Appendix 31

Roberts v Webster (1968) 66 LGR 298

QUEEN'S BENCH DIVISION

Lord Parker of Waddington C. J., Widgery J. and Chapman J.

ROBERTS v. WEBSTER AND OTHERS

December 8, 1967

Highways – Private Street Works – Cul-de-sac in rural area – No public money expended – Natural beauty spot at end – Existence as cul-de-sac since before 1835 – Whether capable of being "highway maintainable at . . . public expense" – Highways Act, 1959 (7 & 8 Eliz. II, c.25), ss. 204(1), 213(1).

The Highways Act, 1959, provides by section 204(1):

"Where, in the case of a private street situated in a rural district, or in a borough or urban district in which this section applies by virtue of section 290 of this Act, repairs are needed to obviate danger to traffic, the street works authority may by notice require the owners of the premises fronting the street to execute . . . such repairs as may be so specified."

By section 213(1):

"In this Part of this Act ' private street' means a street not being a highway maintainable at the public expense . . . "

A street works authority served notices on the frontagers of a lane requiring them to undertake repairs under section 204 of the Highways Act, 1959. The frontagers objected that the lane was a highway repairable at the public expense and that section 204 did not apply. The authority conceded that at the present time the lane was a public highway having been used as of right by the public for a substantial period of time, but contended that it had achieved that status after 1835. The lane, about three quarters of a mile long, started from an ancient highway and ran parallel to a shore estuary, terminating in glebe land near a natural beauty spot. There was no evidence of formal dedication or enrolment but maps showed that it had existed as a road since before 1835, and it was shown, *inter alia*, on an enclosure award made in 1859 under the Inclosure Act, 1845. No public money had ever been spent on it. Although largely built up, residential development had not taken place before 1900. Quarter sessions, concluding that the enclosure award of 1859 was such powerful evidence that they should infer from it that a highway existed over the lane in 1859 and that it was not shown that it had not existed before 1835, dismissed an appeal from a decision of the justices upholding the objections.

On appeal by the authority,

Held, dismissing the appeal, that there was no rule of law that a cul-de-sac in a country district could never be a highway, and if there was some attraction at the end which might cause the public to wish to use it that could be sufficient to justify the conclusion that a public highway had been created; and that, accordingly, quarter sessions were entitled to infer from the evidence that a highway existed over the road in 1859 and the authority's onus of showing that it was not a highway in 1835 had not been discharged.

CASE STATED by Cheshire Quarter Sessions.

The facts are stated in the judgment of Widgery J.

H. EMLYN HOOSON Q. C. and G. CURRY for the appellant authority.

D. B. McNEILL Q. C. for the respondents.

LORD PARKER OF WADDINGTON C. J. Widgery J. will give the first judgment.

WIDGERY J. This is an appeal by case stated by Cheshire Quarter Sessions, who, on January 9, 1967, dismissed an appeal by the present appellant, William Francis Roberts, clerk to and acting on behalf of the Wirral Urban District Council, from a decision of the Wirral justices, that decision being to the effect that Pipers Lane at Heswall in Cheshire was a highway repairable at the public expense. The matter arose in this way: by section 204(1) of the Highways Act, 1959, it is provided that:

> "Where, in the case of a private street situated in a rural district, or in a borough or urban district in which this section applies by virtue of section 290 of this Act, repairs are needed to obviate danger to traffic, the street works authority may by notice require the owners of the premises fronting the street to execute, within such time as may be specified in the notice, such repairs as may be so specified".

The expression "private street" is dealt with in section 213(1) of the same Act as being: "A street not being a highway maintainable at the public expense".

The appellant authority being minded to require the frontagers of Pipers Lane to undertake repairs under section 204, served the appropriate notices, but they were met by the objection from the frontagers, of whom the present respondents, Ewart John Webster and others, are typical, that Pipers Lane was a highway repairable at the public expense. If that were so, of course, it meant that section 204 did not apply.

Before I embark on this judgment, I should pay brief tribute to the care and industry which has been displayed by everybody concerned in this case, not only quarter sessions themselves, but counsel, solicitors and all others. This has resulted in a great deal of information being made

available in a three day hearing before quarter sessions, in a full day spent on a view and further discussion, and finally a detailed judgment by the deputy chairman. If I am able to be more brief than he was, it is not from disrespect for the efforts of those in the court below, but merely because those efforts have made the task of this court so much simpler.

I must start by referring briefly to Pipers Lane as it appears today. Of approximately three quarters of a mile in length, it starts from an admitted ancient highway called Delavor Road, sometimes in the past called "The road to the shore" and it runs in a north-westerly direction substantially parallel to the northern shore of the Dee Estuary. It is a road of varying width, although at all points wide enough to accommodate a carriage, as quarter sessions find, and it has running out of it on its northern side about one third of the way from its western extremity a further road or lane called Oldfield Drive. At the present time Pipers Lane is largely built up by residential development. We have not been told exactly when that development took place, but it can safely be assumed that it did not take place before the turn of the century.

At the western end of Pipers Lane it terminates in a piece of glebe land called Kits Croft and just to the northern side of the lane but prior to its termination is a spring which is called Pipers Well. The deputy chairman caused the quality of the water in Pipers Well to be tested, and pronounced it to be very good drinking water, raising the possible assumption that it was at one time used as a source of water for domestic supply.

A little to the north of Kits Croft and quite close to the western termination of Pipers Lane is a natural ravine called The Dungeons, which is in the way of being a local beauty spot. The justices in their case in paragraph 14 and successive paragraphs described it in this way:

> "14. The Dungeons is an attractive feature of some note sufficiently prominent and noteworthy for people of the area to visit as a matter of interest or amenity from time to time, and must always have been so. On early maps it appears as 'Old Fox Cover'. 15. There is a striking view of The Dungeons from the point where Pipers Lane first arrives at Kits Croft. 16. People have walked along Pipers Lane in order to pick bluebells and collected blackberries and this amenity user by the public may well have extended back many years".

There is no evidence, or there was no evidence before quarter sessions, to justify the assumption that Pipers Lane was once extended further in a westerly direction. In the course of their view the justices examined the terrain in and around Kits Croft, and clearly came to the conclusion that there was no justification for thinking that an ancient highway had existed and proceeded further in a westerly direction.

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The issues in this case arise in this way. The appellant concedes that at the present time Pipers Lane is a public highway; there has never been any formal dedication, and its status as a public highway therefore depends on its having been used as of right by the public for a substantial period of time. It is well known that if Pipers Lane achieved that status of a public highway before 1835, it would automatically become repairable by the inhabitants at large, and therefore maintainable at the public expense. On the other hand, if it became a highway after 1835, and no procedure such as enrolment as contemplated by section 23 of the Highways Act of that year was carried out, it would not become or be a highway repairable at the public expense.

It is common ground that no steps were taken which would have had this result if Pipers Lane did not become a highway until after 1835. Accordingly, the appellant, upon whom the onus on this issue lies, sought to establish in the court below that although the lane is now a public highway, it must have achieved that status at a date after 1835, and he sought to do that by relating the public user which gives the road its status, to the development which, as I have said, occurred considerably after 1835.

The material which was put before the justices, and which has been in turn put before us, consists of a great many old maps and old documents which have been produced by the research of those concerned.

[His Lordship considered and described a map of 1831, the Tithe Apportionment Map, confirmed in 1851, and an enclosure award made in 1859 under the Inclosure Act, 1845, on which Pipers Lane was shown, and the arguments of counsel based thereon and continued:]

It seems to me that the enclosure award of 1859 is very powerful evidence indeed to support the view that Pipers Lane at that time was reputed to be a public highway. If it was a public highway in 1859, then Mr. Hooson's prospects of discharging the onus of showing that it was not a public highway in 1835 are quite hopeless.

I can turn now to Mr. Hooson's argument on behalf of the appellant based, as I say, upon the fact that Pipers Lane was at the material time not only a cul-de-sac, but a cul-de-sac in remote open country far from any development. We have been referred to all the material cases, and I can refer to them again fairly briefly. The first was *Katherine Austin's* case, (1672) 1 Ventris 189. The facts are unimportant, but in the report there is, at p. 189, this reference to Hale

> "Hale said; if a way lead to a market, and were a way for all travellers, and did communicate with a great road, etc., it is an highway; but if it lead only to a church, to a private house or village, or to fields, there 'tis a private way. But 'tis a matter of fact, and much depends upon the common reputation. If it be a publick way of common right, the parish is to repair it, unless a particular

person be obliged by prescription or custom. Private ways are to be repaired by the village or hamlet, or sometimes by a particular person".

Mr. Hooson refers to the indication that private ways may be repaired by a village or hamlet, and sought to found upon it an argument that perhaps Pipers Lane was a kind of quasi public way in 1835. For my part I think that the reference to "repair by a village or hamlet" means no more than that if the way was not truly public, and therefore not a charge upon the parish, it would have to be repaired as a matter of practical politics by those who sought to use it, namely those who live in the village or hamlet concerned.

The next case is *Davies* v. *Stephens* [1836] 7 C. & P. 570. This was a trial before Lord Denman C. J. and a jury, and it concerned an alleged public way which was a footpath from a public parish road over the close in question, down to the sea, where there was a small inlet. In his charge to the jury Lord Denman C. J. dealt with a number of factors relevant to a consideration of whether a way was public or not, and he said, at p. 571:

> "The fact of no repairs having been ever known to be done to the road by the parish, is a circumstance from which you may infer that it is not a public road, inasmuch as the parish is bound to repair all public roads."

The relevance of that reference is that it is common ground that no public money has ever been spent on Pipers Lane.

From there we were taken to *Bourke* v. *Davis,* [1890] 44 Ch.D. 110. The facts of that case are not important save that they were concerned with a highway over water, but I refer to it, as we were referred to it, for a statement of principle in the judgment of Kay J., at p.122. He said:

> "But it is argued that a cul-de-sac may be a highway. That is so in a street in a town into which houses open and which is repaired, sewered, and lighted by the public authority at the expense of the public. Lord Cranworth instances Connaught Place, which opens into the Edgware Road. . . . But I am not aware" said Kay. J. "that this law has ever been applied to a long tract of land in the country on which public money has never been expended. This is one obvious objection to the defendant's claim."

The point is well made that Pipers Lane could be described as a long tract of land in the country on which public money had never been expended.

After that, we were referred to the classical summing up of Wills J. in *Eyre* v. *New Forest Highway Board* [1892] 59 J. P. 517. This is a summing-up to a jury which has long been recognised as being an extremely full and accurate statement of a great many difficult questions which arise in connection with public user, and its effect on

the status of a road. The passage relied on is where Wills J. dealt with a lane called Tinker's Lane, which ran up to a gate giving access to a common; there was a great deal of evidence that Tinker's Lane had been used by the public for a long period, and the question was not only whether there was a highway on Tinker's Lane, but also a highway extending over the common. Wills J. said, at p. 518:

> "There is a considerable body of evidence that Tinker's Lane is at all events now a public highway. Mr. Bucknill is right in saying that will not do for the defendants; they must have a highway before 1835, and what the evidence upon that point is, I will just shortly give you presently. But supposing you think Tinker's Lane is a public highway, what would be the meaning in a country place like that of a highway which ends in a cul-de-sac, and ends at a gate on to a common? Such things exist in large towns. In Leeds, which is a place where I have done a good deal of my hardest forensic work, there were scores of streets which ended with dead walls, and which were repaired by the public. These are all gone now, but I recollect it perfectly well; but whoever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again?".

The judge left the issue to the jury, but in that passage he indicated his own view as to the practicability of setting up a public highway over a rural cul-de-sac.

Following that case one gets what is perhaps the high watermark of Mr. Hooson's argument in *Attorney-General* v. *Antrobus* [1905] 2 Ch. 188; 3 L.G.R. 1071, the well-known case dealing with a claim to public rights of access to Stonehenge, but I cite it for a passage in which Farwell J. dealt with the point now material. He said, at pp. 206 and 1083:

> "Now, the cases establish that a public road is *prima facie* a road that leads from one public place to another public place (see *per* Lord Cranworth in *Campbell* v. *Lang* [1853] 1 Macq. 451 and *Young* v. *Cuthbertson* 1 Macq. 455, 457) or as Holmes L. J. suggests in the *Giants' Causeway* case, there cannot *prima facie* be a right for the public to go to a place where the public have no right to be. But the want of a *terminus ad quem* is not essential to the legal existence of a public road; it is a question of evidence in each case, and it is, after all, only a question between the landowner and the public. It is competent to the landowner to execute a deed of dedication, or by similar unmistakable evidence to testify to his intention. But in no case has mere user by the public without more been held sufficient. The case of a non-thoroughfare, such as Connaught Place or Stratford Place, might be regarded (as suggested in some of the

earlier cases) as not a true cul-de-sac at all. No law requires the wayfarer to take the shortest route, and there is nothing in law to prevent a man walking along Oxford Street from going round Stratford Place instead of using the crossing. But in all the cases in which a cul-de-sac has been held to be a public road there has been expenditure on it by the parish or local authority".

Then he went on to refer to what Kay. J. had said in *Bourke* v. *Davis (supra)*. He added, at p. 207:

"I venture to think that this expenditure of money is the important consideration, and that in such a case the landowner who has permitted the expenditure cannot be heard to say that a roadway on which he has allowed public money to be spent is his private road".

Reading that judgment, one can understand how Mr. Hooson attaches such importance as he does to the fact that this was a country cul-de-sac upon which no public money had ever been expended.

The final authority to which I wish to refer is *Williams-Ellis* v. *Cobb* [1935] 1 K. B. 310; 33 L.G.R. 39, C. A. That was a case concerning claims by the public to rights of access to the shore, and to the extent that the public had no rights in the shore it was of course open to the objection to which I have already referred that it did give access to a public place. Lord Wright in the course of his judgment said, at pp. 319 and 46:

"The county court judge decides, as I follow his judgment, that this question of law" – which is the one based on the cul-de-sac – "is fatal to the defence. I think, with all deference to the judge, that he has taken a view on this question which is not, perhaps, very clearly enunciated, but, so far as I can judge, is narrower than the law, which in modern times has tended to a more liberal view of what may be sufficient in regard to a terminus to constitute a right of way. It is no longer the law (if it ever was) that a highway must end in another public highway: see *Moser* v. *Ambleside Urban District Council* [1924] 89 J. P. 118; 23 L.G.R. 533, C.A. Thus a public right of way may lead only to a point of natural beauty: *Eyre* v. *New Forest Highway Board, (supra),* approved in *Moser* v. *Ambleside Urban District Council (supra);* to a church, or to the sea, or to a river: *per* Phillimore J. in *Tyne Improvement Commissioners* v. *Imrie and Others* [1899] 81 L.T. 174, 179. I think that *Moser* v. *Ambleside Urban District Council (supra)* is now an authority for the proposition that a right of way may be proved, even though it does not lead to a public place. I may again refer to *Moser* v. *Ambleside Urban District Council (supra)* at p. 120 for the language of Atkin J. where he says: 'I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you wish to see you have to return on your tracks by the same high-

way, and you can get no further either by reason of physical obstacles or otherwise'".

Those being the authorities, Mr. Hooson submits first as a matter of law, that the justices could not hold that this country cul-de-sac upon which no money has been expended, was a public highway before 1835; alternatively he submits that no reasonable bench of justices properly directing their minds to the evidence could have reached the conclusion reached in this case. I think it quite clear that Mr. Hooson's first point is unsound. The authorities clearly show that there is no rule of law which compels a conclusion that a country cul-de-sac can never be a highway. The principle stated in the authorities is not a rule of law but one of common sense based on the fact that the public do not claim to use a path as of right unless there is some point in their doing so, and to walk down a country cul-de-sac merely for the privilege of walking back again is a pointless activity. However, if there is some kind of attraction at the far end which might cause the public to wish to use the road, it is clear that that may be sufficient to justify the conclusion that a public highway was created.

In my judgment the position in this case was that the justices were required to weigh on the one side the argument of Mr. Hooson based on the cases, and on the other side the factual evidence, and particularly the evidence of the enclosure award. If they concluded, as they did, that the enclosure award was such a powerful piece of evidence that they should infer from it that a highway existed over this road in 1859, I can see no fault in their doing so. Indeed, speaking for myself, I am prepared to say that had I been sitting with the justices at quarter sessions, I feel sure that I should have adopted the same view.

I can summarise this judgment in one sentence, by saying that in my opinion the justices reached the correct conclusion for reasons given in their judgment, which in my view were correct reasons. I would accordingly dismiss this appeal with costs.

CHAPMAN J. I concur in the judgment which has just been delivered.

LORD PARKER OF WADDINGTON C.J. I entirely agree and would only add my respect to the care with which quarter sessions went into this matter, and the admirable judgment delivered by the deputy chairman.

Solicitors for the appellant - William Easton & Sons for Percy Hughes & Roberts, Birkenhead.

Solicitors for the respondents - Dodds, Ashcroft & Cook, Liverpool.

Reported by Miss Stella Solomon, Barrister-at-Law.