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A MOVING RIGHT OF WAY

THE LAW ALLOWS A HIGHWAY TO MOVE AWAY FROM TIDAL EROSION

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This edition first published in *The Seymour Papers*, by the Byways & Bridleways Trust, May 2006.

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"We do order and direct that there shall for ever be a common King's highway or road forty feet of assize in breadth along the sea cliff, and as the said cliff wastes or falls down, the road shall be removed inwards into the land, the same width to be let off from the sea cliff"

Inclosure Award for the Township of Aldbrough (in Holderness in the County of York) 1766. Made under the Directions of an Inclosure Act of 4 Geo 3 (1764). (As cited in *R v Aldborough* (1853) 17 JP 648).

DEVIATION OUT OF NECESSITY.

Almost every journey along a rural way necessitates a minor deviation from the trodden path for some reason or another. There may be fallen branches, protruding vegetation, deep potholes, or boggy ground. Where ways follow sea cliffs and tidal river banks the need to deviate may constantly change with the season, the time of the day, the state of the tide, or the height of the river. The traveller will therefore, instinctively, move inland and away from danger, as compelling circumstances dictate. Each such deviation, if only of a minute nature, will itself be lawful, because it will fall within the *de minimis* principle.

Thus from time immemorial, passengers have, out of necessity, deviated from their customary way and have followed another line, in order to continue their journey with safety. The ancient common law held that such deviations were lawful and as of right. It was further held that as highways could be created by necessity, each deviation, in turn, therefore, became part of the highway. For it was the "good passage" from one place to another which constituted "the way" rather than just the beaten track itself.

The "good passage" was therefore a legal right. Sometimes the way along this through passage could only be defined by some distant object on the skyline, rather than by the track itself. If a route ran along a cliff top, or followed a river bank, those natural boundaries indicated, as far as the traveller was concerned, the way over which he had a customary legal right. That right to the "good passage" remained

even where the usual track had fallen into the water and the traveller was forced to step inland to avoid danger.

In such flat and desolate areas as the Holderness Coast, between Bridlington and Spurn Point, travellers regularly followed the coastline. The cliff edge was often their only guide to their destination apart from the sight of distant church towers. The coastline therefore defined the customary route. Thus the right of way followed the cliff top wherever it existed for the time being. Common sense states that this must have been the usual practice. Otherwise men and horses would have been constantly forced to turn back if each cliff fall was deemed to prevent their through passage to their intended destination.

THE RIGHT TO DEVIATE IN THE 18TH AND 19TH CENTURIES.

The old books on highway law (as cited below) confirm that in the 18th and 19th centuries passengers were considered to have the right to deviate upon the adjoining private land, This right existed regardless of who owned that land, and or whether the accustomed way was rendered impassable because of natural events :-

“If a highway leading through a Field is founderous, Travellers may go out of the Track-way, notwithstanding there may be Corn sown : And where it hath been used Time out of Mind for the King’s Subjects to go by Outlets on the Lands next the highway, when the Way is founderous, the Outlets are Part of the Way, for the good Passage is the way – Yelv. 141. Trin.10 Car. B.R. 1 Danv.712 “ (‘*The New Law Dictionary*’, Giles Jacob, 5th Ed. [1744].

“It hath been holden, that if there be a highway in an open field, and the people have used time out of mind, when the ways are bad, to go by outlets on the land adjoining, such outlets are parcel of the way; for the king’s subjects ought to have a good passage, and the good passage is the way and not only the beaten track; from whence it follows, that if such outlets be sown with corn, and the beaten track be foundrous, the king’s subjects may justify going upon the corn. 1 Haw. 201” (‘*The Justice of the Peace and Parish Officer*’, John Burn, 16th Ed. [1788] Vol. 2, page 483).

“For highways are for the public service, and if the usual track is impassable the public are entitled to pass in another line. 2 Doug. 748 [*Taylor v Whitehead* 1781]” (‘*The Laws respecting Highways and Turnpike Roads*’ [1801]).

"Neither formal dedication, nor remote antiquity, is necessary to create a public right of user as a Highway. If a highway is out of repair, flooded, or from any other cause impassable, it has always been lawful for any passenger to use the adjoining private land (not being actually in domestic use) with as much freedom as if it were the old accustomed highway. This old and settled rule of the Common Law is recognised by the 25th section of the Highway Act, 5 and 6 Wm. 1V. c.50. The public very soon also acquire a right to the permanent use of a road. A few years' uninterrupted free passage over it will give a right to the public to continue to use it, and be sufficient to prevent the resumption or closing of the ground (see *R v East Mark*, 11 Q B 877 ; *Roberts v Hunt*, 15 Q B 17 ; *R v Petrie*, 24 Law Jl. Q B 167). The number of people passing, or the directness of the way, is not the question. It is the openness, and opportunity, and actual use by any of the public who choose" ('*The Parish*' Toulmin Smith [Barrister], 2nd Ed. [1857], page 349 - my emphasis).

"If a highway be impassable from being out of repair or otherwise, the public have a right to pass in another line, and for this purpose to go on the adjoining ground, and it makes no difference whether it be sown with corn or not ; 1 Roll. Abr. 390a, pl. 1 and b, pl.1. It is clearly settled that where a common highway is out of repair, by the overflowing of a river or any other cause, passengers have a right to go upon the adjacent ground and to pass in another line ; *Robertson v Gauntlett*, 16 M & W 289; *Absor v French*, 2 Show. 21; 2 Lev.234; *Henn's Case*, Sir W. Jones, 296. So, if the banks of a navigable river are impaired by the water, it is justificable to go upon the nearest part of the field next adjoining; 1 Ld. Raym. 725 ('*The Law of Highways*' Leonard Shelford (Barrister) 3rd Ed. (1862) page 25 - my emphasis).

Note - The above quotation is taken from the pages of the book dealing with "How a Highway may be created" and the margin note alongside states "By necessity". The words underlined are particularly relevant, as they are in direct contrast to the findings of Mrs Justice Hallet in the *Maisemore* case below.

"It (the way) was not a strip of land, or any corporeal thing, but a legal and customary right – as the lawyers said, "a perpetual right of passage in the sovereign, for himself and his subjects, over another's land" . . . . . the judges held that it was "the good passage" that constituted the highway, and not only "the beaten track", so that if the beaten track became (as it invariably did in wet weather) "foundrous" the King's subjects might divert from it, in their right of passage, even to the extent of "going upon the corn"" ('*The Story of the King's Highway*' [1913] S & B Webb page 5).

For the ancient traveller the right to divert from the customary line of the way was an absolute necessity when that way followed the edge of a sea cliff or the bank of a tidal river, or crossed land subject to flooding or boggy conditions.

In times when man and beast walked everywhere, it was therefore unthinkable that their "good passage" could be prevented by anyone who objected to their right to deviate should natural forces make their customary route unsafe.

This long-established common law right is now under threat. For it has been held that there has never been a general right to deviate, but only a right which exists in certain specific instances. For example, if a person obstructs the way, the public may lawfully deviate in order to continue their journey, but only upon the offending person's land.

THE *MAISEMORE* CASE.

The most recent case to consider the concept of a "moving right of way" is the "*Maisemore* Case" - (*R [on the Application of Gloucestershire County Council] v Secretary of State for the Environment, Transport and the Regions* [2001] 82 P & CR 15). When giving judgment Mrs Justice Hallett concluded "I am not satisfied that there is such a thing as a moving right of way" (para. 78 of the reported case) (see also the commentary on the case by Peter Wadsley in the *Rights of Way Law Review* June 2001 section 2.2 pages 25 to 33).

THE HISTORY OF THE MATTER.

The case concerned a footpath running along the bank of the River Severn in the parish of Maisemore. The matter at issue being about whether the public were entitled to "pass into another line" at the place where a hundred metres of the path had been swept away by the tidal waters.

After considering the various options the County Council decided to make an Extinguishment Order under s.118(1) HA 1980 for the whole route. Following objections a public inquiry was held.

In his Decision Letter of the 3 March 1999, the Inspector, Mr W J Bingham, OBE, declined to confirm the Order He concluded "It seems to me that the public right of way along the river bank has not been lost due to the erosion of the bank. I consider that the public has, until quite recently, exercised the right to "pass into another line"

and that, as a result, the right continues to exist along the river bank, wherever that may be" (para 7.7.2 of Decision Letter FPS/T/1600/3/3). Thus the issue arose about whether the concept of a "moving right of way" could lawfully exist.

The County Council appealed against the Inspector's decision and sought judicial review. Hallet J. allowed the application and remitted the matter to the Secretary of State for re-determination.

Following the decision of the High Court, a further inquiry was held before Inspector Helen Slade. She confirmed the original Order, subject however, to the modification that the schedule and plan excluded "the section of the path which no longer exists" (see Decision Letter of 1 April 2005 : Ref. FPS/T1600/3/3R as reported '*Byway and Bridleway*' 2005/6/50).

THE FIRST INSPECTOR'S DECISION, 1999.

The law and the facts appear to confirm that Mr Bingham made the correct decision when he concluded "the public right of way along the river bank has not been lost due to the erosion of the bank . . . (and) the right continues to exist along the river bank, wherever that may be".

Mr Bingham (now retired) was an experienced and wise Inspector. He seems to have given careful consideration to the facts of the matter. He then adopted a common sense approach to those facts and to the law relating to those facts. His main object of concern seems to have been the continuation of the public right. Whereas, upon appeal, Mrs Justice Hallett seems to have been more concerned about the alleged rights of "third parties" (who were not represented) rather than the existing rights of the public.

The common sense approach taken by the Inspector is demonstrated by his Decision Letter, particularly where he states :-
"Erosion of the river bank occurs at some point along the course of every river. There have been rights of way along river banks, for a variety of reasons, since time immemorial. It seems to me that these rights of way, wherever they are closely associated with the use of the river, must have adapted to the new course of the river. The public have followed the maxim of Lord Mansfield, quoted in paragraph 7.4.2 above, and the effect is as suggested by Dr Dunn, and quoted in paragraph 7.4.3 above. The only alternative method of retaining a public right of way along a river bank would appear to be to make a Diversion Order every time there is any

significant degree of erosion. This could lead to a path having to be diverted after every series of winter storms. If each diversion led to a public inquiry, the maintenance of the path would be a continual drain on public finances and would, inevitably, lead to the Highway Authority proposing a major diversion which would take each path affected well away from the river concerned. This does not seem to me to be in the public interest, or to be the intention of the law. As Lord Halsbury is quoted as saying in a different contest "is it common sense ?" (see para. 7.4.4.).

THE MATTER OF THE "RIPARIAN OWNER".

Although the Inspector ultimately reached the correct decision, he was misled during the Inquiry by both solicitors regarding an important point of law relevant to the matter at issue. Mr Limbrick (Assistant County Solicitor for the Order Making Authority) and Mr Pearlman (Ramblers' Association) both believed that the landowner whose land adjoined the river bank was "the riparian owner" (see paras. 4.6.2. and 6.6.1 to 6.6.4 of Decision Letter).

Both solicitors were aware from the outset that "The path in the Orders runs by the side of a tidal river" (see para. 4.5.6.). It seems however, that they did not understand the difference between a tidal river and a non-tidal river as far as the ownership of the foreshore, and the rights and responsibilities of the riparian owner were concerned.

It is well-established law that riparian rights only exist where a stream is not affected by the ebb and flows of the tide. For "when the waters are tidal, *prima facie* the Crown is entitled to the foreshore (i.e. the land between ordinary high and low water marks) and there are no private riparian rights, though it is possible for them to be created" ('*The Law of Real Property*' Megarry and Wade 5th Ed.(1984) page 67 - my emphasis).

Because he was misled as to the law, the Inspector therefore failed to realise that no riparian owner existed (see para 7.3.1). He was fully aware however that "The river is tidal at Maisemore" (see para. 7.3.2.) . But the significance of this fact, in relation to the rights of the public and to the rights of any riparian owner, escaped him.

This error in law continued, uncorrected, into the High Court, and continued also into the second inquiry where Mr Pearlman (for the Ramblers) once again raised the matter of the "riparian owner" (see para 55). Mr Wadsley (for the Order Making

Authority) did not set the inquiry record straight by pointing out that the law held that in the case of tidal rivers there was no riparian owner.

In the High Court, Mrs Justice Hallett, Mr Wadsley for the County Council, Mr Bedford for the Secretary of State, and Mr Laurence for the Ramblers' Association, were all aware that "At this point the Severn is tidal" (see para 2 of the reported case). But they were seemingly unaware that the persons which they referred to as "third parties" (see para. 43) or as "landowners" (see para 96) were not riparian owners. As the landowners in question did not own the land all the way to the water's edge they could not enjoy and exercise any riparian rights.

Because she was not properly advised as to the law on this point, Hallet J. consequently misdirected herself as to the rights of the "third parties" who own land adjoining the river bank. She did not appreciate that there is a moving strip of land which exists, and has always existed, between the water's edge and the adjoining land. This strip of land is known as the foreshore .It is vested in the Crown . But as pointed out by Glen (1883) ['*Law Relating to Highways*' page 58] "this ownership of the Crown is for the benefit of the subject". Thus, between the water's edge and the land belonging to the "third parties" there exists a strip of land over which the public have continuous rights.

As a consequence of her failure to take into account the full effect of the existing law regarding tidal rivers and adjacent owners the findings of Mrs Justice Hallett are incomplete and unsound. Thus the right of the public to deviate in such circumstances is in danger of being lost because of a judgment which did not fully consider all the relevant law.

THE JUDGMENT OF MRS JUSTICE HALLETT.

In her findings Mrs Justice Hallett accepted that in certain circumstances there was a right to deviate from the established path. However she said that this right had to be put into context :-

"I accept the right to deviate should be put into context. Its origins date back to a very different time and a very different countryside. Large chunks of the countryside remain uncultivated and unenclosed. Highways were not established in the way that they are today. If a man chose to enclose land he was "bound to leave a good way" (see *Henn's Case* (1633) 82 ER 157). If he stopped up the way so that it became so foul as to be impassable, the public was justified in deviating onto his land (see *Absor v French* (1678) 89 ER 772). Where the landowner has allowed the

usual track to become foundrous and impassable, it is plain the public may deviate onto his adjoining land for as long as that state of affairs persists, even if it is a matter of years" . . . . . (she then added) . . . . . "I also accept that it is very important to maintain the rights of the public wherever possible to enjoy highways such as this along the banks of a river" (see para. 72).

Hallett J then said that she did not accept the remarks of Lord Mansfield (*Taylor v Whitehead* (1781) 99 ER 475, at 477) that "Highways are governed by a different principle. They are for the public service, and if the usual tract is impassable, it is for the general good that people should be entitled to pass in another line" (para 73).

She also refused to accept that similar *dicta* in *Absor v French* (1678) and *Attorney General v Brotherton* (1992) 1 AC 425, at 445 A-B, "were intended to assert the kind of broad unrestricted right to deviate argued by Mr Bedford" (para. 73 continued).

The reason she gave for refusing to follow the cited authorities was that if the right to deviate was unrestricted it could affect the rights of "third parties" who were not responsible for the state of the way. She said "No authority has been cited to me where the right to deviate has been held to exist other than on to the land of the defaulting owner responsible for the obstruction or foundrous state of the way" (para 74).

If the Court had been presented with the works referred to above, Hallet J. would have realised that the very authority which she sought had indeed been old and settled law for over 200 years.

Hallett J. then cited *R v Oldreeve* (1868) 32 JP 271 where Willes J. held that the public are entitled to go round an obstruction in a man's field until he removes the obstruction "But if the obstruction is caused by the actions of the elements, then no such right accrues to the public" (para. 75).

Hallett J seized on the significance of these words and stated "In this case the erosion was caused by the elements." However, the findings of Willes J. were at variance with the accepted state of the common law as reviewed by the legal text books at that time (see above).

She continued "It is accepted that a review of the authorities reveals no case in which the right to deviate has been held in a case involving destruction of a right of way rather than obstruction. The right to deviate has only been upheld in reported cases

where the obstruction was held to be temporary, albeit up to fifty years. Mr Bedford (for the Secretary of State) submits that there are no reported cases against him . . . . . .the authorities to which I have been referred in a comprehensive and helpful review of the law, by both Mr Wadsley (for the County Council) and Mr Bedford, indicate that a right to deviate exists in certain specific circumstances which do not apply here" (see paras. 76-77).

It seems that those instructing learned counsel failed to get their tackle in order in more ways than one. Consequently the matter of *R v Aldborough* (1853) was never put before the Court. This was a case which concerned a highway running along a sea cliff which, when awarded, was directed to be for ever thereafter a moving right of way as the cliff fell down (see below). Although certain cases were put before the Court by learned counsel, it seems that none of the legal text books, referred to above, were consulted. Of these the opinions of Toulmin Smith and Leonard Shelford, both distinguished barristers and authors on matters concerning Highway Law, are particularly relevant to moving rights of way created by necessity.

Thus when Hallet J. was informed that there was no reported case she was misled. As a consequence she misdirected herself, and as a result made a judgment which on the face of it seems unsound and unsafe. However, until it is overturned, a precedent has been established which other judges, rights of way Inspectors, and Highway Authorities will feel obliged to follow.

It is a pity that Dr Alison Dunn of the University of Newcastle Law School was not consulted about the matter. Because by the 1st December 2000 (when *Maisemore* was heard) she was aware of significant facts which were relevant to the case. If Hallett J. has been presented with this information she may have been persuaded that the law did indeed recognise a moving right of way in certain circumstances (see below).

Hallett J. was aware of Dr Dunn's published paper in the *Right of Way Law Review* (September 1997 Section 2.2 pages 15-23). The Judge commented "I am not satisfied that there is such a thing as a moving right of way of a highway of the kind postulated by Dr Dunn in her excellent article on the subject. She says herself that there is no authority for the proposition, and it is a proposition which could have considerable implications for all landowners, including third parties" (see para. 78).

However, Dr Dunn, in her article, did not go so far as to state that "there is no authority for the proposition." What she actually said was "What the case law on

diversion does not squarely address is the situation where the land over which a public right of way lies has been physically destroyed, rather than merely rendered impassable" . . . . and . . . "if a right of way is destroyed by natural causes, as by the erosion of a coastline or the shifting of a river bank**,** it may be more difficult to establish the legal position" (see RWLR s.2.2 page 19).

After reading Dr Dunn's article in the RWLR, I wrote to her on the 16 September 1997. I enclosed a copy of the report of *R v Aldborough* (1853) 17 JP 648 which provides statutory authority for the concept of a moving right of way.

Dr Dunn replied on the 26 September 1997. She said "I do agree with your point that when *R v Hornsea* (1854) Dears 291 is placed in the context of the decision in *Aldborough* and the 1766 Inclosure Award, the decision of Maule J in *Hornsea* becomes more than a little curious. I wonder how many judicial decisions in this area have likewise been at variance with Inclosure Awards. As you are aware, the point is important, especially since, due to the forces of nature, the legal implications for rights of way of coastal erosion will become an ever increasing issue. One hopes a common sense solution will prevail."

However, three years later, in the High Court, the "common sense" solution as advocated by the Inspector, and favoured by Dr Dunn, was rejected by Hallett J. on the grounds that such a solution might disadvantage any 'third parties'.

THE *ALDBOROUGH* CASE AND THE *HORNSEA* CASE.

A proper understanding of both the *Aldborough* case and the *Hornsea* case is vital to the question of a "moving right of way". The *Aldborough* case was decided in 1853 and the *Hornsea* case the year after in 1854. Hornsea is situated exactly 6 miles due north of Albrough (see note below as to spelling). Both townships adjoin the North Sea between Bridlington and Spurn Point.

Note - The hand written Inclosure Act of 1764 from the House of Lords Record Office, and the 1st Edition of the 1" OS map (c.1850) show the spelling as "Aldbrough". This is the correct spelling. However, the reported case, and the law books, refer to it as "Aldborough". But this East Yorkshire township of Aldbrough must not be confused with the township of Aldborough which lies one mile south east of Boroughbridge (formerly in the West Riding but now in North Yorkshire).

South of Bridlington, the coastline of East Yorkshire is reported as eroding at a faster rate than anywhere else in Europe. The reason for this being that the low cliffs were formed by glacial deposits and boulder clay following the last ice age. This material is unstable and soluble at high tide. Therefore, as Dr Dunn confirms, the legal implications for the whole of the highway network of this area are significant as highways are being constantly lost to erosion.

The *Aldborough* case is not mentioned in Peter Wadsley's article in the RWLR. This is not suprising as the case was not considered either by Hallet J. in *Maisemore* . The *Hornsea* case however was considered by Hallet J. because Mr Wadsley for the Applicant regarded it at the time as significant.

Whilst both cases involved a crumbling sea cliff, the circumstances of each case were entirely different. *Aldborough* involved a road which ran parallel to the coastline. Whilst *Hornsea* concerned a highway which approached the cliff top at a right angle, and then descended to the beach down a 'slip way' running parallel to the cliff edge.

It seems that Hallett J. either got the facts of the *Hornsea* case wrong, or, she was misled by Mr Wadsley. She stated that "Mr Wadsley submits . . . . there was no liability to make good something which had been washed away, namely part of the road which ran along a cliff top" (see paras. 32 and 33).

The highway at Hornsea did not run "along a cliff top". The road approached the twenty feet high cliff at a right angle. That section of the road which was washed away, was in reality a 'slip way' for boats, horses, and carts, which ran from the cliff top to the seashore. Like many other such 'slip ways' on the East Yorkshire Coast it probably ran parallel to the cliff edge and was likely to have been partially covered by water at high tide (as is "The Lifeboat Slip" at Bridlington Harbour).

Hallett J. also stated "Mr Wadsley particularly relied upon the remarks of Wightman J. in the case of *Hornsea.* He said in terms : "The obligation on a parish is to make good something existing; but here the part complained of is gone by reason of the encroachments of the sea, against which the parish were not bound to guard" (see para. 37).

She continued, "The final nine words may be *obiter*, he says, but they have not been disapproved in subsequent decisions such as *Sandgate*, where *Hornsea* has been considered" (see para. 38).

The *Maisemore* case report of 2001 (82 P & CR 15) lists the cases referred to at H4, of which '(16)' is *Sandgate Urban District Council v Kent County Council* (1898) 79 LT 425. At page 426, the *Sandgate* case report states "the cases relied on by the appellants in the court below . . . . . (one of which was *Hornsea*) . . . . . are not applicable". (my emphasis). *Hornsea* was therefore not considered by The Lord Chancellor and the other Law Lords in 1898 when they passed judgment in the *Sandgate* case.

Thus it seems that Hallett J. either misled herself about *Hornsea*, or, was misled on two counts by Mr Wadsley regarding the significance of the case. Firstly, the road did not run along the cliff top. And secondly, the House of Lords did not consider the case when unanimously reversing the judgment of the Court of Appeal. Therefore it cannot be claimed that the above "nine words . . . . . have not been disapproved" . Neither can it be claimed that they have been 'approved' either.

The *Hornsea* case, unlike the *Maisemore* case, was not about public user. It was about the liability of the parish to repair that part of the way which had been destroyed by the sea. The rights of the public over the seashore remained as before

Aldborough involved a way running parallel to the cliff edge :-

********* North Sea **********

' " ' ' ' ' ' ' ' ' ' ' ' ' ' ' ' ' ' ' Cliff Edge running north-south' '

- - - - - - King's Highway 40 feet wide running parallel to the coastline - - - - - - - - - - - -

Hornsea involved a way approaching the cliff edge at a right angle :-

*********North Sea********** **********

> > > > > > > > > > Former slip way running down to the seashore

' ! ' Cliff running north-south

!

!

!

Public Road, running east-west at a right angle to the seashore

In the *Hornsea* situation, as the cliff face fell into the sea, the road which remained, still ran as before, to the edge of the 20 feet high cliff. The matter before the court being that part of the ancient way which formerly ran from the top of the cliff down to the seashore (probably in the form of a 'slip way', for boats and carriages, running close to the cliff edge, as was the usual practice). This case was not concerned with the rights of public user. The matter of concern being the liability of the parish to repair that part of the highway which had been swept away by the sea. The rights of the public to their customary use and enjoyment of the foreshore remained as before.

In the *Aldbrough* situation, as the cliff crumbled and was washed away, the road (as directed) kept pace with the erosion and it also moved inland. Thus the highway remained, at its full statutory width, even though its former course was destroyed time after time by the action of the sea. This case, unlike *Hornsea*, was concerned with user. The court held that although the Award set out a "common King's highway or road" the Inhabitants were only responsible for keeping it in repair as a bridleway.

EXAMPLES OF CLIFF- EDGE PATHS WHICH WERE REGULARLY "SET BACK".

Neither the location, nor the directions, at Aldbrough were exceptional. The Commissioners seem to have followed a practice which was common wherever public ways followed cliff edges which were affected by tidal erosion.. This practice was not confined to the 18th century and before, but was one which spanned many centuries and continued, to my knowledge, into the 1990's :-

North of Bridlington lies the ancient township of Sewerby in East Yorkshire. Here the chalk cliffs which form Flamborough Head emerge on the coastline out of the low glacial cliffs of Holderness to the south. These cliffs are constantly eroding but at a slower rate than the cliffs at Aldbrough and Hornsea to the south. A cliff top path runs from Bridlington to Flamborough Head and beyond.

I have been familiar with this path since 1948. I recall that between the 1950's and the 1990's as the cliff eroded the trodden path moved inland away from danger. At Sewerby where the path had been surfaced by the local authority, the former tarmac strip could clearly be seen running out to, and over, the cliff edge, whilst the new tarmac strip continued alongside but further inland.

There is no evidence that at this time the local authority ever sought a diversion order. It simply followed the usual practice (see below) and applied common sense and the common law. There was no challenge from adjoining landowners as the

public moved inland and away from danger as the path fell over the cliffs. Common sense prevailed.

A hundred years ago lawful deviation was clearly the common practice along the Flamborough Headland. For when the "*Royal Commission on Coast Erosion*" visited Sewerby in 1907 it stated in its report :- "The public footpath on the edge of Sewerby Cliff is being constantly set back" (see Vol. 1, Appendices, page 244 para. 3 - my emphasis).

It also seems to have been the common practice in Devon for paths along cliff tops to move inland as the cliffs fell down. In his Decision Letter of 14 September 2005 (regarding Footpath No. 1 Exmouth Devon - Ref. FPS/J1155/4/22) Inspector Alan Beckett considered an Order to divert a footpath "placed dangerously close to the cliff edge" (see para 5).

He heard evidence from Devon County Council that "documents demonstrated that from at least 1889 a footpath had existed along the top of the cliffs, and that the path had progressively moved inland in line with the regression of the cliff face" (see para 7 - my emphasis).

THE ALDBROUGH INCLOSURE ACT AND AWARD.

To return to the *Aldborough* case of 1853. This concerned an indictment for the non-repair of a public highway. The matter was heard by a strong court : Lord Campbell CJ, Earle J, and Crompton J. That court did not question the powers of the Commissioners, 87 years earlier, when they directed that "the road shall be moved inland" as the cliff fell down. It seems therefore, that the Court accepted that it was the usual custom and practice, at this time, in this location, for highways following the coastline to be moved inland at the same rate as the erosion of the cliff.

Note - It was not only the "King's highway" at Aldbrough which was "removed inwards into the land" as the cliff fell down. The town itself also moved inland, and, as some important buildings fell over the cliff they were replaced. Robert Pickwell stated (1878) that a new church had been built to replace the old Saxon church which was lost to the sea. He added that in 1786 the new church was "2043 yards from the cliff". He concluded that an average of 1.7 yards per year were lost between 1786 and 1876 and that "the site of the old church is now far out to sea" ('*The Encroachment of the Sea, from Spurn Point to Flamboro' Head*' – page 11). Thomas Sheppard also reported (1912) that the present church contained "the Saxon

inscribed stone" from the original church at Aldbrough ('*The Lost Towns of the Yorkshire Coast*' – page 161).

It is only common sense that in such circumstances the way must move with the erosion of the cliff. Because, if the local inhabitants could not use and enjoy their customary thoroughfares from one public place to another their ordinary and every-day-business of living would have been severely curtailed.

The Commissioners in the Aldbrough Award must therefore have been following the usual and accepted practice under the common law as it then applied.

It is held that an Inclosure Award is a form of delegated legislation. Its requirements are therefore conclusive and binding unless repealed by a subsequent Act. In the matter of *Re Turnworth Down, Dorset* (1976) 1Ch 251 at 257 Oliver J. cited *CEGB v Clwydd County Council* (1976) 1 W.L.R. 151 where it was stated "An inclosure award made under an Act of Parliament is a form of delegated legislation, its provisions having the same effect as if they had been enacted in the Act itself . . . . . such provisions can only cease to have effect if repealed by a subsequent Act."

It can therefore, safely be said, that the direction of the Aldbrough Commissioners regarding the highway along the cliff edge was in essence a statutory direction which reflected the state of the law as Parliament regarded it at that time. There is no doubt that the Court in *R v Aldborough* clearly accepted that this direction was duly and properly made when it heard the mater before it. Indeed the Albrough Inclosure Act itself confirms the powers of the Commissioners and the evidential value of the Award.

<u>THE ALDBROUGH INCLOSURE ACT.</u>

The Albrough Inclosure Act of 4 Geo.3 was passed in 1764 (see note below).

At page 13 it was enacted that "the said Commissioners . . . . . shall set out and appoint all such public highways or roads . . . . . such public highways not being less than forty feet broad."

Thus the Commissioners acted with the power of their enabling statute behind them when they set out and appointed the road along the sea cliff forty feet in breadth :-
"We do order and direct that there shall be for ever a common King's highway or road

forty feet of assize in breadth along the sea cliff, and as the said cliff wastes or falls down, the road shall be removed inwards into the land, the same width to be let off from the sea cliff."

It was further enacted at page 14 that "all such public highways or roads shall be made and at all times for ever after the setting out and completing thereof be repaired and kept in repair in such manner as the other public highways within the said Township of Aldbrough are repaired and kept in repair."

Note - This is an important clause as regards the issue of a 'moving right of way'. Because it confirms that as the road was " removed inland" the cost of that removal was to be met by the Inhabitants out of the public purse. If the Commissioners had acted unlawfully in 1766 by directing that the road be moved inland when necessary, there would have been a public outcry from the Inhabitants of the Township who were required by the Act to pay for the cost of each diversion. As the Commissioners acted with statutory powers, and as there was no recorded outcry, the logical conclusion which arises is that this was the accepted state of the law at this time. Furthermore, it seems to have also been the accepted state of the law 87 years later when *R v Alborough* was before the court in 1853.

Page 15 of the Act required the Commissioners "to draw up an Award or Instrument thereof in writing."

Page 16 further enacted that the Award should contain "proper Orders and Directions for . . . . laying out and making the public roads and ways and the breadth thereof."

It was further enacted at page 16 that the Award "shall be inrolled in the public Office at Beverley appointed for registering Deeds Conveyances and Wills affecting Lands in the East Riding of the County of York. "

Page 17 further enacted that after the Award had been inrolled it was good evidence in all courts :- "A copy of which Inrollment or of any part thereof . . . . . shall from time to time be admitted in all Courts whatsoever as legal evidence of the same."

Thus the Court in *R v Aldborough* clearly followed the requirements of the Inclosure Act and accepted the directions in the Award as legal evidence. It is a pity that such evidence was not put before both public inquiries and Mrs Justice Hallett 150 years later when the *Maisemore* case was being considered.

Note - The House of Lords Record Office has no printed copy of the Albrough Act. However, it has supplied me with a hand written copy of the original Act. Such copies are difficult to read. Every other A4 page is numbered in the margins, these numbers may correspond to the original numbers on each 'skin' of the original. I have cited these numbers to identify the extracts which I have used.

FURTHER COMMENTS ABOUT THE *MAISEMORE* JUDGMENT.

When Mrs Justice Hallett held that there was no reported authority for the concept of a moving right of way she was wrong. The authority is there. It is a statutory authority. But no one brought it to the court's attention. The question must therefore be asked – Would Hallett J. have made the same decision if presented with *R v Aldborough* ? This question is particularly pertinent in view of the Judge's comments that neither Dr Dunn, nor any of the Learned Counsel present, could point to a case involving a moving right of way caused by "destruction" rather than by "obstruction". Because *Aldborough* clearly provides the statutory authority that the law at that time allowed a way to move inland as its former course was destroyed by the sea.

However, having accepted the importance of maintaining the public right, the Judge then proceeded to hold that the "common sense" solution as advocated by the Inspector was wrong . She therefore held that no right of way continued to exist along the river bank (see para. 29).

Hallett J. declined to follow Lord Mansfield in *Taylor v Whitehead* (1781); *Absor v French* (1678); and the House of Lords in AG v Brotherton (1992). Her grounds being two-fold. Firstly, that no authority had been cited for a right to deviate on to the land of a person not responsible for the obstruction or foundrous state of the way. Secondly, that no case had been cited involving the destruction of the way rather than its obstruction.

She therefore concluded "that a right to deviate exists in certain specific circumstances which do not apply here". However, for both of the said instances (where she said there was no authority) *Aldborough* provides the very authority which she said was lacking" (see para, 77).

Both Hallett J in her judgment, and Mr Wadsley in his article, seem more anxious to protect the rights of "third parties" (i.e. those who own land adjoining the original way

and upon which the public may need to deviate in order to continue their journey) rather than to protect the public right of through passage along a statutory route.

As the Judge stated “No authority has been cited to me where the right to deviate has been held to exist other than on to the land of the defaulting owner responsible for the obstruction or the foundrous state of the way” (para. 74).

It appears that in reaching her decision Mrs Justice Hallett too readily accepted Mr Wadsley’s arguments and his interpretation of the law. As the court clearly did not hear the full arguments for both sides of the case, she allowed herself to be led further than the facts and the law together allowed. It seems that logic and common sense (and justice itself) were allowed to fall by the wayside. Thus the public right fell as second-best to the private rights of the “third parties”. These private rights were only assumed to exist, for the court heard no evidence regarding them.

In her summary of the proceedings Hallett J. recited some of Mr Wadsley’s submissions. In essence these were that “You create a right of way by dedicating a piece of land”. That the right to deviate exists “only onto the adjoining land of the defaulting landowner”. That “there is the position of third parties to be considered”. That “a right to deviate does not arise where the footpath has been destroyed as opposed to a temporary obstruction” (see paras. 41 to 44).

Mr Wadsley further submitted to the court that “Whatever the position may have been in medieval, or post-medieval, times there is now a modern statutory procedure for creating diversions by which the landowner can be compensated for any additional burden placed upon his land” (see para. 45).

It appears that Mr Wadsley was here attempting to redefine the state of the law. He dismisses the ancient common law right to deviate as being obsolete and no longer appropriate for the modern-day world. He argues that the proper procedure is for a statutory diversion order to be made by which “the landowner can be compensated”.

Hallett J. accepted this argument and held “There is provision in the Highways Act by which a new footpath can be created subject to a properly regulated procedure and the right to compensation. The public right is not, therefore, left unprotected” (see para. 80).

However, there is nothing in the Highways Act 1980 which specifically repeals the common law right to deviate and replaces it with a statutory procedure. This ancient

and customary right therefore remains unaffected by any “modern statutory procedure”.

The general principle relating to alterations to common law rights by statutory rules was confirmed by Lord Oliver in (the cited) *Attorney General v Brotherton* (1992). He said “There is, however, a presumption that except is so far as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make alterations in the common law (see, e.g. *Leach v Rex* [1912] A.C.305, 310)” - (cited from page 9 of the published speeches - my emphasis).

Mr Wadsley finally submitted, regarding the moving right of way proposition, **“**this is a creature unknown at common law and there is no authority for it” (para. 46).

Regarding the above matter of “dedication”. This is a ‘red herring’ constantly raised by those who deny the existence of public rights. The old common law knew nothing about dedication, or about ownership of the soil of the way (see below). Furthermore, there cannot be any dedication by a landowner when a way over land is created under an Inclosure Act. At *Maisemore* the allottee was compelled to accept his allotment on the understanding that a way had already been awarded over it. Thus the predecessor to the “third parties” accepted his allotment knowing full well that as the River Severn eroded its banks, the boundary of his allotment would move inland and that the awarded “ public footway or towing path” would move with it.

THE MAISEMORE ACT AND AWARD.

The Maisemore Act was never produced at either the first or the second inquiry. Neither was it exhibited before Mrs Justice Hallett. As also happened with the *Dunlop* case, the very Act of Parliament which enabled the way to be created in the first instance was never placed before the appropriate tribunal for consideration.

The Maisemore Inclosure Act was passed in 1793 (33 Geo 3). The Award was made a year later in 1794. Again, as with the Albrough Act (above), the House of Lords Record Office has no printed copy and has supplied me with a copy of the original hand-written version which is numbered in a similar fashion to Albrough. This copy is also difficult to read.

The Act was only concerned with “open and common fields, common meadows and common pastures, and also a certain tract of land . . . . . called Woolbridge . . . . .and other waste and other commonable lands” In other words all

the lands to be inclosed were “commonable lands” over which the inhabitants of the parish had common rights (see page 1). This is an important issue as far as the final analysis of this matter is concerned. It was enacted that the Commissioners “ shall in the first place set out and appoint such public and private roads and ways . . . . . in over through and upon the lands and grounds hereby directed to be divided and inclosed as they in their discretion shall think requisite” (see page 9).

Page 13 of the Act implies that the new roads and ways were set out in lieu of the ways which formerly existed over the lands to be inclosed. Page 40 of the Act further confirms that the new allotments (and by inference any new ways through them) were “allotted in right of or in respect of or in lieu of any former lands or grounds.”

Thus a person allotted land by the side of the river (in lieu of the land upon which he formerly exercised his common right) accepted his allotment on the understanding that an ancient way followed the river bank. The existence of this ancient way was recognised and confirmed by the Commissioners. Thus the ‘new way’ was awarded “in right of or in respect of or lieu of” the ancient way.

At page 14 it was “further enacted that the said Commissioners shall have full power and authority and they are hereby required . . . to set out allot and appoint . . . . parcels of land within the said commonable fields.”

Thus when the Commissioners directed that there be a public way along the usual track along the banks of the river Severn, they were acting with the full power and authority granted to them by the enabling Act :-

“One other public footway or towing path of the breadth of 6 feet beginning at the south-east corner of a certain piece of land called Thorns Corner and passing first in north then a north-east, then a north and north-west direction along the usual track along the banks of the River Severn to the entrance of the said parish of Ashleworth being the path for towing vessels along the said River Severn” (as quoted by Inspector Bingham at para. 4.1.1 of his Decision Letter).

The inference arises from the words “being the usual track along the banks of the River Severn” that the awarded “public footway or towing path” was set out in lieu of the existing ancient towing path (i.e. “being the usual track”). This ancient track ran through the open common field and along the river bank.

A further inference arises, which is that such an ancient way may be presumed to have moved inland at regular intervals each time the river eroded the bank. Otherwise it could not have fulfilled its intended purpose.

As the land adjoining the river was “commonable” land and belonged to the Township, it can further be presumed that The Vestry did not object to this path being a “moving right of way”. Indeed, common sense decrees that the Inhabitants would have expected to travel in safety away from the tidal waters as those waters swept away the river bank.

At page 38 it was further enacted that the Commissioners “shall form and draw up an award in writing which shall express” . . . . . .(re allotments etc) . . , , , “making and setting out proper roads ways and passages in and through the premises and shall also contain such other orders regulations determinations as shall be proper and necessary.”

It was further enacted that once the Award had been signed, sealed and inrolled it “shall from time to time and at all times be admitted and allowed in all courts whatsoever as legal evidence of the same” (see page 39).

It was further enacted that the Award “shall be binding and conclusive upon and unto all persons to all intents and purposes whatsoever” (see page 40).

Finally, as regards the requirements of the Act :-

“ be further enacted that if any person . . . shall find himself . . . . aggrieved by anything done in pursuance of this Act then in every such case, except in cases where the orders and determinations are directed to be conclusive and final, he may appeal to any general quarter sessions” (see page 51).

The original allottee had therefore the opportunity to object to the Quarter Sessions if he considered that an allotment with a ‘moving’ public way through it was an onerous burden. There is no evdence that any such objection was made at the time. Thus, the present-day “third parties” or “landowners” are bound by the requirements of the Award. Their predecessors in title accepted their allotments upon the full understanding that a public way followed the river bank. A river bank which was subject to erosion. Each successive owner was therefore bound in turn by the same requirements as his predecessor.

The path already existed in 1794, and survived for over 200 years until 1994 (see para. 7.4.4. of Mr Bingham's Decision Letter). The inference therefore arises that during these 200 years the path must have moved inland many times as the river bank eroded. Yet it is only now, two centuries after it was awarded, that the public right is brought into question.

TO RETURN TO THE FINDINGS OF MRS JUSTICE HALLETT.

The facts confirm that the path at Maisemore existed long before the concept of dedication was recognised by the law. Therefore, the matter of the 'dedication' of the 'moving right of way' must be put into perspective.

In para. 26 of her reported judgment Hallett J. confirms that the Inclosure Award states that the footpath followed "the usual track along the banks of the River Severn". Mr Bedford further states (para 57) that "This path originated as a towpath following 'the usual track of the banks of the River Severn'."

The decision letter by Inspector Helen Slade dated 1 April 2005 confirms at para. 11 that the Definitive Statement describes the said "track" as part of the "Towing path, mentioned in the Inclosure Award dated 1794 as a Public Footpath". She further states that "in the Inclosure Award (for which there is apparently no map available) the width of the path is described as being 'six feet'."

Thus from the words "along the usual track along the banks of the River Severn" it may be inferred that the path was an ancient way which existed before the Inclosure Award was made. The presumption therefore arises that under the common law the way followed the banks of the River Severn in perpetuity. In other words the way followed the banks of the river wherever they were at any given time.

This ancient common law right was later given the added force of a statutory right by the said Inclosure Award. Therefore the words of the Inclosure Award must be construed as having creating a statutory right of way which followed "the banks of the River Severn" wherever they moved to at Maisemore. Thus, the public right to a moving right of way along the bank of the River Severn at Maisemore is to be inferred as being confirmed by the Award.

The court was not told, and thus failed to recognise, that the awarded way along the river bank was not, and could not be, dedicated by any landowner. The way was,

however, confirmed, and thus re-created, by a statutory process. Such a 'creation' of a public way within an award could be considered to be a form of 'dedication'.

The original allottee, as an inhabitant and a common right owner, must have known that the common land alongside the River Severn contained an existing ancient track which followed the river bank. He must also have been aware that the Commissioners had awarded this track as a "public footway or towing path" before his own allotment was set out. He thus accepted his allotment well aware of its restrictions and limitations. His successors in title (i.e the "third parties") are bound by his acceptance to likewise accept those same limitations today.

It is significant that there appears to be no requirement in the Award for the awarded public way to be fenced-off from the adjoining land to the west. And clearly, as a towing path, it could not be fenced-off from the river's edge on the east. Thus, in effect the awarded way continued to run, as it had formerly done, through uninclosed land. Therefore, the way fulfilled part of the 'common law test' which the Court accepted as being required for such a deviation to be lawful.

The 1st Edition of the 6" OS map (c.1891) shows that the way ran between the river on the east and an orchard on the west. There was no house belonging to any "third party" at that time on the land (between the river and the road to the west) adjoining that part of the river bank now lost to erosion. The public way was not fenced-off on the west from the adjoining land and user could therefore deviate at will if compelled to do so out of necessity.

THE PROPER CONSTRUCTION OF THE WORDS IN THE AWARD.

At para 80 of her judgment Hallett J. misdirected herself and made a crucial error which ultimately led to the wrong conclusion. She said :-

" I see the logic of giving people accustomed to towing their barges from the river bank the right to continue to do so and, therefore, to hold that their right moves with the river. I accept that Holt C.J. seems to have repeated that proposition in his very brief remark in *Culworth (R v Inhabitants of Cluworth* [1704] 6 Mod.R.163). I am not prepared however, on the basis of such a a very limited statement, relating specifically to the rights of those using navigable rivers,. to declare that a right of the public to walk along a river bank highway automatically moves inland as the river bank erodes. In my judgment for such a right to exist there would have to be some additional factor of usage or new dedication. If such a right should be given to the

public there are now statutory powers to provide for such a situation. There is provision in the Highway act by which a new footpath can be created subject to a properly regulated procedure and the right to compensation. The public is not, therefore, left unprotected."

Once Mrs Justice Hallet had held that the right to a towing path moves with the river, she was then barred, by the true construction of the words in the Award, from concluding that there was no corresponding public right to also walk along the river bank as it moved inland.

It seems, that Mrs Justice Hallett was not properly advised by learned counsel. Consequently, she did not give proper consideration to what the words in the Inclosure Award actually meant. As a result she misdirected herself as to what the Award actually granted. It is therefore necessary to look carefully at the construction of the whole clause within the Award which sets out the way at issue.

The important words in the clause being :-

"One other public footway or towing path of the breadth of 6 feet . . . . . along the usual track along the banks of the River Severn . . . . . being the path for towing vessels along the River Severn."

There is no ambiguity about the intentions of the Commissioners. They were, in the first place, awarding, and confirming the existence of, a "public footway" along an ancient and existing customary track (i.e. "the usual track") which followed the banks of the River Severn.

The Commissioners were also awarding and confirming the existence of a towing path along the same route and over the same ground.

The phrase "public footpath or towing path" does not mean that the track was either one or the other. For the use of the word "or" to link the words "public footway" to the words "towing path" confirm that it was the intention of the Commissioners that the way was to be used as both a footway and a towing path. In other words, it could be used by the public as a footway, whether or not they were accompanied by a boat.

In the context of the clause as a whole, the true construction of the meaning of the word "or" is for it to be construed as having the same meaning as the word "and". The law has long held that "The rule of construction is quite clear, that in a deed as

well as a will the Court may, in favour of the intention, read “or” for “and”, or “and” for “or” (*White v Supple* [1842] 2 Dr. & War. 471, per Sugden L.C. at pp 474-475 - - as cited in ‘*Words and Phrases Legally Defined*’ 2nd. Ed. Vol.4 page 39 - ‘Butterworths’).

Note - As to circumstances where the context does not allow the word “or” to be construed as “and” see ‘Butterworths’ above at page 40. Such circumstances do not apply to the said clause within the Maisemore Award.

The Commissioners further confirmed, for the avoidance of doubt, by their use of the word “being”, that the ancient and “usual track” was already in use, and being used as a towing path (i.e. “being the path for towing vessels along the River Severn”).

Thus, the Commissioners, when inclosing the commonable lands within the parish, recognised the existence, and necessity, of the existing towing path. Therefore, for the avoidance of doubt they confirmed within their Award that the ancient way was to continue as both a public footway and a towing path “along the usual track along the banks of the River Severn.”

The inference therefore arises, from this construction of the clause, that the Commissioners intended the track to continue, in perpetuity, to follow the river bank wherever that bank might move to in the future. Because, if the Commissioners had intended the track to only have had a limited life they would have said so in words plain and simple. They were men of their time, and they knew, or they would have been advised by the proprietors, that the course of the tidal river was forever changing. Therefore, unless the public footway ‘and’ towing path were intended to move with the river bank their statutory purpose would soon be lost for ever. Inclosure commissioners were not in the habit of making useless grants.

Mrs Justice Hallett, therefore, failed to appreciate the true construction of the clause in the Award. The Commissioners were not setting out a public footway or (as an alternative) a towing path. They were setting out a public footway ‘and’ a towing path over the same track.

If the true construction of the clause is to be followed, the public way and the towing path are one and the same. They exist together concurrently. They cannot be distinguished or separated one from another. They both occupy a piece of ground which remains six feet wide along the bank of the river wherever that bank may be at any given time.

Thus once Hallet J. had concluded that the towing path "moves with the river" she was barred by the true construction of the clause from then finding that the public footway did not also move with the towing path but instead was extinguished.

Hallet J. therefore made an error in law and fact. The Award is still good law. It is the root of title to the land now held by the "third parties". This land was inclosed, awarded, and allotted upon the requirement that a public footway and towing path followed the river bank. It was therefore, perverse and unreasonable, to separate the towing path from the public footway for judicial convenience.

The Inclosure Award is an extension of the Inclosure Act. That Act cannot be amended without the authority of Parliament, because what Parliament has granted only Parliament can take away. Likewise, the Award cannot be amended without the consent of Parliament. Thus as the Award set out a public footway or towing path, and that towing path has been deemed by the Court to still exist, it therefore follows, that without statutory intervention the footway must still exist also. One cannot be separated from the other in order to protect the alleged rights of unrepresented "third parties"

FURTHER COMMENTS ABOUT THE CASE.

It seems that whilst the court was aware that the River Severn at Maisemore was tidal, it heard no submissions regarding the consequences of the fact that the river is tidal. Whilst Mr Bedford pleaded the case for navigable rivers he did not plead the case for those rivers which are both navigable and tidal.

This omission could have affected the outcome of the case, because the law recognises a distinction between navigable rivers which are tidal and navigable rivers which are not tidal. In the case of the former the public rights attached to the tidal river move with that river as it changes course. Thus a tidal river embraces the right of the public to a moving right of way.

The forces of nature do not seek a "dedication order" from any landowner. In such circumstances as Maisemore the owners are considered to have purchased their land on the understanding that the limit of the Crown land (wherever it may be at any given time) forms the boundary to their property. Thus the land owned by the Crown moves with the action of the tides to the extent of the medium high water mark, and the boundary of the adjoining landowner moves with it.

The question therefore arises - was the land, which fell into the river owned by the Crown or was it owned by the "third parties" or "the landowners" ? (as they were respectively termed by Mr Wadsley and Hallett J at paras. 43 and 96).

As the River Severn at Maisemore is tidal, the law holds that the river bed and the foreshore therefore belong to the Crown and not to the riparian owners. The law also holds that within all tidal waters, the public have at all times a right of navigation and a right of fishing. These rights follow the movement of the water as it ebbs and flows.

There seems to have been a mistaken belief by the court that the adjoining landowners own the land to the water's edge. It appears that it was not pointed out to the court that the Crown own the foreshore of the River Severn to the extent of the medium high tide, and therefore the said landowners cannot own the soil to the edge of the water at any given time.

For the law holds that "where the tide flows and re-flows, the soil between the medium high water mark and medium low water mark *prima facie* belongs to the Crown, and therefore the boundary between the bed of a tidal river and the adjoining land is, as a general rule, the line of medium high water mark" ('*Halsbury's Laws of England*' 4th Edition, Volume 4, para.854.

Thus as the river bank is swept away by the tide the Crown Estate moves inland. In so doing it will encroach upon the property of those "landowners entirely hostile to the alleged new dedication" (para. 96 of case report).

It was never pointed out to the court that the "third parties" do not own the land right down to the water's edge. Therefore, the pre-occupation of Mr Wadsley and Hallett J. (in protecting their interests along the river bank from public user) was ill-conceived. It is ironic, that whilst the court was intent on defending these landowners from the lesser ravages of the ramblers it could not, and cannot, protect them from the greater destruction caused by the tide.

The law holds that at low tide there will always be a strip of land which the public might lawfully follow. This strip of land forms, or partly forms, the "usual track along the banks of the River Severn". This land belongs to the Crown who holds it "for the benefit of the subject" (see Glen above at page 58). The full extent of this land (whether covered in water or not) has always been, and always will be, a public highway which moves with the course of the river.

Human behaviour is governed at all times by the need for self-preservation. Thus we avoid, and deviate around, that which we perceive to be dangerous. For only a fool would stick to the beaten track when he perceives danger before him. The *Maisemore* judgment, however, leads us to believe that we have no lawful right to deviate around and thus avoid such dangerous circumstances, unless the landowner granted that right when he originally 'dedicated' the way to the public. This proposition is nonsense. It is contrary to centuries of common law which is based on common sense and human need.

A more sensible and reasonable approach however, was the one advocated by Lord Denning in *Ostime v Australian Mutual Provident Society* (1960) AC 459 at 489, when he said "The doctrine of precedent does not compel your Lordships to follow the wrong path until you fall over the edge of the cliff. As soon as you find that you are going in the wrong direction you must at least be permitted to strike off in the right direction, even if you are not allowed to retrace your steps" (cited by Mr Wadsley himself in his article in the RWLR s.2.2 page 27-28).

It is logical to assume, that in all locations where a path runs alongside a crumbling cliff edge, user of that path, will, over time, move constantly and imperceptibly inland away from danger. It can further be assumed, that such deviation will be without recourse to diversion orders or the landowner's consent. As the Inspector said "is it common sense ?" (to have diversion orders every year). In these circumstances, the right of way will therefore move to accommodate the safety, and the need, of all passengers travelling from one destination to another.

The natural thing to do, when a way is either obstructed or destroyed, is for user to deviate and follow the closest line which allows his need for a through passage to continue. As each deviation may only be of itself of minute proportions the *de minimis* principle may apply (see *Seekings v Clark* (1961) 59 LGR 268 and *Puttnam v Colvin* (1984) RTR 150). Therefore, as the law is not concerned with trifles, it is not concerned with each minute deviation as it occurs.

The *Aldborough* case report states that "in parts of the award the road was used as a boundary of allotments". Thus as the cliff fell down and the road moved inland to its full width, the boundary of the adjoining allotment moved with it. Therefore, there was no question of the adjacent landowner objecting to the moving right of way. He had accepted his allotment on the understand that it followed the boundary of the road.

In the 18th and 19th centuries the common law held that the general need of the community as a whole, for a continuous right of passage and other public necessities such as watering places and gravel pits, was greater than individual private ownership rights. The said direction in the Aldbrough Award clearly demonstrates this common law principle.

In other words, it was the public's right to the through passage from one public place to another which was paramount, rather than the right to a way over a particular parcel of land as defined by the beaten track (see *Webb* above at page 5).

Mrs Justice Hallett recognised that the origins of deviation belonged to "a very different time and a very different countryside". What she failed to recognise however, and what was not put before her regarding this "different time", was that before 1800 the notions of "ownership of the soil of the way" and "dedication of the way" were rarely known to the law.

In the famous case of *Pelham v Pickersgill* (1787) 1 T.R. 660 at 667 (regarding tolls on the Great North Road at Boroughbridge) Ashhurst J. said "For there are very few cases where it could possibly be shewn that the soil over which an ancient road passes was the soil of a private person".

As the concepts of ownership and dedication go together hand in hand, it follows that if there is no owner there cannot be any dedication. As many of our existing ways follow ancient parish boundaries along sea cliffs and river banks the likelihood of actual dedication in these circumstances becomes increasingly remote. This is particularly so where the way at issue was created as a result of an inclosure award.

"Dedication" and "Ownership" (as with the notion of "a lost grant") are concepts of legal fiction which were introduced by the judiciary in order to try and give a legal explanation to matters for which the real evidence had long ceased to exist.

Mrs Justice Hallett said that "the right to deviate should be put into context". Indeed it should, but it should be put into the whole context of "*The World We Have Lost*" (Peter Laslett 1965) rather than simply being put into a selective context in order to satisfy the judicial convenience of a particular case.

In other words, in order to properly understand, and to put into a legal context, the notion of a moving right of way and a lawful right to deviate, it is necessary to

examine how the law evolved, and how ancient customs and practices in turn developed from that law.

THE COMMON LAW RIGHT TO PERAMBULATE PARISH BOUNDARIES.

THE STATUTE FOR VIEW OF FRANKPLEDGE (1325).

The origins of the right to perambulate the boundaries of a manor, township or parish can be traced back to the "*The Statute for view of Frankpledge*" passed in the eighteenth year of King Edward the Second (1325).

The statute contained 34 clauses. These clauses covered all matters and nuisances, which were, by custom, of general concern to the Manor, and as such were required to be presented to the Manor Court or Court Leet. The note in the margin states "Leets : Of what things Stewards in their Leets shall enquire".

Five of the clauses were concerned with ensuring that the customary rights of the King, the Lord, and the Tenants of the Lord, to the general and specific use of land within the Manor or Parish, were protected from "annoyance".

Clause 7 required the Steward to enquire "Of purprestures made in Lands, Woods, and Waters to annoyance".

Note - 'Purpresture' as defined in 1744 by Giles Jacob (5th Ed. *New Law Dictionary*) "Is when any Thing is done to the Nuisance of the King's Desmesne, or the Highways, etc. by Inclosure, or Buildings; endeavouring to make that Private which ought to be Publick."

Clause 8 required the Steward to enquire "Of Walls, Houses, Dikes, and Hedges set up or beaten down to annoyance".

Clause 9 required the Steward to enquire "Of bounds withdrawn and taken away."

Clause 10 required the Steward to enquire "Of ways and paths opened or stopped."

Clause 11 required the Steward to enquire " Of waters turned or stopped, or brought from their right course."

The Manor Court Rolls of Methley in the County of York (1331 to 1590) confirm that the statute of 1325 was enforced and obeyed in this Manor for at least 265 years. The final court roll concerns the "View of Frankpledge of the Lady Queen with the Great Court of Henry Ferrar Esquire and William Savyle Gentleman held there on the 27th day of the month of April A.D. 1590 and in the 32nd year of the reign of our Lady Elizabeth" (translated and transcribed within pages 131-243 of the '*The History of Methley*' [Hubert Stanley Darbyshire and George Denison Lumb Leeds 1937]).

It became the common practice for the Steward of the Court Leet (who was required to fulfill his statutory duty under the Act) to delegate the tasks of inspection, inquisition, and presentment to 'The Jurors' of the Court Leet. It thus became their onerous 'duty' to present to the Court those inhabitants who were offending the 'custom of the Manor'.

If the Jurors, as a body, failed to carry out that duty, each of them, as individuals, could be fined by the Court. For example "Because they have not presented an obstruction to the common way to the ferry each is fined ijd" (Methley 1465).

When a custom, or a right, was in doubt, it was sometimes necessary to hold an "Inquisition" into the matter. For example "An Inquisition was taken there, by order of the Lord & by the assent of all his tenants there, for obtaining information & certifying where by right & ancient custom the common way ought to be . . . " (Methley 1472).

The Methley Court Rolls confirm that the "Statute for the View of Frankpledge" was rigorously enforced, without fear or favour, and persons both high and low were expected to obey the custom of the Manor.

In order for the Jurors to carry out their delegated statutory obligations it thus became necessary for them to 'perambulate' the boundaries of the Manor. On such perambulations the Jurors were accompanied by other 'Tenants of the Lord' who were anxious to ensure that the inspection was properly and impartially carried out . As Webb pointed out "If no man committed any new annoyance, or refrained from fulfilling any old obligation, it was assumed that all would be well" (Page 2 '*The Story of the King's Highway*' 1913).

THE “BEATING OF THE BOUNDS”.

As a direct consequence of the Statute of 1325, it became the established customary practice to perambulate the parish boundaries. That practice was to become known as the “beating of the bounds”.

As the centuries passed by, the terms used to describe the collective body of persons living within a settlement changed. Thus, those who were originally known as the “Tenants of the Lord” later became known as “The Inhabitants”, and later still as “The Parishioners”, or “The Inhabitants at Large” (see “*The Public of the Locality*” (para 14) “The Seymour Papers” Byway and Bridleway Trust website 2005).

The control and administration of the manor, parish, or township also changed over time. The authority of the Steward of the Leet and The Jurors gave way to the authority of the Constable and the other Parish Officers under the direction of the ‘Churchwardens in Vestry assembled’.

As each parish or place was totally responsible for whatever occurred within its own administrative area, it was absolutely essential that its own unique and ‘private’ administrative boundary was determined, inspected, and maintained on a regular basis.

Every public necessity, (i.e. roads, drains, watering places, or quarries) located within the boundary of each place was essentially a ‘private possession’. It was ‘private’ because it ‘belonged’ not to the nation as a whole but only to that particular township. It thus fell as ‘parish property’ under section 17 of the Poor Relief Act 1819. However, in reality, these so-called ‘private possessions’ were ‘possessions of a public nature.’ Such possessions were required to be inspected and maintained for the general good of all who constituted ‘the public of the locality’ (see *Seymour* above).

THE ANNUAL INSPECTION OR PERAMBULATION OF PARISH BOUNDARIES.

Parliament itself recognised that the so-called ‘private possessions’ of every place had to be maintained for the ‘public good’ of all the inhabitants of that parish or township. Therefore many local Inclosure Acts (enacted before the Inclosure Consolidation Act of 1801) direct that the Jury of the Court Leet be ordered to make an annual inspection and to present any person committing a nuisance to the Court.

The Inclosure Act for Tockwith in the County of York (1792) enacts and orders that "the Jury of the Court Leet . . . . are hereby authorized and required every Year, at the usual time, before the holding of the said Court . . . . to visit and inspect all and every the private Roads and Ways, Hedges, Fences, Ditches, Drains. Bridges, Gates, Stiles, Causeways, Water Sewers, Banks, Sluices, Flood Gates, and other Works heretofore made, or hereafter to be made by virtue or in pursuance of this Act; . . . . . and in case any of the Occupiers of the Lands and Grounds, to which such Maintenancy and Reparation shall be awarded, shall have neglected to repair, amend, and cleanse, or scour, the said private Roads and Ways . . . . . and other Works respectively, according to the Direction of the said Commissioners, and the Dimensions contained in their said Award, then the said Jury are hereby authorized and required to present and amerce the same to the Lord of the Manor or Court Leet, at the said Court Leet, in such Sum or Sums of Money as they shall in their Discretion think proper for each and every such Offence . . ." (Page 13, 32 Geo 3 cap. 58).

The annual perambulation of the boundary of the parish, township or manor, therefore remained of paramount importance. This perambulation was not merely an option or a discretion, it was a necessary requirement. All the inhabitants of a place were expected to be aware of, and to remember for future reference, the exact position of their ancient boundary (see '*Discovering Parish Boundaries*' (2nd Ed) Angus Winchester (2000) page 39). It was also necessary for the inhabitants to note where, by the actions of natural forces, that boundary had permanently moved to a new position.

As Jacob (above) stated in 1744 "Perambulation of Parishes is to be made by the Minister, Church-wardens and Parishioners, by going round the same once a Year, in or about Ascension Week : And the Parishioners may well justify going over any Man's Land in their Perambulation, according to Usage; and it is said may abate all Nuisances in their Way - Cro. Eliz. 444."

Glen confirmed in 1883 ('*The Law Relating to Highways*' page 310) "perambulation of the boundaries are very generally made in most of the parishes in England, in Rogation week in each year. The parishioners may justify entering and going over a man's land for that purpose (*Goodday v Mitchell*, Croke. Eliz. 441)". Glen also cites Lord Denman CJ "The right to perambulate parochial boundaries, to enter private property for that purpose, and to remove obstructions that might prevent this from being done, cannot be disputed (*Taylor v Devey* 7 A & E 415)."

It has been necessary to set out at length, and in detail, the above historical process in order to explain, and in order for it to be fully understood, how the notion of a moving right of way could legitimately and lawfully come about.

A MOVING PARISH BOUNDARY : A MOVING RIGHT OF WAY.

As hundreds of years passed by. the boundaries of many manors, parishes, and townships, changed. These changes came about mainly for two reasons, either to further administrative convenience, or (as was often the case) because of the forces of nature.

The greatest changes occurred where parish boundaries followed sea cliffs in areas subject to coastal erosion, or, followed river banks subject to the forces of tidal waters. In such circumstances the boundary of a parish could irrevocably change from one annual perambulation to the next. Indeed, in places such as the coastline of Holderness (see above) the parish boundaries, which all follow the cliff edge, changed every year, and the line of the annual parish perambulation therefore moved inland accordingly.

The proposition thus arises, that as a parish boundary moves inland, because of the forces of nature, the route of the annual perambulation of that boundary also moves with it. For the law holds that there is no question of the right to perambulate being prevented by any person, or, by any removable obstruction.

Therefore, as the sea cliff falls, or the tidal river bank is washed away, the annual perambulation moved inland, and away from that danger, regardless of whoever owns the land across which that perambulation takes place.

A perambulation was, and still is, in the eyes of the law, a public activity. It is an activity whose sole purpose is to publicly assert the right of the public to a way, along a recognised and established customary route, in order to inspect public necessities or conveniences.

Logic and common sense therefore support the proposition that a long-established annual perambulation along a parish boundary gives rise to a presumption that a public right of way exists along the route of that perambulation.

This proposition was supported a hundred years ago by a district surveyor. On the 5th October 1905, Joshua W Brooke, submitted a ‘Right of Way Report’ to the

Marlborough Rural District Council. He stated, regarding evidence of reputation of the existence of a highway , that "tracks running along Parish Boundaries . . . are indisputable . . . the tracks following the boundaries or vice versa" (source : '*Byway and Bridleway* 2005/8/72 - my emphasis).

A further presumption also arises. Which is, that if the parish boundary moves, because the ancient boundary has been lost to erosion, the public right of way also moves with it out of necessity. Because if the right of way did not move in such circumstances the common law right of perambulation could not be exercised and as a consequence would therefore also cease to exist. Such a common law right cannot be extinguished however without due process. It cannot be lost by default.

This presumption is not affected by the fact that the new way does not pass over land in the same ownership as was the soil of the old way. Because the old authorities state that "the parishioners may justify entering and going over a man's land for that purpose" (see Glen above at page 310).

It is therefore a sound proposition that a moving right of way can lawfully be created, out of necessity, in circumstances where a parish boundary has been destroyed by natural forces.

Note - The parish boundary at Maisemore does not follow that particular channel of the River Severn affected by the Public Footpath Extinguishment Order. Thus the above propositions regarding perambulation do not apply in these circumstances.

MAISEMORE : PRIVATE RIGHTS AND A 'LOST GRANT'.

PRIVATE RIGHTS - Inclosure Acts and Inclosure Awards create both public rights and private rights. Whilst these rights may exist concurrently, they always exist independently from one another (see the Declaratory Judgment in *Smith v Anderson* (1997) in "*The Seymour Papers*", Byway & Bridleways Trust website).

The law holds that "a private right of way may be extinguished like any other easement by statute, destruction, express release (which must be by deed : *Lovell v Smith* (1857) 3 CB(NS) 120), or even by implied release" (see page 108 Garner's *Rights of Way*, 5th Ed.). However, in the circumstances which apply at Maisemore no such extinguishment of private rights is applicable.

The Maisemore Inclosure Act and Award created, and confirmed the existence of, both public and private rights along the river bank. The Extinguishment Order made under Section 118 of the Highways Act 1980 was only concerned with the public right. The Order was not concerned with any private right which exists over and along the same route. Therefore, the present-day inhabitants of Maisemore can still enjoy their ancient right to pass along the river bank, either on foot, or accompanied by a boat This private right can only be extinguished by a further Act of Parliament.

Professor Garner (at page 108 above) states that "Extinguishment of a public right of way by statutory process does not of itself extinguish a private right over the same way". He cites *Walsh v Oates* (1953) 1QB 578 and *Shonleigh Nominees v Attorney General* (1974) 1 WLR 305.

The 'victory' for Gloucestershire County Council and the so-called "Third Parties" is, therefore, a hollow one. Just as the Court's decision cannot stop the ravages of the tide from constantly eating away at the "landowners" possessions, neither can it stop the inhabitants of the parish from enjoying their ancient right to use the river bank as a footway and towing path.

A 'LOST GRANT' - The possibility cannot be ruled out that the ancient pre-inclosure track along the river bank was created by a lost grant. The inference therefore arises that when the right of a towing path was granted there existed an implicit assumption in the mind of both the grantor and the grantee that the said right was subject to the movement of the river. Thus, as the river moved the towing path moved with it. This is only common sense, because a towing path is useless unless it follows a river bank, and, a useless grant is pointless.

The route of the towing path took it over commonable lands alongside the tidal river. These lands were uninclosed and unfenced.They were common meadows and common pastures. These common fields were occupied by those inhabitants of the Township of Maisemore who enjoyed common rights. Such inhabitants were the very same persons who would also benefit from the use and enjoyment of the towing path. Thus the inference that the grant of the right was subject to the movement of the banks of the River Severn is given extra weight. For both the grantor and the grantee would expect the right to be used and enjoyed for ever. This could only happen if the towing path followed the river bank every time that it moved.

SUMMARY AND CONCLUSION

1 In the eighteenth and nineteenth centuries, the learned writers of legal text books unanimously agreed that it was settled law that passengers had the right to deviate upon the nearest part of the adjoining field whenever the way was impassable. Thus, it was said, that "if a highway is out of repair, flooded, or from any other cause impassable, it has always been lawful for any passenger to use the adjoining private land (not being actually in domestic use) with as much freedom as if it were the old accustomed highway" (see Toulmin Smith above).

2 Under common law parishioners have a right to perambulate their parish boundaries. This right can be traced back to a statutory requirement for the Steward of the Leet to inspect all matters relating to the use of land within his Manor (see above – 18 Edw. 2 (1325) *View of Frankpledge*).

3 Many parish boundaries follow sea cliffs and the banks of tidal rivers. In such instances, as the cliff falls into the sea, or the tide sweeps away the river bank, the parish boundary moves inland accordingly. All such parish boundaries are rights of way along which the parishioners may lawfully pass without hindrance at all times. Thus, as the cliff falls down, or the river bank is eroded, the way along the parish boundary moves inland out of necessity.

4 Therefore, where ways follow parish boundaries which are affected by tidal erosion, there is a common law right for passengers to move inland and away from danger. In other words, in such circumstances, there is a moving right of way.

5 Parliament also recognised the necessity for a way to move inland as sea cliffs (which formed the parish boundary) fell down. The Aldbrough Inclosure Act of 4 Geo 3 (1764) enacted that the Commissioners had powers to set out roads and make such directions regarding them as they saw fit. Thus, when the Aldbrough Award of 1766 came before a court in 1853 (regarding the repair of a road) that court did not question the direction of the Commissioners which said "and as the said cliff wastes or falls down, the road shall be removed inwards into the land" (see *R v Aldborough* above).

6 However, several hundred years of established common law are now under threat as a result of the judgment of Mrs Justice Hallett in the *Maisemore* case.

Hallet J. held that "I am not satisfied that there is such a thing as a moving right of way" (see above).

7 The *Maisemore* judgment is, however, unsound and flawed. It cannot safely be followed as a general proposition in all circumstances. Whilst the findings of Hallet J. may be applied in some very specific instances (i.e. those which follow certain of the criteria which she set out) they cannot be regarded as a definitive statement of the law. In particular, her findings cannot be relied upon in cases where the way at issue involves the destruction of a sea cliff, or the erosion of the banks of a tidal river, by the action of the sea.

8 It seems that Hallet J. was ill-informed by all three learned counsel involved, and was particularly misled by Mr Wadsley who appeared for the Applicant. She looked in vain for guidance that the common law right to deviate was of general application. No such guidance was forthcoming.

9 She said "No authority has ben cited to me where the right to deviate has been held to exist other than on to the land of the defaulting owner responsible for the obstruction or foundrous state of the way."

10 She continued to seek further guidance, but to no avail, when she said "a review of the authorities reveals no case in which the right to deviate has been held in a case involving the destruction of a right of way rather than obstruction."

11 The matter of *R v Aldborough* (1853) was not before the court. This case offers the very authority which learned counsel said did not exist. It cites statutory authority for the proposition that as a sea cliff falls down a way may move inland onto the adjoining land. It also provides authority for the proposition that passengers may move inland out of necessity regardless of whoever owns the adjoining field.

12 It seems also that Mrs Justice Hallet was not presented with copies of ancient learned authorities which confirmed the existence of the very law which she sought. As Leonard Shelford stated in 1862 (see above) "If the banks of a navigable river are impaired by the water, it is justificable to go upon the nearest part of the field next adjoining". This extract is particularly relevant to the *Maisemore* situation.

13 Mrs Justice Hallett was further misled when she was not advised by learned counsel that because the River Severn is tidal at Maisemore there are legal consequences which affect the way at issue. Thus, she was left unaware that there is a strip of land, known as the foreshore, which belongs to the Crown, and extends to the medium high water mark. Therefore, the persons referred to as the "third parties" or "landowners" were not "riparian owners" and did not own the land right up to the water's edge (as seemingly the court and the two public inquiries were led to believe). For the law holds that "where the waters are tidal . . there are no private riparian rights" (see Megarry and Wade above).

14 Thus, the court failed to recognise that there is a strip of land which moves forever inland as the tide erodes the river bank. A strip of land over which the public have rights, both when it is covered with water at high tide, and, when it is exposed at low tide.

15 Although Hallet J was not presented with the *Alborough* case, she was given the *Hornsea* case because Mr Wadsley regarded it as significant (see the commentary above upon the two cases). However, she either got the facts of the case wrong, or she was misled by learned counsel. For she wrongly concluded that the road "ran along a cliff top", and, wrongly believed that the case was "considered" by the House of Lords in the *Sandgate* case. Admittedly, only minor errors, but errors which, when added to, and compounded with, the other errors of fact and law, eventually led to the public right being extinguished.

16 It appears that the Maisemore Inclosure Act of 33 Geo 3 (1793) was never brought to the attention of Mrs Justice Hallett, or indeed, either of the two Inspectors. This is the Act which gave the Inclosure Commissioners the power to set out and direct that the ancient towing path along the banks of the River Severn should become a "public footway or towing path".

17 The Act sets the scene for the inclosure process under which the public footway was confirmed. Without knowledge of the contents of the Act it is impossible to understand the legal framework within which the public ways were awarded and the former common lands allotted.

18 Hallet J, was continually misled by Mr Wadsley when he advanced the argument that "You create a right of way by dedicating a piece of land". In the context of the Maisemore Act and Award this statement is both misleading and incorrect. When ways were set out under the provisions of an Inclosure Act there was no

question of any allottee dedicating a right of way. This was because such Acts required that the public and private ways were to be set out before any land was allotted. Therefore, such private allotments were awarded out of the residue, following the award of the public necessities, and the allottee accepted his allotment subject to any limitation such as a public footway.

19 The existing and ancient path at Maisemore ran along the banks of the River Severn through uninclosed "commonable lands". The awarded path was directed to follow the track of the ancient way "along the usual track along the banks of the River Severn". From these words the inference arises that the Commissioners intended the awarded way to follow the "banks of the River Severn" in perpetuity.

20 In other words, it was the intention of the Commissioners that the track should follow the banks of the river wherever that bank might move to in the future. Common sense supports this view, because unless the public footway and towing path were intended to move with the river bank their statutory purpose was limited and would soon be lost for ever.

21 However, if the Commissioners had intended the track to have only a limited life they would have said so in words plain and simple. They would then, presumably. have faced the anger of the inhabitants who had got used to enjoying a towing path which followed the river bank wherever it moved.

22 Therefore, it must be assumed that the new allottee of the riverside allotment accepted his allotment (stated by the Act to be in lieu of his ancient common rights) upon the understanding that it contained an existing towing path which had been directed by the Commissioners to be also a public footway.

23 In all probability, that allottee must also have been aware that the awarded path (i.e. "the usual track along the banks of the River Severn") was subject to erosion and was, therefore, likely, in the future, to move inland out of necessity. Thus, by accepting his allotment, he also accepted the limitations and restrictions which accompanied that allotment. Therefore, his successors in title (i.e. the "third parties") are bound today by those very same limitations.

24 It is too late now (after 200 years of statutory use of the riverside track) for it to be said by Hallet J. that a "new dedication" was required before the public right could be enjoyed in the future. For there cannot be any "new" dedication, in

circumstances where there could not be any previous dedication, or, any dedication whatsoever.

25 These arguments were not pleaded before Mrs Justice Hallett. Mr Wadsley persisted in defending the alleged rights of "the landowners". These landowners were not represented and their so-called "rights", are, seemingly unfounded. The "third parties" are not riparian owners. They do not own the land either to the middle of the river or even to the water's edge. Their land is bounded by the land owned by the Crown. A boundary which moves inland every time the river bank moves.

26 Therefore, even if the "landowners" had been represented their locus standi would have been limited to the extent of their legal right. That legal right does not include the whole of the land deemed to be covered by the public right.

27 Mrs Justice Hallet further misdirected herself, and made a crucial error of fact and law, when she concluded that whilst the right to a towing path could move with the river, the right to the public footway could not also move. This finding ultimately led her to reach the wrong conclusion and as a consequence the public right was extinguished.

28 It seems that she was not properly advised by learned counsel as to the proper construction of the clause in the Inclosure Award. As a result she misdirected herself as to what the Award actually granted.

29 The Commissioners were not granting a new public way. They were, in fact, confirming that an existing track was to continue as a "public footway or towing path" over the lands to be allotted. The word "or" which links "public footway" with "towing path" does not indicate that the track was meant to be one or the other. It means that it was intended to serve both purposes concurrently.

30 The law holds that "The rule of construction is quite clear, that in a deed as well as a will the Court may, in favour of the intention, read "or" as "and", or "and" for "or" . . . ." (see Butterworths' above). As an Inclosure Award is in effect a deed, and as such is the root of title to the allotted lands, in this instance the word "or" may properly be read as "and".

31 The Commissioners were therefore not setting out a public footway or (as an alternative) a towing path. They were in fact directing that the existing track was

to be used as both a public footway and a towing path. Thus both rights were directed to exist together concurrently. These rights cannot be separated or distinguished one from another to suit judicial convenience. Each right may, however, be exercised independently of the other. Thus, a passenger on foot may lawfully travel without the necessity of being accompanied by a boat.

32 Therefore, once Hallett J. had concluded that the towing path "moves with the river" she was barred by the true construction of the clause from concluding that the public footway did not also move with the towing path.

33 The law holds that Inclosure Acts and Awards create both public and private rights. Both sets of rights exist independently of each other. They may, however, exist concurrently. Thus a private right of way may exist along a public road. However, the extinguishment of the public right over that road, by statutory process, leaves unaffected the private right over the same way.

34 The Maisemore Inclosure Award can be construed as giving authority for both private rights and public rights along "the usual track along the banks of the River Severn". The public were granted a right of footway and towing path. The local inhabitants, because they were the former owners of the commonable lands and former users of the track, retained their former private rights along the same route. For there was nothing in the Act which stated that private rights over ancient ways (which were directed by the Commissioners to continue as public ways) were to be extinguished.

35 Thus, a moving right of way still continues to exist at Maismore along the banks of the River Severn. Just as the Court's decision cannot stop the ravages of the tide from eating away at the "landowners" possessions, neither can it stop the inhabitants of the parish from enjoying their private right to the use and enjoyment of the footway and towing path. The private common law right continues as before.

FINAL CONCLUSION.

The judgment of Mrs Justice Hallett is seriously flawed. She was ill-advised by learned counsel. She was not adequately presented with all the facts, and all the case law, for her to make a properly balanced judgment. She was led by Mr Wadsley into territory beyond which the facts of the matter and the relevant law allowed. Consequently, she concluded, in error, that "I am not satisfied that there is such a thing as a moving right of way."

The *Maisemore* judgment is therefore unsound. It should only be followed with caution in very specific circumstances. It cannot be used as a general proposition and binding authority in circumstances involving erosion caused by tidal waters.

The common law allows a highway to move away from tidal erosion. Thus in cases where a way follows a sea cliff, or follows a tidal river bank, that way may move inland as necessity arises.

A "moving right of way" can therefore exist, in circumstances dictated by necessity, despite the findings of Mrs Justice Hallett in *Maisemore*.