for Mr. and Mrs. Brand. The first one is that a public vehicular highway is and normally must be used to go from one public highway to another. In support of that, there was cited the well-known case of Attorney General v. Antrobus (1905) 2 Ch. 188. That case concerned a path or track leading to Stonehenge. It was held to be not a public highway.

I cannot accept the proposition precisely as stated. The position as I see it is this, that generally a public right of way is a right of passing from one public place or highway to another. Here the claimed right is from one highway (at Bellingdon) to another (at Chesham Vale). Hence I do not have to consider the position as to cul-de-sacs and tracks, as in the Antrobus case. The part of the formulation that I do not accept is the wording that it normally must be used to go from one public highway to another. In my judgment, it does not have to be shown that it is normally used to go from one end to the other. It

may normally be used by people going from either end to and from premises fronting on to it and less frequently used by persons traversing its whole length. The user necessary to establish a right of way is to be considered separately from the way itself.

The next proposition is that dedication must be to the public at large or a sufficiently large section of the public at large and not just to a fluctuating body of persons in a particular locality. Reference was made there to Alfred F. Beckett Ltd. v. Lyons (1967) Ch. 449. I agree with the proposition to this extent, that, if an attempt is made to dedicate the way to the residents of a particular village or residents in a particular locality, the dedication will be void. But that does not mean that if the dedication is to be inferred from user it can be defeated by showing that only the inhabitants of a locality have used it. In earlier times it would be only rarely that strangers to a locality would use a by-way; yet that is not fatal. The case of Alfred F. Beckett Ltd. v. Lyons concerned a claim that the inhabitants of the County Palatine of Durham had the right to take coal from the seashore. That was a specific claim by a section of the community to a profit. But one cannot conclude from that case that, where only the inhabitants of a community avail themselves of a way, the user is not on behalf of the public at large. In Beckett the right claimed could not be claimed by the public at large, as public rights in the foreshore are well defined and do not include taking minerals. But a right of way is a classic case of a public right.

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It is Mr. Martin's third proposition that goes to the heart of the matter. He said that dedication is not a matter to be presumed unless rebutted, but to be inferred from the particular facts of the particular case. In that, he referred me to Folkestone Corporation v. Brockman

B (1914) A.C. 338. There is a passage in the speech of Lord Dunedin which I think is particularly helpful in this context. It is at page 375:

> "With deference to the learned judges, I do not think that is a proper way to approach the question, and its defect, to my mind, consists in regarding 'user' as an inflexible term, which, if found to apply, can lead to only one legal result. User is evidence, and can be no more, of dedication. The expression that user raises a presumption of dedication has its origin in this, that in cases where express dedication is out of the question, no-one can see into a man's mind, and therefore dedication, which can never come into being without intention, can, if it is to be proved at all, only be inferred or presumed from extraneous facts. But that still leaves as matter for enquiry what was the user, and to what did it point. And this must be considered, not after the method of the Horatii and Curiatii, by taking a set of isolated findings, saying that they presumably lead to a certain result, and then proceeding to see if that presumption can be rebutted, but by considering the whole facts, the surroundings which lead to the user, and from all those facts, including the user, coming to the conclusion whether or not the user did infer dedication".

Mr. Marten's third and fourth propositions relate to acceptance. I do not read them out, because I think it is

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accepted that there those do not arise in the sort of case we have here, where dedication is sought to be presumed from user, because user by members of the public imports acceptance.

Then the final proposition was that dedication can be partial. There can be dedication as to the nature of user. Of course the relevance in this case is that the dedication might be limited to pedestrians and people leading or driving animals or riding horses - bridle-ways. The dedication may be expressly limited, and I was referred to an old case, Stafford v. Coyney (1827) 7 Barnewall & Cresswell 257, which, while the decision went off, I think, on other grounds, does lend support to the proposition that the dedication may be limited as to user. In that case, there was an exception for vehicles carrying coal. But the user itself of course may show that the dedication is limited, as may the nature of the way where it can physically accommodate only pedestrians or animals and not vehicles. It is necessary, as I would see it, to consider the whole of the facts, the surroundings which lead to the user, the user itself and whether dedication could be inferred from user. One looks at the nature of the road, its antiquity, the amount of the user, the length and its type.

In seeking to establish a vehicular right of way over this track, Mr. Blackett-Ord, for Lund Consultants, relies on four classes of evidence. The first is that of old maps. The second consists of references to Ramscote Lane in the twentieth century deeds and in certain parish records. The third class is that of expert landscape

historians. The fourth class is evidence of vehicular use by local people during the present century.

I must now examine those classes of evidence, and go first to the old maps. The earliest map which has been produced was engraved in 1770 by T. Jeffereys, described as geographer to the King, and is based on a survey which took place in the years 1766 to 1768. It was republished in 1788, a copy of which has also been produced. The principal interest of this map, apart from its age, is that it shows Ramscote Lane along the same irregular angular line it followed right up to the 1972 diversion. Of subsidiary interest is that it shows the existence of Oak Wood, the smaller area of woodland near the Bellingdon end, but no other woodland adjoining it. Further, the section of the roadway which traversed open fields at the Chesham Vale end is shown with a hedge or fence along the south side.

The next map is the 6 in. 1822 Ordnance Survey map. As far as one can see from the copy supplied to me, this also shows the roadway in identical form with that shown on the 1770 map. There had been no change in it in the fifty years in between. One also notes from the 1822 map a number of other roads or tracks leading off, both east and west, from the road running north from Chesham through Chesham Vale to a Y-fork north of the Vale.

The third map and next in order of time is the map published by A. Bryant in 1825. This map does not show Ramscote Lane and hence reliance is placed on it by

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the defendants to the counterclaim. But the map does not show several of the other roads to which I have just made reference. To my mind, this map was, as one of the expert witnesses said, an early example of an AA road map. It catered for those long distance travellers who were concerned with through routes and not with every detail of local topography. Undoubtedly it shows some lanes and bridle-ways, but does not purport, as I would see it, to show every such way. I regard this map as of no assistance in the enquiry I am making.

The fourth map is the tithe map of 1843 and its accompanying index. This map was made by or on behalf of the Tithe Commissioners for the purposes of their functions under the Tithe Act 1836. That Act abolished tithes in kind and substituted for them a tithe rent charge on the land. The commissioners fixed a yearly rental value which each plot of land was to bear. By reference to this, the annual tithe was fixed in much the same way as rateable value determines the amount of the rate a hereditament has to bear. The map is not primarily a survey of roads, though they have to be shown on the map or the map would be unintelligible. Where the roadway is enclosed on both sides it bears no plot number, nor would one expect it, as such land is barren and not tithable. But where the road runs across open land or where it is fenced on one side only, the track is included in the surrounding or adjoining plots, the plot as a whole being not totally barren. The map shows Ramscote Lane in the position it was on the earlier maps. Behind Ramsey Cottage it is shown very narrow, but

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I am unable to draw the inference that it had narrowed since 1822. The map is not a precise plan as to roads. The section over the open fields is shown with a hedge on one side, as in the earlier maps. Much discussion in the case has centred on plot 1489, which includes the track at the lower end, just before the final section leading to Chesham Vale. This is shown in the index as 2 acres 1 rood and 20 perches, in the ownership and occupation of James Field (Vale), and described as "in common field, arable". It was suggested that the owner would have objected to the inclusion if it had been truly a highway, for by its inclusion he is condemned to pay tithes on a rent charge of two-and-threepence for the vicar and ten-and-ten-pence for the impropriators, not insignificant sums in those days. I find this reasoning unconvincing. As the site of the track clearly occupied only a small part of the entire plot of over 2 acres, James Field had no choice. The plot was as a whole productive and hence tithable. Of far greater interest, to my mind, is what the map discloses about the state of agriculture at this time. Down at Chesham Vale and also right up near Bellingdon, some of the strips or fields are shown unenclosed, including plot 1489, and a number of adjoining strips. These are survivals from open-field farming, a conclusion underlined by the sort of names attributable to them in the index: for example, in common field, acre piece and so on. Another interesting feature of the tithe map is that for the first time some woodland is shown on the area now owned by Lund Consultants, mainly

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in what is now called Stubbings Wood.

The next map is the 25 in. Ordnance Survey map of 1877, together with an extract from the Ordnance Survey Book. The roadway is clearly shown in the same position, through White Hawridge Bottom. It is still fenced or hedged on one side. At the lower end it is described in the Survey as a road. Stubbings Wood is now much more extensive and includes a central section of nearly 4 acres, which has previously been described in the tithe index as Stubbings Field, arable, 1440.

Moving to the next map, twenty years later in 1898 came a new edition of the Ordnance Survey. The road is now called Ramscote Lane. Further, the section of Lund Consultants' land called Ramscote Wood has appeared on an area of over 18 acres, previously designated as arable. Similarly with the section now known as Garretts Wood. Another feature clearly shown on this map is a gate across the Lane, near the Chesham Vale end. The existence of such a gate, unless locked, is not inconsistent with the existence of a vehicular highway. It may simply be a means of restraining cattle and horses.

Next, by 1925 when the next edition of the Ordnance Survey came along, the section of the woodland known as Peppers Hill Plantation, on the north side of the track which now passes through the wood, had appeared, linking Ramscote Wood with the old Oak Wood.

We have now reached modern times. I have described it as it now exists - the lane, that is. These maps show

that for a period of over two hundred years the lane has existed and there is no reason to suppose that it did not exist for a long period before 1770. The depicting of a track on the Ordnance Survey maps is not in itself evidence of the existence of a right of way. It merely purports to show the physical features on the ground. However, its existence for so long unchanged is not without significance and may lend support to the inference that public rights exist over it.

The second category of evidence relied on is that to be gathered from the twentieth century title deeds and parish records. When describing the course of the track, I have already indicated the ownership of the soil where known. I can take the title deeds in three sections: first, White Hawridge Bottom; second, Lund Consultants' land; and third, the roadway leading to Ramsey Cottage and going on along the side of it.

First, the root of title to White Hawridge Bottom is a conveyance of the 24th June 1921, between two brothers, W.G. and R.O. Garrett-Pegge and others and Henry Rogers (the purchaser). The recital states that at the time of his death on the 31st July 1868 John Garrett was seised for an estate in fee simple of the land on each side of the lane as it passes through the upper part of White Hawridge Bottom; and other lower land was acquired by his successors. All the land bordering on this section of Ramscote Lane, and the track itself (which is shown coloured green on the plan), and the tithe rent charge issuing from

it was conveyed to Rogers, but with this exception and reservation: "Except and reserving unto the Vendors" - that is, the Garrett-Pegges - "their heirs successors and assigns and other the owners and occupiers for the time being of the adjoining lands of the Vendors shown yellow on the said plan" - and that is the land which is now owned by Lund Consultants - "or of any part thereof full and free right and liberty at all times hereafter and for all purposes whether on foot or with or without horses carts carriages wagons or vehicles of any and every description laden or unladen to go pass or repass and to drive cattle sheep and other animals along over or upon the existing roadway or public right of way known as 'Ramscoat Lane' the part whereof which is hereby conveyed is shown green" - and that is the part on the lower end, going down to what has been described as point B in the plan.

The interest of this deed is twofold. First, it refers to Ramscote Lane as a public right of way. Secondly, it shows that White Hawridge Bottom and the Lund land were at this time in common ownership. This deed was not executed by the purchaser. Consequently, Mr. Blackett-Ord, for Lund Consultants, has not felt able to rely on the express exception or reservation of a private right of way as the law stood before 1926.

That is the first section. Going to the second section, the root of title to Lund Consultants' land is dated the 4th October 1924. In it the brothers Garrett-Pegge conveyed the land now owned by Lund Consultants.

It included a strip of land 25 ft. wide, between a gateway at Garretts Wood to a point east on the Ramscote Lane which is in that deed called Ramscote Road. Also granted was a right of way west and turning south, coming out at Greencoat Cottages. It is expressly granted for vehicles. Lund Consultants undoubtedly have the benefit of this access to the woods. But Mr. Lund says that it is not convenient for the taking out of timber from the more remote parts of the wood.

The third section, coming up to Bellingdon: the strip of road owned by the Brands at the Bellingdon end leading to Ramscote Cottage and its continuation along the side of the Cottage, were included in the parcels of land which were copyhold until the 8th March 1919. At that date they were enfranchised. They were part of the Manor of Cheshambury. The Lord of the Manor in 1919 was John Compton, fourth Baron of Chesham. Dr. Baines, one of the experts, told me that the Chesham Vale land was disposed of in 1802 to 1804. The deeds of the first section showing that the land in the Vale was freehold from before 1869, and those of the third section showing that at Bellingdon was copyhold until 1919, lend support to that evidence. The title deeds, coupled with the absence of evidence of ownership of stretches of the lane, are consistent with the lane having public rights of way.

I now come to the minutes of the Chartridge Parish Council. Thirteen extracts, ranging from 1920 to 1973, have been produced. During that period the Parish Council was the smallest unit of local government. It was comprised

in the area of the Amersham Rural District Council, which in turn was comprised of the area of the Buckingham County Council. In 1920, under the Local Government Act 1894 section 13(2), the Parish Council had power to repair footpaths and bridle-ways. The repair of other public highways was the responsibility of the Rural District Council; one can see that in section 25 of the 1894 Act. By the Local Government Act 1929, the responsibilities of the Rural District Council were taken over by County Councils, giving rise to the nomenclature of "county roads"; one can see that in sections 29 and 30 of the 1929 Act.

With that background, we can turn to the minutes. The first one is on the 11th August 1920, when at a meeting of the Parish Council the following is recorded:

> "Mr. Elliott produced, and the Clerk read, a letter written to the former by Mrs. Rogers of White Hawridge Farm, Chesham Vale, complaining of the condition of the lane called Ramsgate Lane" -

it said "Ramsgate" in the minute, but it is evidently "Ramscote"

> "leading from the Chesham Vale to Bellingdon; Mrs. Rogers stated that the lane was neglected and in a shocking condition and that if it was neglected much more it would become impassable.
>
> It was proposed by Mr. Elliott, seconded by Mr. Clark, and unanimously resolved, that the Clerk be instucted to write and call the attention of the Amersham Rural District Council to the matter mentioned by Mrs. Rogers, and to ask that Council to take steps to have the lane put into a better condition as speedily as possible".

That minute is consistent with it being a vehicular highway and not a mere footpath, having regard to the relative powers of the Parish Council and the Rural District Council, which I have mentioned.

I can pass over the intervening minutes as not being of any great assistance in the case. I think I can just look at the minute of the 16th March 1961:

> "Ramscote Lane to the Vale. The state of this road was referred to and Mr. de Fraine mentioned that for many years the Amersham R.D.C. had kept the" -

there is an illegible mark here. It looks as though there is a word missed out: "kept the road", or something -

> "in good condition to Mr. Cox's house was this was a Highway and was the responsibility of Amersham R.D.C. The Buckingham County Council were not responsible beyond Mr. Cox's house and do not know who is responsible for maintaining the other portion. It was suggested that we write to the Divisional Surveyor to enquire if the road could be made up with old material and rolled as far as Ramsey Cottage belonging to Mr. Bayley".

That shows that there the road was only repairable to a point short of Ramsey Cottages. Of course that is a very small part of the whole Lane.

I think the last one I need refer to is the minute of the 18th September 1963, headed "Bridlepath. No. 38A Ramscote Lane, Bellingdon". That was its number on the definitive map, as I understand it, under the National Parks and Access to the Countryside Act. The minute reads:

> "A very long discussion took place on this matter and the Clerk was asked to write the Bucks. County Council stating that the opinion was that Ramscote Lane should be designated as a Roadway".

That seems to have reference to the category of roadway used as a footpath under the National Parks and Access to the Countryside Act 1949.

Later minutes are concerned with its upkeep as a footpath and bridle-way, as one might expect, having regard to its designation as such under the 1949 Act. Thus it would seem that the Parish Council were of the view that it was a roadway and not a mere footpath.

The third category of evidence is that of experts in landscape history. Four were called: two by Lund Consultants, and one each by Mr. and Mrs. Brand and Miss Perott.

I can take first Mr. P.M.L. Clayden, called on behalf of the Brands. He is a solicitor and for the past twelve years has been very much concerned with the law relating to public rights of way. He does not claim to be an historian and has no special knowledge of the particular locality. He therefore confined himself to commenting on the reports of the Lund Consultants' experts. His conclusions about that are in paragraphs 9 and 10 - specifically commenting on Dr. Williamson's report. He has no comment to make or quarrel with the general historical and descriptive parts of the report.

> "I question, however, Mr. Williamson's conclusion that the lane is subject to a public vehicular right of way. The mere fact that the lane has been in existence for a very long period of time

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> is not, of itself, cogent evidence of a vehicular right of way. For such a right to be established the evidence must be of user. There is no direct evidence at this point in the Report. In his description of the route (particularly on page 14) Mr. Williamson concludes that the lane must have been a public vehicular right of way in order to give the inhabitants access to the adjacent fields. However there is an alternative explanation, namely, that access was by permission of the Lord of the Manor or other land owner(s). It is impossible to be certain on the point, there being no evidence of actual user by 'vehicles' in the medieval period".

In cross-examination, he said that he did not challenge the view of Dr. Williamson that the way was probably used by carts. The comments of one legally qualified and practising extensively in this subject were very helpful, and indeed I was assisted by a book that he has written on the subject, Rights of Way and Guide to the Law and Practice. As I say, his comments were useful and helpful, but he could not really offer any evidence of his own.

That could not be said of the evidence of the expert called on behalf of Miss Perrott, Mrs. McLaughlin. Her qualifications included the following:

> "Since being awarded a B.A. degree in History in 1950, I have studied history relating to the way people actually lived, evidenced by the documents produced in manorial, civil and criminal courts, mainly concerning property rights and land usage. My research includes the study of cartographic evidence and descriptive conveyances of property and

ancillary rights connected with specific lands".

She says she is the co-author of the book "County Maps and the History of Buckinghamshire" and also the author of a book "Manorial Land Law and Laws of Inheritance".

"I have lived in Buckinghamshire for 17 years, and through my research have gained an extensive knowledge of the history of the locality".

It gives me no pleasure to have to say that I found her evidence virtually valueless for my purposes. One expects any expert witness called to assist the court to be careful and objective. Mrs. McLaughlin was neither. She claimed to have studied the manorial records, but could give no details, not having brought her notes with her. She had a heading in her report on Parish Council Records, but it transpired that she had not looked at them, not even at those extracts adduced in evidence to which I have already referred. She affected to know a lot about a James Field, who features in the tithe map index which I mentioned, but could give no firm biographical details about him. As to objectivity, she attempted to persuade me that in ancient times farming was done without vehicles, not even horse-drawn ploughs; any vehicles were of such immensity and awkwardness that they could not get round the many bends. Thus at the outset of her report, commenting on the Jefferey's map of 1770, she said this:

"What I think is of particular significance, in studying this map, is that it shows a pair of cottages at the junction with Vale Rd,

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> which seriously obstruct the way towards the market town and church. Since no route is shown on the other side of the junction, the only possible turn would be northwards (left). Since this led nowhere significant to the movement of public vehicular traffic, I cannot accept that the junction was used for the same".

A careful study of the map and the slightest knowledge of ordinary farm carts shows that statement to be ridiculous. A Mr. Balcombe (Boughton), who used to farm since the 1939-1945 war, at White Hawridge Bottom, stated that there was only one cottage there. It was demolished fifteen years ago. It was set back from the road, allowing a good sweep out. Aided by my own study of the maps and ground, I accept that evidence.

Then under the rubrick "Horsedrawn Timber Wagons", she said:

> "Timber carting vehicles were huge rigid structures and, needless to say, very heavy. They required a great deal of space, and often many horses to pull them. Even the smallest of timber wagons had wheels six feet in diameter. Since timbers were carried under the vehicle and diagonally, a far greater width than that offered between the hedged sections of the way, particularly on corners, would have been essential [leading to the]
>
> CONCLUSION: Under no circumstances could the sections of the way involved in this dispute have been used for timber extraction".

This takes no account of the unchallenged evidence in the case, that during two periods in the present century in the decades

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of the twenties and the forties, timber was in fact extracted over Ramscote Lane. Further, as I have shown in discussing the maps, the large timber woods are of relatively recent growth. In earlier times we have to consider other smaller farm vehicles.

Finally, my faith in her description of the size and manoeuvrability of timber-carting vehicles was much shaken when she was shown a picture of a hay and corn-carrying four-wheeled wagon of the type prevalent until the 1939-1945 war. She said that six horses would be needed to draw them. But I know from my own experience, confirmed by reference to a photograph in a published work in my possession that only one strong cart horse was needed to draw such a wagon.

Such exaggerations cast serious doubt on her objectivity - and they are merely examples. I have no doubt that she is widely read in her subject, but I have to reject her evidence as wholly unreliable.

Quite different were the experts called on behalf of Lund Consultants. The qualifications of Dr. T.M. Williamson include the following. He says:

> "The study of the English landscape has been my principal activity and interest for the last ten years. I read History . . . and Archaeology . . . Subsequently, I studied the development of the landscape of North Essex for the degree of Ph.D., which I was awarded in 1984. Since 1984, I have been employed as Lecturer in Landscape History at the University of East Anglia, Norwich. I have written two books, and published a large number of articles in academic journals,

relating to various aspects of archaeology and landscape history.

He began by visiting Ramscote Lane, to make observations and measurements, and produced a report which contains a full description of the lane as it now exists and what can be deduced from those signs as to its earlier use. I have already cited from it as regards the Bellingdon Lane end. There are two other parts which I found especially illuminating. First, he is dealing with the section up from Chesham Bottom to White Hawridge Bottom, and he said at page 15:

> "This section of the lane thus once led along the southern side of a small open-field, and this is strong evidence for both its antiquity, and its status. The farmers who held land in this field would not have each possessed separate private access to their tiny strips: this would have been impossible. They would have needed some common access way, to bring in carts and ploughs, and to take out crops after harvest. They would, in short, have needed a public vehicular highway, and this, of course, is what Ramscote Lane provided".

That is his description of that part of it. At this point I can deal with a point taken in the defence to counterclai that access was by consent of the descendant's predecessors in title. A number of witnesses were cross-examined on the lines that, though no-one can recall permission having been sought and given, it might have been. This shows, if I may say so, a lack of historical appreciation. If the tenants had customary enforceable rights in the fields, it is inconceivable that they did not have rights of access to them. Indeed long unchallenged user ripens into a public

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unchallengeable right.

I can now turn to Dr. Williamson's comments on the steep way through Lund Consultants' land, not always, it will be recalled, a way through woodland. He says:

> "As the track proceeds uphill, it becomes a hollow way; that is, it lies in a deep hollow. . . . Hollow ways on this scale are sometimes said to be the result of deliberate excavation, to facilitate the negotiation of steep slopes. In some cases this is true. Indeed it might just conceivably be true in the case of Ramscote Lane, but I personally doubt it. Deliberate cuttings are usually only a feature of major, long-distance roads - medieval 'King's Highways', or (more usually) post-medieval Turnpike roads. Most hollow ways, including this one, are the result of centuries of erosion on unpaved roads. Traffic loosens the surface and prevents vegetation from holding it; rain washes the debris downhill. A well-developed hollow way like this is unlikely to be less than 300 years old, and may be older. Hollow ways are not usually a feature of footpaths: large-scale erosion demands the regular passage of wheeled vehicles.
>
> There are indications that attempts have been made to surface this section of the lane in a number of places. Some of these attempts look relatively recent, some seem rather older. In particular, there are areas where flints appear to have been pushed into the surface: something more likely to have occurred in the 19th century, or earlier, than in this century. The later attempts, by contrast, take the form of brick and other rubble. Most do not look particularly recent, although I would not like

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to be too definite about this. I find it hard to believe that anyone would go to such lengths to improve the surface of what was only a footpath or bridleway: in my experience, this kind of thing is usually only done when lanes are being used for traffic. The track is here, and indeed throughout its length, extremely muddy".

He summarises his report as follows:

"The evidence provided by field survey, and by early maps, leaves no doubt that Ramscote Lane is an ancient public road. Among other functions, it provided medieval farmers in the hamlet of Bellingdon with access to arable holdings in an open-field in White Hawridge Bottom. The width of the lane, the nature of its boundaries, and the degree of erosion which it exhibits at various points along its length are all consistent with a medieval origin. These and other features also indicate that it had the status of a road, rather than a field path. Roads of this length in the medieval landscape were public, rather than private features, and Ramscote Lane continued to function as a public road throughout the post-medieval period. It appears as a road on 18th and 19th century maps, and sporadic attempts made to improve the road surface suggest that it was still being used by wheeled traffic during the 20th century".

I found his report cogent and convincing and completely unshaken in cross-examination.

Finally there is Dr. Baines, a man who has lived in Chesham all his life, been active in local government for much of it, and has a keen interest in local history. He told

me that "road used as a public path" would have been the appropriate categorisation of Ramscote Lane under the 1949 Act, but the County surveyor of the day was very much against using it whatever the circumstances, always preferring "footpath and bridleway". He (Dr. Baines) makes the common-sense point, as Dr. Williamson, that before the advent of the motor-vehicle there was a greater need of roads like Ramscote Lane linking hamlets and avoiding long detours. Horses and carts were a slow means of transport, so that distances, which now one covers quickly and conveniently, would previously have been unacceptable. His final conclusion was this: "I have known Ramscote Lane since before 1934, when it became our town boundary, and frankly I am surprised that its highway status should now have been called into question".

The fourth category of evidence is evidence as to vehicular user in the present century. On behalf of Lund Consultants, four Civil Evidence Act statements of deceased persons were read and eight witnesses were called. For the Brands, there were three witnesses and one Civil Evidence Act statement. I do not propose to review it in detail but can summarise it as follows. Apart from two periods, vehicular use has been very slight and since about 1950 virtually non-existent, until the use by Lund Consultants, which has been challenged. During the 1920s, I find that some timber was brought out along the upper part of Ramscote Lane leading to Bellingdon. There is one statement that during this period timber was also

carried down to the Vale, but it is vague and I cannot attach any weight to it. Also I find that in the 1940s more timber was carried out, both to Bellingdon by Ramsey Cottage and down to the Vale. In addition, I find that the lane was used at this time by a Mr. Matthews and his employees. He had a brickworks at Bellingdon, which closed down during the war, and in place of that he farmed White Hawridge Bottom, taking vehicles along the lane. Outside those periods and beyond those purposes, user has been very slight. However, I find the following: In the 1930s a local handyman used the lane to carry goods and animals by cart, between Bellingdon and Chesham Vale. There were also motor-cycle rallies and trials, but I attach little importance to them; they were brief, totally unlike other traffic and led to objections - more, I suspect, on the ground of nuisance, rather than the invasion of private rights. Also, while dealing with this period, I must mention the evidence of Mrs. Jean White. She claimed that, at the point where the lane coming up from the Vale reaches the open ground, there was a kissing gate which allowed only pedestrians to go through, not even animals, let alone riders or carts. She must be mistaken as to the existence or location of this gate. In so far as her evidence suggests that it would be impossible to take a cart from the Vale along the lane to White Hawridge Bottom and beyond, I reject it.

For the earlier part of the century before the 1930s, I have a statement of a Mr. Horace Jesse Harding. He was born in 1910. He made his statement on the 12th

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October 1984, but sadly has died since then. It seems that he resided in Bellingdon all his life. As I said, he was born in 1910. He said: "As a boy I can remember from the age of 3 or 4 years walking regularly up and down Ramscote Lane with my father and a horse and cart. We used this route to get from Bellingdon to Chesham Vale on our way to visit other farms or to a farm sale or even to go to Berkhamsted. The lane was in regular use by members of the public with wheeled vehicles from the time of my earliest recollections say 1913/14 until Buckinghamshire County Council took over responsibility from Amersham Rural District Council sometime in the early 1930s. Up until then the road was in reasonable condition and I can recollect it being maintained by Council workers. A local owner Mr. Frederick Elliott of Bellingdon Farm employed about nine fulltime workers. I can particularly remember Mr. Elliott's workers taking carts of manure and corn as well as ploughs down Ramscote Lane and using it to get to and from work. I can remember these workers using the lane up until September 1921".

That statement, to my mind, fits in with the regular pattern that we have seen in the experts' reports. Of course one must not forget in this case that it is conceded throughout to have been used as a public bridle-way. That statement, as I say, does fit in. I find it convincing, as it seems to me the lane was continuously used for agricultural purposes and as a way between Bellingdon and Chesham Vale and beyond, right up until the 1920s when horse-drawn traffic

started to disappear. After that, the lane became inconvenient as modern vehicles took over.

Also significant is Mr. Harding's reference in 1930 to the responsibility for the lane being taken over in that year by the Buckinghamshire County Council. Other witnesses refer to it as a County road. This fits in with the changes in the Local Government Act 1929 already referred to, with the evidence of Dr. Baines and with the concern of the Parish Council. There is also the evidence of repair by the Council, though I do not find this went beyond the upkeep of the surface short of Ramsey Cottage at the Bellingdon end and in the trimming of the hedges for a short distance at the Chesham Vale end.

Viewing all that evidence, I find that this is an ancient vehicular highway used from time immemorial along the line of Ramscote Lane. The effect on it of the diversion in 1972 has not been argued before me, nor has the question whether, it having been shown to be an ancient vehicular way, it can be used by all and any types of modern vehicles. Plainly it cannot be so used physically by normal motor-cars, but that is not to say that they do not have rights to go there. This no doubt is a matter which is amenable to the powers under the Highways Act 1980 vested in local authorities.

Now I have to deal with two remaining matters. The first is the claim against Mrs. Hussey. I have already recounted the circumstances under which Mr. Hussey blocked the access from the woods down to the Vale. In her defence, Mrs. Hussey admits that she caused a mound to be erected,

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thus adopting what her husband had done. I can well understand the motives of Mr. and Mrs. Hussey in seeking to stop Mr. Lund from using the way across their land. I accept they did so out of concern for their ponies and not simply to be obstructive. Nevertheless my findings show that they had no right to bar the way. I also find that that action has caused some loss to Consultants. I have already given the details of the logging operations. Over some 80 days of possible operations throughout two winter seasons, he might have achieved five loads a day, whereas he could not achieve more than four, through the limited access to the land. A load to him was worth £12 to £15, so the loss of 80 loads is equivalent of £1,000 to £1,200. But it does not follow that all would have gone by this route to the Vale. There were two other routes. Also the logs are still available for sale. I would put the damages at the much more modest figure of £250.

The second matter I have to deal with is the alternative claim of a private right of way. This need not detain us very long. The way it is pleaded in paragraph 10 of the counterclaim is this: "The Plaintiffs by Counterclaim is to a prescriptive right of way, and it will rely upon the use of the roadway (or on the said parts of the roadway) by its predecessors in title as of right from before 1928 to 1946 or thereabouts and (in respect of the part passing over the land of the 1st and 2nd Defendants to Counterclaim) from before 1928 until 1981 or thereabouts". The evidence as to user accommodating the Lund Consultants' land is very slight. As regards the way down to the Vale, it is confined

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to the war-time years - much less than the minimum of twenty years normally required for the acquisition of any form of prescriptive right. The evidence as to the route out to Bellingdon is slightly more, as there is some user in the 1920s as well as the war years. It is, in my judgment, quite insufficient to establish a private right of way by prescription, and therefore I do not go into a number of the legal objections which counsel for the defendants submitted.

The result of the whole case is that I shall make a declaration in relation to the public right of way. There will be judgment against Miss Perrott for £25. There will be judgment against Mrs. Hussey for £250. I shall hear arguments on the further relief by way of injunction.

MR. MARTEN: My Lord, since my learned friend Mr. Blackett-Ord is not here, it may that we have no option but to adjourn until ------

THE JUDGE: Yes. It is most unfortunate. I was taken by surprise on this matter. I arranged this a long time ago, for the convenience of counsel.

MR. MARTEN: Yes.

THE JUDGE: It is not your fault, Mr. Marten. I delayed giving it, but . . .

MR. MARTEN: Indeed, my Lord. I do not know if ------

THE JUDGE: I had better rise, I suppose, or postpone altogether discussion of the form of the order.

MR. MARTEN: I cannot see that there is anything we can do without him.

THE JUDGE: Is there any news about what is going in the court?

MR. MARTEN: My Lord, a learned pupil is with me today and perhaps, if your Lordship were to rise for a short time, he could go along to Mr. Justice Knox's court and see how my learned friend Mr. Blackett-Ord is getting along.

THE JUDGE: Is that your pupil or Mr. Blackett-Ord's pupil?

MR. MARTEN: He is with me today. He is not Mr. Blackett-Ord's

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pupil. She would be there taking a note, but she is not.

A THE JUDGE: This is most unsatisfactory. I think that is all I can do: to rise. I had arranged all the morning for this. I have to resume hearing another case at two o'clock. Very well. (After a short time).

MR. BLACKETT-ORD: My Lord, I must apologise for the fact that I was unable to be here.

B THE JUDGE: The judgment has been specially arranged for the convenience of counsel. I have been ready to give it for a week or two.

MR. BLACKETT-ORD: I was stuck part-heard in front of Mr. Justice Knox on a one-day motion that was to begin on Friday, and my clerks and I discussed it and said there was no possibility of it going for over two days - which in the event it has. My Lo: C I am extremely sorry, and particularly I am well aware that your Lordship went to lengths to ensure that your Lordship would be giving judgment on a day that was convenient to counsel.

THE JUDGE: Yes; I know. There it is; it has broken down. You really have judgment going for you, Mr. Blackett-Ord.

D MR. BLACKETT-ORD: My Lord, I am happy to say - obviously, to a limited extent I have managed to agree with my friends even the results; there is no dispute about that.

THE JUDGE: Yes.

MR. BLACKETT-ORD: I must address your Lordship briefly on the E subject of costs.

Before I do so, I think your Lordship invited submission from our side, so to speak, on the form of the order. We seek injunctive relief ------

THE JUDGE: There is the actual direction of the way, as I indicate during the course of my judgment, and I have regard to the F diversion of 1972.

MR. BLACKETT-ORD: Yes, my Lord, ---

THE JUDGE: Whereas on the state of the pleadings as I would read them, it has been accepted on your side that the way has been diverted - whatever it was - around ------

G MR. BLACKETT-ORD: My Lord, I do not think so.

THE JUDGE: That is the state of your pleadings. I have not heard argument, really, about that aspect of it. So that is one matter, and that of course goes to what declaration I frame.

H MR. BLACKETT-ORD: Yes, my Lord.

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THE JUDGE: You have to start with the statement of claim, and it says that, on Plan 2, between the points X and Y is known as Ramscote Lane.

MR. BLACKETT-ORD: Yes, my Lord.

THE JUDGE: We see that in paragraph 4. Clearly that is shown on that plan, Plan 2. It is shown on the diverted course.

MR. BLACKETT-ORD: Yes, my Lord, and of course that definition of Ramscote Lane is accepted throughout the pleadings.

THE JUDGE: Yes.

MR. BLACKETT-ORD: Yes, my Lord. I am extremely sorry, but that is a point that I had not noticed. But perhaps I was running ahead to the question, with which we are dealing, as to what the form of the declaration should be.

THE JUDGE: Yes. I have not really had any argument before me as to the effect, if any, on the diversion in 1972, which of course proceeded on the basis that it was a footpath or bridle-way: whether that also diverted the way - whatever it was - or whether it only diverted the way as designated under the National Parks and Access to the Countryside.

MR. BLACKETT-ORD: My Lord, my understanding is that the effect of the diversion order is that it will not have affected the vehicular right of way, because it purported to divert a bridle-path only.

THE JUDGE: I can follow that as an argument, certainly.

MR. BLACKETT-ORD: I do not know whether there is going to be an issue on that. That, for what it is worth, is my submission. I think it must be right, my Lord, that, if the County Council thought they were diverting a bridle-path, they cannot have diverted any more.

THE JUDGE: They have powers certainly to divert a road, let alone ------

MR. BLACKETT-ORD: Yes, my Lord.

THE JUDGE: There it is.

MR. BLACKETT-ORD: I should have anticipated this problem, but I plainly did not. I think I can say no more on that point now, my Lord.

THE JUDGE: Yes. So you say that I should make a declaration that there is a public vehicular right over the old track?

MR. BLACKETT-ORD: Yes, my Lord.

THE JUDGE: Yes.

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MR. BLACKETT-ORD: Your Lordship was indicating that there was a second matter?

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THE JUDGE: Why I put that before you is because it has a bearing on any sort of injunction, I imagine.

MR. BLACKETT-ORD: My Lord, I am not going to seek any injunctive relief.

THE JUDGE: No.

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MR. BLACKETT-ORD: I am sure that the parties now concerned are going to be sensible, and I will not press for any injunctive relief.

THE JUDGE: Very well; yes. That is all right then.

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MR. BLACKETT-ORD: Obviously your Lordship may want to come bac to my friends or I about the form of the declaration apropos the old route, because we will have to define it if it is not defined in the pleadings. I understand I forgot that it was not defined in the pleadings; that is the point I had overlooked.

THE JUDGE: Yes.

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MR. BLACKETT-ORD: That being so, my Lord, apart from that point, what I invite your Lordship to do is this: to dismiss the action simply, that is, Brand v. Lund ------

THE JUDGE: I think that must be right, on my findings.

MR. BLACKETT-ORD: I think that is right, on your findings.

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THE JUDGE: Now I have to make an order on the counterclaim.

MR. BLACKETT-ORD: On the counterclaim, could I go to paragraph 1 of the prayer in the counterclaim?

THE JUDGE: Yes.

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MR. BLACKETT-ORD: "A declaration that Ramscote Lane(or alternatively its part traversing the land of the Defendants to Counterclaim) is a public highway". My Lord, there is a point that of course not all of the owners of the soil of Ramscote Lane were before the court. In particular, at the extreme eastern end, we do not know who the owner is.

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THE JUDGE: There are two sections where I was not able to find any evidence of ownership. There was a section at the eastern end, certainly; and there is a section between Ramsey Cottage and the commencement of the woods.

MR. BLACKETT-ORD: Yes, my Lord. Various people thought it belonged to the Lewisons, I think.

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THE JUDGE: The return frontage: that is pretty clear. That

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belongs to - the Lewingtons, was it?

MR. BLACKETT-ORD: Yes.

THE JUDGE: There is title to that all right.

MR. BLACKETT-ORD: Yes.

THE JUDGE: But the lane at the back of the cottage, I cannot see - unless some presumptions arise, as it may well do, but there is no paper title.

MR. BLACKETT-ORD: Yes, my Lord.

THE JUDGE: There is no paper title to that land. The parcels show it excluded.

MR. BLACKETT-ORD: Yes, my Lord.

THE JUDGE: From memory.

MR. BLACKETT-ORD: Yes, my Lord.

THE JUDGE: But of course certain presumptions do arise: people who border on public vehicular ways, and it may be there is an owner in that way.

MR. BLACKETT-ORD: My Lord, in one of the cases ------

THE JUDGE: There is certainly no paper title to those two sections.

MR. BLACKETT-ORD: Yes, my Lord. In one of the cases - and of course I remember now, and read it when looking at the law on this - a declaration was made as to the existence of a public highway in circumstances similar to this, and the learned judge then simply added the words, not in the order at all, but he stated in his judgment "Of course the declaration as to the highway does not prejudice the rights of any person who is not a party to this litigation".

THE JUDGE: According to the tenor of the evidence, it is all or nothing. It is either a public vehicular highway, or it is nothing.

MR. BLACKETT-ORD: Yes, my Lord.

THE JUDGE: No-one suggested - no witness suggested - that there was a bit of it that was a public highway and a bit not. The whole point of it was that it went from one place to the other.

MR. BLACKETT-ORD: Yes, my Lord.

THE JUDGE: It is not a possible finding that part was a public highway and part was not.

MR. BLACKETT-ORD: I think that is right, my Lord. But I think ----

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THE JUDGE: Having regard to the evidence in the case, I could not possibly find that only bits of it were.

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MR. BLACKETT-ORD: No, my Lord.

THE JUDGE: But that is right; yes; it does not bind parties not here. Nor would any decision, unless it is a sort of in rem type of case. But it is not that.

MR. BLACKETT-ORD: Yes, my Lord. That being so ------

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THE JUDGE: As to status or something of that sort, it might.

MR. BLACKETT-ORD: Yes, my Lord.

THE JUDGE: But otherwise . . .

C

MR. BLACKETT-ORD: Because of that, I feel it is right that your Lordship can simply give a declaration that Ramscote Lane is a public highway. It is unnecessary to put in the sort of words that I put in brackets in my prayer, "its part traversing the land of the Defendants to Counterclaim".

THE JUDGE: Someone else could come along and it would not be res judicatur so far as they were concerned.

D

MR. BLACKETT-ORD: That is the point, my Lord.

THE JUDGE: As far as any person who is not a party to this.

MR. BLACKETT-ORD: Yes, my Lord. So on my counterclaim I ask your Lordship to declare that Ramscote Lane is a public vehicular highway.

E

THE JUDGE: Yes.

MR. BLACKETT-ORD: I am still leaving aside the question of the precise route. Paragraph 2 is obviously unnecessary. Paragraph 3 ------

F

THE JUDGE: Indeed more than unnecessary. I am against you on that.

MR. BLACKETT-ORD: You are against me on that, my Lord.

THE JUDGE: I am certainly not making a declaration there.

MR. BLACKETT-ORD: Yes, my Lord. Paragraphs 3 and 4 I have not proceeded to dealing with.

G

THE JUDGE: Yes.

MR. BLACKETT-ORD: And your Lordship has given me ------

THE JUDGE: I have dealt with the damages.

H

MR. BLACKETT-ORD: Your Lordship has given me damages. That

being so, my Lord, on my counterclaim I feel that I am entitled to the costs of the whole of the counterclaim. It seems to me that the only argument against me that I can anticipate is an argument by my friend Mr. Marten that I should not be entitled to costs in so far as they relate to establishing a private prescriptive right of way. Mr. Marten may say they will not amount to much - those costs but let the Taxing Master decide. I say that there should not be such a distinction made, because I was facing a claim in the action that I was trespassing, and in my defence and ultimately counterclaim I said I am entitled to drive the vehicles in the way that I do, for two reasons. I advanced two reasons, and I conceded on the one and I failed on the other. In those circumstances, having justified the alleged trespass, I say that I should not lose the costs - any costs - of an argument that has failed.

That is one point. The other point is that I think the Taxing Master in practice - or anybody - would have the greatest possible difficulty in sorting out the costs of the allegation of a private right of way from the other costs. As your Lordship knows, my prime submission for the right was a public vehicular way, and it was only by a by-wind that I would pray the reference. Of course it came in most strongly in argument, rather than in evidence.

THE JUDGE: Yes.

MR. BLACKETT-ORD: So for those reasons I ask for the costs of the whole of the counterclaim. And I submit that the order for costs ought to be a joint and several one against all the defendants to the counterclaim.

THE JDUGE: Yes.

MR. MARTEN: My Lord, to deal first perhaps with the question of the diversion ------

THE JUDGE: Yes. That is not primarily your concern, is it?

MR. MARTEN: No. That ------

THE JUDGE: But I am very grateful to hear any submissions on it from you.

MR. MARTEN: My Lord, my submission is a simple one. It is that, whatever it was, it was diverted.

THE JUDGE: Yes.

MR. MARTEN: And it would seem extremely artificial to create another situation where any part of whatever was there that had been diverted ------

THE JUDGE: I do feel that.

MR. MARTEN: I think common-sense is a strong wind blowing behind

one, on that argument.

A THE JUDGE: Yes.

MR. MARTEN: It is not really an argument that one can expand upon.

THE JUDGE: It is just that, having found that it was an old vehicular way - I found that it was an old vehicular way - the whole thing got diverted, though unbeknown at that stage
B its status.

MR. MARTEN: Yes, of course. But it was unbeknown what its status was at the time.

THE JUDGE: The only difference that might have happened was of cours that the authorities might have put a wider road than they
C did, in defining the diverted road.

MR. MARTEN: Yes.

THE JUDGE: That is the only difference there. But I do see the common-sense of what you say, of course.

MR. MARTEN: Yes. There is also the point that my learned friend
D did adopt my ------

THE JUDGE: Yes. That is why I specifically referred to that in the judgment. By that way, of course it precluded the argument.

MR. MARTEN: My Lord, can I go on to the question of costs?

E THE JUDGE: Yes.

MR. MARTEN: In my submission, it makes a very big difference that my learned friend has failed on his private right and only won on his public right. It makes a very great difference to him, because of course a private right is an absolute right vested in the owner, whereas a public right is some-
F thing which is very much susceptible to local authority control, and no doubt, one would anticipate here, to some order which will severely restrict the public user of that public right. So I think my learned friend is not being entirely realistic in saying that the matter of a public right is of no import to him. I think it is of the greatest possible import. His trouble was that there was not enough evidence in support of it.

G THE JUDGE: Yes.

MR. MARTEN: In my submission, it would be fairer for your Lordship to view the matter that a positive case has been made out by my learned friend for a public right or for a private right, that he admittedly won on his public right, but he failed and failed utterly on his private right.
H In those circumstances, I would say it would be quite wrong

ASSN.

for your Lordship to give him all his costs of his counterclaim. I would equally think that it would be more practicable for your Lordship to make some ruling about the costs here, rather than leaving that matter to the Taxing Master ------

THE JUDGE: Yes.

MR. MARTEN: My Lord, what I would suggest is that your Lordship gives my learned friend a proportion of his costs of the counterclaim, and, in view of the importance of the private right of way claim which has failed, I would suggest that you give him 50 per cent. of his costs of the counterclaim.

THE JUDGE: Yes; thank you.

MR. MARTEN: My Lord, as to the form of the declaration, I think there is nothing between my learned friend and I on that.

THE JUDGE: Yes.

MR. DENEHAN: My Lord, I am in the fortunate position to be able to adopt my learned friend Mr. Hedley Marten's submissions about the route ------

THE JUDGE: Yes. This much more concerns you than him.

MR. DENEHAN: My Lord, quite. My Lord, as a matter of common-sense, my learned friend says the diversion moved all the rights of the public along the way. Your Lordship said the authority were not aware of the true status, but now we do, and whatever was there they moved it. The common sense that we come to again is that it is infinitely to the advantage, one suspects, of everybody to have the public right of way running ------

THE JUDGE: Round the woods, than go across this field; yes.

MR. DENEHAN: The precise route of which is difficult to determine on the ground, as your Lordship saw.

THE JUDGE: Yes.

MR. DENEHAN: So I have dealt with my learned friend's submission as to that.

Perhaps I should mention this point to your Lordship. It may avoid any difficulties later. The diversion, as I recall - I do not have the document in front of me - may have specified the width of the route that was to run along the edge of Stubbings Wood, I think it is.

THE JUDGE: Yes. It is a little difficult to follow it through, but I think it does. Widths: it is 8 ft. You have to follow it - I read this as 8 ft. on the relevant section. It is 6 ft. somewhere else. I will hand it down to you, Mr. Denehan, because I think you handed up your copy, did you not? You will see in the Schedule that

there is 8 ft. to some section of it. It is not easy to read. You see a column in the Schedule that says 8 ft.?

MR. DENEHAN: My Lord, yes.

THE JUDGE: It has 6 ft. for some part of it, and 8 ft. for some other part.

MR. DENEHAN: Could I deal with it in this way, my Lord? It would be my submission that the width of the vehicular highway which now your Lordship has found would be the same as that which is specified in this order.

THE JUDGE: If it is wide enough.

MR. DENEHAN: If it is wide enough, yes.

THE JDUGE: If it is.

MR. DENEHAN: My Lord, yes.

THE JUDGE: I am not sure that . . .

MR. DENEHAN: There was evidence of the vehicle - following the route of the bridle-path this was - along the edge of Stubbings Wood, Mr. Lund's Range Rover.

THE JDUGE: Yes.

MR. DENEHAN: There is evidence of that.

THE JUDGE: Yes; I follow.

MR. DENEHAN: My learned friend does not seek injunctive relief now, so perhaps it is not in issue.

THE JUDGE: Yes.

MR. DENEHAN: Dealing with the question of costs, my Lord, my learned friend Mr. Blackett-Ord says the claim should be dismissed, full stop. But my client is not a party to the claim. So any order in respect of the costs that are made against my client, in my submission, should expressly be made only the costs of the counterclaim. There were some elements in the action concerned with the mud. Mr. Brown and Mr. Lockland gave evidence over the course of two days ------

THE JUDGE: I could not make an award of the costs of the action against anybody except the plaintiffs.

MR. DENEHAN: No, my Lord. What I do not want to happen is for Mr. Lund to seek to recover the costs of dealing with the dispute about the mud from my client.

THE JUDGE: I follow that; yes.

ASSN.

MR. DENEHAN: My Lord, provided that that is made clear, I am happy on that point.

A

As to the costs on the counterclaim, the simple point is that my learned friend Mr. Blackett-Ord failed on an element of his claim, and my learned friend Mr. Marten has again said, properly and accurately, that it was a very important and valuable right to acquire. Your Lordship will remember this: first, it was that sort of right, a private right, which Mr. Lund sought to establish in the
B first instance in the history of this matter, and, secondly, your Lordship will recall that in the witness box Mr. Lund said he did not want a public vehicular highway to be found in this case, and he explained the reasons. In my submission, that supports the observations of my learned friend Mr. Marten that that was a very essential part of the claim against both my client and Mr. Brand, and I would do no better than to encourage your Lordship to apportion costs on the 50 per
C cent. basis that Mr. Marten suggested. There is some reference in the practice, my Lord, to awarding costs of issues and how that has fallen out of practice.

THE JUDGE: Yes.

MR. DENEHAN: And the practice now is for the trial judge to
D apportion the costs on ------

THE JUDGE: Yes, simply because of the difficulties, when the bill comes to be taxed, of the Master sorting the issues out.

MR. DENEHAN: My Lord, yes.

E THE JUDGE: And assigning bits of costs to each issue.

MR. DENEHAN: It would seem from the observations in the practice, that that is why that costs of issue practice fell out of favour.

THE JUDGE: Yes.

F MR. DENEHAN: As to the point of my learned friend Mr. Blackett-Ord, that his two elements in his counterclaim were defences, of course my client was not making any claim against his client in respect of the trespass and in so far as that is relevant at all it is not relevant against Mr. Brand or relevant to my client. In those circumstances, I would invite your Lordship to award the costs on that basis.
G The fact that my client has to pay nominal damages in the counterclaim, in my submission does not make my position any weaker than Mr. Brand or indeed Mrs. Hussey. My Lord, for what it is worth, you have invited me in the past to make ------

THE JUDGE: Yes; I shall be grateful.

H MR. DENEHAN: Save in so far as again his damges are £250, again

ASSN.

I would suggest that the same order for costs would be a suitable one in respect of Mrs. Hussey.

A THE JUDGE: Thank you.

MR. BLACKETT-ORD: Could I answer my friend's point?

THE JUDGE: Yes.

B MR. BLACKETT-ORD: On the question of the effect of the 1972 (described as) "public path diversion order", I invite your Lordship to hear further argument on that point at two o'clock. I know it does not lie in my mouth, but, my Lord, here is an order made under section 111 of the Highways Act, which I have not had an opportunity to look at. There must be a simple answer as to whether the local authority had power to divert a vehicular highway or not ------

C THE JUDGE: What is the relevant section?

MR. BLACKETT-ORD: It is sections 111 and 112.

THE JUDGE: But it is ------

D MR. BLACKETT-ORD: It is section 111, judging from the form of the order ------

THE JUDGE: I would like to know the current section, more or less, because -------

MR. BLACKETT-ORD: I see. I am sorry; I was reading from the ------

E THE JUDGE: I have the benefit of Mr. Clayden's book, and among other advantages the book has is that it contains the relevant section, which is now in the Highways Act 1980 section 119. I mentioned this in the course of my judgment. It seems to preclude this. You see: Where it appears to a council as respects a footpath or bridleway in their area (other than one which is a trunk road or a special road) that in the interests of the owner, lessee and occupier it is expedient that the line of the pathway or part F of that line should be diverted - and then it goes into the power. Yes.

MR. BLACKETT-ORD: My Lord, is not the sense of that that, where you have a footpath or bridle-path running down something which is also a vehicular road, then under that section the path can be diverted but the road remains the same?

G THE JUDGE: I do not know. It seems to suggest that it could be, unless it was a trunk or special road. By no stretch, could it be suggested that Ramscote Lane . . .

MR. BLACKETT-ORD: My Lord, as I say, I am in no position to make any request of your Lordship, having been late this morning, but, if your Lordship would be assisted by further argument H at two o'clock, then I would do some research into it.

But if your Lordship feels that your Lordship has really covered the ground ------

THE JUDGE: Yes.

MR. BLACKETT-ORD: Then so be it.

As to the question of costs, your Lordship heard my friends. My Lord, if any allowance is given on the private right of way point - and your Lordship knows that I say that none ought to be given ------

THE JUDGE: Yes.

MR. BLACKETT-ORD: . . . in reality. If any is given, I ask your Lordship to recall quite how little of the time of the trial and the preparation were spent - your Lordship does not know about the preparation, but it would affect the charge - and how much we were concerned with public rights of way and how little with private right, that all of the expert evidence was devoted to public rights of way and nearly all of the oral evidence and I think most of the argument, and any sort of proportion which allowed my friends anything but a minimal deletion, in my submission would be wrong.

THE JUDGE: Thank you, Mr. Blackett-Ord.

The orders I shall make, dealing first with the action between Mr. and Mrs. Brand and Philip Lund (Consultants) Ltd.: in view of my findings, that action will be dismissed, with costs to the defendants. As to the counterclaim, there will be a declaration that Ramscote Lane is a public highway, and Ramscote Lane - the route of it - will be defined as in the map attached to the statement of claim. I say that, for two reasons. First of all, that seems to be the right thing I should do, according to the state of the pleadings which accepted the route. Secondly, I accept the submission made to me by Mr. Marten and adopted by Mr. Denehan, that the common-sense of this is that, once there has been a diversion, whatever rights there were over the road are diverted. Just a quick look at the relevant section of the Highways Act would seem to show nothing that precluded that view. That is the declaration I shall make in regard to the road.

I shall make no order as to injunctive relief. There will simply be liberty to apply for further relief.

There will be judgment on the counterclaim against Miss Perrott for £25, and against Mrs. Hussey for £250 damages.

As to the costs, I propose to award three-quarters of the plaintiffs' costs against Mrs. Hussey and Mr. and Mrs. Brand, and a similar proportion of the costs against Miss Perrott, but in that case it will be limited to the costs accruing since Miss Perrott was joined pursuant to the order of Mr. Justice Millett on the 27th February 1987.

I think that is all.

MR. BLACKETT-ORD: My Lord, I apologise again for my discourtesy to your Lordship, and I think that there is nothing else.

THE JUDGE: I hope that we have dealt with all the points.

I am grateful to counsel for their assistance in this case.
