Historical Evidence for Researchers

British Horse Society Guidance

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Lost Ways: Maps and Records at Law

Definitive Map Modification Orders:
Historical Documentary Evidence and the Law

This paper sets out the British Horse Society Access Department's view on different types of historical documentary evidence which, variously, are relevant in research for order applications, evidential statements for order applications, determination of applications, appeals against refusal and order determination. This paper aims to provide better consistency in understanding the issues, so that submissions at any stage of the process drive better consistency in outcomes.

The book *Rights of Way: Restoring the Record*[1] sets out what the various types of documentary evidence are and what they show, while this paper sets out the evidential force that each type has. This assessment is not prescriptive. In most types of documentary evidence there are variations – sometimes anomalies – between units of nominally the same evidence.

Practitioners in the process may hold different views than those expressed here. This paper seeks to set out the view of the courts, or to clarify what is said in often old statutes. Nothing here prevents different interpretations, but the Inspectors who ultimately determine a case will generally follow what is seen to be the established law at the time. It is important that the established law is sufficiently set out for each topic, and is presented in each appropriate situation.

Order applicants and supporters may use appropriate pages of this paper in their work, or copy/paste relevant parts. This does not replace the need to provide copies of judgments and statutes alongside the actual evidence to which these apply.

This paper is not exhaustive, and the judicial view of types of evidence changes over time. Readers are invited to correct errors and supply additional materials. Contact the authors at:

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Underlining in the case and statute extracts is by the authors.

[1] *Rights of Way: Restoring the Record. Second Edition* 2017. Sarah Bucks & Phil Wadey. ISBN 978-0-9574036-1-1

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Rights of Way Restoring the Record: Second Edition 2017
Early County and Area Maps, p.31

1. ‘Once a highway always a highway’. In Dawes v. Hawkins [1860] 8 CB (NS) 848, 141 ER 1399. Byles J [858]

   “It is also an established maxim, – once a highway always a highway: for, the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of *ad quod damnum,*[2] or by proceedings before magistrates under the statute.”[3]

2. This means that a highway is not lost simply because it has fallen out of use and become forgotten.[4] Finding and recording little-used and ‘lost’ ways is why the definitive map and statement system was created in 1949.

3. In R v. Secretary of State for the Environment ex p Hood [1975] 1 QB (CA) 891. Lord Denning MR [896G]:

   “The object of the statute [the Act of 1949] is this: it is to have all our ancient highways mapped out, put on record and made conclusive, so that people can know what their rights are. Our old highways came into existence before 1835. They were created in the days when people went to work on foot or on horseback or in carts. They went to the fields to work or to the village, or to the church. They grew up time out of mind. The law of England was: once a highway always a highway. But nowadays with the bicycle, the motor car and the bus, many of them have fallen into disuse. They have become overgrown and no longer passable. But yet it is important that they should be preserved and known. so that those who love the countryside can enjoy it and take their walks and riders there. That was the object of the National Parks and Access to the Countryside Act 1949 and the Countryside Act 1968.”

4. The legal framework for recording ‘lost ways’ (such that they are no longer lost) is in the Wildlife and Countryside Act 1981. S.53 puts a duty on the surveying

[2] The writ of *ad quod damnum* still exists in theory, but is long superseded in practice.
[3] Applications to stop up vehicular highways are still made to the magistrates under s.116 of the Highways Act 1980. Applications to stop up footpaths and bridleways can be made under s.116, but more usually orders are made under s.119, where the Secretary of State is the ultimate tribunal.
[4] This is ‘desuetude’ in legal terminology.

authority[5] for any place to keep the definitive map and statement under continuous review and make modifications arising from the ‘discovery of evidence’. Such evidence may either operate to ‘upgrade’ (modify) the highway status of an already recorded highway to a higher status, or to add a highway that was not recorded at all before.

5. Surveying authorities are under a ‘freestanding duty’ to make modification orders consequent on the discovery of evidence, but the task of researching ‘lost ways’ mostly falls to members of the public, who then turn the research into a ‘definitive map modification order application’ to the surveying authority, and then frequently stay engaged right through the following process to ‘fight the corner’ in favour of recording the claimed right.

6. It is in the whole process of research–application–order–determination that a working knowledge of types of documentary evidence, and each type’s evidential weight, is often the difference between success and rejection.

[5] WCA1981 s.66(1) ‘surveying authority’, in relation to any area, means the county council, county borough council, metropolitan district council, or London borough council whose area includes that area.

Map evidence: evaluation and appropriate weight

This section refers to types of evidence discussed in:
Rights of Way Restoring the Record, Second Edition 2017
Early County and Area Maps, p.31

Reluctance of the courts to admit maps as evidence

1. Going back 100 years and more, the courts were reluctant to admit 'old maps' as evidence of public highway status. For a time a map was admitted only if the person who made it was unable to attend to give evidence. This attitude gradually softened, and in Vyner v. Wirral Rural District Council [1909] JP 242: Alverstone LCJ:

   "Although the judgment in the case of Pipe v. Fulcher (1858), 28 LJQB 12, was that the map was held to be inadmissible, it was really held to be inadmissible because it was not evidence of reputation at all."

2. And Walton J added:

   "I only wish to say one word about the maps. It appears to me that the maps, to be evidence, must amount to declarations by a deceased person or persons as to a matter of public interest, that is to say, as to the existence in this particular case of a highway, which means of course a public highway. They must be declarations made, or (applying it to this particular case) they must be maps so recognised and used as, in fact, to amount to declarations made by persons who had competent means of knowledge of the facts as to the existence of the public highway, and I think by persons who had some interest in the matter."

Maps (and associated papers) are now evidence of reputation of the way in question

3. The Rights of Way Act 1932, s.3, introduced a provision for taking maps, plans, histories, and more in evidence, and that is continued as s.32 of the Highways Act 1980.

   "A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."

The 'balancing tests' to be applied

4. The *Inspector Training Manual* | *Public Rights of Way Version 9 2022* advises Inspectors:

   [160] "When confirming an order to add a PROW to the DMS you must be satisfied that the right of way subsists. Once all the evidence has been individually assessed, the standard of proof to be applied in all DMMO cases is the 'balance of probability'.[6] This demands a comparative assessment of the evidence on both sides, often a complex balancing act involving careful assessment of the relative values of the individual pieces of evidence and the evidence taken together."

5. That is correct as far as it goes, but there is also an interim stage. Consider the evidence in favour of public rights. It is not just a matter of 'individual assessment' of each piece of evidence, but also assessment of each in light of the other pieces. For example, a case has four early commercial maps, over 100 years, each showing the route. One map shows it as a 'cross road', one map as a 'parochial road', and two maps have no key. Individually, those no-key maps are of limited status-indicative weight, but taking them together with the maps with a key, the whole set has more weight than each does individually. Then that whole 'class' of evidence ultimately is balanced in with all the evidence.

6. In Commission for New Towns & Worcestershire County Council v. JJ Gallagher Ltd [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3, [2003] 01 EG 67 (CS), Neuberger J lists the documentary evidence that he will consider:

   [82–83] "While each of these aspects of the evidence has to be initially considered on its own. It must, of course, also be assessed in light of the other aspects. In the end, after considering all of these aspects together, I have to ask myself whether, bearing in mind [where the burden of proof lies] I am satisfied on the balance of probabilities that the use and reputation of Beoley Lane was such as to justify the inference that it was dedicated as a public carriageway."

   [123] "The mere fact that there are a fair number of other pieces of evidence all of which tend to point the other way does not of itself mean that the enclosure documentation is outweighed … One piece of high quality or convincing, evidence will frequently outweigh a large number of pieces of low, or weak quality evidence … While the inclosure documentation does represent powerful evidence, it is not unequivocal …"[7]

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[6] Miller v. Minister of Pensions [1947] 2 All ER 372, Denning J: "If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not".

[7] In this case the inclosure covered only a short piece of one end of Beoley Lane, and set this out as a private road. There was considerable other evidence to show that the lane was pre-award a through public road. So the challenge to the award was not head-on, rather it was that notwithstanding the award, BL was anyway a through public road, and it was not

7. In Fortune & Others v. Wiltshire Council [2012] EWCA Civ 334, [2013] 1 WLR 808, Lewison LJ:

> [22] "In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from circumstantial evidence.[8] The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB famously directed the jury in R v. Exall (1866) 4 F & F 922: 'It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.'
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> [78] "The judge's[9] conclusion echoes what is said in the Planning Inspectorate Consistency Guidelines, in the passage we have quoted. But the judge did not treat the Finance Act map as definitive. It was simply one piece of the jigsaw puzzle …"

Direct and indirect evidence

8. Lewison LJ in Fortune says "… direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from circumstantial evidence".
9. From *Black's Law Dictionary*, ninth edition, "Direct evidence. Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption. Also termed positive evidence".
10. From an online law dictionary, "Positive evidence is direct proof of the fact or point in issue, as distinguished from circumstantial proof; evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact".
11. In Somerset v. Scriven (1985) Unreported, from note of the judgment of HH Turner QC, RCJ 1 August 1985,[10] there was a mixed set of documentary evidence, including an inclosure award that satisfied HH Judge Turner (sitting as a Judge of the High Court) as to the existence of the highway at a given year. Judge Turner then engages the maxim 'once a highway always a highway'.

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the inclosure that 'created' that public right. Thus the inclosure was not direct evidence of public status (far from it).

[8] Re Belhaven and Stenton Peerage (1875) 1 App Cas 278 at 279: "… in dealing with circumstantial evidence, we have to consider the weight which is to be given to the united force of all the circumstances put together…".

[9] That is HHJ McCahill in the court below.

[10] This case is referenced in the *Inspector Training Manual* | *Public Rights of Way*. 2022 Version 9, p.213.

12. In considering later evidence contradictory to the existence of the highway the Judge says:

> "If the Tithe Map could stand on its own feet, as it were, it would cast serious doubt on the status of the length B–C. But the Tithe Map is not capable of destroying the cogency of the antecedent evidence."[11]

13. In Somerset v. Scriven the inclosure award sets out a public carriage road,[12] is direct evidence of status, and is now very hard to impeach. See: Fisons Horticulture Ltd and others v. Bunting [1976] 2 EGLR 120; Micklethwait v. Vincent (1893) Law Times September 16 1893; Holden v. Tilley [1859] 1 F & F 651.
14. Other types of direct evidence, which speak expressly to the reputation of roads as public roads, include Quarter Sessions rolls, railway proposal plans and canal plans.

Map evidence: the view of the courts

15. In A-G v. Council of the Metropolitan Borough of Woolwich [KBD] JP & LGRR, 173, 5 October 1929. Shearman J:

> "Very often when you are dealing with things immemorial you are dealing with legal fictions rather than legal realities … Without any opposition a number of maps were put in, including county maps, dating from about 1775 to the earliest brought from the British Museum and the earliest ordnance map and a tithe map of the year 1843, and from all those maps – of course, I know that old maps are rather in the habit of being copied one from the other – which are publications of different origin, the evidence, to my mind, is overwhelming that this was a very ancient highway …"

16. In Fortune v. Wiltshire Council [2012] EWCA Civ 334, [2013] 1 WLR 808. Lord Justice Lewison:

> [98] "We deal first with the argument that the judge should have ignored what he called the 'small scale maps' entirely; and should have concentrated only on the large scale maps (i.e. principally the 1784 map). We reject that submission. First, it conflicts with the statutory instruction in section 32 of the 1980 Act which says that the court 'shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified'. Second, the consistency of treatment of Rowden Lane and Gipsy Lane in commercially produced maps for well over a century showed, if nothing else, the reputation enjoyed by Rowden Lane. Section 12 of the Planning Inspectorate Consistency Guidelines (2nd revision June

[11] That is the inclosure act and award.

[12] Whereas the inclosure award in Commission for New Towns and Worcestershire County Council v. JJ Gallagher Ltd [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3, [2003] 01 EG 67 (CS), set out a private road.

2008) (which Prof Williamson produced) concludes by quoting a paper by Christine Willmore dealing with old maps:

What is looked for is a general picture of whether the route seemed important enough to get into these documents fairly regularly. A one-off appearance could be an error … consistent depiction over a number of years is a positive indication."

[99]" That is the approach that the judge adopted, testing each provisional conclusion against what had come before and what came after. In our view the judge's approach to 'consistent depiction' was fully justified."

17. In Brand & Another v. Philip Lund (Consultants) Ltd (1989) Unreported. Ch 1985 B. No. 532. Judge Paul Baker QC (sitting as a Judge of the High Court):

"I must now examine those classes of evidence, and go first to the old maps. The earliest map which has been produced was engraved in 1770 by T Jeffereys, described as geographer to the King, and is based on a survey which took place in the years 1766 to 1768 … The principal interest of this map, apart from its age, is that it shows Ramscote Lane along the same irregular angular line it followed right up to the 1972 diversion …

… The third map and next in order of time is the map published by A Bryant in 1825. This map does not show Ramscote Lane and hence reliance is placed on it by the defendants to the counterclaim. But the map does not show several of the other roads to which I have just made reference. To my mind, this map was, as one of the expert witnesses said, an early example of an AA road map. It catered for those long distance travellers who were concerned with through routes and not with every detail of local topography. Undoubtedly it shows some lanes and bridle-ways. but does not purport, as I would see it, to show every such way.

Next, by 1925 when the next edition of the Ordnance Survey came along … The depicting of a track on the Ordnance Survey maps is not in itself evidence of the existence of a right of way. It merely purports to show the physical features on the ground. However, its existence for so long unchanged is not without significance and may lend support to the inference that public rights exist over it."

Commercial maps: ‘cross road’ & ‘parochial road’

Commercial maps from the pre-Ordnance Survey era are often used in evidence in rights of way cases where these show ‘roads’

Cross road

1. Some maps delineate and identify ‘cross road’ as a type of minor road. This below has five examples of how the courts consider ‘cross road’ depiction, as regards it being evidential towards public road status. None of the judges says absolutely that cross road depiction = public road status, but most do say that it is one piece of evidence in favour of public road status to be weighed with the rest. ‘Cross road’ is not neutral or equivocal: it is of itself, insofar as it goes as evidence, more indicative of public road status.
2. In Trafford v. St Faith’s Rural District Council (1910) 74 JP 297, Neville J:

   “In the next map of 1826, Bryant’s map, I think we have some indication of reputation, inasmuch as it is indicated on that map by the sign which we are told is meant to indicate a good cross or driving road. That the map is some evidence of reputation is, I think, obvious, because, although the person who was responsible for the drawing of the map may not have been an inhabitant of the immediate locality, no doubt he must have had such information as he possessed with regard to the character of the roads from persons in the vicinity, and therefore I think that is a little bit of evidence to indicate that as early as 1826 this road was considered to be a public road.”
3. In Barnes v. Metropolitan Borough of Bury (1991) A90 24375 (Bolton Crown Court). From the judgment, with regard to Yates’ Map of 1786:

   “Yates is regarded by historians as an accurate surveyor. The proposals for his map which appeared in the General Advertiser, Liverpool, March 1775 state inter alia that ‘… all the main and cross roads … will be delineated with the utmost exactness, and nothing omitted that can render such a work accurate useful and ornamental.’ … The further significance of this map is that in 1786 there was a through route to Haslingden which, if the words of the proposal mean anything, must be described as a main or cross road. We therefore consider that the Yates map is of great help to Mrs Barnes’ argument.”
4. In Hollins v. Oldham [1995] (unreported) C94/0206, 27 October 1995, Manchester Crown Court, HHJ Howarth (sitting as a High Court Judge):

   “Burdett’s map of 1777 identifies two types of roads on its key: firstly turnpike roads, that is to say roads which could only be used upon payment of a toll and, secondly, other types of roads which are called cross roads. That does not mean a place where two roads cross (as one would understand it to be in this case) but a road called a cross road. This latter category, it seems to me, must mean a public road in respect of which no toll was payable. This map was probably produced for the benefit of wealthy people who wished to

travel either on horseback or by means of horse and carriage. The cost of such plans when they were produced would have been so expensive that no other kind of purchaser could be envisaged. There is no point, it seems to me, in showing a road to such a purchaser that he did not have the right to use."

5. In Norfolk County Council v. Mason [2004] EWHC B1 (Ch) (12 January 2004), Hon Judge Cooke speaking to: "The legal and practical significance of Bryant's map" [1826]:

   [73] "I have the impression that this case may be regarded as quite an important comment on Bryant and probably relied on a good deal in this county and I am concerned that there may be some danger of this case being relied on as regards Bryant for more than it really says. So it is appropriate to say a little about what it appears to say and what it does not say.

   [77](b) "'Good cross or driving road' is as I have said not a technical legal term. On its face as a matter of language it refers to capability. It is the answer to the question which the surveyor asks himself, 'what is the road I am looking at capable of bearing?' So if it has broad verges or is a broad road (or both) you can use it for driving, if it is a narrow lane, you cannot.

   [77](c) "Plainly as I have already said a 'driving road' is a capability most often at that time seen in public roads. If one can offer a modern parallel, the key to a modern OS disclaims any accurate statement of status, but the higher up the key you go the more probable it becomes that the road is going to be a public one.

   [78] "What I do firmly conclude as a result of this is that by itself Bryant's map is anything but a firm indicator and not too much reliance should be placed on it.

   [90] "Bryant is of very limited strength …

   [146](2) "There are three pieces of evidence which may be thought to be aberrant .The first is Bryant's map which for reasons I have given I do not think is of the assistance that at first sight it might have been."

6. In Fortune & Others v. Wiltshire Council [2012] EWCA Civ 334, [2013] 1 WLR 808. Lewison LJ:

   [54] "As the judge pointed out, in 1829 the expression 'cross road' did not have its modern meaning of a point at which two roads cross. Rather in 'old maps and documents, a "cross road" included a highway running between, and joining other, regional centres'. Indeed that is the first meaning given to the expression in the Oxford English Dictionary ('A road crossing another, or running across between two main roads; a byroad').

   [56] "The judge concluded that Greenwood's map supported 'the emerging picture of' an established thoroughfare. In our judgment the label 'cross road' added further support."

7. It is often argued against ‘cross roads’ on old maps that the representation used (and shown in the map key) is also used for e.g. dead-end roads to important houses, or roads across emparked estates, neither of which type are likely to have been public. That is correct, but does not strongly go against ‘cross road’ being some evidence of public status in proper context.
8. That context is through-roads that are part of a network of roads/highways and link between other roads – particularly acknowledged highways. That is a ‘cross road’ for the purposes of the Court of Appeal in Fortune, and for the court in Hollins and Barnes. That the map evidence as a whole was not enough to persuade the court in Mason does not go against the superior-court view and approach in Fortune.

Parochial Road

9. See: John Cary’s *Improved map of England and Wales with a Considerable Part of Scotland at a Scale of Two Miles to One Inch*. 1820–32.
10. Cary’s half-inch maps series is accompanied by a key that shows his conventional signs for roads. One road depiction is for ‘parochial roads’, and in the High Court case of Commission for New Towns and Worcestershire County Council v. JJ Gallagher Ltd [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3, 01 EG 67 (CS), two leading cartographic experts, Dr Yolande Hodson and Profession Roger Kain, contested the evidential meaning and weight of ‘parochial road’, with the judge ultimately preferring Dr Hodson’s view that such a road is more likely to be a public vehicular road than, as Professor Kain suggested, a public bridle road. Such a depiction of Cary’s map is only one piece of evidence, not of itself of particularly great weight, and open to being overwhelmed by contradictory evidence from other sources – just as such a depiction may be bolstered by other sources.

What was a ‘Parochial Road’ in the period of John Cary’s maps?

(Parochial = ‘relating to a parish’)

11. The first proper highways Act was in 1555: 2&3 Phillip & Mary c.8 For amending of Highwais being nowe bothe verie noysome & tedious to traveil in …
12. This was the first Act to introduce the ‘Surveyor of Highways’, and to place a statutory responsibility for highway maintenance on, variously, every local inhabitant; on the Surveyor; on the Justices of the Peace; and on owners of adjoining lands.
13. This was the first appearance of the post of Surveyor of Highways – an unpaid post, with the appointee selected by the parish and unable to decline the task. Responsibilities included: to police the provision of statute labour and gear; and at least three times a year to “view all the roads, highways, watercourses, bridges and pavements” and report on their condition to the Justices. The purpose of these statutory provisions were that, from one end of the parish to

the other, there may be “a clear passage for travellers and carriages” (from S&B Webb, *The Story of the King’s Highway*, at 17). Note that s.1 of the 1555 Act makes the Surveyor of Highways liable only to repair ‘roads to market towns’. What of the other roads? Common law and customary rules continue.

14. In *Parish Law or a Guide to Justices of the Peace [and] Surveyors of the Highways*, Joseph Shaw, 7th Edition, 1750, “Law-Printer to the King’s most Excellent Majesty”:

15. At p.278:

    [4] “The authority of the Justices of Peace is limited only to common Highways, and not to private ways; so that the Presentment, etc., of a Justice of Peace of a private Way, is not allowed to be good.

16. At p.279:

    [6] “A private Way, which leads from a Village, etc, to the Parish Church or Fields without any Communication with a great Road, is to be repaired by the Village of Hamlet and sometimes by a private Person (contra of Highways, for there the whole Parish shall be charged); if such a way be out of Repair, every Inhabitant may have an Action…”

17. In 5&6 William IV c.50, 1835 ‘The General Highway Act’: An Act to consolidate and amend the Laws relating to Highways. This Act consolidates and partially repeals much of the previous legislation on road repair. By s.6, the Surveyor of Highways:

    “… shall repair and keep in repair the several Highways in the said Parish for which he is appointed, and which are now or hereafter may become liable to be repaired by the said parish.”

18. Thus all highways liable to be repaired by a parish before 1835 continue to be so repairable. An ‘adoption’ clause is added (s.23) providing that no road of certain types might become highways repairable by the parish without certain formal adoption procedures first. The particular responsibility for ‘market town’ roads has gone; no definition of ‘repair’ is given. In summary: Any highway repairable by the parish before 1835 remains so repairable; the mechanisms and powers of the Surveyor to effect this change somewhat.

19. In Katherine Austin’s Case 1 Ventris 189 (1683):

    “If it be a publick way of common right, the parish is to repair it, unless a particular person be obliged by prescription or custom. Private ways are to be repaired by the village or hamlet, or sometimes by a particular person.”

20. In London Borough of Southwark v. TFL [2018] UKSC 63 (on appeal from [2017] EWCA Civ 1220). Lord Briggs:

    [6] “… At common law, at least prior to 1835, there was, generally speaking, no necessary connection between those responsible for the maintenance and repair of a public highway and those with a proprietary interest in the land over which it ran. Prima facie the inhabitants of the parish through which the highway ran would be responsible for its repair …”

21. In R v. Netherong (Inhabitants) (1818) 2 B&A 179; R v. Leake (1833) 3 B & Ald 370; R v. Newbold (Inhabitants)(1869) 33 JP 115. Before 1835 a parish was prima facie liable to repair all highways, whenever made, and regardless of whether or not repairs had ever been made.

22. In the *Parliamentary Board of Agriculture Survey* 1794: Cheshire – Thomas Wedge:
"The great public roads are not very good, being most commonly either roughly paved and called causeways, or deep sand. Considerable improvements have been made in the last twenty years and greater attention has been paid than formerly was to the private roads. The parochial roads in the clayey parts of the county are generally bad for carriages; but a small horse-pavement on one side of the road renders them conveniently passable at all times for horsemen. The present laws and regulations relating to the public roads of the Kingdom, are in some particulars shamefully irrational and would be discreditable to a nation even in the dawn of civilisation."

23. In the *Parliamentary Board of Agriculture Survey* 1794: Herefordshire – John Clark:
"I cannot see any probability of making the parochial roads in this county even tolerably safe until statute labour is abolished. Except for some parts of the turnpikes, almost every road in this county is liable to be indicted."

24. In the *Parliamentary Board of Agriculture Survey* 1794: Rutland – John Crutchley:
"The parochial roads are mostly ill formed as are the turnpike roads also."

25. In the *Parliamentary Board of Agriculture Survey* 1810: Buckinghamshire – Thomas Priest:
"The parochial roads were not only unpleasant but also unsafe and even the turnpike roads are not to be recommended as such."

26. In the *Parliamentary Board of Agriculture Survey* 1813: Worcestershire – William Pitt:
"The principal roads from town to town, being supplied by toll gates, are generally kept in good repair. Some of the cross roads are very bad in the clayey districts and many are scarcely passable from Christmas to Mid-summer, either with a loaded carriage or on horseback. The public roads are in general good order and improving, but the private or parochial roads are much neglected."

The 'dead end' issue

27. It is sometimes argued that 'cross road' and 'parochial road' delineation on the commercial maps is meaningless because the same symbol is used for local dead-ends and for access to private houses. Greenwood has only two map delineations: 'Turnpike Roads' and 'Cross Roads'.[13] Greenwood certainly

[13] e.g. in his 1828 Map of Northumberland.

shows cross roads that appear to be dead-ends, or go only to private houses. But that of itself does not destroy the depiction in regard to other roads. In Hollins and Fortune the court is clear that all the evidence must be considered together. The courts are also clear that a cross road in this map context is a minor road (most probably public) that links between other roads and towns.

28. A dead-end may prove to be (on all the evidence) a public road anyway, but in these decisions the evidence and argument goes to ‘cross road or parochial road in the context of the road network’, and not to ‘every cross or parochial road regardless’. That distinction focuses the evidential weight of ‘cross, or parochial, road’ in the evidence as a whole.

Inclosure Acts & awards: bringing highways into being

Evidential weight of 'setting out' a public road

This section refers to types of evidence discussed in:
Rights of Way Restoring the Record: Second Edition 2017
Inclosure Records, p.50

1. Inclosure Acts and awards mostly set out 'public highways', some of which enter the land being inclosed – cross – and leave again, and some which were part of a network wholly within the inclosure area. Parliamentary inclosures were carried out to redistribute the ownership of 'open lands' so as to improve productivity, and were effected by an Act of Parliament (usually called a/the 'Local Act') followed by a locally made 'award' which did the actual redistribution.
2. Parliamentary inclosure, in the context of roads and highways, took place mostly within three distinct periods: Firstly, Acts up to 1801, where the terms and details of the processes were unique to each Local Act. Secondly, after 1801, when the Local Acts were mostly made and passed subject to standard clauses as set down in the Inclosure (Consolidation) Act 1801.[14,15] Thirdly, after 1845 under the provisions of the 'General Inclosure Act' 1845.[16] This last was mostly about small areas and tidying up detached portions of parishes and manors.
3. Inclosures Acts and awards could and generally did set out public roads and private roads. Public is what it says, but there remains considerable disagreement about just what was a 'private road' in an award. It is sometimes argued that awarded private roads carry a right of way for the public. That view so far finds little traction with the courts (and consequently with the Secretary of State's Inspectors) and is referenced below. This section looks at the view of the courts about inclosure evidence, as surveying authorities and Inspectors are bound to follow the rules of precedent unless there is a compelling reason at law not to.[17]

[14] An Act for consolidating in One Act certain Provisions usually inserted in Acts of Inclosure; and for facilitating the Mode of proving the several Facts usually required on the passing of such Acts. CAP. CIX. 1801.
[15] There was in 1836: An Act for facilitating the Inclosure of Open and Arable Fields in England and Wales. CAP. CXV. 1836. This concerned largely the appointment of commissioners and streamlining the award process. It is silent on highway matters.
[16] The Inclosure Act 1836.
[17] This is a topic beyond the scope of this paper, but as well as 'ratio' (binding) and '*obiter dicta*' (persuasive) rights of way cases often set out the court's view on the opinion of expert witnesses on a particular area of evidence.

4. In context of what an Act and award sets out as public roads this is very strong direct evidence of the status of each way. There are three cases[18] that demonstrate the courts' reluctance to impeach and inclosure Act and award, particularly after a considerable time has passed.

5. In Holden v. Tilley [1859] 1 F & F 651, the local Act of 1839 incorporated road provisions from the Inclosure (Consolidation) Act 1801. A particular way was set out as a bridle and footway only. Tilley asserted that the way was a cart road from time immemorial, and had continued to be used as such since the date of inclosure. Held that it could not be presumed from the user that the award was otherwise than properly made, and the Act operated to stop up any previous cart road because that right had not been set out afresh.

6. In Micklethwait v. Vincent (1893) Law Times September 16 1893, the local Act of 1801 and award of 1808 allotted a piece of land to a particular person. The defendant impeached the validity of the award, and alleged that the award was made ultra vires for want of powers in the local Act. Held, "that after the lapse of so many years without any dispute as to the propriety of the award, this court would not now consider whether the award was ultra vires or not."

7. In Fisons Horticulture Ltd and others v. Bunting [1976] 2 EGLR 12, this was a case where a 600-acre plot of Crowle Moor was registered as common land. The registration was challenged on the ground that the land had been inclosed by a local Act of 1811 (incorporating the Inclosure (Consolidation) Act 1801) and an award of 1822. The appellant contended that the precise terms of the 1811 Act had not been carried out, including the requirement to proclaim the award as made in the local church immediately afterwards. In his judgment (as reported) Walton J held:

   > "that in his opinion the courts would lend their weight to uphold long-standing awards if they were unchallenged at the time." The Judge added, "It was no use merely looking at the form of words which were used to decide whether requirements in an Act were mandatory or directory. One had to look at the whole setting of the Act to answer the question whether compliance with the particular requirements was so fundamental to the purpose which the Act was designed to secure that non-compliance rendered what was done under it null and void." He concluded, "The award was clearly executed by the commissioners, and that was all that was required to establish that the rights of common were extinguished."

8. These cases set out three fundamental rules of approach to the analysis of the evidence in, and evidential weight of, inclosure Acts and awards:

   • Where an Act and award set out a public road then that cannot now be impeached so long as conditions on the setting out are complied with, and

[18] The issue in each varied, but the principle of unimpeachability is general.

• The whole ‘setting’ of the Act has to be examined to find and properly interpret any conditions,[19] and

• The satisfaction of conditions may be essential for the validity of a road being set out, or may be ‘merely directory’ where evidenced non-compliance is not fatal to the setting out of a public road.[20]

7. The courts give uncontested inclosure Acts and awards good weight as evidence of highway status. In Roberts v. Webster [1967] QBD 298, Widgery J:

> [His Lordship considered and described a map of 1831, the Tithe Apportionment Map, confirmed in 1851, and an enclosure award made in 1859 under The Inclosure Act,1845, on which Pipers Lane was shown, and the arguments of counsel based thereon and continued:] “It seems to me that the enclosure award of 1859 is very powerful evidence indeed to support the view that Pipers Lane at that time was reputed to be a public highway.”

The process of parliamentary inclosure

9. Inclosure carried out under local Acts (up to 1845) generally followed a consistent process, although early instances do vary. The core process was:

• The local Act passed through parliament.

• Appointment of the inclosure commissioners according to the process in the Local Act or the Inclosure (Consolidation) Act 1801.

• The survey of the lands to be inclosed, but this may have happened prior to the local Act being obtained.

• Statutory advertisement.

• Division of the land, including setting out the highways (marking on the ground) so that these could be a datum from which to divide and describe the plots of land to be allotted.

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[19] *Consistency Guidelines*, 3rd Revision February 2016 at [7.8] “It is impossible to fully evaluate inclosure evidence on the basis of extracts from a map and award alone. Where the process was carried out under statute, the relevant inclosure act must be examined to establish the extent of the powers available to the Inclosure Commissioners”.

[20] ‘Directory’ is now a superseded term, but it concerned a requirement in an inclosure Act to be carried out in the process of setting out a public road. Examples include the requirement of ‘proclaim’ an inclosure award in church (*Fisons v. Bunting*, above) and that a right of way should be to a prescribed width (A-G & Settle Rural District Council v. Lunesdale Rural District Council (1902) Law Times 822). A requirement that was ‘merely directory’ would not be fatal to the road coming into existence if it was not carried through. ‘Directory’ has been superseded by the rule in R v. Soneji [2005] 1 AC 340 which holds that the test is whether, from reading the whole Act, did parliament intend that absence of compliance should be fatal to the intention of the provision as a whole.

• A period for objections to these proposals.

• The allotment of the plots to individuals.

• A further period for objections, and consideration of any.

• The final award made.

• Enrolment of the final award as sealed, and deposited, according to the local Act.[21]

• Making up of highways (where required by the local Act) under the supervision of a surveyor appointed by the local Act.

• A Justices' declaration (where required by the local Act) that the highway was satisfactorily made up and thereafter publicly maintainable.[22]

10. The key stages in providing the roads were survey – divide – allot.
11. What matters most now in rights of way order cases is the availability of the local Act,[23] the final award[24] and the award plan.

The 'General Inclosure Act' 1801

12. This Act consolidated the provisions usually inserted into individual local Acts into one statute. All local Acts after commencement of the General Act incorporated the standard provisions therein unless all or any were expressly disapplied by the Local Act.[25]
13. The Inclosure (Consolidation) Act 1801 contained two provisions that directly, and not infrequently, bit directly in rights of way orders. One remains in force, but a court decision has overruled the previous judicial view on the other.
14. S.8 of the Act deals with the setting out and making of "public carriage roads and highways", and requires that these will be thirty feet wide at the least, properly made by the surveyor of highways, and finally certified by local Justices of the Peace.
15. Cubitt v. Maxse [1873] LR 8 CP 704 is authority that, where there is positive evidence that the road was not set out and made up, the court will hold it not to have come into being. But there remains some uncertainty whether it is necessary that all of the requirements of the Acts must be complied with in order for the award of a highway to be effective.

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[21] The final award and plan will be sealed/signed by commissioners and annotated/dated as deposited with the Clerk of the Peace.
[22] This 'declaration' is often casually referred to as a 'certificate'.
[23] Local Acts are readily available from the Parliamentary Archives as scanned PDFs for a copying fee.
[24] Occasionally only the draft award survives (or is found). If the final plan is available this can validate what a draft award provides.
[25] The Inclosure (Consolidation) Act 1801, s.44. Post-1801 local Acts usually reference incorporation of the 1801 Act in their preamble.

16. In the above case a local act of 1808 authorised the inclosure of Effingham Upper Common, and imported ss.8 and 9 of the 1801 Act. The commissioners set out a forty-foot-wide public carriage road, but on the facts as stated in the law reports, this was "… never actually made, so used, or enjoyed by the public in any way". The report is not express on this, but these facts suggest that the road was 'wholly new', not a setting-out, or physical improvement, of an existing road: that would account for total absence of public user. It is difficult to conceive a situation where a pre-existing road 'set out anew' by commissioners would not be 'used-through' the instant of time at which the new setting out came into legal effect. The action in 1873 was for trespass on the ground asserted by the defendant to be the highway set out by the commissioners. The court held that the road set out by the commissioners was never 'made' according to the statutory requirements, and neither was it used by the public; in the absence of either of these requirements, it had simply never come into being as a highway.

17. In the law reports, Keating J appears to confirm that the road in issue was new; he says:

> "Now it is for those who seek to force upon the public such new roads and highways to show that they have been set out, formed, and made complete by the commissioners and their surveyor according to the acts. Such is the case where there is no user of the new roads – it may be if the public take to the roads, and use them, other questions may arise – and that then the parish could not turn round and say that the roads were never properly formed and completed, and that they are not bound to repair them." His Lordship expressly distinguishes R v. Lyon 4 D & R 497, because "… the road was treated as an existing highway and used, and no question arose as to its creation."

18. Where an award made under the 1801 provisions continued a preexisting road (through and beyond) over the inclosed land, and the portion within the award area was not certified by the Justices, the highway status survives, and the parish remains liable to repair the road.[26]

19. Where a public carriage road was set out by an award incorporating s.8 of the 1801 Act, but there is no record that the road was certified by the Justices, if that road has long been regarded and treated by the highway authority as a public road, prima facie arising from the award, then the absence of certification is not fatal to that status.[27]

20. S.10 of the Inclosure (Consolidation) Act 1801 gives the commissioners a power to set out "private roads, bridleways, footways … as they shall think

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[26] R v. Inhabitants of East Hagbourne (1859) Bell 135.

[27] R v. Inhabitants of Enford (1956) 28 March 1956, The Times 6 & 7 January 1956, transcript is held in the Wiltshire Record Office WRO/F2/250/178 & QS Great Roll WRO/A1/110/195611. Sir Patrick Devlin J, sitting with justices as a High Court judge on circuit.

requisite …". In R v. Secretary of State for the Environment ex p. Andrews [1993] QBD, [1995] JPL, it was held that the only power in the 1801 Act to award public footpaths and bridleways was in s.8, and any so awarded had to be thirty feet wide at the least. In R oao Andrews v. Secretary of State for EFRA [2015] EWCA Civ 669, [2015] PLSCS 198, the earlier decision was overturned, and held that footpaths and bridleways could properly be awarded under s.10, at whatever width the commissioners thought requisite.

The existence of public rights over awarded 'private roads'

21. The courts are quite clear that 'private means private in the sense of ownership', and, in general, hold that, (i) private means private, and, (ii) the setting out in an inclosure award of a private road is a powerful piece of evidence against the existence of public rights.

22. In Dunlop v. Secretary of State for Environment and Cambridgeshire County Council (1995) 94 LGR 427, (1995) 70 P & CR 307, Sedley J addressed whether a 'private carriage road' (set out in an inclosure award) was a 'private road for carriages', or a 'road for private carriages' – a form of lesser, or low, public road. Held that 'private' means private in its modern sense: the opposite of public; and that to read such a meaning as claimed into the inclosure award would be "a hazardous and probably a false step".

23. It has since been argued, particularly in 'The Dunlop judgment: a perilous path to follow?'[28] that, on facts and law not before Sedley J, the route at issue was a public road, notwithstanding its being set out as a 'private road' in the award. That may be so, but the meaning of 'private road' as used in inclosure awards is now generally to be taken as what it says: private, not public.

24. In Buckland v. Secretary of State for Environment [2000] 1WLR 1949, [2000] QBD CO/1682/1998, Kay J dealt with an application to quash an Inspector's decision to modify an order to add a byway open to all traffic to the definitive map. The application largely turned on the Inspector's view of the effect of the setting out, in an inclosure award, of the route in question. The route was set out by the commissioners as a 'private road', but with the recital of users of the route expressed to include "all and every other person or persons whomsoever having any occasion whatsoever to go travel pass and repass through, upon and over the same roads …". Kay J held that the commissioners had the power only to set out public roads and private roads, and if they wished to set out a public road, then they had to do so "in accordance with the precise powers given under statute". The Inspector's decision was quashed.

25. In Venetia Craggs v. Secretary of State for the Environment, Food and Rural Affairs [2020] EWHC 3346 (Admin), this "all and every other person …" wording

[28] Part of *The Seymour Papers* by Colin Seymour. Available on the Byways and Bridleways Trust website.

was held to give rise to private roads with public bridleway status, distinguishing Buckland, which rule still applies to vehicular highways.

26. In Hall v. H B Howlett Ltd and Others [1976] EGD 247, the divisional court heard an appeal by way of case stated against a decision of Watlington magistrates to dismiss a private prosecution for obstruction. The route in question – Holcombe Lane – was not (except in a small part) either on the definitive map or list of streets, and had been set out in an inclosure award as a 'private carriage road and driftway'. Lord Widgery, CJ:

> "… I should have thought that if the commissioners set out a new private road in an inclosure award it is almost conclusive that the commissioners did not think that there was already a public highway there, because there is no basis to establish and lay out a new private road over existing public highway [*sic*]. I think this is a point of considerable weight to go into the scales when those scales are operated by the tribunal of fact concerned with this matter."

27. In Commission for New Towns and Worcestershire County Council v. JJ Gallagher Ltd [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3, 01 EG 67 (CS), Neuberger J had to determine the status of Beoley Lane, agreed by the parties to be at least a public bridleway, and contended by the appellant to be a public carriageway. Part of Beoley lane had been set out in an inclosure award of 1824 as a 'private carriage road and driftway'. In considering Dunlop, Neuberger J says,

> [93] "There is no doubt, therefore, that the description of Beoley Lane as a 'private carriage road' in the inclosure award, is a substantial factor against its being a public carriageway, at least as at the date of the award."

28. So, clearly, the courts take the view that, in inclosure awards, 'private' means private,[29] and the setting out of a 'private road' is strong evidence of its not being (at least at that date) a public road. But the courts have also considered whether public rights that pre-existed an award as a private road can survive the inclosure process, and whether public rights can come into existence after an award.

29. In Commission for New Towns v. JJ Gallagher Ltd, Neuberger J not only had the inclosure award setting out Beoley Lane as a 'private carriage road', but also a considerable range of other pieces of documentary evidence tending to show public road status. He says,

> [91] "The inclosure award of 1824 is concerned with a relatively small part of Beoley Lane, namely the very south-eastern end. However, given that the issue between the parties concerns whether or not Beoley Lane is a carriageway, it seems clear that the highway status of this part of Beoley Lane cannot be any different from the rest of Beoley Lane. Further, the inclosure award does refer to the whole of Beoley Lane at least in one place.

[29] Absent an 'all and every other persons' clause as per Craggs.

[94] “On the other hand, in any field of human endeavour, mistakes can be made, even if the greatest care has been, or should have been, taken … However, it is clear that nothing done or awarded by the commissioner could impinge on the highway status of Beoley Lane, so it does not appear to me overwhelmingly significant that its highway status was not described.

[12] “The mere fact that there are a fair number of other pieces of evidence all of which tend to point the other way does not of itself mean that the inclosure documentation is outweighed. Obviously, it is not a case of seeing which of the parties has identified more separate pieces of evidence. One piece of high quality, or convincing, evidence will frequently outweigh a large number of pieces of low, or weak, quality evidence. However, on this occasion, bearing in mind the quality of the various items of evidence pointing in favour of Beoley Lane being a public carriageway, I consider that they do outweigh the effect of the inclosure documentation. While the inclosure documentation does represent powerful evidence, it is not unequivocal, not least because the commissioner would not have been ultimately concerned with whether Beoley Lane was a public carriageway or not; as I have mentioned he would not have had the power on his own to discharge it from such status. In my view, the weight of the evidence the other way leads to the conclusion either that an error was made in the inclosure award and map, or that Beoley Lane became a public carriageway subsequent to 1824. If it needs to be decided, I incline to the view that the former alternative is correct.”

30. The courts have no difficulty with the concept that public rights can come into being on roads set out as private roads in inclosure awards.

31. In Commission for New Towns v. JJ Gallagher Ltd, Neuberger J:

    [123] “In my view, the weight of the evidence the other way leads to the conclusion either that an error was made in the inclosure award and map, or that Beoley Lane became a public carriageway subsequent to 1824.”

32. In Buckland v. Secretary of State for Environment [2000] 1WLR 1949, [2000] QBD CO/1682/1998, Kay J at p.1960:

    “Equally, I am satisfied that Mr Hobson is right when he submits that this lack of power does not prevent a way which is created pursuant to an award becoming a public highway.”

33. In R v. Westmark (1840) 2 M & Rob 304, on an indictment against inhabitants for not repairing a road, held that the inclosure award of 1784 stopped up any earlier public rights (well-argued to exist) and ‘created’ a private road. But that nothing in the inclosure process operated to prevent public rights being rededicated after the inclosure process had happened.

34. In R v. Bradfield (Inhabitants) (1874) 9 QB 552 and R v. Richards (1800) 3 TR 635, each case dealt with extensive public user of roads set out in awards as ‘non-public roads’, with a particular concern as to whether these roads became publicly repairable *ipso facto* by virtue of this public user.

35. Quite clearly, as a matter of law, an awarded private road can subsequently be dedicated as a public road, either expressly, or by virtue of long use by the public. This is a matter of evidence. In Bradfield, where the awarded road was set out as an 'occupation road', then the degree of public user should be 'more narrowly watched' than in the case of a way that had never been private.

36. In Richards the road at issue was set out in an inclosure award of 1795 as a private road. In 1799 or 1800 a jury at Bridgwater Assizes found that 'all persons' had used the road 'at their free will and pleasure' since the award, holding that the persons responsible for repair could be indicted for non-repair. Held on appeal: that the road's being set out as private barred any indictment against those responsible for the repair, no matter how many of these there were.

Pre-existing roads over inclosure award areas

37. In Harber v. Rand (1821) 9 Price 58, a local inclosure Act imported the provisions of the 1801 Act. A pre-existing public footpath was not stopped up according to the provisions in the Act, and was not set out by the inclosures commissioners as a road or way of any sort. On an action for trespass in breaking a close, held: the pre-existing status had not been extinguished:

    "Nothing short of an order of the magistrates expressly stopping up the road would satisfy the statute: merely not setting out a road is not sufficient to extinguish it, even in the case of a private road, bridle or footway."

38. In Logan v. Burton (1826) 5 B&C 513, a local inclosure Act imported the provisions of the 1801 Act. A pre-existing public footpath was not expressly stopped up according to the provisions in the Act, and was set out by the inclosures commissioners as a 'private foot way'. The pre-existing footpath continued across old inclosures, and no stopping up had been carried out here either. Held: the public right of way over both the old inclosures and the allotted land had not been stopped up. Bayley J explains the tension between ss.8 & 11 of the 1801 Act clearly:

    [196] "The eleventh section provides, that all roads, ways and paths which are not set out shall be for ever stopped up and extinguished, but that applies only to such roads as pass over the lands and grounds to be inclosed. Those ways which passed partly over lands to be inclosed, and also over other inclosures, are within the protection of the eighth section."

39. Bayley J also gives a short and clear indication as to how inclosure acts should be interpreted as regards highway closures:

    [195] "If the construction be doubtful, that construction should be adopted which, whilst it gives the greatest power to the commissioners, most effectually guards the rights of the public."

40. In Thackrah v. Seymour (1832) 1 C&M 18, an inclosure award of 1818 was made under a local Act importing, but modifying and attenuating, provisions of the 1801 act. An ancient footway [in this context, a footpath] was not mentioned

in the award. It ran from a public highway, across the wastes to be inclosed, then across old inclosures, and into another public highway. Did s.11 of the 1801 Act operate to stop up this footway across the wastelands that were newly inclosed?

41. It was contended that, because the local Act did not import the provision of s.8, the commissioners could stop up existing highways over old inclosures, but only with the consent of two Justices, and that the actions of the commissioners did amount to a stopping up. Held: it is not possible to suppose that the commissioners had this general power – where they are given such a power to stop up, it is only with the 'proviso 'of the consent of two Justices. On the facts of this case, the footway ran partly over wastes to inclosed and partly over old inclosures. The commissioners had no power as regards the old inclosures, and because they did not set out any new way over the wastes to be inclosed, "we are of the opinion that the old way still exists as it formerly did, over the waste lands, and over the old inclosures, into the public highway …"

42. In R v. Inhabitants of Hatfield (1835) 4 AD & E 156, held:

> "A road continued, as well as a road newly made, under the award of Commissioners of Inclosure, must be declared by the justices in Special Sessions to be fully completed and repaired, before the inhabitants of the district can be indicted for not repairing it."

43. Again, no contention that failure to meet the conditions of the acts and award as to forming and repair were in any way lethal to the road's public highway status.

44. In R v. Marquis of Downshire (1836) 4 AD & E 697, a local inclosure Act imported the provisions of the 1801 Act, and an award was made inclosing a waste adjoining old inclosures. Road A ran across old inclosures and "opened into" the waste, where it joined road B, an existing road, which formed a continuation. Road A was not stopped up by the commissioners (which stopping would need justices' approval) and road B had not been "set out or continued" by the commissioners. Held: because road A had never been stopped "as a consequence road B remained open also".

45. In R v. The Inhabitants of Cricklade St Sampson [1850] 14 QB 735, at p.283, an inclosure act of 1814 imported the provisions of the 1801 act, and led to an award being made that set out "one public bridle road and private carriage road" (the latter for named persons). Evidence showed that there had been a public bridleway on roughly the same alignment (same termini) before inclosure. No order of the Justices stopping the old bridle road was made. Held: the old road was not extinguished; the new bridle road 'continues' the old road, albeit somewhat realigned, and the width altered in places.

46. In R v. Inhabitants of East Hagbourne (1859) Bell 135, a publicly repairable highway was set out in an inclosure award of 1840, with some straightening and widening, but the "whole of the original road was comprehended in the existing road as set out in the award". The local Act incorporated the provisions of the 1801 Act. The commissioners never took steps to put the road into

repair, and there was no declaration of the Justices; further, it had never been 'adopted' per s.23 of the Highway Act 1835. Held: the parish was not liable to repair the road. There was no argument advanced that the absence of evidence that the road had been 'formed' in accordance with the acts and award in any way affected its public highway status.

47. In Williams v. Eyton (1859) 4 H&N 358, a local inclosure Act incorporated s.8 of the 1801 Act, and also provided in its s.19 that the inclosure commissioners were empowered to stop up old roads, under the conditions set out in s.8 of the 1801 Act, but not until such time as the new roads were 'properly formed'. Evidence showed that a gate had been placed across an 'old road' and kept locked, and that a justices' declaration existed to show that the new roads had been properly formed. There was no 'order' of the justices as to the stopping up to be found. Held: it might be presumed from the combination of facts that the justices' order stopping up the old road had been duly made.

48. Clearly, the courts required clear compliance with the terms of the acts where existing roads were to be stopped up – particularly where these roads continued beyond the edge of the lands subject to the Act and award. In only one case found has the court been content to presume the validity and compliance of the supposed stopping up, and in that case all the evidence pointed to the likelihood of a 'lost declaration'. The courts were keen to prevent culs de sac arising unless as the consequence of an intentional and properly executed decision of the commissioners. The public benefit of maintaining highways as thoroughfares was the courts' 'starting point'.

The Inclosure Act 1845

49. Late inclosure awards – mostly small in area and lacking in detail – were made under the general provisions of the "Act to facilitate the Inclosure and Improvement of Commons and Lands …. ", CAP CXVIII, of August 1845. This is now known by the short title of The Inclosure Act 1845. Essentially, this general Act empowered a board of inclosure commissioners to propose that certain parcels of land be inclosed (and these were scattered widely across England), and also set out general standard procedures that were then followed in each local award.

50. The application of the 1845 Act to a piece of land was brought about by "An Act to authorize the Inclosure of certain Lands". This is a very short General Act,[30] and it performs a function that would be done by a statutory instrument today: it contains a schedule of lands that the inclosure commissioners wished to inclose, authorised this to be done, and thereby applied the provisions of the 1845 Act to the lands listed. The crucial section in the 1845 Act is the "Power to alter Roads and Ways" in s.LX11 (62). This section gives the 'valuer' setting out the award quite wide powers. Before he allots the land, the valuer:

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[30] These Acts were bound in the annual volumes of Public General Acts.

"shall and may … set out and make public roads and ways, and widen public roads and ways and stop up, divert, or alter any of the roads or ways passing through the land to be inclosed, or through any old inclosures in the parish … and the soil of such of the roads and ways so to be discontinued and stopped up … shall be deemed part of the lands to be inclosed: Provided always, that nothing herein contained shall authorise the altering … of any turnpike road, unless the consent [of turnpike trustees] is obtained: provided also that before any public road or way shall be discontinued, diverted, stopped up, or altered by the Valuer [he] shall cause to be affixed at each end of such road … a notice … and the Valuer shall also cause the same notice to be given by advertisement for four successive weeks, and also on the church door on the four Sundays of the four successive weeks; and after the said several notices have been so given such road or way shall, from and after the day in such notice mentioned, be deemed to be discontinued, stopped up, diverted, or altered … subject to such appeal as is herein-after mentioned."

51. There is then set out an appeal process in s.LXIII (63) where a 'person aggrieved' could appeal to Quarter Sessions. S.LXII above appears to deal with the potential stopping up of public roads and ways, while s.LXVIII deals with 'private roads', giving the valuer a power to make and award private roads for the various occupiers. This section finishes: "… and after such setting out as aforesaid all private or occupation roads or ways over, through, and upon the lands to be inclosed which shall not be set out as aforesaid shall be for ever stopped up and extinguished".
52. This last means that any pre-existing private road is automatically extinguished unless set out again by the valuer in the new allotments. This requirement is absent from s.LXII, dealing with the public roads.
53. The wording of s.LXII gives the valuer the power to 'set out and make' public roads. The valuer cannot 'set out and make' a public road if such already exists as a made road, unless the provision automatically extinguishes any existing road not 're-set out and made'. Since this section does not have that automatic extinguishment provision – which the 'private roads' section does have – and since this section provides express elective powers to stop up public roads, and to divert parts of public roads, then the section indicates that existing public roads that were not expressly stopped up or diverted by the award remain in their status as before the award was made.

Tithe commutation records

This section refers to types of evidence discussed in:
Rights of Way Restoring the Record: Second Edition 2017
Tithe Records, p.73

1. ‘Tithing’ (a tenth part) historically was a means of taxing the produce of land for the upkeep of the established church. Tithing required that the appropriate quantity of produce of the land was handed over when harvested or gathered. Tithe commutation was a mandatory process to convert the value of produce into a money tax. The principal statute was the Tithe Act 1836,[31] and this was quickly amended by the Tithe Act 1837.[32]
2. The process of commutation involved commissioners who carried out surveys of the land, made plans identifying the different plots, valued the produce, and made schedules of the cash equivalents. The plans generally showed ‘roads’ and ‘tracks’, but were generally silent as to the public or private status of these. The schedules – ‘apportionments’ – sometimes differentiated public and private roads and tracks. Where ‘public roads’ were identified these documents are stronger inferential evidence than where the references were only to ‘roads’.
3. The courts have on occasions considered the degree of evidential weight that can be placed on tithe documents as to their showing ‘public roads’. The current view seems to be that simply depicting a road on a tithe map is a ‘piece of evidence’, but not of much weight alone (Norfolk v. Mason), but where ‘public roads’ are expressly identified in the tithe apportionment listings, this is of greater weight (Robinson Webster Holdings Ltd v. Agombar).
4. In Giffard v. Williams (1869) 38 LJ Ch 597. Held: that a tithe map and apportionment is a public document.
5. In Smith v. Lister (1895) 64 LJ QB 709. Held: (in that case) that a second-class map is evidence of the facts therein.
6. In A-G v. Antrobus [1905] 2 Ch 188. Held: that ascertaining if parts of the land to be surveyed are roads is a matter material to the preparation of the apportionment and map. Only matters in the apportionment and map that are within the scope and purview of the commissioners who made the documents can be pleaded in evidence. [But see, contra, Maltbridge below].
7. In Copestake v. West Sussex County Council [1910] Ch 567. (Headnote) A tithe map is not admissible as evidence of the extent of a public right of way, though it may be evidence that part of the land was not used at the time when the map was made for such purposes as to make it titheable. ‘Extent’ here

• [31] Full title: An Act for the Commutation of Tithes in England and Wales 1836.
• [32] Full title: An Act to amend an Act for the Commutation of Tithes in England and Wales 1837.

means physical extent as regards the width of the road, rather than the extent of status.

8. The court was dealing with the matter of the admissibility of a tithe plan in a particular matter, and not what that tithe plan actually showed (i.e. had it been admitted in the first place). Lord Parker simply barred the plan from being put in evidence at all. Before the Rights of Way Act 1932 (which provided the origin of what is now s.32) the courts were extremely restrictive about the admissibility of what we now call 'documentary evidence'. But s.32 has displaced that view, and this tribunal "shall" take account of the tithe plan, and give to it "weight … justified by the circumstances".

9. In Webb v. Eastleigh Borough Council [1925]. Held: that although tithe maps are admissible in evidence of the existence of a public highway, they are not good to prove the boundaries of such highways.

10. In Stoney v. Eastbourne Rural District Council [1927] 1 Ch 367. Held: that it was "going altogether too far and misreading the purpose [of the tithe map] to hold that just because a public highway was not shown in a tithe map, it did not exist". Further, that it is "contrary to common sense" to suggest that the tithe was not payable on the small strip of a public footpath across an arable or pasture field.

11. In Mertsham Manor Ltd. v. Coulsdon and Purley Urban District Council [1937] 2 KB 77, [1936] 2 All ER 422. Held: on the facts of the case that the tithe records in question showed roads not subject to tithe, but did not distinguish which were public and which private.

12. In Kent County Council v. Loughlin (1975) 235 EG 681, The Times 26 March 1975. (From a case note only):

    "On the questions whether a road was in existence and repairable by the inhabitants at large in 1835, the existence of a tithe map of later date which does not show the road at all is of the first importance, for a road was not titheable and accordingly the landowner would have been expected to insist on the road being shown. If such a map exists and there is no evidence that the road has at any time been repaired at public expense, the conclusion must be that it is a private street."

13. In Brand & Another v. Philip Lund (Consultants) Ltd (1989) Unreported. Ch 1985 B. No. 532. Judge Paul Baker QC (sitting as a Judge of the High Court):

    "The fourth map is the tithe map of 1843 … The map is not primarily a survey of roads, though they have to be shown on the map or the map would be unintelligible."

14. In Maltbridge Island Management Company v. Secretary of State for Environment and Hertfordshire County Council [1998] EWHC Admin 820 (31 July 1998), EGCS 134. Sullivan J dealt with tithe evidence and an Inspector's handling of this in paragraphs 45–60:

    [56] "The tithe map and apportionment evidence is undoubtedly relevant as to both the existence, and physical extent, of a way at the relevant time (see

the Benyon and Loughlin cases, and Sauvain). Because both public and private roads were not titheable, the mere fact that a road is shown on, or mentioned in, a tithe map or apportionment, is no indication as to whether it is public or private.

[57] “But if detailed analysis shows that even though he was not required to do so, the cartographer, or the compiler of this particular map and apportionment, did in fact treat public and private roads differently, whether by use of different colours, the use or non-use of plot numbers, or other symbols, or in schedules or listings, I do not see why evidence based upon such analysis should not be admissible as to the existence, or non-existence of public rights of way. Whether the analysis does lead to such a conclusion, and if so, what weight should be attributed to the conclusion is a matter for the Inspector. Since it was not one of the purposes of the 1836 Act to distinguish between public and private roads, such information as can be derived from the tithe map and apportionment cannot be conclusive, and must by its very nature be tentative …”

15. In Robinson Webster Holdings Ltd. v. Agombar [2001] Ch D HC 000095, 9 April 2001, [2002] 1 P & CR 20. Etherton J:

[44] “A linen tithe map of 1875 for Colerne shows the Blue Land coloured the same as all the other principal roads in the area, including Thickwood Lane. The Blue Land and those other roads are shown numbered 1158 on the map. In the tithe apportionment schedule accompanying the 1875 Colerne Tithe Award, the roads designated no. 1158 are shown as being in the occupation of “Parish Officers”. This is important evidence. On the face of it, this is evidence that in 1875 the Blue Land was a public highway within the responsibility of the parish officers. This could only be on the basis that the Blue Land was dedicated and adopted following the Highways Act 1835 or, alternatively, had been the responsibility of the parish officers since before the coming into force of that Act. In the latter case, the parish officers would only have assumed responsibility if there had been evidence of dedication and acceptance of the road by the public.

[45] “Tithe maps are admissible in evidence to prove the existence of a highway: Kent County Council v. Loughlin [1975] 234 EG 68 1. Roads generally, whether public or private, were not titheable, and so tithe maps are generally relevant only to proving the existence of a road at a particular time rather than its status. … The map and schedule clearly show the Blue Land was then in the occupation of the parish officers. It is that fact, rather than the issue of whether the Blue Land or the surrounding land were titheable, that is significant. In this connection, it must be borne in mind that tithe maps are public documents and that the Commissioners, under whose authority and control the tithe map was prepared, had power to examine witnesses on oath.”

16. In Commission for New Towns and Worcestershire County Council v. JJ Gallagher Ltd [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3, [2003] 01 EG 67 (CS), Neuberger J dealing with tithe records:

    [98–100] “I turn to the tithe maps. There is a marked difference between the Studley tithe map and the Beoley tithe map. The Beoley tithe map shows the northern section of Beoley Lane as an enclosed route on which no tithe rent-charge was apportioned. Accordingly, it follows that Beoley Lane was treated as having highway status in this tithe map. However, I do not consider that the tithe map takes matters further, at least on its own, …”

17. In Norfolk County Council v. Mason [2004] EWHC B1 (Ch) (12 January 2004). Cooke J, case heard from 10–14 November 2003, no approved transcript.

    [79] “It is common ground

    “(i). That these documents show The Road grouped together with others in the acreage of public roads

    “(ii) That the Commissioners ’duty did not involve identifying the status of roads

    “(iii). That the Map is a second-class map – conclusive on titheability but not anything else.

    [80] “As a matter of legal principle (Sauvain 2–72) tithe maps are admissible to show the existence of the road but are not evidence of the status there recorded however on recent authority (Trevelyan v. Secretary of State for the Environment, Transport and the Regions [2000] QBD CO/2206/99, 24 January 2000, The Times 22 March 2000; and Maltbridge v. SoS 1998 EGCS 134) it has been held that if the evidence shows that the cartographer did in fact treat public and private roads differently then such evidence ought to be admissible to show the existence/non existence of public rights. It is a matter of weight and degree in each case. In fact the Judge in the latter case went on to remind himself that because of the purpose of the tithe map the information could not be regarded as conclusive.”

Finance Act 1910: roads ‘coloured-out’ on valuation plans

This section refers to types of evidence discussed in:
Rights of Way Restoring the Record: Second Edition 2017
Inland Revenue Valuation Records, p.184

1. The ‘Instructions to Valuers’ for the making of the statutory plans for 1910 Act valuations indicate why some roads were ‘coloured-out’ of adjoining plots, but these have to be read against the provisions in the Act.

The statutory duty to value all land

2. The Finance Act 1910[33] was intended to bring about a new ‘land tax’, to pay in part for widespread social reforms. The principal taxation was levied on the incremental increase in land value, compared to the value immediately after commencement. This required a detailed national survey such that all land was valued and details of ownership of each plot were recorded by and for the Inland Revenue. S.1 of the Act required “… there shall be charged … on any land a duty”. S.26(1) required:

   > “The commissioners shall, as soon as may be after the passing of this Act, cause a valuation to be made of all land in the United Kingdom … Each piece of land which is under separate occupation, and, if the owner so requires, any part of any land which is under separate occupation, shall be separately valued …”

3. The Act therefore requires all land to be valued. There is no exemption or exception from valuation for ‘roads’ because of the presumption that the owner of land immediately to the side owned the subsoil up to the centre line.
4. Once valued, some land attracted special treatment, e.g. railways, and by s.35(1):

   > “No duty under this part of the Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority … and any increment value duty in respect of any such land …[shall] be deemed to have been paid.”

5. A highway authority was a rating authority, and held the surface of highways in a limited freehold, but the adjoining landowner presumptively owned the subsoil, and this was i) valued, and ii) subject to duty if sold. The highway authority anyway owned no interest in highway soil that it could sell. Nowhere does the Act expressly state, or suggest, that roads, or public highways, or any type thereof, should not be valued.

[33] Strictly the Finance Act (1909–10) 1910.

How the national survey worked

6. The Act was commenced on 29 April 1910. The work was done by ‘valuers’ employed by the Inland Revenue (who, one might reasonably surmise, would not have been recruited until after commencement, as there would have been no financial appropriation to pay them) and these received a comprehensive set of ‘Instructions to Valuers’ in the form of a booklet roughly A5 in size containing some 225 numbered instructions on what was plainly envisaged as the full spectrum of situations that a valuer might face. The cover of this volume is dated 31 December 1910. This set of instructions includes:

7. Instruction No. 157: “All land in the district to be recorded on plans – when all the boundaries have been identified and plotted on to the record plans, care must be taken to see that all property within the limits of the valuer’s district has been recorded.” This is consistent with s.26 of the Act: “… all land … to be valued.”

8. Instruction No. 150: “Boundaries of units of valuation to be shown on plans - the valuer will mark with a pink border upon the record plans the boundaries of each property or part of a property to be separately valued – i.e. each valuation unit will be shown upon the record plans by means of a pink border. Detached portions should be braced together, and parts should be numbered as parts. In cases where it is found advisable green may be used as a second colour for marking these boundaries.” Again, this is clearly consistent with s.26, “… each piece of land which is under separate occupation … shall be separately valued …”

9. Instruction No.148: “Record Plans to be complete – Thus the whole area of each district must be shown on a set of Ordnance sheets to be known as the record plans.” How did the valuers know where to draw the boundaries of valuation units? Simple. They asked the landowners. Landowners were served with a standard form (Form 4 - Land) “Return to be made by an owner of land …” on which the landowners had to furnish comprehensive details of their holdings. Did landowners make true returns? S.94 of the Act provides that any person making a false return for the purpose of obtaining any advantage regarding the duty payable could get up to six months in prison with hard labour.

10. Four issues arise and are dealt with in those Instructions:

    • ‘All land’ is to be recorded.

    • Split plots are to be braced together (which is commonplace across coloured-out roads).

    • Boundaries of each valuation unit will be shown in pink (which is visible standard practice nationally, with the occasional use of green as envisaged).

    • These boundaries were specified by the landowner in his statutory ‘owner’s return’, with the valuer checking if the information was not clear. It is reasonable to assume, in the circumstances and potential penalties, that the landowners knew, and correctly stated, the boundaries of their land.

Does the survey identify public roads?

11. Nothing in this set of instructions expressly indicates that the coloured-out roads are public roads, but the later Instruction to Valuers No. 560 (28 February 1911) does.

> "Deduction of value attributable to appropriate of land for streets
>
> "In normal cases the ownership of land abutting upon a road carries with it the ownership of half of the adjoining roadway, subject to the rights of the public, and in such cases the unit of valuation is the land abutting upon the roadway plus half the site of such roadway and, under such circumstances, no deduction falls to be made under Section 25(4)(c) because there is no part of the total value of the whole proved to be directly attributable to the appropriation of land for the purposes of the street.
>
> "Although the unit of valuation includes half the site of the adjoining roadway the area recorded on the record plan should continue to be exclusive of the site of the external roadways, and the area to be inserted in the valuation book should be computed accordingly.[34]
>
> "In any case where, having regard to local custom, it is usual to compute the area by including a portion of the site of external roadways, upon the demand of any owner a statement may be made in the 'remarks' column of the valuation book and also on forms 36 and 37 …"

12. Instruction No. 560 clearly concerns valuing land abutting existing public roads, and Instruction No. 735, 'Construction of roads', seems to buttress this approach by the chief valuer:

> "Where land, forming one unit of valuation has subsequently been developed by the construction or laying out of roads for the use of the public, and an occasion arises in respect of part of the unit, it becomes necessary to prepare and serve an apportionment of site value. Unless the site of the roads is reserved by the vendor or lessor, half the width of the adjacent road or roads to which it has a frontage should be considered as being included with each unit in the apportionment."

13. Note that this Instruction again deals only with roads "for the use of the public" and no reference is made here, or in any other instruction found (and all volumes found have been examined), to a road newly set out as a 'private road'.

14. Four further issues arise, based on actual experience of researching Finance Act records:

15. (Issue 1) Nothing in the Act or Instructions to Valuers states that these coloured-out public roads are vehicular roads – they could be merely footpaths because a 'public road' does envisage a 'public foot road' – but the Finance Act

• _____

[34] This accords with the maxim *ad medium filum viae*. Each streetward landowner is presumed to own the soil of a highway, or a private way abutting land, up to the centre line.

processes typically deal with footpaths, bridleways and easements by way of value deduction from the valuation unit as a whole, recorded in the field books, and not by delineating the road from the unit of valuation. Remember that the delineation is done to indicate boundaries of units of valuation. It could be that 'public roads that are no more than bridleways or footpaths' were coloured out and valued in accordance with Instruction No. 560. Other evidence would be necessary to establish status in any case, but width and location would be factors (e.g. narrow ginnels in towns).

16. (Issue 2) Some roads are shown coloured out that are not delineated from the adjoining plots by hard inclosures. The Act and the Instructions are concerned with 'boundaries'. Boundaries do not have to be fences or walls.[35] They could equally well be the ditches made when setting out roads under inclosure awards, or the outside edge of verges, or be marked by bounder stones, or be a measurement from a centre-line or other datum. These less-substantial boundaries generally do not lead to colouring out on Finance Act plans.
17. (Issue 3) Similarly, some roads, which were in 1911 demonstrably public roads, are not coloured out. There are no mapped physical boundaries to either side and – obviously – none inside the road. Experience indicates that these were, almost always, in 1911 unenclosed public roads, often with a rudimentary surfacing, if any. Many such uninclosed roads in countryside were recorded as 'unclassified roads' by the county councils after 1929 and are still on the list of streets. Valuing the subsoil of these roads in with the whole unit of valuation crossed would have yielded the same value against the owner's name as for an adjoining roadway under Instruction No. 560.
18. (Issue 4) Across the country some dead-end roads are coloured out, and there is a balance of case evidence that suggests that these never served any purpose other than providing access to the fields leading off them. Experience of examples of this type suggest that where an inclosed 'occupation road' served as access to a number of fields/units, it was sometimes treated in the same way as a public road for valuation purposes. Similarly, examples are known of thoroughfare roads 'coloured out', where present day research indicates these were inclosure roads awarded for the use of a 'bundle' of owners of allotments. These roads do/did have firm boundaries (usually hedges) and, where, for example, they originate from an inclosure award, no one allotment would be given 'ownership'. Again, the way these were handled in the valuation process sits with Instruction No. 560, although that Instruction does not mention private roads.

The view of the courts

19. In Maltbridge Island Management Company v. Secretary of State for Environment and Hertfordshire County Council [1998] EWHC Admin 820 (31

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[35] For example, former turnpike roads over the Wiltshire Downs still are uninclosed except by their original ditches, and are coloured out on the Finance Act plans.

July 1998), EGCS 134, the court considered a 'coloured out' road, and had in mind Instruction No. 560. In the view of Sullivan J the Finance Act evidence was "corroborative" rather than of significant weight on its own.

20. In Robinson Webster Holdings Ltd v. Agombar [2001] Ch D HC 000095, 9 April 2001, [2002] 1 P & CR 20, Etherton J accords more weight to a 'coloured out' road:

    [46] "… The 1910 Finance Act map and schedule show the Blue Land, as also Thickwood Lane and other principal roads in the area, as untaxed public roads.

    [47] "The 1910 Finance Act map and schedule are, in my judgment, most material evidence in relation to the status of the Blue Land at that time."

21. In Fortune & Others v. Wiltshire Council & Taylor Wimpey [2010] EWHC B33 (Ch), McCahill J:

    [80] "Mr Mould submitted, correctly in our judgment, that the treatment of the disputed section of Rowden Lane on the Finance Act map shows very clearly that it was regarded at that time as a highway. [126(xxii)] The 1910 Finance Act is strongly supportive of Sections A and B as a wholly untaxed public vehicular highway, as opposed to a private road subject to deduction for minor highway rights."

22. In Fortune v. Wiltshire Council [2012] EWCA Civ 334, [2013] 1 WLR 808, Lewison LJ:

    "[71] The consensus of opinion, therefore, is that the fact that a road is uncoloured on a Finance Act map raises a strong possibility or points strongly towards the conclusion that the road in question was viewed as a public highway.[36] The Planning Inspectorate Consistency Guidelines suggest that such a highway was normally a vehicular highway, although Mr Braham warns that if viewed in isolation, the lack of colouring leaves open the question whether the highway in question was no more than a bridleway. In addition, different treatment was given to fenced and unfenced highways."

The view of Consistency Guidelines (Final Revision April 2016)

Exclusion of a route on the map record

[11.7] "… It is possible, but by no means certain, that this is related to s.35(1) of the Act: No duty under this part of the Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority."

23. As set out above the highway authority generally holds no alienable freehold in a highway, and so the payment of duty is a non-issue anyway.

    [11.7] "So if a route in dispute is external to any numbered hereditament, there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually

[36] This is almost word-for-word what Consistency Guidelines says.

dealt with by deductions recorded in the forms and Field Books; however, there may be other reasons to explain its exclusion."

24. 'Strong possibility' is not a proper assessment. It is a matter of probability founded on the provisions of the statute. It is probable that a coloured-out road was so treated because it was regarded to be a public road.

    [11.7] "… however there may be other reasons to explain its exclusion".

25. There may be, but absent in any particular case evidence that there are, and what those reasons are, the presumption rests in favour of the reputation as a public highway.

    [11.7] "… Instructions issued by the Inland Revenue to Valuers in the field deal with the exclusion of 'roadways' from plans, but do not explicitly spell out all the circumstances in which such an exclusion would apply."

26. The Instructions to Valuers spell out all the circumstances under which the Act provides for "exclusion of roadways from plans". Those are the only "circumstances in which such an exclusion would apply". It is just conjecture to qualify what is statutorily specified by reference to unspecified non-statutory circumstances that may, or may not, apply. In any particular case there may be evidence that the valuers departed from their statutory remit. Absent such evidence the presumption is that they did their job in compliance with the Act and Instructions.

    [11.9] "It should not be assumed that the existence of public carriageway rights is the only explanation for the exclusion of a route from adjacent hereditaments although this may be a strong possibility, depending on the circumstances."

27. Depending on what circumstances? The proper way to weigh this type of evidence is to take a coloured-out road as being presumptively indicative of a public highway, and then as a public vehicular highway. This is inferential evidence to be considered along with all the other evidence (which may, in the end, outweigh it) but the starting point is that a coloured-out road is a piece of evidence in favour of public highway status, and that status is more probably vehicular than bridleway only.

Railways: highways and roads affected by proposed railways

This section refers to types of evidence discussed in:
Rights of Way Restoring the Record: Second Edition 2017
Railway and Canal Records, p.93

1. When railways were built in the nineteenth century most crossed existing highways and private roads. Sometimes these were diverted, but in general they were bridged, with some 'crossed on the level'. Not all proposed railways were built, but the plans and reference books are anyway strong inferential evidence of reputation of the roads mapped and described. It is straightforward to see roads, bridleways and footpaths on the plans where these are not now recorded, or even visibly in existence. To understand the evidential value of what is mapped it is necessary to understand the legal framework in which the proposal documents were made.
2. Until the coming-into-force of the Railway Clauses Consolidation Act 1845[37] each special Act for the making of a particular railway used either or both unique clauses or inserted specimen clauses (after the early days of railways this latter seems to have been the standard practice).
3. The Railway Clauses Consolidation Act 1845 brought together earlier good practice and proven provisions, and set out that the whole Act could be imported into future special Acts,[38] albeit with a degree of flexibility available. The Railway Clauses Consolidation Act provides that the whole Act may be incorporated into a special Act, with the special Act's preamble specifying this incorporation. The 1845 clauses and provisions would be imported "save so far as they shall be expressly varied or excepted", and the special Act is to be construed accordingly.

Making and deposit of plans, sections, and books of reference

4. It is a misconception that the process of making a railway required that the special Act be made first, followed by surveys, followed by the making of the line. Even before 1845, and certainly after, the process was that the railway company carried out surveys of the proposed route, encompassing 'limits of variation' on the line, to allow for later local difficulties. The plans also had cross-sections, sometimes not only of the gradients, but also showing details of where and how roads were to be crossed.

[37] A short title by which it was referenced in other Acts of Parliament. The full title was: An Act for consolidating in one Act certain provisions usually inserted in Acts authorising the making of railways, 8 May 1845.
[38] The Railway Clauses Consolidation Act provides that each Act for a particular proposed railway will be known as a 'special Act'.

5. The plans were accompanied by ‘books of reference’, listing the plot numbers on the plan, landowners, parishes, roads (public and private), canals, and various other features. For public roads, bridleways, and footpaths the ‘owners’ was usually the Surveyor of Highways, either solo or listed together with the owner of the subsoil.
6. The plans and books of reference once made were deposited with the Clerks of the Peace for the places crossed by the proposed railway, and a notice to this effect was put into the *London Gazette* indicating that the railway company intended to pursue a bill through Parliament. The Clerk of the Peace was the senior officer for the Justices of the Peace, and oversaw highways matters (such as diversions and obstructions) at that time. The railway processes for e.g. diverting bridleways, or crossing these on the level, demanded the engagement of, and consent of, Justices of the Peace.
7. The deposit process also required that the area-relevant plans, sections, and books of reference be deposited with the clerks of the parishes crossed by the proposed railway. The parishes were the highway authority at this time as regards maintenance and nuisance.
8. The *London Gazette* notices listed the parishes and townships affected by the proposal, and specified the dates by which the plans and sections had to be put on deposit for inspection. From experience these dates match the dates stamped on to the plans and sections held in public record offices as ‘public deposited documents’. The *London Gazette* notices are online in the *London Gazette* archive, and can be found by working backwards from the date of a special Act, using a ‘word search’ from the title of that Act, or from the list of parishes to be crossed.
9. The special Act specified that the validity of the provisions in that Act were conditional upon the plans deposit having been made, and stated that deposit had taken place. The special Act then gave the railway company the power to make railways in accordance with the deposited plans. There was no further stage in the process. The special Act was made on the basis of the information in the deposited plans and sections, as accepted by Parliament. The first spade could go into the ground on the day of ‘commencement’ (which was the date of Royal Assent).

The Railway Clauses Consolidation Act 1845

10. Where a special Act incorporated the Railway Clauses Consolidation Act 1845, s.6 of the Act then provided that the provisions of that Act, and of the Land Clauses Consolidation Act 1845, would apply to the construction of the railway. The building of the railway could only be carried out in accordance with the plans and books of reference, unless ‘errors and omissions in plans’ were first corrected (s.7) requiring the Justices’ consent, and further deposit with the Clerks of the Peace.
11. The ‘limit of variation’ on the line of the railway on the plan allowed only the lateral variation of the line (s.15). It did not allow, e.g. the substitution of a

bridge for a proposed level crossing without the prior approval of Parliament. S.8 states that "all such alterations from the original plan and section" shall be approved by Parliament before the work commences. This provision is a powerful incentive to get right first time fundamental matters such as the interference of the railway with public roads, and raises a strong inference that the surveyed and listed status of roads, and the type of roads crossings, were correct.

12. S.9 provides that the plans and sections of alterations approved by Parliament had to go to the Clerks of the Peace and be available for inspection.
13. Ss.9 & 10 deal with the process for the variation of the levels of the railway. Small variations demand 'highway authority' consent; bigger variations demand public notices and, potentially, Board of Trade consent.
14. The Railway Clauses Consolidation Act has a part, "Crossing of Roads, and Construction of Bridges", starting at s.46, which section provides:
15. "If the line of the railway cross any turnpike road or public highway, then, (except where otherwise provided by the special Act) either such road shall be carried over the railway, or the railway shall be carried over such road, by means of a bridge of the height and width and with the ascent or descent by this or the special Act in that behalf provided; … provided always, that, with the consent of two or more justices in petty sessions, as after mentioned, it shall be lawful for the company to carry the railway across any highway, other than a public carriage road, on the level."
16. In Dartford Rural District Council v. Bexley Heath Railway Company [1898] HL 210, the House of Lords considered the scope of the railway Acts to require, or empower, the crossing of footpaths [and by extension bridleways] by means of bridges, rather than at-grade crossings. By a special Act of 1883 the Bexley Heath Railway Company was authorised to build a railway which crossed a public footpath in the area of Dartford Rural District Council. The special Act imported the provisions of the Railway Clauses Consolidation Act. The special Act contained no provisions regarding the crossing of footpaths. Held: that unless the special Act contains a provision for bridging footpaths (and bridleways), and thus engages s.46 of the Railway Clauses Consolidation Act, these highways shall be crossed on the level. Thus absent such a provision in the special Act 'highways' to be bridged over or under the railway are turnpike roads or public carriage roads.
17. It will be a comparative rarity to find a provision in a special Act to bridge a footpath or bridleways over or under the railway. These paths would predominantly be taken across on the level.

Private roads, and coincident public footpaths and bridleways

18. What of 'private roads' as are provided for in s.49? Well, s.46 of the Railway Clauses Consolidation Act is not concerned with 'private roads'. It is concerned only with 'turnpike roads and public highways'. The same is true of ss.47 & 48. 'Private roads' are not highways. The crossing of a private road is essentially a

matter between the owner of the road and the railway company, with Railway Clauses Consolidation Act 1845 providing a default specification that a 'private road' crossing must have a width of 12 feet for the road, with a height (head clearance) stipulation for a 'private carriage road'. The special Act could (but study yields no examples) provide for narrower or wider private road bridges.

19. What of the situation where a public footpath, or a public bridleway, runs along a 'private road'? Does the public right of way simply follow the private road if that is bridged across the railway? No, because s.46 applies to footpaths and bridleways (because those are public highways) only if an express provision in the special Act causes this to be so. There is no provision that a public footpath or highway that happens to be coincident on a 'private road' is somehow excluded from, exempted from, or pulled out of, the provisions in s.46, which are there to protect the public's interests in the enjoyment of the highway.

20. Simply, the special Act would have to list and specify a footpath or bridleway bridge, which might be a twelve-foot-wide private road bridge, if that was thought sufficient for the highway purpose. It would be open to the railway company to list and specify a wider bridge (arguably even a narrower bridge) if that was thought desirable. A 'private road' in s.49 is just that: a bare private road without any coexistent public highway.[39]

The railway Acts in current guidance

21. In Consistency Guidelines (Final Revision April 2016):

    "Dartford Rural District Council v. Bexley Heath Railway Company [1898] HL 210: The 1845 Act does not impose a duty upon a railway company to carry a footpath over the railway or the railway over the footpath by means of a bridge." Correct as far as it goes, but on a proper construction the Dartford case provides far more clarification than this note suggests.

    [10.3] "The process for the authorisation of railway schemes provided for scrutiny of the plans by involved parties. Landowners would not have wished unnecessarily to cede ownership, Highway Authorities would not have wanted to take on unwarranted maintenance responsibilities, and Parish Councils would not have wished their parishioners to lose rights. Therefore an entry in the book of reference that a way was in the ownership of the 'Surveyor of Highways' may be persuasive evidence of a public right of some description. However, the weight to be given to this can only be determined when it is considered alongside all the other evidence. There may be reputable evidence to rebut it such as a deed, conveyance or local map."

22. Why "may be persuasive evidence"? It is evidence; the question is what weight should be given to it? See below.

[39] Experience indicates that there are many non-compliant occupation road bridges carrying public paths. It is not obvious how this can be reconciled with the Act.

[10.4] “Where schemes were not completed, the plans were still produced to form the basis for legislation and were still in the public domain. Whilst they are likely to provide useful topographical details, they may not be as reliable as those that have passed through the whole parliamentary process. As above, the weight to be attached will need to be determined alongside all the other available evidence.”

23. This is misleading. The plans and sections that were deposited, and which formed the basis of Bills, which in turn became special Acts, did pass through the whole required process. Once a special Act was passed, there was no further ‘parliamentary process’ left. If the railway was not built then it might be said that it was always open to a party to seek rectification or revision, or variation, of any of the road-crossing provisions on that railway. That is true, but it remains the case that the parliamentary process leading to the special Act was predicated upon, and itself ratified, the accuracy of the surveys, plans and sections. If a Bill went before parliament, but did not become the special Act sought, then it is appropriate to be more cautious about the degree of scrutiny accorded to the proposals. Equally, parliament in that era did not have the scrutiny committee system of today, and the railway Bills passed through the whole process quickly. In practice it was the railway scheme itself, and locally the route taken, that was scrutinised, rather than the detail of road crossings.

[10.5] “Railway plans and cross-sections usually differentiate between public and private roads. Where this is not the case and the route is described as ‘road ’in the book of reference, it is sometimes possible to establish the nature of the way by reference to the description of other roads”.

24. If there is a ‘road ’shown and scheduled in the railway plans and books of reference, then the owner would normally be listed. There will (except in uncommon circumstances) be a reference to how that road is to be crossed. It is the crossing details that generally point to the status of the road.

[10.5] “… the minimum width for bridges carrying roads over the railway in the 1845 Act (section 50) is … 12 feet (3.66 metres) for private roads. However, caution needs to be exercised regarding the latter as some high status estate roads had wider bridges …”

25. If a bridge is a “high status estate road bridge” then it will not be listed on the railway plans, sections, and books of reference, as any sort of public highway. Such “high status estate road bridges” should be self-evident in the proposal papers.

[10.5] “There were no specified widths for bridleways or footpaths.”

26. That is correct, but it is misleading. There were no ‘specified widths for bridleways or footpaths’ because this part of the Act does not apply to bridleways or footpaths unless such are specified in the special Act, and such specification would express the width.

[10.6] “The status of a way had an impact on the cost of the scheme and it is unlikely that railway plans would show a route at a higher status than was actually the case. There was no obligation to bridge footpaths under the

1845 Act and, as a general rule, unless there is specific provision in the Special Act, any public route requiring a bridge is of at least bridleway status."

27. This is simply wrong. As, not 'a', but rather 'the', general rule (per the Dartford case) that unless there was express provision in the special Act, then a public bridleway could not be bridged; rather it would be crossed on the level with the consent of the justices: that was the 'general rule'.

Evidential weight and presumptions

28. The Highways Act 1980, s.32, provides:

    "A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced."

29. Railway plans, sections, and books of reference, fall within the provisions of s.32 and should be assessed and given weight as evidence accordingly. It needs to be remembered that the purpose for which these documents were made was the promotion of a Bill through Parliament for the making of a special Act to allow the building, without more, of the railway so surveyed.

30. Most special Acts for railways (from study) had a final clause, "And be it enacted, that this Act shall be a public Act, and shall be judicially taken notice of". The Railway Clauses Consolidation Act 1845 was a public general Act. Any document made for, or by, or from, or under the provisions of, a public Act, cannot lightly be discounted as evidence.

31. There may be locations within the scope of any special Act where it can be shown, from other status-express evidence, that the status ascribed to any road in railway surveys was and is wrong, but given the express parliamentary purpose of the railway surveys, this contrary evidence would need to be strong enough to displace a starting position that the railway surveys were correct.

Turnpike roads

This section refers to types of evidence discussed in:
Rights of Way Restoring the Record: Second Edition 2017
Turnpike Records, p.41

1. The process of turnpiking roads was part of economic and social reforms from the mid-seventeenth century to the last quarter of the eighteenth century. Essentially local landowners came together to promote a local Act of Parliament under which they could raise money to improve a road, or roads, and then charge the public a toll for use, whereby they could recoup their outlay. Some schemes were very successful, but a few failed early on.
2. The process of surveying the roads proposed to be made into turnpikes usually produced a linear plan of the road, showing junctions (often with named destinations) and places where a ‘new road’ was proposed to replace an ‘old road’. It is this snapshot of the existing roads, together with how the local Act treats the parts to be superseded, that can provide strongly inferential evidence about the old parts.
3. Turnpike roads were highways, at least for the duration of the Act of Parliament applying to the road. A turnpike road was not necessarily the same as a toll road. Historically a toll road (or bridge) was generally privately owned, and the public’s use permissive, on payment of a toll charge. A turnpike road was generally a pre-existing public road made subject to an Act of Parliament so that tolls could be levied for the repayment of private monies spent on improvement and maintenance.
4. A few turnpikes were completely new roads, and these might cease as highways on expiry of the turnpike’s Act of Parliament. Most turnpikes were existing important public roads over long distances. A turnpike scheme might apply to only a part of the existing road, might create new and better lengths within an existing road, and there might be a number of different turnpike schemes along the length of a major highway.
5. Turnpike Acts of Parliament did not change the status of an existing highway. Where the Act set out tolls to be charged for, e.g. carriages, this is a strong indication that the existing road being turnpiked was already a public road for carriages.
6. Most turnpike roads ended up as part of the network of main roads in the care of the county councils consequent on the provisions in the Highways and Locomotives Act 1878, and the Local Government Act 1888.
7. Roads existing before 1836, that had been turnpiked, reverted to being ordinary parish roads when the turnpike Act of Parliament expired, unless this was renewed. If the road did not exist before 1836, and a later turnpike expired, then the road did not revert to being repairable by the inhabitants/parish. See:

R v. Thomas (1857) JP October 17 1857 661, and Cababe v. Walton-Upon-Thames District Council [1912] CA 481.

8. If a road existing before 1836 was turnpiked, and had new sections inserted along its run, then the whole road again became a parish road if the Act expired.
9. In general, a public road that became turnpiked was still a public road where the inhabitants/parish could be presented or indicted and made to repair the road to a general standard for the area. See: R v. Inhabitants of Edge Lane (1836) 4 AD & E 721; R v. Inhabitants of Lordsmere (1850) 15 QB 689; R v. Inhabitants of Parish of Steventon (1843) 1 C&K 54; R v. Inhabitants of St George, Hanover Square (1812) 3 Camp 222; R v. Netherthong (1818) 2 B & Ald 179.
10. A turnpike Act could 'abandon' an earlier turnpike in favour of a better alignment. Usually the abandoned part would simply revert to being an ordinary parish road, but the terms of the later Act need to be examined.
11. A turnpike Act providing a better alternative route to an existing road would normally contain provisions for the extinguishment of the older route. This was usually a power for the turnpike trustees to ask the Justices of the Peace to stop up the route. Less frequently the Act itself expressly stopped up specified roads.
12. Most often where a turnpike 'cut corners off', and replaced short sections along the route, there was no stopping up carried out. The old sections remained as the parish roads that they were previously. There is no presumption of these sections being stopped up simply because a power to stop up existed. See: Dawes v. Hawkins [1860] 8 CB (NS) 848, 141 ER 1399; Harber v. Rand (1821) 9 Price 58.

Quarter Sessions: highway cases as evidence of status

The role of justices of the peace in ensuring the proper repair of highways 1555–1773, 1774–1835, 1835–1959

This section refers to types of evidence discussed in:
Rights of Way Restoring the Record: Second Edition 2017
Quarter Session Records, p.127

1. Records from the Quarter Sessions can provide clear and direct evidence about the existence and status of public roads at a particular point in time. The cases heard by Justices of the Peace included stopping up, widening, diversion, obstruction (nuisance) and, most often, a road being out of repair.
2. This section focuses on the situation 1774–1835, and post-1835, regarding the use of presentment and indictment, and where the justices made orders directing that repair be done. Only the Highways Acts dealing with general repair issues are listed here.
3. Presentment: a formal presentation of information to a court, especially by a sworn jury regarding an offence or other matter.
4. Indictment: a formal document setting out all criminal charges against the defendant to be tried.
5. In the period between the Highways Acts of 1773[40] and 1835 where a highway was found by the justices in 'Special (Highway) Sessions' to be out of repair, then the justices did not make an 'order' for repair. There would only be an order where a number of roads were out of repair and one or more needed to be prioritised. 'One road, one order' was first introduced by the Act of 1835. There may, though, be a surviving record that the proceedings happened, and the context. If proceedings happened that is itself evidential as to the status of the road concerned.
6. Next below is a short note about, or extract from, the four Acts preceding the 1773 Act. The 1767 Act is, in key matters that are relevant here, the foundation of the 1773 Act.[41] Some of these extracts are transcribed from the original Acts and other parts are taken from OCR scans of the Acts.

[40] Similarly, before 1773 no 'order' was made consequent upon a presentment. The 1773 Act sets out a more formalised process.
[41] This list leaves out the revoked 1654 Commonwealth Parliament's 'An Ordinance for Better Amending and Keeping in Repair the Common Highwaies within this Nation'. It has been suggested by commentators that this was a major improvement on what went before, and a significant influence on what came after.

1555. 2&3 Ph. & M. CAP. VIII FOR amending of Highways, being now both every noisom and tedious to travel in, and dangerous to all Passengers and Carriages

7. The first ‘proper Highways Act’. Put the burden of repair of the highways on to the individual parishes. Introduced the post of Surveyor of Highways.

   1562. 5 Eliz. Ic. 13 An Act for the Continuance of the Statute made 2 & 3 P. & M. for the Amendment of Highways

8. Gave the Justices of (the) Peace at Quarter Sessions the power to investigate and punish supervisors in cases where they did not carry out their duties properly, imposing “such fines … as shall be thought meet”.

   1691. An Act for the better repairing and amending the Highways and for settling the Rates of Carriage of Goods.

9. S.8 “That the Justices of the Peace of every County shall in their respective Divisions once in four months hold a special Sessions and shall thereunto summon all the Surveyors of the Highways within that Division to come before them and shall give them a charge to do their duty and declare to them what they are obliged to do by virtue of this or any former Act after which the said Surveyors of the Highways shall make a Presentment to them upon Oath … of the state and condition of the Highways within their respective Parishes Townes Villages Hamlets Precincts or Tythings for which they are appointed Surveyors …”

   1767. An Act to explain, amend, and reduce into one Act of Parliament, the several Statutes now in being for the Amendment and Preservation of the Publick Highways of this Kingdom; and for other Purposes therein mentioned.

10. S.8 The Surveyor of Highways is to “take a view of the state and condition of the roads and highways within his district … (for nuisances, etc) wherein he is to give notice to the parties to remove … (or do it himself and charge) and if not paid on demand, to be levied by warrant of a justice”.

11. S.15 “… every … Justice of the Peace … upon his or their own View … to make Presentment at their respective Assizes, or General Sessions, or in the open General Quarter Sessions … of such respective Highway, Causeway, or Bridge, not well and sufficiently repaired and amended; … no such Presentment, nor any Indictment for any such Default or Offence shall be removed … till such Indictment or Presentment be traversed, and judgement thereon be given, except where the Duty or Obligation of repairing the said Highways… may come into question …” [this is the defence engaged in Inhabitants of Hornsey, above].

12. S.16 “… the said Justices of the Peace, at any Special Sessions to be held by virtue of this Act, may, by Writing under their Hands and Seals, order and appoint those roads which do most want Repair … to be first amended, and at what Time, or in what Manner, the same shall be performed; according to which Order (if such there be) all and singular the respective Surveyors … are hereby required to proceed …”

1773. An Act to explain, amend, and reduce into one Act of Parliament. The Statutes now in being, for the Amendment and Preservation of the Publick Highways within that Part of Great Britain called England, and for other Purposes.

• S.12 replicates the provisions in 1767 S.8.

• S.23 replicates the provisions in 1767 S.14.

• S.24 replicates the provisions in 1767 S.15.

• S.25 replicates the provisions in 1767 S.16.

13. The Schedule to the Act contains the Forms relating to each provision where a form of words is necessary:

• Form No. XVI Order of Two Justices for [widening] or [diverting and turning] a Highway (s.16 of the Act).

• Form No. XVIII Order for Stopping up the old Highway, and selling the Land and Soil thereof (s.22 of the Act).

• Form No. XXIV Order of the Justices at their Special Sessions, for the Repair of certain Highways which most want Repair (s.25 of the Act).

• Form No. XXXII Presentment by a Justice of Peace (s.24 of the Act) where the Justice presents the matter 'on and up' to the General Quarter Sessions, or Assizes – the situation in Inhabitants of Hornsey, above.

14. Summary of the 1773 Act provisions:

• The Justices were the 'highway authority'. They had the power, and burden, to operate proactively to keep the highways in sufficient repair.

• The Surveyor of Highways was a locally elected officer with a duty to ensure that the highways were kept in repair by 'statute labour', and report the general situation, and specific problems, to the Justices.

• Where a highway was out of repair the Justices could direct that it be repaired within a specified period.

• This direction did not require any 'order'. There is no 'Form for an Order' in the Schedule to the Act. There would not be any 'enrolled order' because there was no order.

• If the highway was still not properly repaired the Justices at Special (Highway) Sessions could present or indict the issue up to General Quarter Sessions or Assizes. If this referral was a 'prosecution', or any other action with a fine as an outcome, it would be by indictment to go before a jury.

1835. An Act to consolidate and amend the Laws relating to Highways in that Part of Great Britain called England.

15. S.1 repeals the 1773 Act and subsequent amendments to that Act.

16. S.45 empowers and requires Justices to hold "no less than eight nor more than twelve Special Sessions in every year for executing the purposes of this Act".

The same section requires the Surveyor of Highways to make a “Return in Writing to such Special Sessions of the State of all the Roads, Common Highways … and of all Nuisances and Encroachments, if any … as well as the Extent of the different Highways which the said Parish is liable to repair, what Part thereof has been repaired …”.

17. S.94 is the provision by which Justices can act on the “Information thereof, on the Oath of One credible Witness” and oblige the Surveyor of Highways to put a highway into a “State of thorough and effectual Repair” and fine the Surveyor of Highways for default of statutory duty to keep highways in repair. If on a view the highway is considered out of repair then the Justices “shall” fine the Surveyor of Highways and “shall” make an order for the highway to be repaired by a given date.
18. S.99 ends the ability to take proceedings for out of repair by way of presentment against the inhabitants of a parish, or any other person.
19. Summary of the 1835 Act provisions:

    • The Justices are no longer the de facto highway authority, acting on their own initiative. The parish is now the highway authority, with the Surveyor of Highways as their officer enforcing against nuisances, and organising repairs.

    • The Surveyor of Highways must still regularly report to the Justices on the “state of all the Roads, Common Highways …” and “Nuisances and Encroachments”. The Justices can fine the Surveyor for default.

    • “One credible Witness” can lay an information before the Justices that a particular highway is out of repair, and if this is found to be correct the Justices “shall” fine the Surveyor of Highways, and “shall” make an order that the highway be put repair.[42]

[42] This is the forerunner of the current ‘s.56 notice’ process in the Highways Act 1980, where any person can serve a notice on the highway authority and, if not satisfied with the outcome, seek an order from the Justices or Crown Court.

Quarter Sessions: indictments, and meaning of ‘common highway’

1. R v. The Inhabitants of Hatfield (1736) CAS.T.HARD. 204:
2. [316] This hearing was into an unsuccessful challenge to the validity of an indictment for not repairing a highway.[43] The defendant argued that “… this description of the highway is too uncertain, for it ought to shew whether it is a footway, or a way for carts, or for horses, etc, and so are the precedents …”.
3. The court held that the description was good; Lord Hardwicke, C.J., “… I do not remember any authority that holds it necessary to say, it is a highway for this or that particular carriage, for if it is a common highway, it is a highway for all manner of things”.
4. R v. The Inhabitants of Aldborough (1853) 17 J.P. 648
5. The Inhabitants were indicted for non-repair of a public highway as a “highway for all purposes”. The Crown appealed to have the verdict set aside on the ground that the highway was no more than a bridle road. Evidence before the court suggested that the road was a “mere raised bridle road and had been used as such before, up to and ever since the making of the award”.
6. This was an inclosure award (1766) in which the commissioners had set out the way as “… a common king’s highway or road forty feet of assize in breadth …”,[44] while other ways had been set out expressly as ‘bridle road’, ‘private road’ or ‘footway’. The road at issue had never been “completed”[45] as a carriageway, and had been used as a bridle road since the date of the award up to the indictment. Held:
7. Lord Campbell, C.J. “The language used in the act may mean ‘public carriage way’; but I think it does not necessarily bear that meaning only. Peradventure the commissioners, who had the power to set out any public road, meant to set out a bridle road. Now if that be so, the usage of nearly a century ought to be taken into consideration … Upon the whole, therefore, I think that the argument that the road was intended to be a bridle road only must prevail.”
8. Erle, J. “I also think that this rule must be discharged. It is not to be made absolute unless the phrase ‘public highway’, conclusively establishes that this road was one for all purposes. The presumption is strong that the words have the meaning intended for by the prosecutors; but they may have a meaning less wide. That being so, the long period of time during which the narrower meaning has been understood to be the true one, decides the question.”

• ———————————

[43] The report does not say in which court, but the judge cited is Lord Hardwicke, C.J., where ‘Chief Justice’ was then the senior judge in each of the common law courts, before merger in 1875. So, very much a superior court.

[44] That was the language used in the award for other, undisputed, public carriage roads.

[45] The inclosure act put the repair burden on to the parish(es) once the roads were ‘set out and completed’, but there was no justices’ certification requirement.

9. Crompton, J. “Prima facie it may be that a public highway means a way for carriages. In indictments I should say that was the case. In acts of parliament it is not always so. In this very act they have a clear power to set out bridleways; and yet the only words are ‘public highway or road’.”

10. Comment:

    • There is a “strong presumption” (per Erle J.) that ‘public highway’ (and in the context of the case, ‘common king’s highway’) indicates a public carriage road. If there is a strong presumption then there is no burden to prove the way is a public carriage way, rather the burden lies to prove it is not.

    • “… public highway means a way for carriages” – yes in indictments; no in acts of parliament (per Crompton J.).

Council highway records: ‘handover maps’ 1929–30

This section refers to types of evidence discussed in:
Rights of Way Restoring the Record: Second Edition 2017
Handover Maps, p.221

1. ‘Handover maps’ are in many places the earliest surviving council record of ‘public highways’ in any place where the Local Government Act 1929 transferred the highway authority role from rural district councils to county councils. Examination of handover maps shows that this process was in the great majority for ‘roads’, but the maps,[46] in some places, also show a few bridleways and footpaths.
2. In England the rural district councils superseded the various nineteenth century highway boards, highway unions, sanitary boards, and parish councils[47] by virtue of s.25(1) of the Local Government Act 1894. This transfer of ‘powers and duties’ was with regard to all highways, and not just to publicly maintainable highways.
3. The Local Government Act 1929 transferred the duties and powers regarding ‘roads’ from the rural district councils to the county councils.[48] All the transferred roads, and all the ‘main roads’ already the responsibility of the county council, became ‘county roads’.
4. The district councils were under a statutory duty to furnish the county council with information about the roads to be ‘handed over’. In s.127(2):

   > “It shall be the duty of every district council to furnish, and to instruct their officers to furnish, any information in their power which may reasonably be required by the council of any county for the purpose of enabling them to discharge their functions under Parts III. and IV. of this Act.”

5. There was no requirement in the Local Government Act 1929 for the preparation of ‘handover maps’ by the rural district councils, although any so prepared would be in keeping with the requirement to inform the county council appropriately.
6. The function of ‘highway authority’ was also transferred to the county council.[49] Highway authority duties go to all classes of highways, and also to highways that are not maintainable by the public.[50] The 1929 Act thus makes a distinction in its handling of ‘roads’ and ‘highways’.

[46] Sometimes the maps are accompanied by listings of the roads shown.
[47] Including vills and townships.
[48] Local Government Act 1929 s.29 County roads.
[49] Local Government Act 1929 s.30 Transfer to county councils of functions with respect to highways in rural districts.
[50] For example, dealing with public nuisances, or diversions.

7. The 1929 Act makes a distinction between publicly maintainable roads and roads that are not publicly maintainable. In s.134 Definitions:

   "'Road' means a highway repairable by the inhabitants at large, and, save as in this Act otherwise expressly provided, includes any bridge so repairable carrying the road, and 'improvement' in relation to a road includes the fixing of a building line or improvement line under any enactment."

8. Thus, going forward from 1929, a 'county road' is publicly maintainable, as reflected in the 'list of streets':[51] "The council of every county, metropolitan district and London borough and the Common Council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense."

9. Once the responsibility for unclassified roads was established with the county council there was scope for 'delegation' of these back to district councils. In s.35:

   "(1) The council of any district wholly or partly within a county may within three months after the commencement of this Act apply to the county council for the delegation to them as from the appointed day of the functions of the county council with respect to the maintenance, repair and improvement of, and other dealing with –

   "(a) the whole of the unclassified roads, exclusive of county bridges, within the district or such part of the district as is within the county;"

10. The Local Government Act provides that any 'road officer' in the employment of a district council shall become an officer of the county council.[52]

[51] Highways Act 1980 s.36(6).

[52] Local Government Act 1929 s.120 Transfer of road officers.

Council highway records: Restriction of Ribbon Development Act 1935

1. The inclusion of an unclassified road in maps or schedules made for the purposes of the Restriction of Ribbon Development Act 1935 is evidence of the road's reputation within the highway authority as being a public road to which the provisions of the Act apply: a road vulnerable to inappropriate development and consequential motor traffic.
2. The Restriction of Ribbon Development Act 1935 was an early town and country planning measure primarily to prevent unregulated housing development fronting on to roads, with a consequent burden for maintenance and in-road services. The language of the Act is clearly concerned with public vehicular roads.
3. S.2(1) applies the provisions to all classified roads (with exemptions) and s.2(2) allows the council to include whichever unclassified roads it chooses. This includes listing part only of any unclassified road because in s.24 Interpretation, "Road means … any part of such a highway" (as is still current in the Highways Act 1980).
4. S.6 requires that the plans of roads prepared by the highway authority shall be put on public deposit at the council's offices.
5. Thus the unclassified roads listed by the council to have RRDA provisions applied are not necessarily all the unclassified roads available to the council to select.

Through route: rural culs-de-sac are unlikely

1. The courts have long held that there is nothing at law to prevent a dead-end highway existing, but in rural parts these are unlikely and demand particular circumstances to come about. Consistency Guidelines advises "Before recognising a cul-de-sac as a highway, Inspectors will need to be persuaded that special circumstances exist".[53] That is correct, but the more common situation is where there is a cul-de-sac that is recorded as, or provably, a highway, and the issue is whether there was historically a through route of which the cul-de-sac was part. This was the situation with Tinker's Lane in the leading case Eyre v. New Forest Highway Board (1892) JP 517, 13 August 1892. Here the Court of Appeal commended Wills J's summing-up as "… copious and clear and a complete exposition of the law on the subject; it was a clear and correct direction to the jury on all the points raised". Wills J:

   > "But supposing you think Tinker's Lane is a public highway, what would be the meaning in a country place like that of a highway which ends in a cul-de-sac, and ends at a gate onto a common? Such things exist in large towns … but who ever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again? … It is a just observation that if you think Tinker's Lane was a public highway, an old and ancient public highway, why should it be so unless it leads across that common to some of those places beyond? I cannot conceive myself how that could be a public highway, or to what purpose it could be dedicated or in what way it could be used so as to become a public highway, unless it was to pass over from that side of the country to this side of the country. Therefore it seems to me, after all said and done, that the evidence with regard to this little piece across the green cannot be severed from the other … it would take a great deal to persuade me that it was possible that that state of things should co-exist with no public way across the little piece of green … I am not laying this down as law; but I cannot understand how there could be a public way up to the gate – practically, I mean; I do not mean theoretically, – but how in a locality like this there could be a public highway up to the gate without there being a highway beyond it. If there were a public highway up Tinker's Lane before 1835, it does not seem to me at all a wrong step to take, or an unreasonable step to take, to say there must have been one across that green."

2. There are three often-cited cases on culs-de-sac and whether such can be (public) highways: Roberts v. Webster (1967) 66 LGR 298; A.G. v. Antrobus [1905] 2 Ch 188; Bourke v. Davis [1890] 44 ChD 110. In each of these the way in dispute was (apparently) a genuine dead-end with no 'lost' continuation. Fundamental argument in each was whether or not a cul-de-sac (especially in

[53] PINS Definitive Map Orders Consistency Guidelines, April 2016 Revision, at [2.36].

the countryside) could be a (public) highway. In each case the court took the point that the law presumes a highway is a through-route unless there are exceptional local circumstances: e.g. a place of public resort, or that the way was expressly laid out under the authority of statute, such as an inclosure award.

3. In A-G (aro A H Hastie) v. Godstone Rural District Council (1912) JP 188, 25 May 1912, Parker J was called upon to give a declaration that a cluster of minor roads were public and publicly repairable highways:

   "The roads in question certainly existed far back into the eighteenth century. They are shown in many old maps. They have for the most part well-defined hedges and ditches on either side, the width between the ditches, as is often the case with old country roads, varying considerably. There is nothing to distinguish any part of these roads respectively from any other part except the state of repair. They are continuous roads throughout and furnish convenient short cuts between main roads to the north and south respectively. It is possible, of course, that a public way may end in a cul-de-sac, but it appears rather improbable that part of a continuous thoroughfare should be a public highway and part not."

4. In Brand & Another v. Philip Lund (Consultants) Ltd (1989) Unreported, Ch 1985 B. No. 532. Judge Paul Baker QC (sitting as a Judge of the High Court):

   "Before I come to the evidence I should deal with certain submissions of law, supported by a number of authorities which have been placed before me … The first one is that a public vehicular highway is and normally must be used to go from one public highway to another. In support of that, there was cited the well-known case of Attorney General v. Antrobus [1905] 2 Ch 188. That case concerned a path or track leading to Stonehenge. It was held to be not a public highway. I cannot accept the proposition precisely as stated. The position as I see it is this, that generally a public right of way is a right of passing from one public place or highway to another."

5. In Commission for New Towns and Worcestershire County Council v. JJ Gallagher Ltd [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3, [2003] 01 EG 67 (CS), Neuberger J:

   [91] "The Inclosure Award of 1824 is concerned with a relatively small part of Beoley Lane, namely the very south-eastern end. However, given that the issue between the parties concerns whether or not Beoley Lane is a carriageway, it seems clear that the highway status of this part of Beoley Lane cannot be any different from the rest of Beoley Lane."

6. In Fortune v. Wiltshire Council [2012] EWCA Civ 334, [2013] 1 WLR 808, Lord Lewison:

   [35] "… She accepts that Rowden Lane is a public highway. It follows therefore that at some time in the past it must have been dedicated as a highway (no doubt inferred by long public use). However, Mrs Fortune says that the public rights of way are limited to use on foot or with animals. The first question is: if it is accepted that the public used the way as of right,

where were they going to? The answer must be either that they were using Rowden Lane as part of a network of highways (i.e. as a thoroughfare) or they were visiting some particular place simply as members of the public."

7. In R oao Leicestershire County Council v. Secretary of State for EFRA [2003] EWHC 171 (Admin), Collins J:

   [16] "The Inspector notes that it was highly improbable that the footpath actually finished at the northern boundary of Manor Cottage. That seems to me to be a matter of common sense because it would serve no practical purpose unless it went through to the road …"

Through route: ‘to XXX’ and ‘from YYY’ labels on roads on old maps

1. In Commission for New Towns and Worcestershire County Council v. JJ Gallagher Ltd [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3, [2003] 01 EG 67 (CS), Neuberger J:

   [90] “… I am of the view that the 1758 Estate plan is independently supportive of the contention that Beoley Lane was a public carriageway. It is described on the plan as ‘the lane leading from Mappleborough Green to Holt end’. This description, coupled with the fact that the lane is shown joining the Birmingham Road, appears to me to be an indication, albeit not a decisive indication on its own, of public carriageway status. It was agreed between both experts that the designation ‘from X’ or ‘to X’ on a road was indicative of highway status. A specific description of a lane as leading from one village to another, particularly when one bears in mind that it was a carriageway (albeit that its status as a public carriageway is in issue) does provide some support for the notion that it was a public carriageway.”

2. In Consistency Guidelines, “… However, the annotation of a road ‘to’ or ‘from’ a named settlement is suggestive of public rights …”.[54]

[54] PINS Definitive Map Orders Consistency Guidelines, April 2016 Revision, at [8.12].

Through route: old maps not showing roads across commons

1. In Commission for New Towns and Worcestershire County Council v. JJ Gallagher Ltd [2002] EWHC 2668 (Ch), [2003] 2 P & CR 3, [2003] 01 EG 67 (CS), regarding evidence from Dr Hodson and Professor Kain, Neuberger:

   [86] "The two published maps appear to show the southern end of Beoley Lane ending at the point that it joins the Common, rather than going across the common and joining the Birmingham Road. As Professor Kain said, that might have been a factor militating against Beoley Lane being a public carriageway, on the basis that it would have been primarily used as a means of access to, and egress from, the Common, rather than to and from the Birmingham Road as well. Initially, Dr Hodson thought that this could be explicable on the basis of a mistake on the part of Dawson and Greenwood. However, for the first time when in the witness box, she suggested that there might be a cartographic convention, adopted by at least some map makers in the 18th and early 19th centuries, which involved not marking a non-metalled highway (or, presumably, private road) when it crossed a common or a heath. (In this connection, it should be explained that a road is not metalled when its surface is no more than beaten earth. It is metalled if it is covered with anything from thick asphalt over a foundation, at one extreme, to loose chippings, at the other extreme).

   [87] "Although initially inclined to dismiss this suggestion as heretical, Professor Kain, although still sceptical, was prepared to accept, on further examination, that the suggestion had more force than he had at first supposed … Dr Hodson's hypothesis is supported by two factors. First, the 1758 Estate Map makes it clear, as Professor Kain fairly accepted, that Beoley Lane did track a defined route over the common to the Birmingham Road. Secondly, it would seem that the convention may well have been adopted by Dawson and Greenwood in relation to a significant number of other heaths and commons on the same page of their respective maps as contained Beoley Lane. That is only a matter of inference, but, on a fair number of occasions, one can see a road coming onto a common or heath precisely opposite another road on the other side of the common or heath, and a fair inference would be that those using either road to cross the common or heath would naturally walk or ride along the shortest distance joining the two points.

   [89] "On the basis of the documentary evidence, particularly the 1758 Estate Map, and on the basis of Professor Kain's acceptance that Beoley Lane had a visible vehicular route across the common, and, indeed, that members of the public would not have had a right to stray on the common, I have reached the conclusion that Dr Hodson's notion of a cartographic convention is in fact correct. In case this decision is of interest to cartographic historians, it should be emphasised that I have reached this view on the balance of

probabilities, and on the basis of the documentary, oral and expert evidence, as well as the arguments, advanced before me."

Topography & character of roads: evidence of public status

1. In A.G. v. Council of the Metropolitan Borough of Woolwich [KBD] JP & LGRR, 173, 5 October 1929. Shearman J. “Apart from that there is what I may call local reputation and name, and the present contour of the place …”.
2. In Brand & Another v. Philip Lund (Consultants) Ltd (1989) Unreported. Ch 1985 B. No. 532. Judge Paul Baker QC (sitting as a Judge of the High Court):

   “Quite different were the experts called on behalf of Lund Consultants … There are two other parts which I found especially illuminating. First, he is dealing with the section up from Chesham Bottom to White Hawridge Bottom, and he said at page 15: ‘This section of the lane thus once led along the southern side of a small open-field, and this is strong evidence for both its antiquity, and its status. The farmers who held land in this field would not have each possessed separate private access to their tiny strips: this would have been impossible. They would have needed some common access way, to bring in carts and ploughs, and to take out crops after harvest. They would, in short, have needed a public vehicular highway, and this, of course. is what Ramscote Lane provided.’ … I can now turn to Dr. Williamson’s comments on the steep way through Lund Consultants’ land, not always, it will be recalled, a way through woodland. He says: ‘As the track proceeds uphill, it becomes a hollow way; that is, it lies in a deep hollow. Hollow ways on this scale are sometimes said to be the result of deliberate excavation, to facilitate the negotiation of steep slopes. In some cases this is true. Indeed it might just conceivably be true in the case of Ramscote Lane, but I personally doubt it. Deliberate cuttings are usually only a feature of major, long-distance roads – medieval ‘King’s Highways’, or (more usually) post-medieval Turnpike roads. Most hollow ways, including this one, are the result of centuries of erosion on unpaved roads. Traffic loosens the surface and prevents vegetation from holding it; rain washes the debris downhill. A well-developed hollow way like this is unlikely to be less than 300 years old, and may be older. Hollow ways are not usually a feature of footpaths; large-scale erosion demands the regular passage of wheeled vehicles … I find it hard to believe that anyone would go to such lengths to improve the surface of what was only a footpath or bridleway: in my experience, this kind of thing is usually only done when lanes are being used for traffic. The track is here, and indeed throughout its length, extremely muddy’. He summarises his report as follows:

   ‘The evidence provided by field survey, and by early maps, leaves no doubt that Ramscote Lane is an ancient public road. Among other functions, it provided medieval farmers in the hamlet of Bellingdon with access to arable holdings in an open-field in White Hawridge Bottom. The width of the lane, the nature of its boundaries, and the degree of erosion which it exhibits at various points along its length are all consistent with a medieval origin.

These and other features also indicate that it had the status of a road, rather than a field path'."

3. In Fortune & Others v. Wiltshire Council [2012] EWCA Civ 334, [2013] 1 WLR 808. Lord Justice Lewison:

   [100] "The second main argument rests on topography. According to Prof Williamson Rowden Lane and Gipsy Lane (which were two parts of the thoroughfare found by the judge) meet in an acute V-shaped junction. The argument is that it would have been very difficult (although not impossible) for a horse and cart to negotiate the V-shaped junction. If Rowden Lane and Gipsy Lane had been used as a connected through route, then horses and carts would have had to have cut the corner. If they had done this with any regularity then there would have been visible traces of cart tracks, which the map-makers would have recorded." The judge dealt with this point as follows:

   [§ 676] "I am not persuaded that the junction of the two tracks, Section C and the southernmost continuation of Gypsy Lane, form the impractical 'V' junction described by Professor Williamson, nor that they are simply different private access tracks to Rowden Farm. Rowden Farm Lane is narrower than either Rowden Lane or Gypsy Lane, and there is no visible obstruction on the plan to stop the corner being cut at the 'V' junction."

4. During the hearing of Fortune, Mr Laurence KC said,[55] with regard to the evidential value of 'old maps' before the trial judge, "Yes, the point very much in mind … [there is] not an old map before this court which is material for the avowed purpose of the map maker addressing the status of the way." In response, Lady Justice Arden observed, "Maps … all social history around them, e.g. a less-steep way to rejoin [the main road]. We take into account everything we see [on the maps], settlements, river …".

[55] From a note taken at the hearing.

‘Guide Posts’ at highway junctions, as shown on Ordnance Survey maps

1. Guide posts, in the meaning of stones inscribed with destinations ahead, or on a branch road, were noted by travellers in 1598 and 1695.[56] The Highways Act of 1697 required surveyors of highways to erect “a direction post or stone” at “cross highways”.
2. The Highways Act 1767,[57] s.18, “Justices impowered to order proper Direction Posts to be set up where several highways meet”.

   “And, for the better convenience of travellers where several highways meet, be it further enacted that the said justices … shall issue their precept to the surveyor or surveyors of the highways … where several highways meet, and there is no proper or sufficient direction post or stone already fixed or erected requiring them forthwith to cause to be erected or fixed in the most convenient place … a stone or post with an inscription thereon, in large legible letters, containing the name, or names, of the next market town or towns, or other considerable place, to which the said highways respectively lead …”
3. The Highways Act 1835, s.24, “Direction Posts, where and how to be erected”.

   “And be it further enacted, that the surveyor of every Parish … shall with the consent of the inhabitants of any parish in vestry assembled, or by the direction of the justices at a special session for the highways, cause (where there are no such stones or posts) to be erected or fixed in the most convenient place where two or more ways meet a stone or post, with inscriptions thereon in large legible letters … the name of the next market town, village, or other place to which the said highways respectively lead …”
4. So the requirement for surveyors to erect guide posts evolved over the years. In 1697 guide posts were required at cross roads. In 1767 the Act specified “several highways” and “market town, or towns, or other considerable places”. ‘Several ’in its ordinary meaning indicates more than two. ‘Several’ in its legal meaning is ‘individual’. In context, the 1767 provision probably still applied to cross roads, and other multi-road junctions, but not to fork roads.[58]
5. In 1835 this issue was resolved. The requirement applied to fork roads, and encompassed villages and other highway destinations.
6. Richard Oliver, in *Ordnance Survey Maps: a Concise Guide for Historians*, 2005, notes (at p.107) that “isolated examples are found on 1:63,360 Old Series mapping … they seem to have been systematically recorded from the start on the 1:10,560 and larger scales …”.

[56] From *The Story of the King’s Highway*, S&B Webb, 1913.
[57] The titles of the Acts are here simplified to how they are now casually referenced.
[58] A term that had largely gone from use in the second half of the twentieth century.

7. So, where the Ordnance Survey shows a ‘Guide Post’ this is some evidence that the roads meeting at the junction were public roads within the terms of the evolving Acts.
8. There were also guide post requirements specific to turnpike roads. In the General Turnpike Act 1767, s.30 “Direction Posts to be set up where several Highways meet”.

    “And for the better convenience of travellers, where several highways meet, be it further enacted, that the [turnpike trustees or commissioners] shall direct the surveyor of every such turnpike road where several highways meet, and there is no sufficient direction post or stone already fixed or erected, forthwith the erect … a stone or post with an inscription thereon in large letters, containing the name of, and distance from, the next market town, or towns, or other considerable place or places to which the said highways variously lead;”
9. In the General Turnpike Act 1822, s.69 “Milestones and Direction Posts to be erected”.

    “And be it further enacted, that the said trustees or commissioners shall cause stones or posts to be set up or placed in or near the sides of every turnpike road … and also such direction post at the several roads leading out of any such road, or at any crossing, turnings, or terminations thereof, with such inscriptions thereon denoting to what place or places the said roads respectively lead …”
10. It is clear from examination of nineteenth century Ordnance Survey maps that the great majority of public road junctions did not have ‘Guide Posts’ when surveyed. That does not mean that these were not public roads. Where a junction of a claimed ‘lost way’ meets an acknowledged public road, and no ‘Guide Post’ was mapped, that needs to be assessed in the context of how other road junctions in the local network were surveyed and mapped.

‘Lane’: the meaning of

1. In A-G v. Council of the Metropolitan Borough of Woolwich [KBD] JP & LGRR, 173, 5 October 1929, Shearman J:

   “… and I also consider the name ‘Plum Lane’ – a ‘lane’ usually means a minor road leading between one main road and another main road…”.

2. In Fortune & Others v. Wiltshire Council & Taylor Wimpey [2010] EWHC B33 (Ch). McCahill J:

   [712] “In 1820, the Lane bore a name then, ‘Rowden Down Lane’ and the word ‘lane’ has been judicially defined as usually meaning a minor road leading between one main road and another.”

3. In Fortune & Others v. Wiltshire Council [2012] EWCA Civ 334, [2013] 1 WLR 808. Lord Lewison [126] lists HHJ McCahill’s accepted heads of evidence, and this point about ‘lane’ is set out at (vii):

   [127] “Even if some of these factual findings can be chipped away at the margins, in our judgment the judge was amply justified in concluding on the material before him that (even without reliance on the evidence of modern use) Rowden Lane was a vehicular highway.” Nobody ‘chipped away’ at the meaning of ‘lane’.

4. In Trail Riders Fellowship v. Secretary of State for the Environment, Food and Rural Affairs [2015] EWHC 85 (Admin), Collins J:

   [26] “The inspector in his final decision referred to the definition of ‘lane’ which I have set out above. In paragraph 17 he said this:- ‘Irrespective of whether the claimed route could be defined as running between the two main roads I am not satisfied from the judgment or dictionary definitions provided that the word “lane” is necessarily supportive of a route being a particular class of highway. The status of a route is a matter to be determined from the evidence as a whole. In my view, it is a descriptive term and provides no clarification regarding what rights exist over a particular route.’”

Settled land: effect on dedication of highways

1. It is sometimes argued that a piece of land was, at a particular period, ‘settled land’, thus preventing deemed dedication by the owner for the time being. That argument may be effective against a claim of deemed dedication over a known period of years, but it does not easily stand up against a case founded on historical documentary evidence.
2. Where a public road or right of way was set out by an inclosure Act and award, there was no owner of the land until the commissioners set out the roads, then divided the residue, and then allotted the various plots to various owners.
3. Where documentary evidence indicates that a right of way originated long ago – ‘time out of mind’ – at some unknown date, then a later settlement would not operate to extinguish, or prevent, that highway existing.
4. In A-G and Newton Abbot RDC v. Dyer [1947] 1 Ch 67, the court addresses the situation where ‘incapacity to dedicate’ was for a known period in the past. It is a long judgment and Evershed J on pp. 90–91 deals with the capacity of a court to infer legitimate “dedication, at some date, however remote, prior to the earliest time when title to the land is known”. The Secretary of State is that ‘court’ in the context of determining this order.

Width of historical bridleways & byways

This paper looks at issues regarding establishing and recording the width of ‘ancient highways’ on the basis of historical documentary evidence.
This does not consider the width of bridleways and restricted byways ‘deemed dedicated’ by recent user evidence. That is dealt with in a separate paper, although some aspects overlap.

Guidance

The Planning Inspectorate
RIGHTS OF WAY SECTION ADVICE NOTE No 16
(First issued May 2003)
WIDTHS ON ORDERS
This Advice Note is accompanied by DEFRA’s *Non Statutory Guidance on the recording of widths on public path, rail crossing and definitive map modification orders* (12 February 2007).
The two documents caution strongly against using ‘average widths’, and ‘minimum widths’, and demonstrate how to specify a ‘minimum and maximum range’ by using a plan, or referencing to a large-scale historical map.

Inspector Training Manual/Public Rights of Way. Version 9
Definitive Map Modification Orders Provisions of the WCA81

> [164] “A DMMO must specify a width for a new highway. If it does not, the Inspector should invite comments from the parties on the appropriate width and, in the decision, propose that the order be modified to record a width. This will require further advertisement. If the width is given as a minimum or approximate width then the Inspector should modify the Order. This may or may not require further advertisement; see Advice Note No. 16.”

Introduction

1. A public right of way must have a width. Without a width, the right to 'pass and repass' would be unconstrained, and therefore be in the nature of a 'right to wander'.[59] The common law does not generally recognise the concept of a public right to wander; statutory provision of such – e.g. the 'right to roam' under the Countryside and Rights of Way Act 2000 (CRoWA 2000) – is a rather different matter.

Essential characteristics of a right of way

2. Three characteristics fundamentally define a public right of way:
   - its termini[60] (and by extension the distance along the route between termini)
   - its width
   - the type of traffic for which there is a lawful right.
3. There may be other matters, such as 'limitations' existing at the date of dedication, or statutory restrictions imposed after dedication, but these are a 'bolt-on' to the three defining elements. A right of way cannot be recorded on the definitive map without a clear and precise statement of termini and the extent of the right (i.e. footpath, bridleway, byway). Width is a matter that is often not so 'visible' and can (and often has) become a matter requiring clarification after the right of way is acknowledged to exist. Many rights of way are recorded on the definitive map with no statement as to the width.[61] That is a fact. It is not an acknowledgement that such incomplete recording is proper, or desirable.

Widths in the first definitive statement

4. The National Parks and Access to the Countryside Act 1949 provides at s.27(4):

   > "An authority by whom a draft map is prepared as aforesaid shall annex thereto a statement specifying … such particulars appearing to the authority to be reasonably alleged as to the position and width thereof …"

   In Surveys and Maps of Public Rights of Way for the purposes of Part IV of the National Parks and Access to the Countryside Act, 1949. Memorandum prepared by the Commons, Open Spaces and Footpaths Preservation Society in collaboration with the Ramblers Association; recommended by the County Council's Association and approved by the Ministry of Town and Country Planning. January 1950:

   - _____

[59] A *jus spatiandi*.
[60] The start or *terminus a quo*, and the end or *terminus ad quem*.
[61] The recording of widths in the first definitive statement was both sparse and patchy. Orders with no widths, or badly specified widths, were commonplace up to about 2010. Matters have improved considerably since.

[5(f)] “If the surveying authority requires particulars to be furnished of the width of any public paths, these should be given in the schedule, as far as possible. If, for example, a way was set out by an inclosure award as a public footpath 4 feet wide, or a public bridleway 8 feet wide, these widths can and should be specified. Again, there is a legal presumption (in default of evidence to the contrary) that where a way runs between defined boundaries such as hedges or walls, the public right of passage extends over the whole width between those boundaries, and this width can also be specified. Where, however, a path runs in the open, though the width dedicated to public passage may be, and often is, greater than that of the ‘beaten track’, it will seldom be possible to ascertain exactly what that greater width is, and in such cases no width should be stated, unless proof of it can be produced which would satisfy a court of law.”

5. This Memorandum was not a circular, but a similar provision regarding width was in Circular 91 of 30 June1950.

6. Width issues still engage the courts today. In Dacorum Borough Council v. Foy [2016] EWCA Civ 48, Jackson LJ:

> [6] “Next to that there is a column headed ‘width’, but, somewhat unhelpfully, the Definitive Statement does not include any figure in that column to assist the court or the public as to the width of the footpath.”

Widths in definitive map modification orders

7. The Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, 1993 No. 12, provides templates for the drafting of modification orders. Schedule 2 ‘Form of Modification Order’ sets out “SCHEDULE [PART 1] Modification of [Definitive] Map. Description of path or way to be added. (Describe position, length, width of path or way in sections, e.g. A–B, B–C, etc., as indicated on map)”.

8. Failure to enter a width would not of itself render an order invalid, but if determination falls to the Secretary of State or Welsh Government then the order can and should be modified to include the width.[62]

Determining the width of a right of way

9. Historical public highways are usually shown to have originated in one of two ways: by statutory creation, or by presumed dedication at some unknown date ‘time out of mind’.[63] Statutory creation might typically be in the form of an instrument made under parliamentary authority (e.g. an inclosure award) or judicial authority (e.g. a quarter sessions diversion). Such instrument might typically say, “one public bridle road ten feet wide …”, or “one public foot road,

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[62] Per Lord Phillips MR in Trevelyan v. SoS for DETR [2001] 2000/0392/C.

[63] R v. Secretary of State for the Environment ex p Hood [1975] 1 QB (CA) 891. Lord Denning MR [896G]: “Our old highways came into existence before 1835 … They grew up time out of mind.”

four feet in breadth …" That is the extent of the lawful way and is the width that should be recorded in the definitive map and statement.[64] Inclosure Acts and awards, in setting out roads, specify a 'precise width'.[65] Although inclosure awards are not deeds at law, the allotment of the lands is analogous to the grant of lands, so sufficient precision of boundaries was, and remains, essential.

10. Dedication at common law, 'time out of mind', presents more difficulty in determining width. Where there is a 'physical roadway feature' along the route of an acknowledged highway – e.g. hedges bounding a track or road, at a regular width, over some distance – then the 'full width between inclosures' presumption will generally apply, albeit open to challenge on the facts in any case.[66] Whatever, the width of an 'ancient highway', where a width is not available from a source such as an inclosure award, is a question of fact. Absent sufficient facts a tribunal will need to fall back on a presumed width.[67]

What width is dedicated when dedication takes place?

11. The presumption of dedication of a public highway, by evidence of reputation (e.g. old maps), supposes a dedication, or grant, long ago of the public right by the owner of the soil. In the absence of evidence to the contrary the courts would tend to find the dedication or grant of a 'minimal right' to the public, i.e. that the grantor had given away as little of his own rights as is consistent with the reasonable exercise of the public right.[68]

12. Any tribunal charged with determining whether or not a public right of way exists, anciently, or by recent deemed dedication, is obliged to consider the width of the claimed public right, because the width is a relevant and material fact in deciding whether or not dedication has taken place.

The presumption of a 'reasonable width'

13. In the case of a claimed public right of way over an unenclosed route, where there is no evidence – no facts – on which a tribunal can determine an 'actual width based on evidence', if the tribunal holds that, on all the evidence, there is deemed dedication of a right of way (i.e. termini, and sufficient user to indicate dedication and status) then, in order to determine that the public right does exist, the tribunal must determine a width. If no evidence of a precise width exists, then the tribunal must fall back on the legal presumption that the owner of the soil has dedicated just sufficient for the reasonable exercise of the public right of way in question.

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[64] Unless there has been any subsequent lawful intervention altering such a width.

[65] Occasionally, this would be qualified by '… at the least' meaning that a wider road could lawfully be made.

[66] See the section on the 'fence-to-fence presumption' below.

[67] See the section on the presumption of a 'reasonable' width below.

[68] Ford v. Harrow (1903) LT 23 May 1903. Also, in general, the law of easements.

How wide is a 'reasonable width'?

14. What is a 'reasonable width' for a public right of way? Eyre indicates that 'reasonable' goes to the ability of the public to 'pass along' the route.[69] Passing along plainly envisages two-way traffic (leaving aside the issue of 'pinch points' – see below) because there is no concept in law of a right of way normally extending into a right to deviate for 'convenience'. There may be a right to deviate on to roadside wastes adjacent to unenclosed highways, but this assists only with (some) ancient highways, and not with those recently dedicated.[70] If a footpath right of way is recorded as e.g. two feet wide (0.6 metres), then the landowner may at any time fence it in to that width, thereby removing the ability for users to 'step to one side' to accommodate passing traffic.[71]
15. A 'reasonable width' is wide enough for the lawful traffic at the date of dedication to meet and cross within the confines of the legal right. If a way was dedicated too narrow for the traffic that habitually used it (and that begs the question 'how could it be?') then the passage of that traffic might well serve to indicate deemed dedication of a greater width – but that is an issue separate from the actual width at original dedication.

The physical size of highway users

16. Where a man sits on a large saddle horse, with knees and feet in a normal riding position, the width across his toes can easily reach 4 foot. That this is a typical width is evidenced by the statutory requirement (so far as it goes) for bridle gates to have a 5 foot gap – sufficient clearance to ride through without catching feet or packs. The very least width needed for two horses to pass within the confines of a right of way is therefore 8 foot, but historically the usual way would be wider: horses do not walk in a straight line, they naturally path-pick for ease and safety. Packs and panniers on a typical pack animal would tend to be as wide as a rider on a big saddle horse.
17. That, in practice, walkers or riders would tend to 'overhang' the legal, established width of a path is not a justification for a too-narrow recorded width.

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[69] Eyre v. New Forest Highway Board (1892) JP 517.

[70] The old law books acknowledge a right to deviate where the highway is out of repair, but none find a general right to 'step sideways' to meet and cross other traffic.

[71] That would never happen? Well, it has. 'Yon narrow way' (B&B 2008/1/3) reports Inspector Dr John Ritchie confirming an order to add a public footpath in the Lake District with a width of 24 inches. This was, said Dr Ritchie, the width of the 'beaten track', and he opined "Nor is there any evidence that the owners of the land would limit users by boxing in the path, on which there are no limitations, in the manner envisaged by the OMA." Dr Ritchie's confident prediction was well wide of the mark: the landowner did fence-in the path at 24 inches wide, with 6ft-high chain link fencing.

The landowner could lawfully fence-in to the lawful width, so the lawful width must be sufficient to allow passage if fencing takes place.[72]

18. What about carts and carriages? The character, location, and antiquity of the road provide a pointer to the type of vehicles that would have used it. Small carts were ubiquitous for local transport. Carriers' wains, and stage coaches, came later and were generally used on wider roads and turnpikes. Consider what width would be necessary for, say, two one-horse traps to meet and pass conveniently. It is improbable that a vehicular highway would be narrower, pinch points excepted.[73]
19. Not all carriage roads were, or are, wide enough for all types of carriage or cart. In R v. Lyon, 5 Dowl. & Ry. 497–500, Abbott CJ: "There are many lanes in the country which are not wide enough for a wagon to pass, but that would not make it the less a public way for all the King's subjects to pass and repass with their carriages; i.e. such carriages as the way will allow of passage."

The 'fence-to-fence presumption'

20. The width of a highway is generally a matter of evidence as to the width that was dedicated to the public, but in the absence of evidence about the extent of the dedication, presumptions can apply, or be applied, in some circumstances.
21. The 'fence-to-fence presumption' is long-established and widely applied. Where an established highway runs between fences (or hedges or walls), or dykes (ditches or banks) then prima facie the highway occupies the full space between the inclosures, even if those inclosures are irregular shape, resulting in a varying width between.[74]
22. In Harvey v. Truro Rural District Council [1903] 2 Ch 638 the principle was stated thus: "In the case of an ordinary highway running between fences, although the space between them may be of a varying and unequal width, the right of passage or way prima facie, and unless there be evidence to the contrary, extends to the whole of the ground between the fences, and the public are not confined to the metalled portion." The judge held that that principle applied whether the boundary on each side of the highway was a fence or a hedge.
23. This presumption suits the on-the-ground situation in many cases: a public road, or a public bridleway, is inclosed by walls or hedges, and, so far as the

[72] Inspector Ronald Holley observed ('An adequate width', B&B 1997/7/44): "I hold it to be axiomatic that public rights of way entitle the users to proceed in either direction; I accept that such use is commonly impeded by the need to negotiate such features as gates or bridges, one user at a time; but such features do not, in my view, define the overall width of the right of way …" That is well put.

[73] A good reference document is *Packmen, Carriers and Packhorse Ways* by David Hey. ISBN 1843061325 & 978-1843061328.

[74] R v. United Kingdom Electric Telegraph Co Ltd (1862) 31 LJMC 166; Locke-King v. Woking UDC (1897) 77 LT 790.

large-scale Ordnance maps show, that is how it has always been back to time out of mind. Short of a width-specific origin of creation (e.g. an inclosure award) it is impossible in most cases to prove that the land between the walls was dedicated at the width between the walls, but the alternative origins are:

- that there was a public highway and, time out of mind, the adjoining landowners fenced their land against the highway, or,
- that there was an inclosed private road and, at some point time out of mind, the owners dedicated that private road to the public.

24. This fence-to-fence presumption should not be engaged on the basis that 'there are fences, therefore the ground between must be presumed to be highway'. The fences have to be referable to the highway being a highway: essentially to separate the adjoining land from the highway: Hale v. Norfolk County Council [2001] Ch 717. But in Hale the fence to one side (at least) of the highway was a relatively recent fence, with a provable origin not referable to the extent of the highway; those facts defeated the fence-to-fence presumption in that case. Hale does not operate inevitably to put a burden of proof on a party seeking to establish the fence-to-fence extent of a highway in any case. Where the existence of a highway-inclosing fence cannot be otherwise satisfactorily accounted for, then the fence-to-fence presumption is engaged.[75]

Private roads established over existing public rights of way

25. In AG v. Esher Linoleum Co Ltd [1901] 2 Ch 647, the court considered a case where a pre-existing public footpath had been 'overlaid' by a later private carriage road of a greater width. Held: that it is a matter of evidence of dedication rather than of presumption, but such evidence would tend to point towards the owner having dedicated the whole width of his carriage road to the public foot traffic.

Pinch points do not prejudice a 'reasonable width'

26. That, in fact, many rights of way have 'pinch points', such as gateways and narrow bridges, is in no way reflective of the general principles and presumptions as to the width of the majority of each route. Inspector Ronald Holley noted this back in 1998 (footnote 14). Narrow bridges remain common, even on busy motor roads. Traffic alternates to cross. Until circa 1959, one part of the Great North Road was just 14ft 1in wide between buildings.[76] This did not have any bearing on the width of the rest of the Great North Road. In Ford v.

[75] Offin v. Rochford RDC [1906] 1 Ch 343; Goodmayes Estates Limited v. First National Commercial Bank and Essex County Council [2004] EWHC 1859 (Ch) (As quoted by HHJ McCahill in Fortune & Others v. Wiltshire Council & Taylor Wimpey [2010] EWHC B33 (Ch)).
[76] Carelgate in East Retford.

Harrow "… the footpath should be 4ft 6in wide, except at the entrance gate, which was to remain as it was".[77]

Establishing the boundaries of highways from maps

27. The Rights of Way Act 1932 provides, s.3:

> "Any court or other tribunal shall, before determining (a) whether a way upon or over any land has or has not been dedicated as a highway, or (b) the date upon which such dedication, if any, took place, take into consideration any map, plan or history of the locality or other relevant document that is tendered in evidence, and such weight shall be given thereto as the court or tribunal consider justified by the circumstances, including the antiquity of the tendered document, the status of the person or persons by whom it was made or compiled, its purpose, and the custody in which it has been kept and from which it is produced."

28. That provision is continued in s.32 of the Highways Act 1980. In Webb v. Eastleigh Borough Council (1957) (QBD) LGR 124, Salmon J considered an application for a declaration as to the physical extent of the highway at Chestnut Avenue, Eastleigh: was a strip of land contiguous with the acknowledged highway also part of that highway? As part of their evidence, Eastleigh Borough Council relied upon the representation of the highway in maps, and the boundary of the 'highway feature' in those maps. Salmon J observed, "in my judgment, however, these maps, although they are evidence of the existence of a highway, are not evidence of the boundaries of the highway. This seems to me to be established by authority". His Lordship cites Stoney v. Eastbourne RDC [1927] 1 Ch 367 and Copestake v. West Sussex County Council [1910] Ch D 567. He continues, "The cartographer merely records the physical features which he considers of importance, and which he observes on the ground. He is not a lawyer, and does not purport to interpret, or even to consider, the legal significance of what he sees … Whether or not everything in between [the boundaries shown in this case] forms part of the highway is entirely out of the ken of the map maker. That question must depend upon many circumstances, such, for example, as the nature of the district through which the road passes, the width of the margins, the regularity of the line of the bank and hedges, whether they were made in relation to the highway, or for some other purpose, and the levels of the land adjoining the road; see R v. United Kingdom Electric Telegraph Company Ltd, (1862) 6 LT Reps 378".

29. What if the determinative tribunal found that historical evidence (e.g. old, large-scale Ordnance Survey maps), indicated a wide physical roadway, but much, or all, of this had been destroyed by agriculture? It is not safe to scale even wide roads from the OS map, other than to say, e.g., 'it seems to have been about

[77] Ford v. Harrow (1903) LT 23 May 1903. This case was about user evidence, but the pinch point principle is the same.

forty feet in width', but if part of the physical road survives, perhaps as wall foundations, or dykes, then it would seem to be a reasonable finding of fact for the determinative tribunal to hold that on the surviving physical evidence, together with the map evidence, that the historic public right of way was, e.g., 30 foot wide for all its length.

30. What if no physical trace of the width of the route survived, but the old OS maps suggested thirty feet? Because of the effects of scale, and the difficulties of line-width on the page and line-spacing in the printing processes, determining a width by map scaling alone might well be seen as unsafe. Here the default position of 'reasonable width' might have to be imposed, leaving it open for the definitive map and statement to be amended by order at a later date if the true historical width becomes provable by other evidence (e.g. aerial photography; ground-searching radar).

Specifying and recording historical widths

31. What if a right of way was determined to exist as a physical feature – e.g. between hedges or walls – and the width between varies along the route's length? How should this be specified and recorded? Since the feature exists there is evidence for a determinative tribunal to consider. It is a matter of straightforward site measurement and plotting to represent the feature sufficiently accurately. The definitive statement could also carry a textual description such as 'as bounded on both sides by established hedgerows founded in drystone dykes, nominally 17ft between foot of dykes, varying plus or minus 2ft, as represented on the 1:2500 OS map of 1871'. Such measurement is straightforward for civil engineers and surveyors. GPS point locations are also an accurate way of pinpointing particular data from which to reference and measure. Some useful data is also found on early OS maps – e.g. junctions and angles on drystone walls – and so can be used to relate map features to ancient physical features.

Summary

32. The width of a public right of way is essentially a matter of evidence as to the width that was dedicated. Where the claimed right is found to be an 'ancient highway' with a physical nature – such as a walled lane – it is straightforward to determine (by documentary evidence, or users' testimony or presumption) and specify the width of the public right. Where the right of way is 'newly proved' by a period of user evidence, it is likely that there will be evidence of the breadth of the right deemed to have been dedicated, from the breadth of the way actually used by the public (subject to the caveat regarding the deemed dedication of an insufficient width). If there is no good evidence of the width actually used, the determinative tribunal must fall back on the presumption that the grantor – the owner of the soil – dedicated just sufficient, but no more than is necessary, for 'reasonable use' of the right dedicated. Where there are no constraining physical features (other than localised limitations aforesaid) then this 'presumed

reasonable width' would not be less than 4ft for walkers, and 8ft for horses, but the tribunal could reasonably increase this, as a finding of fact, where ground conditions indicate.

33. Regulations require that modification, creation and diversion orders state a 'width'. Evidence or, in the absence of evidence, presumption, provide a width in modification order cases. The fact of a 'clean sheet creation' in diversion orders means that an adequately precise width can be specified in creation and diversion orders. Widths are required in orders. Widths may be found from evidence, presumed if there is no evidence (modification orders) or specified (creation & diversion orders), so there is no reason not to specify adequately precise widths in all orders.

Limitations and conditions

Guidance

DEFRA
Rights of Way Circular (1/09) Guidance for Local Authorities. Version 2 October 2009

The Planning Inspectorate
Inspector Training Manual | *Public Rights of Way.* Version 9

What are Limitations and Conditions?

1. There is no statutory definition of 'limitation and/or condition', but physical features restricting public highways do come up in case law. Leaving aside 'conditions' for now, a 'limitation' is something that lawfully restricts the public's enjoyment of the way without preventing it altogether. This might be a gate that the public have to negotiate in order to pass along, or it might be a pinch point that prevents some lawful traffic from passing.
2. With ancient highways, particularly where the origin and existence of the highway is proved by documentary evidence, there would need to be sufficient evidence to show that a claimed limitation was in place when the highway was dedicated. Often dedication happened 'time out of mind' and proving that, say, a current gate is itself ancient is difficult, although showing that a gate existed at a point as far back as map depictions go may be enough.
3. The courts were reluctant to find that a current gate or stile was of itself a valid limitation. In one case a public footway [*sic*] had been dedicated subject to the right of the owner to maintain a stile, "two feet high". The owner replaced the stile with "a high five-bar gate, with a step upon it". Park J held,

   > "If there was no gate there before, the defendant has no right to put up a high five-bar gate to give people the trouble of getting over it."
   >
   > Ludlow, Serjt. in reply, "I am in a condition to prove that there were gates before, across other parts of the way."
   >
   > Park J, "If there were twenty gates in other places before, that will not justify you in putting up this gate."[78]

Limitations and Conditions in the definitive statement

4. A reference to 'limitations and conditions' comes in the National Parks and Access to the Countryside Act 1949 in the context of something that should be recorded in the definitive statement, but no definition is provided. It is

[78] Bateman v. Burge (1834) 6 Car & P 391; 172 ER 1290.

sometimes suggested that a ‘condition’ is some burden on the landowner to do something positive as regards the public right of way, but s.31(1)(d) of the act, dealing with the resolution of disputes by Quarter Sessions, provided “… that the said [public] right was subject to other limitations or conditions specified …” Plainly Parliament regarded a ‘condition’ as something biting upon the public’s right – something that fettered the exercise of the public right of way. Given this usage, in the context of ‘limitations and/or conditions’, both bear upon the public’s right, and neither upon the grantor’s (landowner’s) interests. It seems most likely that Parliament regarded ‘limitation’ and ‘condition’ as essentially the same thing: a fetter on the exercise of the public’s right of way in favour of the grantor (the landowner).

5. The 1949 Act provided that limitations and conditions should be recorded in the definitive map (location) and statement (description). Where definitive map modification orders are made to add a right of way then the order should include details where these are available. Where an order is deficient, and the knowledge exists, a Secretary of State’s Inspector should modify the order accordingly.[79]

Constriction or constraint?

6. There are essentially two types of ‘limitation’ (in a general, not act-specific sense): ‘constrictions’ and ‘constraints’ (our terms – not from statute or case law). A ‘constriction’ is where the right of way itself is narrow, or narrowed, compared either to the rest of the right of way, or to that type of right of way in general. A good example is where a public carriage road passed under an archway nine feet in width and ten feet in height.[80] This arch prevented carriages and other vehicles, which could otherwise use the highway, from passing along the highway. The arch was a feature of the highway from time immemorial – essentially it could be presumed coeval with the dedication of the highway in the first place. It was argued that the presence of this arch was evidence that the road was not a public carriage road (for the purpose of a particular act). Abbott CJ observed,

   > “There are many lanes in the country which are not wide enough for a wagon to pass, but that would not make it the less a public way for all the King’s subjects to pass and repass with their carriages; i.e. such carriages as the way will allow of passage.”

7. A constriction is not a limitation in the sense that, if removed, the right of way is wider. Where an arch narrower than the rest of the highway is known, or

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[79] PINS Ref: FPS/C1435/4/13. The Wealden District (Hadlow Down 33 (part)) Public Path Diversion Order 2012. Decision date 25.2.2014. Inspector Peter Millman: (4) “It is important that the walking public knows, if possible, the extent of its rights over any path, and details of any limitation on those rights. It is important that the owner of land over which a path runs knows the details of any limitations (such as gates) for which he or she might have some responsibility.”

[80] R v. Lyon, 5 Dowl. & Ry. 497–500.

presumed, as old as the highway itself, then the passage under the arch *is* the highway. The highway is no wider at that point. This is no different from a mile-long highway all 20 feet wide, except for 100 yards at 15 feet wide. That is not a limitation; it should be recorded as a varying width as a matter of description.

8. A ‘constraint’ is, or is more likely to be, a ‘limitation or condition’. A gate is a constraint on users. They have to open and close it, rather than having free passage along. Take the gate away and free passage returns. A gate, always assuming that it is shown to be coeval with the highway, can be (and generally should be) recorded as a limitation, always remembering that a current metal field gate is not what its ancient predecessor was. Better to record just ‘gate’ which – obviously – has to be passable by the lawful traffic of the way.

Reopening the issue of public status

1. It is established law that the process of applying for, and (separately) making, an order to modify the definitive map, is not barred to further orders after an initial order has been made and processed through. What matters is the 'discovery' of evidence, and that discovered evidence must then be considered with all other available evidence, whether 'new' or not. In the Wildlife and Countryside Act 1981, s.53(3):

   (c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—

   (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic;

2. In R v. Secretary of State for the Environment, ex p. Riley [1989] CO/153/88, the ability to 'reopen' the question of status of a way previous subject to a definitive map reclassification order was considered. Held: that there is no *res judicata*[81] in this statutory provision, and MacPherson J provided an oft-quoted reference to a "better greybeard's evidence" being added to a (earlier) "not very convincing greybeard's evidence", and the whole being weighed together (at D–E on page 10 of the judgment). It does not matter that Riley concerned a former RUPP, or that the earlier reclassification found that vehicular rights subsisted. Riley dealt expressly with what is in law a 'trigger' for a definitive map modification order to be made for a way that has previously been through a modification (or reclassification) process.

3. The court held that the 1968 Act reclassification did not establish a non-vehicular status *res judicata*, and MacPherson J, on page 8 at G (of the transcript) says "I accept Mr Laurence's argument, which proceeds as follows:" Mr Laurence's submissions included: "The discovery by the authority of evidence means exactly what it says … The words '… evidence (when considered with all other relevant evidence available to them)' wholly cover the present case, where it is accepted that the 'discovered evidence' was not minimal, even if it did not 'really add to the weight of evidence previously considered …'"

4. That view of the Learned Judge is important. It means that the discovery of even one piece of 'new' evidence is sufficient to reopen the question of status even if that 'new piece', added to the known evidence "did not really add to the weight…"

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[81] *Res judicata* (a matter judged), prevents a party from re-litigating any issue already litigated. Thus a modification order, once determined, cannot be reargued without the discovery of 'new evidence', not previously considered.

5. MacPherson J continues on page 10 at E, “For example, one not very convincing ‘greybeard’s’ evidence given in 1970 could be supplemented by a better ‘greybeard’s’ evidence in 1986, or by the addition of documentary evidence …”
6. Both the Judge and Mr Laurence acknowledge the doctrine of *de minimis*, which is a common law term meaning “too small to be meaningful or taken into consideration; immaterial”. But since MacPherson J held (in this case) that discovered evidence that does “not ‘really add to the weight of evidence previously considered’ …” is sufficient to trigger the new order, such evidence cannot be *de minimis* simply by being of little weight.
7. Stubbing Court v. Secretary of State for EFRA [2012] (consent order) is a case concerning an order to delete a public right of way from the definitive map and statement. The Secretary of State consented to judgment on the point that there is no ‘gatekeeper test’ for the discovered evidence (the ‘new evidence’). Once there is new evidence then the test of sufficiency (cogency, positivity, etc.) is applied to all the evidence together. It is wrong to apply any different test to any part of the evidence: the relevant test must be applied to all the evidence.
8. The key issue here is in [2(f)] of the consent order, and is the matter of the Inspector’s ‘preliminary assessment’. This case was about an order for deletion of a way from the definitive map and statement, and a deletion order, like an addition order, is founded on the ‘discovery of evidence’. Because of the words in the two Trevelyan cases[82] there was a wide belief (even among Inspectors, as this decision shows) that there is a ‘gatekeeper test’ for deletion, where the new evidence has to be variously cogent and substantial, even to allow the order process to start.
9. The outcome in Stubbing Court shows that is an incorrect approach: it is simply i) discovery of evidence, and ii) the weighing together of all the evidence. There is no ‘gatekeeper test’ in a deletion case. That being so, there is no ‘gatekeeper test’ to be applied to the discovered evidence in an addition/modification application.
10. The same evaluation and weighing standards are to be applied to the discovered evidence as to all the other evidence, and to all the evidence taken together.
11. In this application there is the evidence previously considered, plus ‘new evidence’, which ‘new’ is also evidence that speaks to the historical public status of the road. It does not matter if this ‘new evidence’ alone is not sufficient to establish the claimed status. What matters is whether this ‘new evidence’, plus all other evidence, weighed together, is sufficient to prove.

[82] Trevelyan v. Secretary of State for the Environment, Transport and the Regions [2000] QBD CO/2206/99, 24 January 2000, The Times 22 March 2000.

12. The correct approach is to establish that there is discovery of evidence and, if there is, forget that the route has been subject to an earlier application, or order. Consider this application, and all of the evidence ‘old and new’, as a stand-alone issue.

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