

John A. Gumbs

Appellant

v.

Attorney General of Anguilla

Respondent

FROM

**THE EASTERN CARIBBEAN SUPREME COURT
(ANGUILLA)**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 7th July 2009

Present at the hearing:-

Lord Scott of Foscote
Lord Rodger of Earlsferry
Baroness Hale of Richmond
Lord Neuberger of Abbotsbury
Sir Jonathan Parker

[Delivered by Lord Neuberger of Abbotsbury]

1. The issue on this appeal is whether there is a public right of way, and, if there is, the extent of that way, over a parcel of land at Little Bay, Anguilla. The land in question (“the Property”) is registered at the Anguilla Land Registry (“the Registry”) in the name of the appellant, John Gumbs.

2. The relevant facts are now uncontroversial following the judgment at first instance of George-Creque J, given on 17 June 2005 after a hearing at which a number of witnesses gave evidence much of it relating to the existence and use of the way in question over the years.

3. The Property had originally been acquired by the appellant's grandfather. For many years, there had been a footpath, whose width was around three feet, running just within the north eastern boundary of the Property. This footpath ("the path") appears to have been a link between two wider tracks. Having heard much evidence on the issue, the Judge was satisfied that, by 1973, as a result of more than twenty years of uninterrupted public use, it could and should be presumed that the path had been dedicated as a public right of way.

4. During 1974 and 1975, a comprehensive Cadastral Survey of the island of Anguilla was carried out, pursuant to the Land Adjudication Ordinance 1974 ("the 1974 Ordinance"). The purpose of this Survey, at least in general, was to provide a definitive adjudication of rights and interests in all land in Anguilla as at the date of the Survey.

5. The Demarcation Officer, who carried out the inspection of the Property and the surrounding area for the purpose of the Survey, saw the path. However, the definitive map, drawn up some time in 1975 in accordance with the 1974 Ordinance, showed no path on the north east boundary of the Property, although it did show the two tracks which it linked. In June 1975, in accordance with the conclusions of the Survey, the Property was registered in the Registry pursuant to the Registered Land Ordinance 1974 (now re-enacted with amendments as the Registered Land Act 2000). This registration recorded "the heirs of" the appellant's grandfather as the proprietor, and no reference to any path or right of way over any part of the Property was noted on the register. In November 1980, Rose Carter, in the capacity of administrator of the appellant's grandfather's estate, was registered as the proprietor. In September 1981, the appellant was registered in her place, and he has remained the registered proprietor of the Property ever since.

6. Meanwhile, in 1980, the Anguilla Government carried out substantial works which involved widening the path to some 13 feet and enabling it to accommodate vehicular traffic. This work was carried out without the consent of Rose Carter, although it appears that the Government sought consent of the adjoining owners in relation to the tracks at either end of the path. Rose Carter protested, and, after becoming the registered proprietor, the appellant took up the protest in 1982. He was told that the Government was considering the matter and would be looking into ways of settling the issue. Thereafter, the Government did nothing, other than to widen the path still further, so that it now extends to some 20 feet in width. Meanwhile, the widened path was used by the public both with vehicles and on foot. Because the appellant's work required him to be away from Anguilla for long periods,

he did not press his concerns till 2002, when, in protest, he dug a trench across the widened path. As a consequence, the Attorney General issued the instant proceedings.

7. The Judge accepted the Attorney General's submission that a public right of way over the path continued to subsist, notwithstanding the absence of any registration to that effect on the definitive map or at the Registry. However, she accepted the appellant's contention that the right of way was limited to the original width of three feet, and that there was no right of way over the path in so far as it was widened in 1980 and subsequently.

8. Having found that a public right of way over the original path arose by presumed dedication to the extent of three feet, the Judge rejected the Attorney General's contention that a public right of way over the widened path had been established by presumed dedication. In that connection, she observed: "Whilst there is evidence of user by the public, I do not consider in the circumstances of this case that this is sufficient from which to infer dedication by the owner of the [Property] of the widened way." She referred to the fact that there had been a threat by the appellant in his correspondence with the Government to close off the way in 1982, and concluded that he had not "formed the [requisite] animus dedicandi".

9. Both parties appealed. The Court of Appeal agreed with the Judge that the right of way subsisted notwithstanding its non-registration, but differed from her view that it was limited to the original three feet. They concluded that, in the light of the provisions of the Anguilla Roads Ordinance 1973 ("the 1973 Ordinance"), the width of the way over which the public right extended was 32 feet. Consequently, the Court of Appeal disagreed with the Judge's conclusion that the appellant had any cause for complaint. Accordingly, they dismissed the appellant's appeal, and allowed the Attorney General's cross-appeal. The appellant now appeals to the Board.

10. Two arguments are raised on behalf of the Attorney General as to why the Court of Appeal was right, and there is a public right of way over the full width of the path in the state that it now exists. The first, and principal, argument is that the original path was subject to a public right of way in 1973, and accordingly was a "road" within the meaning of the 1973 Ordinance, section 16 of which provides that the width of the right of way is effectively 32 feet. Consequently, it is said that it must have been open to the Government to widen the path as it did, provided that the overall width did not exceed 32 feet. In the alternative, if that is wrong, the Attorney General contends that, in the light of the events since

1980 (or earlier) until 2002, there has been a presumed dedication of the widened path as a public highway, as a result of which the appellant's claim must fail.

11. The appellant agrees that the path in its original form was a "road" within the meaning of the 1973 Ordinance, and says that, as a result, the freehold of the path vested in "the Anguilla Administration" pursuant to section 5 of that Ordinance. Accordingly, contends the appellant, when the 1974 Ordinance came to be implemented, the failure of Her Majesty's Commissioner in Anguilla ("the Commissioner") to ensure that the path was duly recorded on the definitive map or recorded as owned by the Crown means that the Crown's title to the freehold of the path has been lost, and, as a result, there is no public right of way over the path. If this is right, then, as there was no public right of way over the path, it must follow that the Government could not lawfully have widened the path as it did in 1980 and thereafter. In answer to the Attorney General's alternative argument, the appellant contends that whether the path, as widened, became a public right of way as a result of presumed dedication after 1975 is an issue which turns on an assessment of the evidence, and there are no grounds for interfering with the Judge's conclusion that there was no presumed dedication.

12. Section 2 of the 1973 Ordinance contains definitions for the purpose of the Ordinance, which include this:

“ ‘Road’ means any public road mentioned in the Schedule and includes any public rights of way at present existing in Anguilla, or which may hereafter come into existence ...”

Section 5 of the 1973 Ordinance states that:

“All roads and all land taken for their construction are the property of the Anguilla Administration.”

Section 16 of the 1973 Ordinance is in these terms:

“The boundary of any road should be the fence, which may be erected by the officer in charge of the Public Works Department, running along it on either side, and where there is no such fence, the boundary shall be a line at all points sixteen feet from the centre of the roadway measured in a direction at right angles to the road”.

13. The Board is prepared to proceed on the assumption, on which both parties are agreed, indeed on which both parties rely, namely that, even though it was only a public footpath three feet in width, the path in its original form was indeed a "road" for the purpose of the 1973 Ordinance.

However, it should be emphasised that the Board is not deciding that that assumption is correct. For instance, it is a little hard to accept that those who drafted the 1973 Ordinance could have intended that a public right of way by foot over a three foot path should be converted into a public right of way, potentially with motor vehicles, over a width of 32 feet. On the other hand, the wide definition of the word “road” in section 2 of the Ordinance makes it somewhat difficult to avoid such a conclusion. It may be that evidence, which is not available in this case, as to the extent and nature of public rights of way in Anguilla in 1975 would assist in resolving this conundrum, but it need not be resolved on this appeal.

14. Having had the benefit of seeing in draft the judgment of Lord Scott of Foscote, it is right for the Board to develop this point a little further. Lord Scott’s judgment eloquently sets out the arguments as to why the common assumption, which both parties rely on, namely that the 1973 Ordinance extends to a footpath some three feet wide, may be wrong. However, the point was not argued, and the Board therefore believes it wrong to decide it without offering both parties a full opportunity to address it. Without taking that course, it is impossible to be confident that all arguments and facts relevant to the point, and all the implications of holding the assumption to be wrong, are before the Board. As is clear from Lord Scott’s decision, and as explained below, the outcome of this appeal is only slightly affected if the common assumption is wrong, and, in those circumstances, the Board considers it an inappropriate use of court time and the parties’ funds to invite further argument on the point.

15. In the present case, it suits both parties to accept that the original three foot path was a “road” for the purpose of the 1973 Ordinance. It would appear to be the only basis upon which the Attorney General could justify the subsequent widening of the path, and it assists the appellant’s case in the light of the terms of section 5 of the Ordinance.

16. On the assumption that the path in its original form was indeed a “road” within the meaning of the 1973 Ordinance when it came into force, it must follow, in the Board’s view, from the plain words of section 5 of that Ordinance, that the freehold of the path vested in the Anguilla Administration (now the Government, i.e. the Crown) when the Ordinance came into force. It was argued on behalf of the Attorney General that, until there was a decision of the court, or some other determination or formal agreement, that a public right of way subsisted, section 5 would somehow not take effect. The Board is, with respect, unable to see how such an argument could succeed in light of the plain and clear words of section 5, or indeed how such an argument could work in practice.

17. Turning to the 1974 Ordinance, it came into force, like the 1973 Ordinance, at a time when the responsibility for governing Anguilla had been effectively vested in the Commissioner. The purpose of the 1974 Ordinance was well summarised in *Webster v Fleming* (1995) Anguilla Civil Appeal no 6 of 1993 at page 5, by Byron JA who said that it:

“was enacted in Anguilla ‘to provide for the adjudication of rights and interests in land and for purposes connected therewith’, with provisions for appeal to the High Court. At the same time the Registered Land Ordinance was enacted ‘to make provision for the registration of land and for dealings in land so registered and for purposes connected therewith.’ All land in Anguilla came subject to these Ordinances which together prevailed over all other laws relating to land adjudication and registration. The end product of this judicial adjudication process was the compulsory creation by the Registrar of Lands of a first registration of land with absolute or provisional title on the Land Register. ... by virtue of the final adjudication record emanating from the judicial process under the Land Adjudication Ordinance. Such a first or subsequent registration can be defeated and rectified only on proof of mistake or fraud under the Registered Land Ordinance.”

18. Section 6(1) of the 1974 Ordinance requires the Adjudication Officer (the person stated by section 4 to be “in charge of the adjudication”) to “require any person who claims any interest in land ... to make a claim either in writing or in person or by his agent” within a specified period. Section 8(1) requires “[e]very person claiming any land or interest in land” to “make his claim” within a specified manner and period. Section 11 provides that the Demarcation Officer (who, under section 4, has to inspect the land, subject to directions from the Adjudication Officer) must:

- “(a) see that the boundaries of each piece of land, which is the subject of a claim, are indicated or demarcated ...;
- (b) indicate or cause to be indicated the boundaries of:-
 - (i) public roads, public rights of way and other Crown land, and
 - (ii) unclaimed land.”

19. By section 12(1) of the 1974 Ordinance, the Demarcation Officer “may ... make a declaration of such existing rights of way over any land” and, if he does so, “he shall direct that such rights of way be recorded in the adjudication record in respect of the dominant land and the servient

land.” Section 13(b) requires the Adjudication Officer to “prepare ... a demarcation index map ... on which shall be shown every separate parcel of land identified by a distinguishing number, except that public roads shall not be required to be identified by a number.”

20. It is also appropriate to refer to section 16(1)(b) of the 1974 Ordinance which requires the Recording Officer (who is appointed under section 4 by the Adjudication Officer) to record, if he is so satisfied, “that any Crown land is entirely free from private rights”. Section 18(1) provides for an “adjudication record”, in which the Adjudication Officer must include “the name and description of the person entitled to be registered as the owner of the parcel ... or the fact that the parcel is Crown Land”.

21. Part V of the 1974 Ordinance is headed “Objection and Finality” and gives “the Commissioner or any person named in or affected by the adjudication record or demarcation map” the right to challenge the same within a specified period by referring the matter to the High Court, and, on appeal, the Court of Appeal. After the time for challenge has expired without a challenge being mounted (or, if there is a challenge, once that challenge has been determined), section 23 provides that “the adjudication record shall become final”, whereupon the Adjudication Officer is to certify accordingly, and the adjudication record and demarcation index map are to be delivered to the Registry “for compilation of the register in accordance with the provisions of the Registered Land Ordinance”.

22. In the light of these provisions and on the basis of the arguments advanced on this appeal, the Board considers, that, by failing to ensure that the path was recorded on the demarcation index map and by failing to be recorded as the owner of the path on the adjudication record, the Crown lost the ownership of the path which it had acquired pursuant to section 5 of the 1973 Ordinance. The finality of those documents seems clear from section 23 of the 1974 Ordinance. It also appears from the terms of section 11(b)(i) of the 1974 Ordinance that the boundaries of a public highway should be shown on the demarcation index map in the same way as any other property claimed: cf. section 11(a). This view is supported by the requirement in section 13(b) that any public road must be shown on the map, although it need not be assigned a number. Equally, under section 18 of the 1974 Ordinance, it appears to be the case that, if the path was subject to a public right of way, it ought, in the light of section 5 of the 1973 Ordinance, to have been recorded in the adjudication record, and reflected in the subsequent registration at the Registry, as being owned by the Crown, rather than, as was the case, by the heirs of the appellant’s grandfather (as part of the Property).

23. The conclusion that any public right of way should be properly recorded in the Survey is reinforced by the fact (relied on by both parties) that any such way, whatever its actual character or width, is within the ambit of the 1973 Ordinance. Any such way is vested in the Crown and is treated as having a width of up to 32 feet as a result of the 1973 Ordinance. Anyone recorded on the conclusion of the Survey as owning land which included a public right of way, and any subsequent purchaser of such land, would expect such a potentially confiscatory right to be recorded at the Registry.

24. Although it was not a suggestion advanced on behalf of the Attorney General, it might be argued that the fact that the Crown lost the ownership of the path as a result of it not being shown on the demarcation index map and the Crown not being registered as the proprietor of the path, did not mean that the public right of way enjoyed over the path was also lost. However, the Board consider this to be an unrealistic suggestion. If the public right of way did survive over the path, then the path would be owned by the Crown pursuant to section 5 of the 1973 Ordinance, but that is the very ownership which, pursuant of the 1974 Ordinance, was lost as a result of the Crown's failure to register. Further, this suggestion does not appear to meet the point that no public right of way over the path was recorded on the demarcation index map.

25. What was argued on behalf of the Attorney General was that it is unrealistic in practice to conclude that the public right of way was lost due to not being recorded on the map or in the adjudication record (or at the Registry). This is because the Crown could not have been expected to protect every public right of way which existed in Anguilla in 1974 by seeking its registration. The Board has some sympathy with that point, but does not consider it to have great force, at least on the facts relied on in this case. The area of Anguilla is relatively small, namely a total of some 32 square miles. Furthermore, the Commissioner should have been aware of the need to investigate and claim the right to any pieces of land over which public rights of way existed. Furthermore, members of the public who used land for what they believed was a public right of way could have written to the Commissioner, or one of his employees, or even to the Adjudication Officer, or one of his Officers, drawing the existence of any alleged public right of way to their attention. Furthermore, the Adjudication Officer, and other Officers working for him, would have been under an obligation to consider whether any public rights of way existed.

26. If the Commissioner or anybody else had raised the existence of the right of way during the Survey, as should have happened, the dispute

as to whether or not there was a right of way over the original path by the early 1970s could have been decided by the Adjudication Officer in 1975, rather than being dealt with by a judge 30 years later. In the Board's opinion, this was just the sort of issue that could and should have been raised in 1975 on the Survey. One of the main purposes of the Cadastral Survey and the subsequent demarcation index map, adjudication record and registration of title was definitively to fix the existence, ownership and rights in respect of land in Anguilla as at 1975. The Board readily accepts that it must follow from this that there was a real risk of some public rights of way being lost as a result of not being recorded or registered, but that is equally true of private rights in or over land. It is inherent in a Cadastral system.

27. In the circumstances, the Board conclude that the public right of way which existed over the path when the 1974 Ordinance was introduced was lost as a result of not being shown on the demarcation index map, the Crown not being recorded as the owner of the path in the adjudication record, and the registration of the heirs of the appellant's grandfather, as opposed to the Crown, as the owner of the land which included the path.

28. It is right to mention that reference was made on behalf of both parties to the Registered Land Ordinance 1974. The Board does not consider that it takes matters further in this case. It reinforces the argument that the effect of registration is conclusive, subject to the provisions of Part X relating to rectification of the Register (which have not been invoked in this case). As to whether the reference in section 28(a) of that Ordinance (now section 28(a) of the 2000 Act) to "rights of way" extends to public rights of way, that is not a point which needs to be determined. Indeed, on the agreed assumption that all public rights of way are "road[s]" within the 1973 Ordinance, so that section 5 applies, there would appear to be no circumstances in which there could be a public right of way over privately owned land.

29. No reliance was placed by either party on the English authorities relating to the interrelationship of highways and land registration or to the effect of public rights of way not being shown on maps statutorily required to be maintained by local authorities. This was presumably because the English legislation is differently structured and expressed, and because, in England, there has been no adoption of a Cadastral system of registration, and there is no automatic vesting of highway land in the Crown or any other governmental body.

30. The alternative argument raised by the Attorney General, namely that the continued use of the path (as widened from time to time) by

members of the public since 1976 until these proceedings were issued operated as an implied dedication, can be dealt with very shortly. There is no doubt that twenty years continuous use of land by members of the public can operate, as a matter of common law, so as to give rise to a presumption of dedication. However, whether on the facts of a particular case the presumption arises is very much a matter for the trial judge. In this case, the Judge rejected the contention that there had been an implied dedication. In the Board's view, she was, to put it at its lowest, entitled to take that view.

31. It is true that members of the public used the path (in its original state and as subsequently widened) for more than twenty years after 1976 without a direct objection from the owners of the path. However, it is clear that Rose Carter and then the appellant wrote to the Government in clear terms making plain their strong objections to the widening and the use of the path. It is also clear that the Government effectively accepted these objections, and led the appellant to believe that they would come up with proposals, which they never did.

32. The Board accordingly concludes that, since 1975, there has been no public right of way over the path, whether in its original form or as widened from time to time.

33. Referring back to the common assumption made by the parties, and repudiated by Lord Scott, it is only right to add this. If the parties are wrong in agreeing that the path in its original form was a "road" within the 1973 Ordinance, then it may well follow that the right of way by foot over the three foot path has survived. However, in that event there would be no basis upon which the subsequent widening, or the use for motor vehicles, could be justified. The only justification for the widening of the path is on the basis of section 16 of the 1973 Ordinance, and that paragraph only applies, of course, if the way was a "road" within section 2 of that Ordinance. Accordingly, if the agreement as to the applicability of the 1973 Ordinance is wrong, the appellant would still succeed on this appeal, albeit to a slightly more limited extent.

34. In these circumstances, the Board will humbly advise Her Majesty that this appeal should be allowed.

Concurring Judgment by Lord Scott of Foscote

35. I, too, would allow this appeal but I would do so for reasons which differ from those of my colleagues. The judgment of the majority, prepared by Lord Neuberger of Abbotsbury, has fully set out the facts of

the case, as found by the trial judge, George-Creque J, and I gratefully adopt what he has said. The essential finding of the judge, on the basis of which all discussion of the legal principles relevant to this case must depend, was that a three foot wide footpath over the appellant's land became a public right of way as a result of over twenty years of uninterrupted user of the footpath by members of the public. This user, it was held, justified the presumption that the path had been dedicated as a public footpath by the appellant and his predecessors in title to the land over which the footpath passed.

36. It is not in dispute that the Anguillan Government, without the consent of the then owners of the appellant's land, widened the path to some thirteen feet, laid down a surface on the thirteen foot wide strip of land so as to render the strip suitable for the passage of vehicles and thereby, in effect, transformed what had been a three foot wide public footpath into a thirteen foot wide public roadway for vehicular traffic. The presumed dedication by the presumably generous landowner of a three foot wide strip of land for use as a public footpath had thus led to the creation by the Government of a public highway for vehicular traffic and the expropriation of sufficient additional land for that purpose, all done without the use of compulsory purchase powers and without the acceptance of any obligation to compensate the unfortunate landowner. This is a remarkable state of affairs the legality of which demands very careful examination.

37. The creation of public highways by dedication has long been accepted under common law. Indeed, as it is put in Pratt and Mackenzie's *Law of Highways* (20th Ed.) at 16

“With the exception of highways created under statute, no highway can be created except by dedication, express or presumed, by the owner of land, of a right of passage over it to the public at large and the acceptance of that right by the public.”

It is relevant, therefore, when considering the facts of the present case, to bear in mind the implications at common law of a public right of way created by dedication. First, an owner who dedicates land to the public as a highway does not thereby relinquish his property in the soil:

“The owner of the soil of the highway is entitled to use and enjoy his property in every way not inconsistent with the public right of passage”

(Pratt and Mackenzie (*ibid*) at 53)

As Lord Cairns LJ put it in *Rangeley v Midland Railway Co. (1867)* LR 3 Ch. 306, 311:

“... a public road ... is a dedication to the public of the occupation of the *surface* of the land for the purpose of passing and repassing” (emphasis added)

38. Secondly, the extent of the rights of members of the public to use a public highway created by dedication presumed from long public user depends upon the nature of that public user. If the user was on foot, the right of way acquired by the presumed dedication can be no more than a footpath. If the path was used also by members of the public on horseback, the presumed dedication will be of a bridle path. In either case the public right of way thus acquired would not extend to vehicular use. In *Harrison v Duke of Rutland* [1893] 1QB 142 Lopes LJ said at 154

“If a person uses the soil of a highway for any purpose other than that in respect of which the dedication was made ... he is a trespasser”

and, as it is put in *Pratt and Mackenzie* (ibid) at 22,

“Conditions restrictive of the mode of enjoyment are necessarily involved in the dedication of a bridleway, i.e. a way not to be used with carts or carriages, or of a footway, i.e. a way not to be used with horses, carts or carriages.”

39. And, thirdly, a dedication may be made subject to the right of the landowner to do things on the land over which the right of way runs that would otherwise constitute an unlawful interference with the right of way and, accordingly, a public nuisance. Examples of this include the right of the landowner to erect gates across the right of way (*Davies v Stephens* (1836) 7 C&P 570 and, even, the right to plough up the right of way in due course of husbandry (*Mercer v Woodgate* (1869) LR 5QB 26).

40. It is easy to conclude, therefore, that what the Government has done to the appellant’s land in transforming the three foot wide footpath into a thirteen foot wide highway for vehicular traffic, all done without the consent of the landowner, would, at common law, have been unlawful and incapable of entitling the public to vehicular rights of passage.

41. The Government seek to justify what they have done by reliance on the Anguilla Roads Ordinance 1973. Their justification is based on three sections of the Ordinance. The relevant content of each is set out in paragraph 12 of Lord Neuberger’s judgment. In short, section 2 defines “road” as including “any public rights of way”; section 5 says that “all roads and all land taken for their construction are the property of the

Anguilla Administration”; and section 16 says that the boundary of any unfenced road “shall be ... sixteen feet from the centre of the roadway ...”. So, the argument goes, the three foot public footpath is a “road” for the purposes of the 1973 Ordinance (see section 2), the “road” belongs to the Government (see section 5) and has a width of up to thirty-two feet (see section 16). Thus, *mirabili dictu*, the three foot public footpath dedicated by the landowner has become a thirteen foot, potentially thirty-two foot, public highway belonging to the Government who are, accordingly, entitled to authorise vehicular use of it.

42. Can this be right? As Lord Neuberger has noted in paragraph 13 of his judgment, both counsel for the appellant and counsel for the respondent before the Board agreed that the three foot wide footpath was, since it was a public right of way, a “road” as defined in section 2 of the 1973 Ordinance. For my part, however, I have the greatest doubt whether that concession was correctly made. Even if it was, why should section 5 be read as vesting in the Government anything more than the *surface* of the footpath? It was the surface that was dedicated to public passage, nothing else (see *Rangeley v Midland Railway Co.* (supra)). And why should section 5 be read as entitling the Government to expand the use permitted by the dedication, use on foot, to vehicular use? And, finally, how can it be sensibly supposed that section 16 was intended to apply to footpaths, *a fortiori* footpaths created by dedication? Who has ever heard of a thirty-two foot wide rural public footpath?

43. There are some well-recognised principles of statutory construction that need to be borne in mind. In *Colonial Sugar Refining Co. Ltd v Melbourne Harbour Trust Commissioners* [1927] AC 343 Lord Warrington of Clyffe said at 359 that -

“In considering the construction and effect of this Act, the Board is guided by the well known principle that a statute should not be held to take away private rights of property without compensation unless the intention to do so is expressed in clear and unambiguous terms.”

And in *Hartnell v Minister of Housing and Local Government* [1965] AC 1134 Lord Wilberforce at 1173 cited with approval the above cited passage. The Board hearing the present appeal should, I respectfully suggest, be similarly guided by the principle of law expressed by Lord Warrington.

44. The presumption that the 1973 Ordinance was not intended to take away private rights of property without compensation, i.e. the appellant’s property rights in the thirty-two foot wide strip of land, is fortified by a

further presumption, namely, that the legislator does not intend absurd consequences. The presumption against absurdity is fully discussed in Bennion on Statutory Interpretation (5th Ed.) at 969 et seq and was referred to by Lord Millett in *R (Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209

“The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless. But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result. The more unreasonable a result, the less likely it is that Parliament intended it ...”

45. The 1973 Ordinance and its effect on the three foot wide footpath must be examined with these presumptions in mind. The Ordinance is described in its introductory preamble as

“An Ordinance to provide proper procedures for improving and constructing roads in Anguilla and matters incidental thereto”.

This language does not appear to me to be an apt introduction to confiscatory legislation that can turn a dedicated footpath into a highway for vehicular use. In my opinion, for reasons that I will explain, and giving due weight to the presumptions to which I have referred, first, the 1973 Ordinance ought not to be construed as applying to footpaths created by implied dedication; secondly, section 5 ought not, at least in relation to dedicated rights of way, to be construed as vesting in the Government anything more than the surface of the right of way in question, and, thirdly, section 16 ought not to be construed as applying to footpaths or bridleways.

46. As to the first point, if the Ordinance is read as a whole it becomes apparent that its purpose was to make provision for the construction, improvement and maintenance of roads for vehicular use. I have already referred to the introductory preamble. The section 2 definition is consistent with this impression:

“‘road’ means any public road mentioned in the Schedule and includes any public rights of way at present existing in Anguilla, or which may hereafter come into existence and also includes the roadway, water tables, any bridges and culverts, and the land on each side of the roadway including road drainage works and water tables up to the boundary of any road”.

It is true that, literally read, the words “any public rights of way” would include public footpaths created by dedication; but the definition taken as a whole does not read, to me at least, as if the draftsman had them at all in mind. Needless to say, the roads mentioned in the Schedule are all roads for vehicular traffic. Section 3 says that the roads mentioned in the Schedule are to be constructed and maintained at public expense and section 4 that, if the Government so decide, the same applies to any other road. In section 6 provision is made for the Government to enter into contracts for the repair or maintenance of any of the roads in the Schedule and to annul any contract for the repair and maintenance of any road. Section 7 entrusts “the general care and supervision of the roads of Anguilla” to the Officer in charge of the Public Works Department. In relation to none of these sections is it reasonable to suppose that the draftsman had in mind footpaths that had become public footpaths by implied dedication and acceptance.

47. Sections 8, 9 and 10 of the Ordinance deal with the laying out of new roads and the widening or improvement of existing roads. Section 8 gives power to government officials of entry on to land for the purpose of “making such surveys as may be necessary”, drawing up plans and making estimates of costs. What has this to do with dedicated footpaths? Section 9 seems to me particularly important. Sub-section (1) says that

“Whenever it appears to the Commissioner that any particular portion of land is required for the laying out of a new road or the *widening* or diverting of any part of an existing road, a declaration to that effect shall be published in the Gazette” (emphasis added).

This provision enables what is, in effect, the compulsory acquisition of land for the purpose of the construction, widening or improvement of roads to take place. Section 12 allows the owner of land to which a section 9 declaration relates to apply for compensation and sections 13, 14 and 15 deal with the assessment and payment of compensation.

48. If the construction of the Ordinance that treats a dedicated footpath as a “road” is right, the owner of land over which runs a dedicated right of way the width of which is less than 32 feet, i.e. every dedicated footpath, cannot apply for compensation if the Government decides to widen the right way, unless and to the extent that the right of way is widened to a width of more than 32 feet. The reason is that, on that construction, the Government already owns the 32 foot wide strip of land and so does not need to invoke the section 9(1) compulsory purchase

procedure. This suggests, to my mind, that neither section 5 nor section 9 could have been intended to apply to dedicated footpaths.

49. Section 16, which appears to provide that every unfenced public “road” must have a width of 32 feet, seems to me wholly inapposite where footpaths are concerned. Why should a statute require every footpath to be thirty-two feet wide? The proposition is simply absurd. It would be equally absurd for bridleways. Section 16 seems to me to be consistent only with a statute dealing with roads for vehicular use. Exactly the same can be said for section 17 and section 18. Why on earth should there be a prohibition on building within 10 feet of every public footpath? It makes no sense.

50. It would be wearisome to go through all the remaining sections of the Ordinance repeating the points already made. The flavour of all these sections is, I respectfully suggest, consistent with an enactment intended to make comprehensive provision for the construction, maintenance and improvement of public roads for vehicular use and essentially inappropriate for application to narrow footpaths. The conclusion I would draw is that the Ordinance was not intended by its draftsman to apply, and should therefore not be applied, to footpaths.

51. The second conclusion that I would draw is that, even if, contrary to my view, the Ordinance does apply to public footpaths, section 5 of the Ordinance does not, in its correct construction, vest in the Government anything more than the *surface* of a public road that has been created by dedication. It is clear that, at common law, dedication entitles the public to use the surface of the right-of-way for the purpose of passage but leaves the ownership of the soil vested in the owner of the land (see para.3 above). In order, however, to produce the ownership consequence of section 5 contended for by the Government (and accepted by counsel for the parties) “road”, in relation to a dedicated right-of-way, has to be construed as consisting not simply of the surface but also of the underlying soil. It is, of course, open to legislation to override the common law so as to produce that result. But why should that expropriating construction be adopted? The presumption against expropriation without compensation has to be rebutted. What is there in relation to the 1973 Ordinance to rebut it? On the contrary, the Ordinance makes express provision for compensation to be payable to the owners from whom land is taken under the section 9 procedures. How can it then be supposed that the combination of the definition of “road” in section 2, coupled with the provisions of sections 5 and 16 were intended by the legislator to produce expropriation without compensation? That construction would, I respectfully suggest, be perverse. Why should the “road”, for section 5 purposes, consist of anything more than the *surface*

of the road. It was only the *surface* that was the object of the common law dedication. It is only the *surface* that comes within the section 2 definition of “road”. And it should only be the surface that is, as section 5 declares, “the property of the Anguilla Administration”. There is no need to treat the section as expropriating anything other than the surface. The consequence of this conclusion, if as I think, it is right, is that any works of maintenance or improvement that break the surface would, in order to be lawful, require compliance with the section 9 procedures and with the compensation consequences of those procedures. But, of course, if, as I think, the Ordinance ought not to be construed as applying to footpaths at all, section 5 would not come into play.

52. Thirdly, and finally, there is the section 16 point. If I am wrong in thinking that, on its true construction, the Ordinance does not apply to footpaths, what is one to make of section 16? The utter absurdity of a statutory demand that every public footpath be accorded a width of at least 32 feet would seem to me to justify holding that section 16 should be construed as applicable only to public roads for vehicular traffic. If that were wrong section 16 would by implication, in my opinion, exclude in Anguilla the operation of the common law enabling the creation of rights of way by dedication. It would not be possible to create by dedication a right of way with a lesser width than 32 feet. An intention to dedicate a footpath limited in width to three foot or, say, a bridle path limited in width to ten foot, could not be given effect. If the intention, the *animus dedicandi*, could not be given effect, how could the dedication be accepted by the public? In my opinion, it could not. I would be loath to conclude that the 1973 Ordinance had annulled the common law on the dedication of footpaths and bridlepaths but that annulment would, in my opinion, be the effect of applying section 16 to footpaths and bridleways.

53. In summary, I am of the opinion

- (i) that the 1973 Ordinance on its true construction does not apply to footpaths;
- (ii) that, in any event, section 16 of the Ordinance cannot, on its true construction, be applied to footpaths; and
- (iii) that, in any event, section 5 of the Ordinance, on its true construction, does not, in relation to public rights of way created under common law by dedication and acceptance, vest in the Government anything more than the surface of the right of way.

54. So where does that leave this appeal? Subject to the effect of the Land Adjudication Ordinance 1974 and the Registered Land Ordinance 1974 the appellant is the registered owner of the land over which the public right of way runs. The public right of way is, as the trial judge found, a right of way on foot over a three foot wide path. The appellant, not the Government, is the owner of the soil over which the path runs. In my respectful opinion, the proposition that the Government became by virtue of section 5 of the Roads Ordinance the freehold owner of the land over which the path runs is misconceived.

55. The Adjudication Ordinance, section 2, defines “interest in land” as “any right or interest in or over land which is capable of being recorded under the provisions of this Ordinance”. The reference to “any right or interest” is a reference, in my opinion, to a proprietary right or interest. A public right of way is not a proprietary right or interest. No one has a proprietary right or interest in a public right of way. The right of each member of the public is a right of passage but it is a public right enforceable in public law, not a private right. An unlawful obstruction of the way is an interference with a public right, not a private right. That is why a claim for an injunction has to be brought by, or in the name of, the Attorney General. Both the Land Adjudication Ordinance and the Registered Land Ordinance are concerned with proprietary rights and interests in land. It is significant and entirely consistent with the nature of public rights of way that section 11(b)(i) of the Land Adjudication Ordinance required the Demarcation officer to “indicate or cause to be indicated the boundaries of ... public roads, public rights of way and other Crown land” without providing any procedure for claimants to assert these public rights. The public footpath over the appellant’s land was not, as it ought to have been, indicated by the Demarcation officer but that failure did not bring about the cesser of the public right. Absent some statutory means of terminating a public right of way, and there is none to be found in the Adjudication Ordinance, the common law maxim “once a highway, always a highway” is, in my opinion, as applicable in Anguilla as in England.

56. As to the Registered Land Ordinance, section 28 says that all registered land is subject to “such of the following overriding interests as may for the time being subsist and effect the same, without their being noted on the register.” There then follow eight paragraphs each of which lists a category of rights which qualify as overriding interests. The first such paragraph refers to

“rights of way, rights of water and any easement or profit
...”

These rights, like the rights falling under each of the other paragraphs, are private rights vested in some person or body. Public rights of way are not, in my opinion, overriding interests under section 28. The “rights of way” referred to above are private rights of way.

57. Accordingly, in my opinion, the public right of way along the footpath over the appellant’s land found by the judge to have been created by dedication remains a valid public right exercisable on foot only by members of the public.

58. I would, for these reasons, allow the appellant’s appeal. The Government had, in my opinion, no right to widen the right of way, to make up the surface so as to render it suitable for vehicular use, or to authorise its use by vehicles. I am not clear whether or not the appellant was entitled to dig a trench across the right of way. It was probably an unlawful interference but nothing turns on that now. If the Government wants to legalise the road that it has, in my opinion unlawfully, created, it must use the compulsory purchase procedure provided for in the 1973 Roads Ordinance.