

Royal Courts of Justice
Strand, London, WC2A 2LL

10/03/2010

**LORD JUSTICE MUMMERY
LADY JUSTICE ARDEN
and
LORD JUSTICE ELIAS**

**THE QUEEN ON THE APPLICATION OF
WAYNE SMITH** Appellant

and

THE LAND REGISTRY (Peterborough Office) Respondent

and

CAMBRIDGESHIRE COUNTY COUNCIL Interested Party

Mr David Watkinson (instructed by the Community Law Partnership) for the Appellant
Mr James Strachan (instructed by Treasury Solicitor) for the Respondent
Mr Richard Ground (instructed by Messrs Sharpe Pritchard) for the Interested Party
Hearing date : 24 November 2009

1. The appellant, Mr Wayne Smith, has occupied his caravan and associated structures on an unmetalled byway near Belsar's Hill, Willingham in Cambridgeshire for more than twelve years. He says that he does not obstruct the byway and that he keeps the hedges and verges on the area he occupies trimmed. He provides window cleaning services in the locality, and the evidence shows that he is an established and valued member of the community. He also says that his possession has been undisturbed during the twelve year period. So in about May 2007, he filed an application with the Land Registry seeking to register title by adverse possession to the land which he occupies. The land is unregistered and this was an application for first registration. The local authority, Cambridgeshire County Council, however, soon objected, stating that the highway was shown on the definitive map for the area as a public highway open to all traffic. On 25 July 2007, the assistant land registrar rejected the application on the ground (so far as material) that the land was a public highway. Mr Smith brought judicial review proceedings to

challenge that decision but this was dismissed before HHJ Pelling QC, sitting as a judge of the High Court of Justice, Queen's Bench Division, Administrative Court on 13 February 2009. Mr Smith now seeks to appeal that decision. The issue on this appeal is the important and relatively novel issue whether a person may acquire the right to land forming part of the highway by means of adverse possession.

2. There is a long-standing saying "once a highway, always a highway". English law has since at least the time of Bracton in the thirteenth century regarded "the King's highway", now the Queen's highway, as incapable of ownership by any person other than the King or Queen. It is commonly assumed that there can be no adverse possession of any part of a highway, and Mummery LJ delivered an important dictum to this effect in *Bromley LBC v Morritt* [1999] 78 P & CR D37, where he held:

"In my judgment, this appeal does fail. On the judge's finding of fact the land enclosed by the fence and the wall was part of the public highway. As a matter of law, an adverse possession or squatter's title cannot be acquired to land over which a public right of way exists. The only question is the exercise of discretion to make a mandatory order."

3. However it is not possible to point to any decision from which the maxim is derived, and, moreover, there is no exception for public highways in the provisions facilitating adverse possession. Furthermore it is a common experience from time to time to find a highway wholly or partially obstructed for a temporary or permanent purpose, for example, by café tables, items displayed for sale, salt bins, street markets, public conveniences or other obstructions. In other words, there are situations in which people have, or appear to have, a right to occupy the highway to the exclusion of others. The saying that "once a highway always a highway" cannot therefore be taken as an absolute and universal rule. There are some circumstances in which a highway can cease to be such on a permanent or temporary basis. One of the ways in which this might occur is under licence from the local authority granted under some statutory power. But can it occur through adverse possession?
4. It will be clear from what I have already said that this appeal engages two areas of property law, namely (1) ownership of the byway and rights over it, and (2) adverse possession. I begin my judgment with a summary of the material parts of the judge's judgment and then by looking at relevant aspects of those areas of law. I will then discuss the arguments advanced before us and state my conclusions.

Judgment of HHJ Pelling QC

5. The judge gave a detailed and careful judgment. The judge considered a number of authorities, including *Haigh v West* [1893] 2 QB 19, *Seddon v Smith* (1877) LT 168, *St Ives Corporation v Wadsworth* [1908] Knight's Local Government Reports 306, *Dawes v Hawkins* (1860) 8 CPB 348. He noted that, although a highway could be extinguished in the ways I have mentioned, there was no reference to extinction by adverse possession. He dismissed Mr Smith's claim for judicial review.

Ownership of the byway and rights over it

6. Before the Highways Act 1835, the obligation to repair highways often fell on the inhabitants of the parish through which the highway ran. There was no statutory vesting of the highway in a public authority at this stage. The liability of inhabitants of the parish was abolished by s 38 of the Highways Act 1959.
7. The principal Act now applying to highways is the Highways Act 1980 ("HA 1980"). That Act does not define "highway" and accordingly it is necessary to find the meaning of that term from the general law.

8. There are two elements to a highway. A highway is both a public right to pass over a defined route and the physical land or other property over which the right is exercised. It is possible to have a highway over water, as where a highway continues via a bridge.
9. Where there is a highway, the surface of the land or other property is dedicated to public use (see per Cairns LJ in *Rangeley v Midland Railway Company* (1868) 3 Ch App 306).
10. Section 263(1) of the HA 1980, which is based on statutory provisions stretching back to the Highways Act 1835, provides for the statutory vesting of highways. It provides that:

“Every highway maintainable at the public expense, together with the materials and scrapings of it, vests in the authority who are for the time being the highway authority for the highway. “
11. The materials and scrapings appear to be whatever is used to make the surface of the road, such as tarmac, gravel, sand etc.
12. In *Tithe Redemption Society v Runcorn UDC* [1954] Ch 383, relied on by Mr David Watkinson who appears for Mr Smith, this court considered the effect of a provision in s 29 of the Local Government Act 1929 which is similar to s. 263 of the HA 1980. Evershed MR cited a passage from an earlier judgment of James LJ in *Rolls v Vestry of St George the Martyr, Southwark* (1880) 14 Ch D 785 @ 796-7 explaining the difficulties arising out of a similar provision in the Public Health Act 1875:

“It appears to me that the legitimate construction of the enactment that streets being highways shall vest is that streets *if and so long as they are highways* shall be vested. There are no words of inheritance, there are no words of perpetuity in the Act, there is nothing to say whether the streets are to vest in fee simple or for any limited estate, and it appears to me that they are given to and vested in the public body for the purposes of the Act and during the time for which those purposes require them to be held, and no longer. Words of divesting or defeasance are not required, because to my mind the interest of the vestry is exactly like a limited estate. If an estate is given to a woman during her widowhood words of defeasance are not required to divest it on her marriage, because the estate has ceased when the original limit is arrived at. So in this case it appears to me that when the thing has ceased to be a highway, when it has ceased to be a street, then it ceases to be vested, because the period for which it was to be vested in the board has come to an end. “ (emphasis added)
13. In reliance on this, and other authorities, this court held in *Tithe Redemption* that the statutory vesting of a highway in the highway authority operated to vest in the highway authority a determinable fee simple in the surface of the land.
14. Two things are thus clear. First, the highway is not just the surface of the physical property to which the right attaches. It is also the right of passage over that land. Secondly, the statutory vesting is not permanent: it could come to an end. That is a major point in Mr Watkinson’s argument. It is not, therefore, an answer to Mr Smith’s case to say, following the maxim “once a highway always a highway”, that by virtue of s 263 the highway has become vested for ever and a day in the highway authority.
15. In what circumstances can a highway cease to be such? It is common ground that the common law does not treat highways which fall into disuse as having ceased to be highways (see *Dawes v Hawkins* (1860) 8 CB 848). They might cease to be such if they were destroyed, for example if a cliff path fell into the sea, but they might equally in such circumstances be diverted. A highway could in the past be declared in judicial proceedings commenced by writ *ad quod damnum* to have ceased to be such. Proceedings can also be taken under the HA 1980 to stop up a highway in certain specified circumstances. It may also be possible to extinguish highways under other statutes.

16. The public may use a highway as of right primarily for passage but certain other activities are also permitted (see generally *DPP v Jones* [1999] 2 AC 240).
17. The public right of passage is protected by the imposition of liability for the commission of an offence by s 137 of the HA 1980 if the highway is in whole or part obstructed. The public have the right to use the full width of a highway: see *Seekings v Clark* [1961] LGR 268, *Harvey v Truro RDC* [1903] 2 Ch 638. The judge considered the effect of s 137 on the claim for adverse possession. This involved considering in detail the decision of the House of Lords in *Bakewell Management Ltd v Brandwood* [2004] 2 AC 519. We informed the parties in the course of the hearing that we did not require argument on this issue and so I shall not deal with it or the judge's reasoning on it further.
18. Under the Wildlife and Countryside Act 1981 ("WCA 1981"), County Councils must maintain and keep under review definitive maps recording the existence of all public paths within their area. These maps will record the paths as falling into one of three categories, byways open to all traffic, bridleways and footpaths. Definitive maps are conclusive evidence of the existence of specified minimum highway rights over a given line. A byway open to all traffic, or BOAT, is effectively a vehicular highway over which the public have a right of way for vehicular traffic but which is used by the public mainly for the purposes for which full paths and bridleways are used: WTA 1981 s 66 (1).
19. The highway would also include an appropriate part of the soil beneath the surface and the surface itself. But a person can clearly acquire an interest in the land below that. In some parts of London at least it is not uncommon for houses to have cellars that stretch under the road. Mines may stretch under roads. More mundane things like drains, cables and pipes may also run under highways. In those circumstances the question of adverse possession may in essence be no different from the principle upheld in *Roberts v Swangrove Estates Ltd* [2007] 2 P & CR 326 that a person may acquire title to part of the bed of a tidal river by adverse possession notwithstanding the existence of the public right of navigation.
20. By claiming title Mr Smith, of course, claims title of the surface and all that is above and below it, but primarily we are concerned only with the surface. Unless he has obtained that by adverse possession, registration is not worthwhile.

Adverse possession

21. In the case of unregistered land, the owner must bring his action against a person in possession to recover possession of it within twelve years: Limitation Act 1980 ("LA 1980"), s 15. The title of *that owner* will in general be extinguished at the expiry of that period: LA 1980, s 17. Land for this purpose does not include incorporeal hereditaments unless the Act so provides: LA 1980, s 38(1). There appears to be no provision that it should apply to incorporeal hereditaments in any of the relevant provisions. "Land" does not, therefore, in the absence of such a provision, include a right of way. Time begins to run when the owner is out of possession and "adverse possession" starts: LA 1980 sch 1, para.1 and 8. To be in adverse possession, the person in possession who is not the owner, commonly called a "squatter", must have an intention for the time being to possess the land to the exclusion of all other persons, including the owner with paper title: see *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.
22. If the squatter succeeds in his claim, he will obtain the rights in the land owned by the person whom he has dispossessed: s17 LA 1980, above. Accordingly, if the land was subject to a public footpath, the land will be acquired subject to that footpath: see, *passim*, *J A Pye v Graham*. As Lord Radcliffe said in *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510 at 536, "... since his possession only defeats the rights of those to whom it has been adverse, there may be rights not prescribed against, such, for instance, as equitable easements, which are no less enforceable against him in respect of the land than they would have been against the owners he has dispossessed."

23. All this means that Mr Smith has to show not just that he has dispossessed the owner of the highway but that he has also dispossessed the public entitled to a right of passage over the highway as well.

DISCUSSION

24. Although Mr James Strachan, for the Land Registry, reserved the question whether there was sufficient evidence of intention to possess in any event, I have already stated that I propose for the purposes of this appeal to assume that Mr Smith is able to show sufficient acts of adverse possession to entitle him to be registered as owner of the land now claimed, assuming for this purpose that it was not part of a highway.
25. On that basis, and having conducted my review of the relevant law as set out above, it is in my judgment, clear that Mr Smith must show two things: (1) that under the common law the title of the highway authority may be extinguished by adverse possession – and this means showing that a highway can be brought to an end in this way; (2) that the public’s right to use the highway is simultaneously extinguished. If Mr Smith cannot show this, and is limited to showing for instance that he has acquired title to the surface of the road by adverse possession, he would have achieved nothing because the road would not have ceased to be a highway and so would continue to be subject to the statutory vesting in s 263. Likewise he has in practice achieved nothing if the right of passage over the land he occupies still subsists.

Extinction of the title of the highway authority by adverse possession?

26. As explained above, highways are vested in the highway authority by s 263 of the HA 1980. This does not mean that the title cannot be extinguished: there are, for instance, statutory provisions which enable a highway to be stopped up. In those circumstances s 263 would cease to apply and could thus not be a barrier to the acquisition of land by adverse possession.
27. Mr Watkinson has relied on a number of cases. From these, he deduced a number of propositions. His principal submission was that, once 12 years had expired, the highway authority’s title was extinguished and the squatter obtained a new title, and he could prevent access to the land which he had acquired. He further submitted that the authorities showed the land could cease to be a highway. He submitted that a highway would cease to be such if it was not used as such. I will summarise each case in turn but my clear conclusion is that none of these cases establish that the title of the highway authority is extinguished.
28. The first authority is *Haigh v West*. In this case, a highway was vested in the inhabitants of a parish. They let out the land for pasturage to a tenant. The lord of the manor claimed from the tenant damages for trespass in pasturing his sheep in the road. This court held that it had to be assumed from long usage that the road was vested in trustees for the inhabitants of the parish. Lindley LJ, giving the judgment of the court held:
- “We see no legal difficulty in the acquisition by the churchwardens and overseers of the title by the statute of limitations, although of course the title so acquired must be subject to the public right of way” (page 31)
29. In my judgment, this authority does not assist Mr Smith. It is not an authority which deals with the effect of the statutory vesting of highways in a public authority. On the contrary, it is about the acquisition of title by the persons who were then in the position of the highway authority. Moreover, their acquisition of title was subject to the public right of way and so there was no change in status of the highway in question: it was and remained a highway.
30. Mr Watkinson also relied on *Seddon v Smith*, also a decision of this court. The report is extremely brief, a disadvantage which is amply made up for by the fact of the eminence of the Lords Justices sitting: Cockburn CJ and Baggallay and Brett JJA. In this case, the defendant had

the paper title to a strip of land along Molyneux Lane. The plaintiff sued him for damages for trespass, claiming damages for the allegedly wrongful abstraction of coal from under the strip of land (as well as from under his own adjacent land). The evidence showed that the right of way had been granted over the land to the plaintiff's predecessors in title and others. The strip of land led from a public road to other land of the plaintiff. It appeared that the plaintiff had not simply used the right of way over the strip; he had also used the remainder of the strip to raise cabbages, potatoes and other produce, ploughing it up and doing all other acts necessary for that purpose, leaving only a narrow lane which could be used as a way. This way was used by the plaintiff, and others, who were said to derive title from the defendant's predecessor in title. At trial, the plaintiff obtained damages for coal abstracted from under all parts of the strip, but on appeal his damages were reduced by one-quarter. Cockburn CJ, with whom Baggallay and Brett LJ agreed, held that the plaintiff had acquired the strip by adverse possession, save in relation to the lane.

31. In *Seddon*, there is nothing to suggest that the lane was a public highway rather than simply a private right of way. Moreover, the plaintiff did not acquire title to the land actually used as a lane. Accordingly, I do not consider that this authority assists Mr Smith.
32. The last two cases to which I will refer are *Dawes v Hawkins* and *Harvey v Truro RDC*. *Dawes v Hawkins* is an important case. In it, Byles J referred to the maxim "once a highway always a highway". This is the earliest case in which we have seen reference to that maxim. Byles J explains the maxim as follows:

"for, the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of *ad quod damnum*, or by proceedings before magistrates under the statute." (page 858)

33. In *Dawes v Hawkins*, a road had been unlawfully stopped up by an adjoining land owner and diverted by another route. It was held that the public had a right to deviate on to the adjoining land. The road was subsequently diverted back to its original route. Some years later, the defendant tried to pull down trees which the plaintiff owner grew on the substituted road. It was held that the plaintiff was entitled to damages to trespass as there was no evidence that the substituted road had been dedicated to the public.
34. The relevant passage in the judgment is that which I have already quoted from the judgment of Byles J. Far from supporting Mr Smith's case, this passage is inconsistent with it since the methods of extinction of a highway are not stated to include adverse possession.
35. *Harvey* was cited by Mr Strachan. This case is important to his case as authority (i) for the proposition that a highway does not cease to be such simply because it is not used as such and (ii) for the proposition that the highway authority cannot by its acquiescence authorise an obstruction. At 644, Joyce J held:

"It is an established maxim that once a highway always a highway. The public cannot release their rights. Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not have been used will preclude the public from resuming the exercise of the right to use it if and when they think proper. The authorities for this are to be found in any of the ordinary text-books on the law of highways, and there is a well-known case where some of the encroachments on the roadside waste had existed for more than forty years, but it was held that no period of modern enjoyment was of any avail to deprive the public of the right they had once enjoyed.

Suppose, then, that in the year 1885 the plaintiff's predecessor in title, as owner of the Trenowth estate, had succeeded in inclosing the strip of land now in question in the absence of effective opposition from the then highway authority, it appears to me that even uninterrupted possession for the seventeen years before the present dispute began would not and could not have legalised the encroachment. "

36. Likewise, in *Suffolk County Council v Mason* [1979] AC 705 at 710, Lord Diplock, with whom Lord Morris of Borth-y-Gest agreed, held that:

“At common law too a public right of way of any of the three kinds has the characteristic that once it has come into existence it can be neither extinguished nor diminished by disuse, however long the period that has elapsed since it was last used by any member of the public – a rule of law that is the origin of the brocard “once a highway, always a highway.”

37. In short, none of these cases establishes the proposition that the title to land on which a highway runs may be acquired by a squatter by adverse possession.

Extinction of the public right of way?

38. Earlier in this judgment, I explained the highway had two components: a physical element and an incorporeal element, namely a public right of passage. Further, when dealing with adverse possession, I explained that a squatter can only acquire the title of the owner whom he has dispossessed. Accordingly, there is no means in law by which, as a result of occupying land forming part of the highway, Mr Smith or any squatter can bring to an end the public’s right of passage.
39. As Mr Strachan points out, the public right to use the highway cannot be terminated by action which affects some members only of the public because the right belongs to them all, and the public is an ever-changing class. Mr Strachan and Mr Richard Ground, for Cambridgeshire County Council, further point out that by virtue of schedule 1, paragraph 5 and s 29 of the Land Registration Act 2002, public rights are an overriding interest and any title which Mr Smith acquired would be subject to the right of passage over the byway on registration in any event.
40. On the authorities it is no answer that the public can use the byway without needing to pass through the land now occupied by Mr Smith: see *Seekings*, above.

Article 8 of the European Convention on Human Rights?

41. Article 8 of the Convention confers on everyone the right to respect for his private and family life and his home. This is a qualified right and there are circumstances in which a public authority may interfere with it. Mr Watkinson referred to article 8 but this is not engaged by a refusal to set aside the decision of the assistant land registrar. It may of course be engaged if a public authority takes steps to evict Mr Smith from the site which he occupies, but I express no view on that as it falls outside the appeal.

Disposal of this appeal

42. In the circumstances, I would dismiss this appeal. I take note of the modern day conditions, and the fact that there is a great shortage of land on which people can make their homes, and that the land on which Mr Smith has his caravan would appear to be surplus to need in relation to the byway. However, to some extent Parliament has already provided for this in providing statutory means of stopping up highways. Even if, contrary to my view, it were open to us to extend the common law in this area, the decision to create any additional means of extinguishing highways ought to be left to Parliament. Any development by the courts would undermine the common and long-held understanding of the law that highways are a shared resource and that all members of the public are entitled to use the highway in perpetuity save in those limited cases where Parliament has provided otherwise. I have had the privilege of reading in draft the judgment of Lord Justice Mummery. We have defined the issues differently: I have analysed the issues according to the two elements of a highway, the physical element and the incorporeal right whereas Lord Justice Mummery has divided his analysis between the common law and statute. But in the end the principles we have applied are the same, and thus I am able to agree with his judgment too. I have also had the privilege of reading the judgment in draft of Elias LJ. I

respectfully agree with his judgment save that I would not accept that a highway was necessarily capable of acquisition by adverse possession at common law, even subject to the public right of way, prior to the introduction in 1835 of statutory vesting. But that point is immaterial in this case.

Lord Justice Elias:

43. I gratefully adopt the facts as set out by Lady Justice Arden.
44. I agree with Mummery LJ that the critical feature in this case is section 263 of the Highways Act. That section vests title to a highway which is maintainable at public expense in the highway authority responsible for its maintenance, namely Cambridgeshire County Council. Absent this provision, it would in principle be possible for title to land to be acquired by adverse possession notwithstanding that it is a public highway: see *J A Pye (Oxford) Limited v Graham* [2003] 1 AC 419 where title to a large tract of land was acquired by adverse possession, notwithstanding that it was subject to a public footpath. However, since the public right to use a highway runs with the land, a new owner would take subject to the public right of way, as the *Pye* case makes clear. He cannot get a better title than the person whose title he is displacing.
45. It might have been acceptable to the appellant in this case to have acquired the land subject to the right of way, given the rare use made of the particular highway in issue, notwithstanding that he faced a risk of prosecution under section 137 of the Highways Act for obstruction. (He would, however, then have faced an argument which found favour with the judge below, but which we did not consider, that he could not acquire title by adverse possession where that possession was unlawful.)
46. However, whether it would have been acceptable to him or not, it is not an option open to the appellant since the effect of section 263, as Mr Watkinson recognised, is that whilst the highway remains maintainable at public expense, no title can be obtained by adverse possession. Title is at all times automatically vested in the highway authority. Accordingly, if title to the land is to be acquired, it can only be if the land ceases to be a highway. If that were to occur then section 263 would no longer bite since there would be no public right of way being maintained. Furthermore, the Council would cease to have title at that point, and any claim to title by adverse possession would be asserted as against their successor or successors in title.
47. Mr Watkinson, counsel for the appellant, does indeed make the bold submission that the land has ceased to be a highway. He does not suggest that this has occurred by any of the usual methods for terminating a highway, such as proceeding under statutory provisions in the Highways Act 1980. Mr Watkinson contends that it is as a consequence of the adverse possession itself. He says that, at one and the same time, adverse possession both defeats the right of the public to use the land as a highway, and thereafter gives the appellant squatter's rights to the land now stripped of its status as a highway and therefore falling outwith the automatic vesting provisions in section 263.
48. In my judgment, this is an impossible submission to sustain. Mr Watkinson has not been able to identify any statutory provision, nor any authority, to support the principle that the right of the public to use land as a highway can be defeated by adverse possession. The Limitation Act merely sets a 12 year limit to bringing an action to recover land. It has no application to rights of way. Nor could the principles readily apply to such public rights, given that the right can be exercised by a large and amorphous body of individuals none of whom may have sufficient interest or inclination to uphold the right as against the squatter.
49. Furthermore, as both Mummery and Arden LJ have demonstrated, the authorities are inconsistent with any such principles. Of the two cases principally relied upon by Mr Watkinson, *Haigh v West* [1893] 2 QB 19 does not assist since at all times the land remained a highway; it does not therefore support the proposition that adverse possession can extinguish the highway.

The other case was *Seddon v Smith* (1877) 36 LT 168. The facts were very particular, and in any event it concerned a private right of way and has no bearing on public rights of way.

50. Moreover, there are numerous cases which have approved the maxim: “once a highway, always a highway” which pithily expresses the principle that a public right of way cannot be extinguished by disuse, however long the period of non-user: see for a recent and authoritative confirmation of the principle the observations of Lord Diplock in *Suffolk County Council v Mason* [1979] AC 705, 710. If the appellant’s submissions were correct, and the right to use the highway could be lost by adverse possession, this would constitute a major qualification to that principle. Nobody has ever suggested that it should be so qualified.
51. For these reasons, which essentially reflect those of both Mummery and Arden LJ, I would dismiss the appeal.

Lord Justice Mummery:

52. In the court below, counsel for the Land Registry cited a passage from *London Borough of Bromley v. Morritt* [1999] EWCA Civ 1631 in which, without any display of law, I said—

“As a matter of law, an adverse possession or squatter’s title cannot be acquired to land over which a public right of way exists.”
53. Counsel for Mr Wayne Smith submitted to HHJ Pelling QC that he was not bound by that statement, as it was obiter and was arrived at without a consideration of the relevant authorities. The judge considered the authorities cited to him and concluded that the *Morritt* dictum was

“...plainly correct at any rate in relation to a contention that a possessory title has been obtained which has the effect of extinguishing some or all of the public highway concerned.”
54. Mr Wayne Smith’s paper application for permission to appeal gave this court an opportunity to consider all the relevant legal materials and to settle the question at this level of decision. I granted permission to appeal.
55. The limitation point would normally arise in the setting of legal proceedings by the paper title owner of the land for recovery of possession of land from a person in occupation of it without the consent of the owner. It makes no difference to the point of principle that the limitation issue in this case arises on an application to the Land Registry for registration of title to unregistered land. In the judicial review proceedings against the Land Registry the question is whether the Land Registry’s decision is unlawful and void. The legal challenge is to a decision cancelling Mr Smith’s application to be registered with possessory title to a piece of land which is subject to a public highway. The Land Registry gave as the reason for cancellation the impossibility in law of acquiring title by adverse possession to land over which a public right of way exists. The same point could arise again on other applications for registration. A ruling from this court would be useful.
56. The judgment of Arden LJ sets out all the facts, issues and legal materials. I agree with her that this appeal should be dismissed. No good ground has been shown for questioning the lawfulness and validity of the Land Registry’s decision.
57. In principle the existence of a right of way over land, whether it is a private right of way or a public highway, does not necessarily prevent a person from claiming adverse possession of that land under the Limitation Act 1980. See for example, *Roberts v. Swangrove Estates Ltd* [2007] 2 P & CR 326 at 341; affirmed [2008] Ch 439; and *JA Pye (Oxford) Ltd v. Graham* [2003] 1 AC 419 in which part of a large expanse of land, the title to the whole of which was extinguished by adverse possession, was subject to a public footpath.

58. In the case of highways maintainable at public expense section 263 of the Highways Act 1980 is critical. It expressly vests a highway maintainable at the public expense in the authority who are for the time being the highway authority for the highway. In the face of that statutory vesting of title it is accepted on behalf of Mr Smith that he can only succeed if he can establish that the public right of way has been extinguished over that part of the land to which he claims adverse possession: in other words that there is no longer a public highway over that land to be vested by force of statute in the highway authority. In my judgment it has not been shown that that has occurred by operation of law either under statute or at common law.
59. First, statute. The Limitation Act 1980, on which Mr Smith relies to bar any claim that the Cambridgeshire County Council might have as the relevant highway authority, is precise on the point of what is extinguished on the expiration of the limitation period i.e. the period prescribed by that Act for any person to bring an action to recover the land. Section 17 provides that “the title of the person to the land shall be extinguished.” Nothing is said in that section or in the rest of the 1980 Act about extinguishing the rights of the public or of anyone else over that land at the expiration of the prescribed period. Further, no procedure under the Highways Act 1980 or other statutory provision has been invoked to extinguish the public right of way over the land.
60. Second, common law. None of the cases cited supports the proposition that a public right of way is extinguished at common law in consequence of the expiration of the statutory limitation period and the statutory extinction of title of the person seeking to recover possession on the basis of a better title. In fact the trend of the authorities is that the person acquiring a new title by adverse possession takes subject to an existing and continuing public right of way.
61. In *Dawes v. Hawkins* (1860) 8 CB 848 at 858 Byles J said that the only ways in which a public right of way can be extinguished are stopping up a highway by the old writ of *ad quod damnum* or by proceedings before magistrates under the statute. (The old writ has now fallen into desuetude). No mention was made of extinction of the public right of way by adverse possession of the land over which a public highway runs.
62. The case of *Seddon v Smith* [1877] 36 LT 168 does not assist in the case of a public highway. According to the brief report, the strip of land in dispute, which belonged to the lord of the manor, was subject to a private right of way.
63. *Haigh v. West* [1893] 2 QB 19 is a very unusual case. The lord of the manor claimed damages for trespass to a road from the defendant for grazing his sheep on it and on the verge. (The road was itself grassed over for a long period). The defendant was a tenant of the parish vestry. In those days the parish vestry was the body responsible for the maintenance of the local highway. It was held that the parish vestry had acquired a title to the road under the Statute of Limitations, but Lindley LJ said at page 31 that the title so acquired “must be subject to the public right of way.” The parish vestry do not appear to have argued to the contrary, but it is difficult to see how they could have done having regard to their public duties as authority for the maintenance of the public highway.
64. Thus, as was recognised by Joyce J in *Harvey v. Truro District Council* [1903] 2 Ch 638 at 644 the possession of a squatter on the highway cannot bar the public right over it. Possession by the squatter and exclusion of, or disuse by, the public does not extinguish, release or diminish public rights over the highway, or rule out their resumption. See also *Suffolk CC v. Mason* [1979] AC 705 per Lord Diplock
65. Finally other points canvassed in argument, such as the breach of Article 8 of the Convention and the effect on adverse possession of the alleged illegality of Mr Smith’s continued obstruction of the highway (the *Bakewell* point), do not require to be ruled on in deciding the issue in the judicial review proceedings whether the Land Registry’s cancellation of Mr Smith’s application for registration was lawful.