The Planning Inspectorate

Please note the future of this document is under review and no revision of its contents will be made in the meantime – last review April 2016

Wildlife and Countryside Act 1981

DEFINITIVE MAP ORDERS: CONSISTENCY GUIDELINES

First issued April 2003

CONTENTS

SECTION 1 INTRODUCTION

How to use these Guidelines

1.1 These Guidelines provide information and references to resources and relevant case law to assist in the interpretation and weighing of evidence on Definitive Map Orders (DMOs).

1.2 The Guidelines are divided into topic or document related sections. Before referring to a particular section of the Guidelines, it is recommended that time is taken to familiarise with 'Putting the Guidelines into Practice', Section 2. This sets the context in which Inspectors approach DMOs and provides helpful background to the type of guidance available and how it should be applied

1.3 Each subsequent Section, where appropriate, begins with a list of relevant reference material from guidance which must be applied, to directory and advisory guidance, followed by a list of other publications on each subject. Most of this material is available in the public domain: where this is not the case, links are provided, including for the referenced Rights of Way Advice Notes.

1.4 The Guidelines refer to a number of publications and articles, this should not be taken to imply that the Inspectorate endorses any of them. Although they all contain some useful advice, it should be borne in mind that they have often been written from a particular standpoint. Moreover, in some cases the advice may have been overtaken by later research. In the circumstances, the relevance of such advice and the weight to be attached to it in any particular case has to be carefully assessed in the light of the circumstances prevailing at the time.

1.5 Each DMO case is considered by the Inspector on its own merits taking into account the relevant tests laid down by statute and the evidence presented in each case. It is a matter of fact that, whilst there may appear to be similarities between cases, the particular combination of evidence in each case is unique.

1.6 It is important to bear in mind that whilst the Inspector, in any given case, will determine the weight to attach to each individual piece of evidence, they will be considering the evidence together, as a whole. Having evaluated all the evidence, the Inspector's Decision will be reached on the balance of probabilities.

1.7 Exceptionally the Inspector may be convinced that it is appropriate to depart from the Guidelines. However, in such cases their Decision will include an explanation of the reasoning which led them to this conclusion.

What the Guidelines cannot do

1.8 The Guidelines are neither definitive nor exhaustive and do not set any precedent. They are subject to change, whether by the application of new case law, or as a result of new understanding following academic research.

SECTION 2 PUTTING THE GUIDELINES INTO PRACTICE

REFERENCE MATERIAL

Departmental Guidance

Letter from the Head of Countryside Division (dated 24/08/98) on 'unclassified roads'

Other Publications

Halsbury's Laws of England (Volume 21 'Highways') Fourth edition

CONTENT This section is in three parts

PART 1 – THE HIERARCHY OF 'GUIDANCE'

Introduction

2.1 The law and facts of a case largely determine the preparation and making of an Order, the consideration of representations, and the eventual decision on the Order. Mandatory, directory and advisory considerations generally give an Inspector little latitude in exercising judgment.

Mandatory Guidance	*Statute law and case law where the judgment is a binding precedent to be disturbed only by a higher court of record (see Section 3 'Case Law').*
Directory Guidance	*Other judgments where the reasoning pursued clearly appears to have a bearing on the matters before an Inspector (see Section 3 'Case Law'), Regulations and Schedules.*
Advisory Guidance	*Circulars and Advice Notes that explain procedures and government policy and which may assimilate the outcomes of advisory bodies and consultations.*

2.2 There is often other reference material which can assist, but does not bind, an Inspector. It falls into two broad categories.

Explanatory:	*Subject papers by authors of recognised legal and/or academic standing and research papers into social and environmental aspects of highways.*
Of interest:	*Articles on behalf of statutorily recognised user groups or affiliated organisations or interested parties and anecdotal pieces, often in the form of recorded journeys or local histories*.

Statute Law

2.3 Statute law is law arising from Acts of Parliament or any regulations arising from an Act. Statute law also includes byelaws made by any local authority.

Case Law

2.4 Case law arises from judicial judgments handed down by the various Courts of Record (principally the High Court, Court of Appeal and the Supreme Court (formerly the House of Lords)) The judgments provide a legal framework as to the interpretation of statute law. (see Section 3 'Case Law').

Regulations

2.5 Statutory Instruments are secondary, or subordinate, legislation made under authority contained in Acts of Parliament. Regulations are Statutory Instruments.

Circulars and other Departmental Guidance

2.6 Circulars and Departmental Guidance set out the policy of Government departments and offer a view as to the interpretation of legislation. The main guidance in respect of rights of way is provided by the Department for Environment Food and Rural Affairs Circular 1/09 or in Wales the Welsh Office Circular 5/93 on 'Public Rights of Way'

Other Publications

2.7 There is a plethora of articles, books etc on rights of way issues. These are often produced by authors who are recognised as having considerable specialist professional knowledge of rights of way matters. Experts do not always agree amongst themselves and when tested in the Courts their opinions do not always survive (see Part 3). A view in an article should not be accepted as authoritative unless it has received judicial approval. Expert evidence deserves due respect, but Inspectors should always use their critical judgment in considering such evidence.

2.8 A more localised type of expertise may legitimately be claimed by those who have researched evidence relating to a particular Order. These individuals may appear at a hearing or inquiry on behalf of campaigning organisations or as concerned individuals. However, their contributions have to be critically scrutinised and assessed as with all other evidence.

2.9 Some enthusiasts now share their opinions on the internet or in informal publications. This widespread dissemination can lead to several witnesses at a hearing or inquiry drawing on the same source for their opinions. Whether they have the same source can sometimes be usefully explored but, whatever their source, the repetition of opinions does not affect their factual or intellectual merit, one way or the other.

2.10 British literary heritage is rich in personal recollections of 18th and 19th century travellers. Informal local histories may also be tendered in evidence. Such works should not generally be relied upon as primary sources of evidence. Nevertheless they not infrequently provide useful corroboration of evidence gleaned from documents of superior provenance.

Concluding Comment

2.11 Inspectors must make their decisions on the evidence of fact put before them, within the framework of Statute Law as interpreted by the Court and with the assistance of other reputable guidance.

PART 2 – GENERAL CONSIDERATIONS

Consideration of Evidence

2.12 An analysis of hearing or inquiry evidence usually comprises three stages: the identification of fact, the derivation of an inference from that fact, and an assessment of the evidential weight of the inference.

Identification of Fact

2.13 When a document is introduced at a hearing or inquiry, the facts it contains become [inquiry] evidence, whether relied upon by the witness or not. Consequently, it is necessary to consider the portion of the document on which the witness relies, not by itself, but in context. Similarly, it is necessary to study maps carefully to see whether the feature relied upon is supported by other information on the map. As Mummery L J said in *O'Keefe*[1] *... it is important to read all the documents ... as a whole and not to examine passages taken out of context.* If appropriate, Inspectors should attempt to resolve any apparent inconsistency by questioning the witness who introduced the document. Such additional evidence can often be of value to the Inspector later, when considering the issues. Section 32 of Highways Act 1980 (HA 80) indicates how the Inspector should evaluate a document as a whole and determine the weight to give to the facts derived from it.

Inference

2.14 More often than not documentary evidence will not supply a seamless array of facts leading to a confident conclusion. In such cases, gaps in evidence may be bridged by the use of one or more of a number of legal presumptions. One of them is contained in the maxim: *Once a highway, always a highway*[2]. This presumption must prevail unless some legal event causing the highway to cease can actually positively be shown to have occurred. Another – what is termed the 'presumption of regularity' - can be invoked where there is a lack of evidence on whether proper legal procedures were followed.

2.15 An approach to the application of an inference derived from evidence was suggested by McCullough J in '*West Yorkshire MCC v Harry Brown' (1983).* The decision-maker should give *... careful consideration of what should prima facie be drawn from a fact and then see whether, upon consideration, this should be rebutted or whether it should ripen into an inference upon which further conclusions may in turn be based.* However any inference must be tested against other hearing or inquiry evidence. No matter how reasonable the inference drawn, it is generally no more than a rebuttable presumption.

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[1] O'Keefe v SSE and Isle of Wight Council [1997]
[2] Dawes and Hawkins [1860]

Evidential Weight

2.16 When all the material considerations have been identified, the weight attaching to the evidence as a whole must be assessed. Most recent case law guidance is to be found in the *Hollins v Oldham* 1995 (*C94/0206, unreported*) judgment.

2.17 There is a distinct and important difference between the 'cumulative' and 'synergistic' approach to the weighing of evidence. Under the cumulative approach a number of relatively lightweight pieces of evidence (e.g. three commercial maps by different cartographers, all produced within the same decade or so) could be regarded as mere repetition. Thus, their cumulative evidential weight may not be significantly more than that accorded to a single map. If, however, there is synergy between relatively lightweight pieces of highway status evidence (e.g. an OS map, a commercial map and a Tithe map), then this synergy (co-ordination as distinct from repetition) would significantly increase the collective impact of those documents. The concept of synergism may not always apply, but it should always be borne in mind.

2.18 Section 32 of the Highways Act 1980 requires any court or tribunal to which documentary evidence is adduced to take such evidence into consideration "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". It is also required by that section to give such weight to the document it considers is "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 was produced."

2.19 Section 32 is declaratory of the common law. Inspectors should follow it in how they treat documentary evidence. In assessing the value of a document, Inspectors should, for example, take into account evidence of the facts surrounding its creation and its provenance such as, in the case of a private map, the reputation of the person who produced it. The surrounding circumstances may point to a document being of some weight.

2.20 For example, the document may have been prepared by someone acting in a public capacity, the procedures for producing it may have involved external checks or public participation, or what was recorded may be the result of a person acting against his interest. A document may not on its own be conclusive of the status of a way. This may, for example, be because it was prepared merely to record the physical existence of the way or who was responsible for maintaining it. Documentary evidence will often support other such evidence or user evidence and so ought not to be considered in isolation.

2.21 In general, the weight to be attached to documentary evidence is for the Inspector, subject to the administrative law test of reasonableness.

Balance of Probability

2.22 Once all of the evidence has been individually assessed, the 'balance of probability' test demands a comparative assessment of the evidence on opposing sides. This is a complex balancing act, involving careful assessment of the relative values of the individual pieces of evidence and the evidence taken together. It is the infinitely variable nature of this assessment which makes WCA 81 case decisions unique.

Written Evidence

2.23 It is unusual for all statutory and other contributors of evidence to be able to appear at a hearing or inquiry. They may present written representations in the form of Statutory Declarations, Witness Statements made to a solicitor, User Evidence Forms, statements which would serve as a proof of evidence had the author appeared (often supported by the documents relied on) or simply letters to The Planning Inspectorate or the Inspector. Provided that these documents pass the test of relevance they must be examined for material considerations. The latter then form part of an Inspector's post-hearing or inquiry deliberations. The evidential weight attaching to the various types of evidence can vary. Legally attested documents will carry more weight than other statements. The need for critical scrutiny of User Evidence Forms is addressed in 'Dedication.' Other written representations should be subjected to similarly disciplined scrutiny. However, evidence tested in cross-examination is best evidence. Untested post-hearing or inquiry submissions should normally be accorded less weight.

PART 3 – TOPIC RELATED GUIDANCE

Content

- What is a Cross-Road?
- Named Highways
- Unclassified County Roads
- Administrative Boundaries
- Rural Culs-de-sac

What is a Cross Road?

2.24 In modern usage, the term "cross road"/"crossroads" is generally taken to mean the point where two roads cross. However, old maps and documents may attach a different meaning to the term. These include a highway running between, and joining, other highways, a byway and a road that joined regional centres. Inspectors will, therefore, need to take into account that the meaning of the term may vary depending on the road pattern/markings in each map.

2.25 In the case of *Hollins v Oldham* [1995] which considered this matter, Judge Howarth stated:

> "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."

2.26 An Inspector will need to consider the term "cross road" in relation to each particular map or document. That a cross road appears on an old map or document does not automatically indicate public rights: the designation of a way will depend on analysis of the particular map and the categorisation of other ways shown on the map.

2.27 In *Hollins v Oldham* the Judge analysed the two categorisations and concluded that a "cross road" must mean a public road for which no toll was payable, stating:

> "This latter category, it seems to me, must mean a public road in respect of which no toll is 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 which he did not have the right to use."

2.28 The Judge further acknowledged that just because a mapmaker regarded a way as a public right of way of a particular status does not mean that he was necessarily correct. He stated:

> "Pingot Lane must have been considered, rightly or wrongly, by Burdett as being either a bridle way or a highway for vehicles."

2.29 Therefore, in reaching a conclusion in relation to a particular piece of evidence, it is necessary to consider it with the totality of all other relevant evidence, as illustrated in the judgement:

> "The whole of the documents have to be examined to assess their reliability. It seems to me that I have to assess each piece of documentary evidence to see how far I can rely upon it. This applies just as much to official documents such as the definitive map or ordnance survey sheets or tithe surveys as it does to other records such as commercially produced maps. They have all been produced by human beings and are so liable to error to some extent."

2.30 In considering documentary evidence, the recording of a way as a cross road on a map or other document may not be proof that the way was a public highway, or enjoyed a particular status at that time. It may only be an indication of what the author believed (or, where the contents had been copied from elsewhere that he accepted what the previous author believed). In considering such a document due regard will not only need to be given to what is recorded, but also the reliability of the document, taking full account of the totality of the available evidence in reaching a decision.

Named Highways

2.31 It is sometimes asserted that a named highway is probably a public highway. One strand of the argument runs like this. One of the requirements of Section 69 Highways Act 1773, was that all 'common highways' had to be named before indictment for obstruction or disrepair could take place. This requirement continued in Highways Act 1835. As private roads were not liable in this way, they did not need to be named. It therefore follows that a named way is probably a public highway.

2.32 Inspectors may have some difficulty with this argument. Although the statutory element is probably correct (supporting evidence would be required), it is a matter of fact that nowadays many public highways are not named and some private roads are. Furthermore, road names, like place names, can be corrupted over time, or even disappear completely, and new names appear through local usage. These new names would have no legal import but, nonetheless, they may have found their way onto OS maps and into List of Streets[3].

2.33 In summary, the arguments that a named highway is probably a public highway, or, at least, that its naming carries some inference of public

[3] Section 36(6) of the Highways Act 1980 requires every highway authority to make and keep up to date, a list of streets within its area which are highways maintainable at the public expense.

status, should be thoroughly tested. Of themselves, they are not persuasive evidence.

Unclassified County Roads (UCR)

2.34 This classification has no legal standing but it carries some inference that the public may use the highway with vehicles. Extant advice is that 'all other relevant evidence must be taken into account' (see letter from the head of Countryside Division dated 24 August 1998).

Administrative Boundaries

2.35 On the Definitive Map, some long and apparently continuous highways change status at administrative (e.g. parish/community) boundaries, when common-sense suggests they should not. An Inspector may well meet a situation where an Order highway continues into the next administrative area and be invited to accord it the status already awarded there. An Inspector should not feel bound to do so. It would not be safe to draw any firm inference from the awarded status without knowing the diligence of the procedure leading to its award. There was sometimes considerable inconsistency between parishes' diligence during the creation of the Draft Definitive Map. If, however, the section under consideration continues at both ends as a public highway of the same description, and if there is no other access to the mid-section, and if the ends lie in different parishes, a more firm inference may be drawn. It is a question of considering all the relevant evidence (see also *Eyre v New Forest Highways Board* 1892*).*

Rural Culs-de-Sac

2.36 The courts have long recognised that, in certain circumstances, culs-de-sac in rural areas can be highways. (e.g. Eyre v New Forest Highways Board 1892, Moser v Ambleside 1925, A-G and Newton Abbott v Dyer 1947 and Roberts v Webster 1967). Most frequently, such a situation arises where a cul-de-sac is the only way to or from a place of public interest or where changes to the highways network have turned what was part of a through road into a cul-de-sac. Before recognising a cul-de-sac as a highway, Inspectors will need to be persuaded that special circumstances exist.

2.37 In *Eyre v New Forest Highway Board* 1892 Wills J also covers the situation in which two apparent culs-de-sac are created by reason of uncertainty over the status of a short, linking section (in that case a track over a common). He held that, where a short section of uncertain status exists it can be presumed that its status is that of the two highways linked by it.

SECTION 3 CASE LAW

Introduction

3.1 The principal sources of the law in England and Wales are statute law and common law. The major part of common law is contained in the accumulated decisions of judges, often referred to as case law. An Inspector may be bound by it. It is therefore essential that he/she be aware of potentially relevant judgments. The following general guidance may assist.

Judicial Precedence

3.2 Decisions of "courts of record" are binding on all inferior courts and tribunals. In terms of domestic law, the principal courts of record are the High Court, the Court of Appeal and the Supreme Court. A higher court of record binds the decisions of a lower court of record. Decisions have immediate effect. They apply during any period in which an appeal could be lodged or, having been lodged, is pending.

3.3 An Inspector is bound to follow the decisions of all courts of record, but is not normally bound by decisions of the County or Magistrates' Courts ('stopping up' decisions are obvious exceptions). Whilst not binding, decisions by courts other than those of record may be 'persuasive'. The weight to be attached to them will depend on the circumstances. Inspectors are not bound by another Inspector's decisions. These are frequently quoted at inquiry but do not set any precedent. It is often the situation that the circumstances in the case are somewhat different.

3.4 A past decision of a court of record is binding on a present case (sometimes termed 'instant' case), only to the extent that the facts are comparable. If the facts in a present case are materially different, an Inspector may reach a different decision, but should explain why the apparent precedent has not been followed, i.e. distinguish the present case from the precedent decision. If there are extant two conflicting decisions of the High Court (both of which are, in principle, binding on inferior courts), an Inspector is entitled to choose which to follow.

Judicial Precedents etc

3.5 A judgment will usually follow a fairly standard sequence. The issues raised are first described and the relevant statute law is rehearsed. There then follows the judge's reasoning. This may contain extensive quotations from judicial precedent and include personal opinion. The decision which follows will be binding in respect of the issue(s) addressed.

3.6 In some cases e.g. *R v SSE ex parte Andrews 1993* (see Section 7 'Inclosure Awards'), the point at issue may be widely applicable. The decision will therefore be binding in all cases where the issue arises. In other judgments, e.g. *Dunlop v SSE and Cambridgeshire County Council*

1995 (see Section 7 'Inclosure Awards'), the decision may be specific to a particular issue and is therefore binding only in relation to that. However, in the reasoning, a judge may offer opinions which appear to be more widely applicable. Such opinions can be influential beyond the confines of the actual decision if they are central to it. Other opinions expressed may be *obiter dicta* (incidental statements made in passing). Such opinions are not legally binding, but as they represent the view of a distinguished judge they should normally be followed. Judicial precedents quoted with approval in the judgment must, where relevant, be followed by an Inspector. As a general rule, the more senior the judge or court, the more persuasive the opinion.

3.7 A further consideration is that many judgments which had previously withstood the test of time have now been overtaken by, or absorbed in, more recent judgments. If witnesses inadvertently seek to rely on somewhat dated judgments they should be invited to consider whether later judgments affect their case. Fortunately, overtaken or absorbed judgments are usually identified in the later judgments and the way and extent that they have influenced it are identified

Relevance

3.8 Case law should be the subject of legal submission, not given in evidence and subject to cross-examination. Witnesses will sometimes introduce case law which does not read across to the case before the Inspector. On other occasions extracts may be quoted which are taken out of context and inappropriately used to suit a particular argument, or partial quotes used which disguise or distort the full meaning. An Inspector should always try to obtain full copies of judgments from someone quoting case law, or at least a sufficient extract to see the quotation in context. Its production may also help informed cross-examination.

Availability of Full Judgments

3.9 Identification of relevant case law in these guidelines is achieved from three sources.

- 'Leading Cases' i.e. those cases considered to be most useful are identified in each topic-related section. These judgments are essential reading. Inspectors are provided with copies for retention.

- Judicial precedents which are considered to be relevant to the point at issue are often found within 'leading cases'.

- There are a number of legal encyclopaedias, which offer a detailed oversight of the law with comprehensive references. Parties to Orders relying on such material would be expected to produce it at inquiry in sufficient detail.

Concluding Comment

3.10 Consistent interpretation and application of case law is essential. If an Inspector is aware of relevant case law which the parties show no sign of

introducing, at the earliest opportunity and in a neutral manner, attention should be drawn to it. Obviously it will benefit all parties to know the judicial precedents the Inspector anticipates will need to take into consideration.

SECTION 4 WILDLIFE AND COUNTRYSIDE ACT 1981 AND THE DEFINITIVE MAP AND STATEMENT

REFERENCE MATERIAL

Statutes and Regulations

National Parks and Access to the Countryside Act 1949

Countryside Act 1968

Highways Act 1980, section 31 (HA 80)

Wildlife and Countryside Act 1981, sections 53, 54 and 66 and Schedules 14 and 15 (WCA 81)

SI 1993 No.12 – The Wildlife and Countryside (Definitive Map and Statement) Regulations 1993

Countryside and Rights of Way Act 2000, sections 47, 48 and 49 (CROW)

Natural Environment and Rural Communities Act 2006, sections 66, 67 and 71 (NERC)

Case Law

Canon v Villars [1878] 8 ChD 415 – private easements

Eyre v New Forest Highway Board (1892) 56 JP 517 – meaning of 'highway' at common law, culs-de-sac, dedication and maintenance

R v SSE ex parte Kent County Council CO/2605/93 – not appropriate to use s53(3)(c)(iii) to delete a way which is known to exist but the line is uncertain

R v Isle of Wight ex parte O'Keefe [1989] JPEL 934 1994, 1996 and 1997 – s53 and s54 'interpreted' and OMA's pre-Order making responsibilities ("O'Keefe 1")

O'Keefe v SSE and Isle of Wight Council (QBD) (1994) [1996] JPEL 42 ("O'Keefe 2")

O'Keefe v SSE and Isle of Wight Council (CA) (1997) EWCA Civ 2219, [1998] JPEL 468 ("O'Keefe 3")

R v SSE ex parte Riley (1989) 59 P & CR 1 – reclassification to bridleway and extinguishment of vehicular rights

R v SSE ex parte Burrows and Simms [1990] 3 All ER 490 [1991] 2 QB 354 – status of Definitive Map and modification thereof through 'discovery' of evidence

Fowler v SSE and Devon County Council [1992] JPEL 742 – recording at a particular status on the DMS does not mean that higher rights could not exist.

Mayhew v SSE [1992] 65 P & CR 344 – status of Definitive Map and modification thereof through 'discovery' of evidence, suitability and traffic regulation orders

Lasham Parish Meeting v Hampshire County Council and SSE [1993] JPEL 841 – duly made objections and 'relevance'

R v SSE ex parte Bagshaw and Norton [1994] 68 P & CR 402 – Schedule 14 appeals - 'subsists or is reasonably alleged to subsist'

R v SSW ex parte Emery (CA) [1998] 4 All ER 367 – continuation of the *Bagshaw* debate

R v Oxfordshire CC ex parte Sunningwell PC [1999] 3 All ER 385 – belief element of 'as of right'.

Masters v SSETR [2000] 4 All ER 458 (CA) – statutory definition of BOAT

Trevelyan v Secretary Of State For Environment, Transport & Regions [2001] EWCA Civ 266 – cogent evidence needed to modify definitive map and statement

Leicestershire County Council v SSEFRA CO/4566/2002 – continuation of the *Bagshaw* debate and the test to be applied at the confirmation stage; presumption against change

Todd and another v Secretary of State for Environment, Food and Rural Affairs [2004] EWHC 1450 - burden of proof 'on the balance of probabilities'. With reference to *Norton and Bagshaw* the decision at Schedule 15 is whether the route subsists. No significantly different view on interpretation or reference to new evidence without an opportunity to comment.

Burrows v Secretary of State for Environment, Food and Rural Affairs [2004] EWHC 132 (Admin) – 'discovery of evidence'; there must be some new evidence, which, when considered together with all the other evidence available, justifies modification of the Definitive Map and Statement.

Norfolk County Council, R (on the application of) v Secretary of State for Environment, Food & Rural Affairs [2005] EWHC 119 (Admin) - under section 56, the definitive map is the primary document; if the statement cannot be reconciled to it then the position shown on the map prevails and a degree of tolerance is permissible. Neither the map nor statement is conclusive at review stage; there is no evidential presumption in favour of the map.

Winchester College, Warden & Fellows Of & Anor R (on the application of) v Food & Rural Affairs [2007] EWHC 2786 (Admin) – for an exception to apply under NERC in relation to an application to record a BOAT the application must comply with the requirements of Paragraph 1 to Schedule 14 of WCA 81.

Circulars and other Departmental Guidance (available from Government bookshops or on-line)

Defra Rights of Way Circular 1/09:
https://www.gov.uk/government/publications/rights-of-way-circular-1-09

General information on rights of way available at:

https://www.gov.uk/government/organisations/department-for-environment-food-rural-affairs

www.nationalarchives.gov.uk

Welsh Office (WO) Circular 5/93: Public Rights of Way*

WO Circular 45/90: Modifications to the Definitive Map: Wildlife and Countryside Act 1981*

Ministry of Town and Country Planning Circular No.81 1950 covering the *Surveys and Maps of Public Rights of Way* produced by the Commons, Open Spaces and Footpaths Preservation Society in association with the Ramblers' Association (the Memorandum)

Ministry of Town and Country Planning Circular No. 91 1950 covering guidance to surveying authorities on action to be taken following completion of surveys

Ministry of Town and Country Planning Circular No. 53 1952 - Procedural guidance to surveying authorities on DMS preparation procedures

Ministry of Town and Country Planning Circular No. 58 1953 – Further procedural guidance to surveying authorities on DMS preparation procedures

Planning Inspectorate Guidance

Guidance booklet on Procedures for Considering Objections to Definitive Map and Public Path Orders:

http://www.planningportal.gov.uk/planning/countryside/rightsofway/guidance

Planning Inspectorate Advice Notes:

http://www.planningportal.gov.uk/planning/countryside/rightsofway/advicenotes

* applicable only to cases in Wales

Other Publications

'A guide to definitive maps and changes to public rights of way' - Countryside Agency, May 2003;

http://publications.naturalengland.org.uk/publication/31038

'Rights of Way: A guide to law and practice' by John Riddall and John Trevelyan (published by the Open Spaces Society and the Ramblers' Association) – Section 4 in particular – and the on-line resource;

Blue Book Extra; http://www.ramblers.co.uk/rightsofwaybook/bbe

'Public Rights of Way and Access to Land' by Angela Sydenham – Chapter 5 in particular

Articles in Section 8 (Recording of Highways) of the Rights of Way Law Review.

GUIDANCE

Introduction

4.1 Over the years, statutes on rights of way matters have frequently inter-related. Sections 53 and 54 WCA 81 and section 31 HA 80 do so today in relation to Definitive Map Orders. Guidance on the revision of the Definitive Map for England is in Circular 1/09, particularly section 4, and, for Wales, Annex B, WO Circular 5/93.

Case Law

4.2 There are many judgments dealing with the interpretation of these statutes, most of which build on former judgments. The judgments in *R v SSE ex parte Burrows and Simms (1990)* and *R v Isle of Wight ex parte O'Keefe (1994)* provide an overview of the legislation.

4.3 The *Burrows and Simms* judgments can be read in conjunction with WO Circular 45/90, which succinctly deals with the reversal of the judgement in *Rubenstein*[4]. The Circular, however, does not mention two significant aspects of the judgment, namely confirmation that s53(c)(ii) permits both upgrading and downgrading of highways and that s53(3)(c)(iii) permits deletions from the Definitive Map.

4.4 *Mayhew* confirms that the discovery of evidence under S53(3)(c) does not have to be the discovery of fresh evidence. It held that the meaning of "to discover" is to find out or become aware. This implies a mental process of the discoverer applying their mind to something previously unknown to them.

4.5 *Lasham* amplifies the legal justification for the fact that Inspectors are not empowered to take amenity issues into account in determining definitive map orders.

4.6 *Bagshaw and Norton* arises from a Schedule 14 appeal. It addresses the 'subsists or is reasonably alleged to subsist' issue. The gist of the judgment is that the statutory test comprises two separate questions, one of which must be answered in the affirmative before an Order is made. The two questions are (1) whether a right of way subsists or (2) whether a right of way is reasonably alleged to subsist. The *Emery* judgment provides further clarification on the "reasonably alleged to exist" question at the Schedule 14 stage.

4.7 In the *Todd and another* judgment, Evans-Lombe J made it clear that only the first question is applicable at the Schedule 15 stage. He concluded that the confirming authority (whether the local authority confirming an unopposed order or the Secretary of State confirming an opposed order) must be satisfied on the balance of probabilities that the right of way subsists. This means that when considering the confirmation

[4] Rubenstein v SSE [1989]

of an order, Inspectors are only able to consider whether on the balance of probabilities the right of way subsists.

4.8 An article in Section 8 of the RWLR entitled 'ex parte Bagshaw ex parte Norton' addresses the question of whether an Order based on presumed dedication should be made under s53(3)(b) or s53(3)(c)(i). Normally this would only be of concern when considering whether an Order is properly made. However, by inference the *Bagshaw* judgment appears to accept that either sub-clause is an acceptable vehicle in these circumstances. Pill J in *O'Keefe No.2* appears to agree.

4.9 The *O'Keefe* judgments result from what was, in effect, an assault upon the legality of the Definitive Map process in general and sections 53 and 54 of WCA 81 in particular. They provide sound guidance on a range of issues, but comment on 'as of right' has been overtaken by *Sunningwell*. They also remind OMAs that they should make their own assessment of the evidence and not accept unquestioningly what their officers place before them.

4.10 The conclusion reached in the *Masters* appeal resolves previous uncertainty about the meaning of s66 (1) WCA 81 in respect of BOAT (see also Section 5 'Dedication'). It supersedes the *Nettlecombe*, original *Masters* and *Buckland and Capel* judgments on the matter.

4.11 In relation to BOATs the effect of NERC is to extinguish vehicular rights of way on commencement – 2 May 2006 for England and 11 May 2006 for Wales – subject to certain exceptions, including the date of application and the date of determination by the surveying authority. *Winchester* found that for such exceptions to be relevant the application must fully comply with the requirements of Paragraph 1 of Schedule 14 to WCA 81. It is appropriate firstly to determine whether or not the vehicular rights subsist and, secondly, whether or not any exceptions apply; if vehicular rights subsist but the exceptions are not engaged then the appropriate status is restricted byway.

4.12 There are many other judgments on matters which now fall within the scope of WCA 81. For the most part, the referenced judgments contain relevant extracts from these former leading cases (see Section 3 'Case Law').

RWLR Articles

4.13 Many of the judgments have formed the background to articles in the RWLR. These articles are generally a reduction of the judgments to a form more readily understandable by the public at large.

4.14 Other RWLR articles cover various aspects of the Definitive Map itself. Largely, they address pre-inquiry matters, with emphasis on the OMA's order making role and responsibilities. Where they do include comment which affects the interpretation of case law or evidential values, it is important to note the date of the articles. Some of the articles advance opinions which have subsequently been discounted or overturned by the Courts.

The Definitive Map

4.15 The Definitive Map and Statement are conclusive as to the status of the highways described, generally without prejudice to the possible existence of higher rights (defra Circular 1/09, WO Circular 5/93). This conclusivity is not, however, a permanent feature: as Lord Diplock put it in *Suffolk CC v Mason* (1979) *The entry on the definitive map does not necessarily remain conclusive evidence forever.* It had been held, in the case of *Rubinstein v Secretary of State for the Environment (1989)*, that once a right of way was shown on a definitive map, it could not be deleted, but the judgments in *Simms & Burrows 1981* made it clear that s53 of WCA 81 allowed both for the addition or upgrading of rights of way on the discovery of new relevant evidence, and for their downgrading or deletion. In his judgment Purchas LJ stated that he could see *no provision in the 1981 Act specifically empowering the local authority to create a right of way by continuing to show it on the map, after proof had become available that it had never existed.* Parliament's purpose, expressed in WCA 81, he said, included the duty to *produce the most reliable map and statement that could be achieved,* by taking account of *changes in the original status of highways or even their existence resulting from recent research or discovery of evidence.*

4.16 Parish/community councils usually provided the information regarding the routes to be added to the Definitive Map and Statement and the status of those routes. It is not uncommon for witnesses (e.g. local inhabitants, parish/community councils or user organisations) to assert that the parish/ community council's inputs to the Definitive Map process are not reliable. It is variously argued that they did not have the proper guidance, or that they misinterpreted it, and these assertions then form the basis of the case for the modification. The Memorandum attached to Circular No.81 was distributed down to parish council / parish meeting level and the legal 'presumption of regularity' applies. Unless claimants can demonstrate otherwise, it should be assumed that a parish/community council received this detailed guidance and complied with it. The diligence with which a parish/community council met the remit is a different question. The Council minutes can be a useful source of information on this procedure, and other local highway issues which have arisen since the relevant date. As the minutes are a public record of the perception of the parish/ community council at that time, and therefore probably also represent the perception of parishioners, they may carry significant evidential weight. Other procedural guidance was issued to surveying authorities in Circulars 91/1950, 53/1952 and 58/1953.

4.17 In *Burrows v Secretary of State for Environment, Food and Rural Affairs [2004]* the judge commented that modification of the definitive map requires the discovery of evidence. An inquiry cannot simply re-examine evidence considered when the way or ways in question were first entered on the Definitive Map; there must be some new evidence, which, when considered together with all the other evidence available, justifies the modification.

Deletion and downgrading

4.18 When considering whether a right of way already shown on definitive map and statement should be deleted, or shown as a right of way of a different description, the Inspector is not there to adjudicate on whether procedural defects occurred at the time the right of way was added to the definitive map and statement (for example notice was incorrectly served). Unless evidence of a procedural defect is relevant to establishing the correct status of the right of way concerned (for example a key piece of documentary evidence indicating a different status was ignored), there can be no reason to consider it. There must be presumption that the way is as shown on the definitive map and statement, even if the procedures were defective, unless there is evidence to establish that the way should be shown as being of a different status, or not shown at all. See Section 4 of Circular 1/09 and paragraphs 4 and 7 of WO Circular 45/90.

4.19 *Trevelyan* confirms that cogent evidence is needed before the Definitive Map and Statement are modified to delete or downgrade a right of way. Lord Phillips MR stated at paragraph 38 of *Trevelyan that*:

"*Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake*."

4.20 In the *Leicestershire* case the Inspector refused to confirm an order which sought to modify the definitive map and statement to show a path which was shown on the map as running through the curtilage of one cottage, as running through the curtilage of another. Collins J held that in these circumstances, "*it is not possible to look at (i)* [s53(3)(c)(i)] *and (iii)* [s53(3)(c)(iii)] *in isolation because there has to be a balance drawn between the existence of the definitive map and the route* shown on it which would thus have to be removed" He went on "*If* [the Inspector] *is in doubt and is not persuaded that there is sufficient evidence to show the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive…..where you have a situation such as you have here, it seems to me that the issue is really that in reality section 53(3)(c)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong – which would normally no doubt be satisfied by a finding that on the balance of*

probabilities the alternative was right – that a change should take place. The presumption is against change, rather than the other way around".

4.21 Another case relevant to deletions is *Kent*. The Inspector refused to confirm an order under S53(3)(c)(iii) on the basis that the confirmed order would have deleted the whole of the footpath whose position but not existence was in dispute. In upholding the decision, the judge stated that *it seems inherently improbable that what was contemplated by section 53 was the deletion in its entirety of a footpath or other public right of way of a kind mentioned in section 56 of the Act of 1981, the existence, but not the route, of which was never in doubt*.

4.22 The correct way to remove from the definitive map rights whose existence was not in doubt would have been to extinguish (or divert) them under the Highways Act 1980. As the judge continued: *one would expect to look elsewhere [than s53(3)(c)(iii)] for statutory provisions which were concerned with the question whether or not an established right of way (but not its route) should continue to exist*.

4.23 Previous guidance has indicated that, in the case of a way that had been incorrectly shown on the definitive map, a case for dedication could be established on the basis of use in the period between the first recording of the way and its subsequent removal. The current view of Defra (as stated in Circular 1/09 version 2) is that it is not possible for a right of way to be dedicated for the purposes of section 31 of HA 80 when use is by virtue of it already being shown on the definitive map; use in such circumstances cannot be 'as of right' as rights that cannot be prevented cannot be acquired.

SECTION 5 DEDICATION / USER EVIDENCE

REFERENCE MATERIAL

Statutes

Law of Property Act 1925 section 193 ("LPA25")

Rights of Way Act 1932 ("RWA32")

National Trust Act 1939

Countryside Act 1968 section 30 ("CA68")

Highways Act 1980 section 31 ("HA80")

Wildlife and Countryside Act 1981 sections 53(3)(b), 53(3)(c), 66(1) ("WCA81")

Road Traffic Act 1988

Charities Act 1993 section 36

Countryside and Rights of Way Act 2000 ("CROW00")

Natural Environment and Rural Communities Act 2006 ("NERC06")

Case Law

Poole v Huskinson (1843) 11 M & W 827 - common law dedication – intention to dedicate – interruption – limited dedication

Hollins v Verney 1884 - sufficiency of user

Dawes v Hawkins [1860] 8 CB (NS) 848 - no time limit on dedication – once a highway etc

Mann v Brodie 1885 - common law dedication – sufficiency of user – presumption – Scottish law – difference of English law

R v Southampton (Inhabitants) 1887 19 QB 590 – 'the public'

Sherrington UDC v Holsey 1904 - physical character of a way

Thornhill v Weekes (1914) 78 JP 154 - physical character of a way

Moser v Ambleside RDC (1925) 89 JP 59 - effect of ancient maps, modern – culs-de-sac surveys, interruptions, noticeboards – pleasure user

Hue v Whiteley [1929] 1 Ch 440 - 'as of right'

Merstham Manor v Coulsdon and Purley UDC [1937] 2 KB 77 – ROW Act 1932 – 'as of right' – 'without interruptions'

Jones v Bates [1938] 2 All ER 237 - dedication at common law – meaning of as of right (ROW Act 1932) – burden of proof – bringing into question

Lewis v Thomas 1950 1 KB 438 - interruption – intention to dedicate

Fairey v Southampton County Council [1956] 2 QB 439 – whether ROW Act 1932 is retrospective – intention to dedicate – differentiation between common law/statute law dedication – burden of proof

Davis v Whitby [1974] 1 All ER 806 - 20 years user

Dyfed County Council v SSW (1989) 58 P & CR 68 – Recreational use giving rise to public rights of way

British Transport Commission v Westmorland County Council [1957] 2 All ER 353 – dedication must be compatible with purpose of land held

R v SSE ex parte Cowell [1993] JPEL 851 - Toll – annual manifestation of non-dedication

Jaques v SSE [1995] JPEL 1031 - common law dedication – true construction of S31 HA80 – no intention to dedicate – burden of proof – effect of requisitioning

Robinson v Adair (1995) Times 2 March 1995 -illegal vehicular user post 1930 – effect in relation to s31 (1) HA80

Nicholson v Secretary of State for the Environment [1996] – common law dedication

Stevens v SSETR (1998) 76 P & CR 503 - rights along RUPPs – effect of Road Traffic Act 1930 on vehicular user evidence

R v SSE ex parte Billson [1998] 2 All ER 587 - duration of no intention to dedicate - rights over common land

R v Wiltshire CC ex parte Nettlecombe [1998] JPEL 707 – definition of BOAT – current user

Masters v SSE [2000] 4 All ER 458 (CA) - definition of BOAT – balance of predominant user - 1929 Handover map – OS maps

R v Oxfordshire CC ex parte Sunningwell PC [1999] 3 All ER 385 – history of prescription of dedication – belief element of as of right

R v SSETR ex parte Dorset CC [1999] NPC.72 - bringing into question – no intention to dedicate

Buckland and Capel v SSETR [2000] 3 All ER 205 - meaning of BOAT – discourse on *Nettlecombe* and *Masters* judgments

R v Planning Inspectorate Cardiff ex parte Howell (2000) unreported – vehicular use post 1930 (see also *Robinson v Adair; and Stevens v SSETR*)

Rowley and Cannock Gates Ltd v SSTLR [2002] EWHC (Admin) – positive actions of a tenant

R v City of Sunderland ex parte Beresford 2003 UKHL 60 – the proposition that use pursuant to permission given by the landowner is always *precario* is not correct. Also toleration equates with acquiescence; not permission

Bakewell Management Ltd v Brandwood [2004] UKHL 14 – presumed dedication of a public vehicular right of way

R (on the Application of Godmanchester Town Council) (Appellants) v SSEFRA and R (on the application of Drain) (Appellant) v SSEFRA [2007 UKHL 28 – lack of intention to dedicate – overt acts by the landowner to be directed at users of the way – duration of no intention to dedicate

James Wild v SSEFRA and Dorset CC (2009) (CA) [2009] EWCA Civ 1406 – lack of intention to dedicate – duration of no intention to dedicate - ownership

R on application of the Ramblers Association and SSEFRA and interested parties 2008 (CO 2325/2008) - a cul-de-sac is capable of being dedicated as a highway

R (Lewis) v Redcar and Cleveland Borough Council and Anor [2009] EWCA Civ 3 (15 January 2009)

R(Lewis) v Redcar and Cleveland Borough Council and Anor [2010] UKSC 11 (03 March 2010)

Whitworth v SSEFRA [2010] WWCA Civ 1486 - sufficiency of user and use by bicycles *R (Powell and Irani) v SSEFRA [2014] EWHC 4009 (Admin)*

Planning Inspectorate Guidance

Rights of Way Advice Note No.12 – Wildlife and Countryside Act 1981 – Vehicles and Rights of Way

Rights of Way Advice Note No.15 – Breaks in user caused by Foot and Mouth Disease

Defra Guidance

The Natural Environment and Rural Communities Act 2006 Part 6 and Restricted Byways: A guide for local authorities, enforcement agencies, rights of way users and practitioners

Other Publications

Halsbury's Laws of England Vol.21 paragraphs 65-86

Rights of Way - A Guide to Law and Practice', 4th Edn. 2007, (published by the Open Spaces Society and the Ramblers' Association)

Relevant articles may be found in the Rights of Way Law Review

GUIDANCE

Introduction

5.1 Dedication of rights of way to the public can arise under statute law (s31 HA80) and under common law. The references above provide a good basis for understanding a controversial subject. It has given rise to a number of judicial interpretations, with some earlier judgments being superseded.

5.2 These guidelines initially concentrate on issues affecting the interpretation of s31 HA80 and then address some aspects of deemed dedication at common law. Comment on specific related topics is found later on in this section.

Section 31, Highways Act, 1980

5.3 Under s31 HA80 dedication of a route as a public highway is presumed after public use, as of right and without interruption, for 20 years, unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period runs retrospectively from the date of bringing into question. The main issues to be considered in relation to the statute are therefore:

- when the status of the claimed route was called into question;
- the extent and nature of the claimed use;
- whether there is evidence of a lack of intention to dedicate a public right of way.

'Bringing into Question'

5.4 *House of Lords in R (on the application of Godmanchester and Drain) v SSEFRA [2007]* ("*Godmanchester")* is the most recent case addressing the meaning of s31(2) HA80 endorsing earlier judgements in regard to what act or acts constitute 'bringing into question.'

5.5 In *R v SSETR ex parte Dorset County Council 1999* Dyson J was not satisfied that a landowner's letter to DoE, passed to the County Council but not communicated to the users, satisfied the spirit of s31(2). The test to be applied is that enunciated by Denning LJ in *Fairey v Southampton County Council 1956*. Dyson J's interpretation of that judgment is that:

> *"Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway."*

5.6 The "bringing into question" does not have to arise from the action of the owner of the land or on their behalf. In *Applegarth v Secretary of State for Environment, Transport and the Regions [2001] EWHC Admin 487*, the owner of a property whose access was via a track claimed to be a

bridleway, challenged the public use although he did not own the track. Munby J stated: "*Whether someone or something has "brought into question" the "right of the public to use the way" is…a question of fact and degree in every case."* Thus any action which raises the issue would seem to be sufficient. However, where there is no identifiable event which has brought into question the use of a path or way, s31 ss (7A) and (7B) of HA80 (as amended by s69 of NERC06) provides that the date of an application for a modification order under WCA81 s53 can be used as the date at which use was brought into question.

User Evidence

5.7 Claims for dedication having occurred under s31 HA80 will usually be supported by user evidence forms ("UEFs"). Analysis of UEFs will identify omissions, lack of clarity, inconsistencies and possible collusion, although the completion of common parts of the form by someone organising collection of the evidence is not necessarily indicative of collusion. Analysis allows the rejection of invalid UEFs (e.g. no signature, no clear description of the way or of how it was being used) and to note the questions to raise at inquiry. A similar analysis should be made of other types of user evidence, such as sworn statements, letters and the landowner's evidence. UEFs are not standardised, and pose differing questions of varying pertinence and precision.

5.8 If the potential value of UEFs is to be realised they must be completed with due diligence. All questions should be answered as accurately and as fully as possible. If there are questions which, from the claimed duration and extent of use, appear capable of being answered yet are not, it may be reasonable to assume that the respondent's recall was insufficient to provide this information. This may then lead to a question as to whether the claimed use is accurately recalled. The evidential weight of the form may well be reduced.

5.9 Similarly if an overall picture emerges, from a variety of sources, which differs significantly from the respondents' recollections, or if a particular difficulty which must have been encountered during claimed use is not mentioned, a question may be raised as to whether the use is accurately and honestly recalled.

5.10 Sometimes objectors do not challenge user evidence in cross-examination. If so, the Inspector may question the evidence, in order to be in a position to decide what evidential weight to place on the UEFs. If few, or no, users attend the inquiry, questions may be posed to the party presenting the evidence, so that the evidential weight can be determined. As with other evidence, user evidence tested in cross-examination generally carries significantly more weight than untested evidence.

5.11 Wandering at will (roaming) over an area, including the foreshore (*Dyfed CC v SSW 1989*), cannot establish a public right (Halsbury's Laws of England, Vol.21, paras 2 and 4 refer). Use of an area for recreational activities cannot give rise in itself to a presumption of dedication of a public right over a specific route. Attention should be paid to the maps

attached to UEFs, and any description of the used route, to ensure that the Order route is under discussion.

'The Public'

5.12 There appears to be no legal interpretation of the term 'the public' as used in s31. The dictionary definition is "*the people as a whole, or the community in general"*. Hence, arguably, use should be by a number of people who together may sensibly be taken to represent the community. However, Coleridge LJ (as he was then) in *R v Southampton (Inhabitants) 1887* said that "*user by the public must not be taken in its widest sense ... for it is common knowledge that in many cases only the local residents ever use a particular road or bridge."*

5.13 Consequently, use wholly or largely by local people may be use by the public, as, depending on the circumstances of the case, that use could be by a number of people who may sensibly be taken to represent the local community. It is unlikely that use confined to members of a single family and their friends would be sufficient to represent 'the public'.

5.14 It was held in *Poole v Huskinson (1843)* that "*there may be a dedication to the public for a limited purpose ... but there cannot be a dedication to a limited part of the public".*

Sufficiency

5.15 There is no statutory minimum level of user required to show sufficient use to raise a presumption of dedication. Use should have been by a sufficient number of people to show that it was use by 'the public' and this may vary from case to case. Often the quantity of user evidence is less important in meeting these sufficiency tests than the quality (i.e., its cogency, honesty, accuracy, credibility and consistency with other evidence, etc.)

5.16 Use of a way by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more (*Davis v Whitby (1974)).* However, use of a way by trades-people, postmen, estate workers, etc., generally cannot be taken to establish public rights.

5.17 It was held in *Mann v Brodie 1885* that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. It is generally applicable that in remote areas the amount of use of a way may be less than a way in an urban area. Lord Watson said:

> *"If twenty witnesses had merely repeated the statements made by the six old men who gave evidence, that would not have strengthened the respondents' case. On the other hand the testimony of a smaller number of witnesses each speaking to persons using and occasions of*

user other than those observed by these six witnesses, might have been a very material addition to the evidence."

5.18 Arguably, therefore, the evidence contained in a few forms may be as cogent - or more cogent – evidence than that in many. *R. v. SSETR (ex p. Dorset) [1999]* accepted that, although the evidence within five UEFs was truthful, it was insufficient to satisfy the statutory test. The finding did not consider whether use by five witnesses would satisfy the test.

5.19 In *Whitworth* Lord Justice Carnwath thought it arguable that the use of a way by two individuals on bicycles should be treated as an assertion of a private right rather than evidence of use by the public.

5.20 In *R (Lewis) v Redcar and Cleveland Borough Council UKSC 11 (03 March 2010)* Lord Walker said that if the public is to acquire a right by prescription, they must bring home to the landowner that a right is being asserted against him. Lord Walker accepts the view of Lord Hoffman in *Sunningwell* that the English theory of prescription is concerned with how the matter would have appeared to the owner of the land or, if there was an absentee owner, to a reasonable owner who was on the spot. In *R (Powell and Irani) v SSEFRA* [2014] EWHC 4009 (Admin) Dove J confirmed that the judgements in *Lewis* were not authority for an additional test beyond the tripartite '*as of right*' test. The judgements in *Lewis* confirm that the extent and quality of use should be sufficient to alert an observant owner to the fact that a public right is being asserted. The presumption of dedication arises from acquiescence in the use. Again in *Redcar*, in the Court of Appeal Dyson LJ refers to *Hollins and Verney* and the words of Lindley LJ.

"… no actual user can be sufficient to satisfy the statute, unless during the whole of the statutory term … the user is enough at any rate to carry to the mind of a reasonable person…the fact that a continuous right to enjoyment is being asserted, and ought to be resisted if such a right is not recognised, and if resistance is intended."

'As of right'

5.21 Use 'as of right' must be without force, secrecy or permission ('nec vi, nec clam, nec precario'). It was once thought that users had to have an honest belief that there was a public right. In *Sunningwell 1999* it was held that there is no requirement to prove any such belief. However, if a user admits to private knowledge that no right exists, it may have a bearing on the intention of the owner not to dedicate.

5.22 Force would include the breaking of locks, cutting of wire or passing over, through or around an intentional blockage, such as a locked gate.

5.23 In *Sunningwell, 1999,* Lord Hoffman said that s1 of the RWA32[5] was an echo of the Prescription Act 1832, with the purpose of assimilating the law of public rights of way to that of private rights of way. Lord Hoffman

[5] The precursor to section 31 of the HA80

goes on to say that the issue of dedication of a highway was how the public using the way would have appeared to the landowner. The use must have been open and in a manner that a person rightfully entitled would have used it, that is not with secrecy. This would allow the landowner the opportunity to challenge the use, should he wish.

5.24 If there is express permission to use a route then the use is not 'as of right'. The issue of implied permission, or toleration by the landowner, is more difficult. In the context of a call not to be too ready to allow tolerated trespasses to ripen into rights, Lord Hoffmann, *Sunningwell 1999,* held that toleration by the landowner of use of a way is not inconsistent with user as of right. In R (*Beresford) v Sunderland CC [2003]*, Lord Bingham stated that a licence to use land could not be implied from mere inaction of a landowner with knowledge of the use to which his land was being put. Lord Scott stated in the *Beresford* case

> *"I believe this rigid distinction between express permission and implied permission to be unacceptable. It is clear enough that merely standing by, with knowledge of the use, and doing nothing about it, i.e., toleration or acquiescence, is consistent with the use being "as of right"."*

5.25 Permission may be implied from the conduct of a landowner in the absence of express words. Lord Bingham, in *Beresford*, stated that

> *"…a landowner may so conduct himself as to make clear, even in the absence of any express statement, notice, record, that the inhabitants' use of the land is pursuant to his permission."*

But encouragement to use a way may not equate with permission: As Lord Rodger put it,

> *"the mere fact that a landowner encourages an activity on his land does not indicate ... that it takes place only by virtue of his revocable permission."*

In the same case, Lords Bingham and Walker gave some examples of conduct that might amount to permission, but the correct inference to be drawn will depend on any evidence of overt and contemporaneous acts that is presented.

'No Intention to Dedicate'

5.26 Once use is established as of right and without interruption, the presumption of dedication arises. Section 31 provides for methods which show that during the period over which the presumption has arisen there was in fact no intention on the landowner's part to dedicate the land as a highway. This would defeat a claim under the statute and is often referred to as 'the proviso'.

5.27 Under s31(3) a landowner may erect a notice inconsistent with the dedication of a highway, and if that notice is defaced or torn down, can give notice to the appropriate council under s31(5). Under s31(6), an

owner of land may deposit a map and statement of admitted rights of way with "the appropriate council". Provided the necessary declaration is made at twenty year[6] intervals thereafter, the documents are (in the absence of evidence to the contrary) "sufficient evidence to negative the intention of the owner or his successors in title to dedicate any additional ways as highways". This is for the period between declarations, or between first deposit of the map and first declaration.

5.28 "Intention to dedicate" was considered in *Godmanchester,* which is the authoritative case dealing with the proviso to HA80 s31. In his leading judgement, Lord Hoffmann approved the obiter dicta of Denning LJ (as he then was) in *Fairey v Southampton County Council* [1956] who held "*in order for there to be 'sufficient evidence there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large – the people who use the path…that he had no intention to dedicate*".

5.29 It is clear from *Godmanchester* that actions satisfying the proviso will, usually, also bring the public right to use the way into question. It nevertheless remains the case that not every act which brings the rights of the public into question will necessarily satisfy the proviso.

5.30 Lord Hoffmann held that "*upon the true construction of section 31(1), 'intention' means what the relevant audience, namely the users of the way, would reasonably have understood the owner's intention to be. The test is … objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie (1885), to 'disabuse' [him]' of the notion that the way was a public highway*".

5.31 For a landowner to benefit from the proviso to s31(1) there must be 'sufficient evidence' that there was no intention to dedicate. The evidence must be inconsistent with an intention to dedicate, it must be contemporaneous and it must have been brought to the attention of those people concerned with using the way. Although s31 ss (3), (5) and (6) specify actions which will be regarded as "sufficient evidence", they are not exhaustive; s31 (2) speaks of the right being brought into question by notice "or otherwise".

5.32 *Godmanchester* upheld the earlier decision of Sullivan J in *Billson* that the phrase "*during that period*" found in s31 (1) did not mean that a lack of intention had to be demonstrated "*during the whole of that period*". The House of Lords did not specify the period of time that the lack of intention had to be demonstrated for it to be considered sufficient; what would be considered sufficient would depend upon the facts of a particular case.

5.33 However, if the period is very short, questions of whether it is sufficiently long *('de minimis')* may arise, and would have to be resolved on the facts.

[6] The Growth and Infrastructure Act 2013 has, with effect from 1 October 2013, increased the interval between highways statements from 10 to 20 years.

5.34 In the Court of Appeal case *Lewis v Thomas 1949,* Cohen LJ quoted with approval the judgment of MacKinnon J in *Moser v Ambleside UDC 1925*:

> *"It was said, very truly, in the passage of Parke, B in Poole v Huskinson (1843) that a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment. If you bear quite clearly in mind what is meant by an act of interruption by the owner, if it is an effective act of interruption by the owner…himself – and is effective in the sense that it is acquiesced in, then I agree that a single act is of very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not there and without his knowledge.*
>
> *"The fact that the owner…locks the gates once a year…is, or may be, a periodic intimation…that he is not intending to dedicate a highway, but it must be an effective interruption;…if you have evidence of an interruption which is not effective in the sense that members of the public resent the interruption and break down the gate, or whatever it is, and that defiance of his supposed rights is then acquiesced in by the owner, or…if it is an attempted interruption by a tenant without the…authority of the owner and is also an interruption that is ineffective and a failure because the public refuse to acquiesce in it, then, as it seems to me such an ineffective interruption, either by the owner or by the tenant, so far from being proof that there is no dedication, rather works the other way as showing that there has been an effective dedication."*

5.35 However, in *Rowley v SSTLR & Shropshire County Council May 2002*, Elias J held that the acquiescence of a tenant may bind the landowner on the issue of dedication. Also, in the absence of evidence to the contrary, there is no automatic distinction to be drawn between the actions of a tenant acting in accordance with their rights over the property and that of the landowner in determining matters under s31HA80.

> *"the conclusion...that there was no evidence that any turning back had in any event been authorised by the freeholder involved an error of law. A similar argument was advanced in Lewis v Thomas [[1950] 1 K.B 438] and rejected, the court apparently taking the view that if it is alleged that the freeholder has a different intention to the tenant, there should at least be evidence establishing that."*

5.36 In cases where a claimed right of way is in more than one ownership, and only one of the owners has demonstrated a lack of intention to dedicate it for public use, it should be considered whether it is possible that public rights have been acquired over sections of the way in other ownerships, even if this would result in cul de sac ways being recorded (*R on application of the Ramblers Association and SSEFRA and interested parties 2008 (CO 2325/2008) this is not decided case law but a consent order where the Secretary of State submitted to judgement)*.

5.37 If there is no contradictory evidence in accordance with the proviso to s31(1), deemed dedication is made out and the Order should be

confirmed. This is so whether there is an owner who cannot provide sufficient evidence of lack of intention or whether there is no identified owner available to produce such evidence.

Status

5.38 Dedication of a highway of a particular status will depend, amongst other things, on the type of public user. The definitions of minor highways in s66 (1) WCA81 are particularly relevant. In England roads used as public paths, RUPPs, were reclassified to restricted byways under CROW00 following commencement of the relevant section of that Act in 2006. Public vehicular rights have been removed from such routes, although transitional savings may allow the status of some to be reconsidered.

5.39 The definition of a byway open to all traffic, BOAT was settled in the Court of Appeal in *Masters v SSETR* (2000). Roch LJ held:

> *"…Parliament did not intend that highways, over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horse riders than vehicular traffic."*

5.40 Section 66(1) of NERC06 provides that no public rights of way for mechanically propelled vehicles can be created unless expressly provided for or if the rights relate to a road constructed for the use of mechanically propelled vehicles. S67(1) of NERC06 extinguished, with effect from 2 May 2006 (in England), public motor vehicular rights over every highway that was not shown on the definitive map and statement before that date, or was shown only as a footpath, bridleway or restricted byway. Section 67(2) and (3) provide certain exceptions to that extinguishment of rights for mechanically propelled vehicles.

5.41 For reclassification of RUPPs to BOATs under section 54 of the WCA81, the decision depends on the test of whether public vehicular rights exist and does not require current vehicular (or any other) use. For orders recording BOATs under section 53, public vehicular rights must be shown to exist but to satisfy the description BOAT, the question of use should be addressed, in the light of *Masters*. There are tests to determine whether or not public vehicular rights have been subsequently extinguished under the NERC06.

5.42 Use without lawful authority of mechanically propelled vehicles, adapted or intended for use on the roads, on footpaths, bridleways and elsewhere than on roads became a criminal offence in 1930. However, lawful authority may be granted by a landowner, and Lord Scott, in *Bakewell Management Ltd v Brandwood* [2004] (in the context of the acquisition of an easement to drive over common land) held that if such a grant could have been lawfully made, the grant should be presumed so that long de facto enjoyment should not be disturbed.

5.43 A grant would not be lawful if, for example, it gave rise to a public nuisance. The granting of vehicular rights over an existing footpath might constitute a public nuisance to pedestrians using that path. In considering the creation of rights for mechanically propelled vehicles before 2 May 2006, subject to any exceptions provided by NERC06, consideration will need to be given as to whether vehicular use of the way has given rise to, or is likely to give rise to, a public nuisance.

5.44 Section 31, HA80, as amended by section 68 of NERC06, provides that use of a way by non-mechanically propelled vehicles (such as a pedal cycle) can give rise to a restricted byway. In *Whitworth* it was suggested that subsequent use by cyclists of an accepted, but unrecorded, bridleway, where use of the bridleway would have been permitted by virtue of section 30 of the CA68, could not give rise to anything other than a bridleway. Whilst Carnwath LJ accepted that regular use by horse riders and cyclists might be consistent with dedication as a restricted byway, it was also consistent with dedication as a bridleway. In such an instance of statutory interference with private property rights, he determined, it was reasonable to infer the dedication least burdensome to the owner.

Dedication at Common Law

5.45 The common law position was described by Farwell J, and Slessor and Scott LJ in *Jones v Bates 1938,* quoted with approval by Laws J in *Jaques v SSE 1994,* who described the former's summary as "*a full and convenient description of the common law"*. Other leading cases regarding dedication at common law are *Fairey v Southampton CC 1956, Mann v Brodie 1885* and *Poole v Huskinson 1843. Jaques* is particularly helpful on the differences between dedication at common law and under statute. Dyson J's judgment in *Nicholson v Secretary of State for the Environment 1996* comments further on aspects of these differences.

5.46 Halsbury states – "*Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance…An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple;…At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication".*

5.47 Regardless of whether or not dedication at common law is argued as an alternative, in case the s31 claim fails, there should be consideration of the matter at common law. Whilst the principles affecting dedication by landowners and acceptance by user will normally apply in both statute

and common law (even though there is no defined minimum period of continuous user in common law), there is an important difference in the burden of proof. Denning LJ clarified in *Fairey v Southampton County Council 1956* that RWA32, which was the precursor to s31 of HA80:

> *"…reverses the burden of proof; for whereas previously the legal burden of proving dedication was on the public who asserted the right...now after 20 years user the legal burden is on the landowner to refute it."*

5.48 From these comments it follows that, in a claim for dedication at common law, the burden of proving the owner's intentions remains with the claimant. For the reasons given by Scott LJ in *Jones v Bates 1938*, this is a heavy burden and, in practice, even quite a formidable body of evidence may not suffice. However, should it be asserted in rebuttal that there was no one who could have dedicated the way, the burden of proof on this issue would rest with the asserting party (Halsbury).

5.49 In *Nicholson* Dyson J commented on an assertion that *Jaques* was authority for the view that the quality of user required to found an inferred dedication was different from that required to found a statutory dedication. To bring the statutory presumption into play it was not necessary that the user should have been so notorious as to give rise to the presumption, necessary for common law purposes, that the owner must have been aware of it and acquiesced in it. Dyson J stated, "*The relevant criteria so far as the quality of the user is concerned are the same in both cases. The use must be open, uninterrupted and as of right. The notoriety of the use is relevant for common law purposes in the sense that the more notorious it is, the more readily will dedication be inferred if the other conditions are satisfied. But notoriety is also relevant for the purposes of the statute, since the more notorious it is, the more difficult it will be for the owner to show that there was no intention to dedicate."*

Land Held in Trust or Mortgaged (common law only)

5.50 Halsbury gives useful guidance; Volume 21 para 73 states: "*Where a mortgagor (borrower) is still in possession of the mortgaged land it would seem that the mortgagee's (lender's) assent to a dedication is necessary, and that a dedication cannot be inferred from user unless the mortgagee can be shown or presumed to have had knowledge of it."*

5.51 Trustees of land held on trust for sale generally have power to dedicate on their own provided that no incompatibility is introduced (Halsbury Vol.21 para 74 refers). For leaseholds and copyholds the consent of both landlord and lessee, or copyholder, would usually be required for dedication. However, the detailed wording and provisions of the trust or mortgage document should always be checked, in case there are specific requirements for enabling powers. A public body can in general create a right of way, provided that the public use would not be incompatible with the purpose of the body. (See also relevant RWLR articles and note the provisions of HA80 s31(8)).

Crown Land

5.52 HA80 does not apply to land belonging to Her Majesty in right of the Crown or of the Duchy of Lancaster, the Duchy of Cornwall, a government department or held in trust for a government department. If an agreement has been made between the appropriate authority charged with the administration of the land and a highway authority then the provisions of HA80 can apply; in the absence of any such agreement, there cannot be a presumption of dedication of a public right of way over Crown land under s31.

5.53 The Crown Estate manages property belonging to the monarch in right of the Crown. The Crown Estate does not include land belonging to a government department; such land is nonetheless Crown land and is exempt from the provisions of HA80. Forestry Commission land, Defence Estate land and National Health Service land is Crown land, as those lands are owned by the relevant Secretary of State.

5.54 With regard to the land assets of the remaining and former nationalised industries, whether the land at issue could be regarded as Crown land will depend upon the terms of that body's enabling legislation. The presumption is that a public corporation (such as a nationalised industry) is not a Crown body and therefore the land belonging to that body is not Crown land.

5.55 It seems likely that s31 would not apply to land leased to the Crown, as the land subject to the lease would belong to the Crown for the duration of the lease. However, whether it would be possible for the freeholder of the land to dedicate a public right of way during the operation of the lease would depend upon the terms upon which the lease was granted.

5.56 Although Crown land is exempt from the provisions of s31 of HA80, this would not prevent or preclude a presumption of dedication arising in a 20-year period prior to, or after, such ownership or leasehold of the land.

5.57 Under common law, there can be a presumption of dedication of a way over Crown Land. However, there cannot be such a presumption over land requisitioned by the Crown, as there would be no one with power to dedicate *(Jaques 1994).*

Common Land

5.58 Public rights of way over defined routes can and do exist on common land and can be established by deemed dedication through use over a number of years. However, the effect of various statutes, including schemes of regulation and management under Part 1 of the Commons Act 1899, and s193 of the LPA25, which create (often restricted or conditional) public rights of recreational access, may have to be considered, since these apply to a substantial number of commons.

5.59 This issue is addressed in *R v SSE ex parte Billson 1998*[7]*,* and background information can be found in the RWLR article 'Public Access to Common Land' 15.4. Public rights of access have been conferred on nearly all common land (where no previous statutory rights existed) by Part I of CROW00, and s.12(3) makes clear that: "*the use by the public or by any person of a way across land in the exercise of the right conferred [under Part I] is to be disregarded*".

The National Trust

5.60 The Trust has power to dedicate highways by virtue of s12 of the National Trust Act 1939. However, Trust bylaws may be in place and operate as a conditional permission to use the land. Such bylaws may prevent a presumed dedication under s31, whether users were aware of them or not. Useful reference can be made to *National Trust v SSE* [1999] JPL 697, holding that the permissive nature of the use of NT land precluded user as of right.

Land in management agreement with Natural England

5.61 Where land is subject to a management agreement with Natural England under s7 of the NERC06 (e.g., Environmental Stewardship agreement), use of a way across the land is to be disregarded during the term of the agreement for the purposes of presumed dedication (see s7(5))

Charities

5.62 Section 36 of the Charities Act 1993 provides that no land held by or in trust for a charity shall be conveyed, transferred, leased or otherwise disposed of without an order of the Court of the Charity Commission. 'Land' includes any estate, interest, easement, servitude or right in or over land, and thus the dedication of a right of way over land would seem to qualify as a means of 'disposal'.

5.63 However, even in the absence of such an order, and/or where dedication is to be presumed by virtue of long use, it is considered there is nothing to prevent the statutory dedication of public rights of way over land held for charitable purposes, provided always that such a dedication would not be contrary to the stated purposes of the charity concerned, by reference to Section 31(8) of the Highways Act. This provides that the incapacity of a body or person in possession of land for public and statutory purposes to dedicate a way over land is not affected by Section 31 provisions as a whole, if the existence of a highway would be incompatible with those purposes.

5.64 At common law, the lack of any owner with the capacity to dedicate could be a bar to the necessary finding of an actual intention to dedicate.

Physical Characteristics of a Claimed Way

[7] This judgment was partially overruled in the *Godmanchester* judgment.

5.65 In some circumstances the physical characteristics of a way can prevent a highway coming into existence through deemed or inferred dedication. In *Sheringham UDC v Holsey 1904* it was held that use by wheeled traffic of a public footway appointed by an Inclosure Award at 6 feet wide had always been an illegal public nuisance in view of the obstruction and danger to pedestrians, and no length of time could legalise it. Furthermore, there was no one with power to dedicate. Hence there could not have been any dedication of the way as a vehicular highway.

5.66 In *Thornhill v Weeks 1914,* Astbury J observed that:

> *"it seems impossible that a lady who resided there would at once start dedicating a way through her stable yard … In trying to form an opinion whether an intention to dedicate has existed, one must have some regard to the locality through which the alleged path goes. The fact that it goes through the stable yard [close to the house] is strong enough to raise a presumption against an intention to dedicate."*

5.67 Where physical suitability of a route is argued, referring to gradient, width, surface, drainage, etc., there should be awareness that what may now be regarded as extremely difficult conditions may well have been relatively commonplace and frequently met by stagecoaches, hauliers and drovers in times past. Special arrangements were often in place to negotiate them.

SECTION 6 HIGHWAY RECORDS AND RELATED DOCUMENTS

REFERENCE MATERIAL

Statutes

Highway Act 1835 – sections 5 & 23

Highways Act 1862

Public Health Act 1872

Highways and Locomotives Act 1878 (see 'Turnpikes')

Local Government Act 1894

Local Government Acts 1924, 1929

Rights of Way Act 1932

National Parks and Access to the Countryside Act 1949

Highways Act 1980

Note: The above list is not exhaustive. They are some of the acts from which Highway Records may emanate.

Case Law

R v SSE & Somerset CC ex parte Masters [1999] CO3453/97 – amongst other things, evidential status of 1929 Handover Maps

Fortune and others and Wiltshire County Council [2010]EWHC 2683 (Ch) and [2012] EWCA Civ 334 – thorough examination of relevant highway documents and their evidential value

Other Publications

Articles in Sections 1 (History) and 9 (Evidence of the Existence of Highways) of the RWLR.

GUIDANCE

Introduction

6.1 All highway records have to be interpreted carefully, with particular attention paid to the meanings of words within the given context. Usually they will provide suggestive, rather than conclusive, evidence on the case as a whole, but they may be conclusive evidence of what they purport to show. Below are listed some of the types of highway records that may be presented at inquiries, with some general commentary. It is helpful, in understanding 19th century evidence, to know something of the development of the highway network in England and the legal framework within which the development took place. The RWLR article on 'Highway Use and Control up to 1895' provides a useful outline.

Manorial Records

6.2 Manorial records may include Court Rolls (which carry the same weight as their successors in Quarter Sessions); and books and papers relating to a variety of matters, including references to issues connected with highways and bridges.

Quarter Sessions and Petty Sessions

6.3 Quarter Sessions records go back a long way. They may provide conclusive evidence of the stopping up or diversion of highways. Presentments or indictments for the non-repair of highways may also be found here and may provide strong evidence of status where they are confidently identifiable. It should be borne in mind that Quarter Session records are conclusive evidence of those matters the Court actually decided, but are not conclusive in relation to other matters. Reliance on orders alone can be misleading and evidence of completion may be required. Petty Sessional records may also be a source of evidence.

Deposited Plans of Public Undertakings

6.4 The legal deposit of plans or public undertakings was first provided for in the 1793 Standing Orders of the House of Lords. The need for such deposits was recognised following the canal mania of the early 1790s when it became evident that canal bills were being hurried through Parliament without proper scrutiny. Thereafter, promoters of canal or waterworks bills (and later bills for other public undertakings) were required to submit to the Lords plans of works, books of reference, and other papers before a bill was brought up from the Commons to the Lords. In 1837 an Act compelled the local deposit of plans of public undertakings with the Clerk of the Peace, although in practice local deposit had been taking place from a much earlier date.

6.5 Plans of canals, river navigations and highway diversions are common from 1793 onwards. By the early 19th century, records of harbour works and turnpike improvements are also found. From 1829 until the late 19th century railway undertakings predominate. (Canal, Railway and Turnpike

documentary evidence is covered in more detail in later sections of these guidelines). Papers relating to schemes for street lighting, tramways, gas, electricity and water undertakings become numerous in the late 19th century.

6.6 Any of these various types of document may provide evidence on adjacent paths, roads or tracks and therefore could be relevant as evidence in relation to the existence of Highways.

County Records

6.7 County records go back into the 19th century and may consist of any of the following, in addition to those items already mentioned:

County Surveyor's Annual/Quarterly Reports

Report of County Works Committee

Special Reports on Main Roads

Various minutes, estimates, tenders and grants

Rights of Way Reports

1929 Handover Maps and Records

County List of Streets

County Surveyor's Map and other records of Roads and Bridges

Aerial Photographs

Definitive Maps and Statements

Often these records bear notes relating to rights of way. Some of the annotations may have been for internal administrative purposes and may sometimes reflect only the views of the surveyor or engineer of the day. The evidence they provide therefore needs to be viewed in context. An article in Section 9 of the RWLR called 'Highway Authority Records' provides helpful background, particularly on those relating to County Roads and the Definitive Map.

1929 Handover Maps

6.8 The following comments apply to the 1929 and all other formal handover/takeover documents and to today's List of Streets[8]. The view that this form of documentary evidence may be relevant appears to have been endorsed by Hooper J in *R v SSE and Somerset County Council ex parte Masters 1999*. The Secretary of State for the Environment (SSE) had argued that such documents were a positive indication of what the Highway Authority then believed to be the status of the roads listed.

[8] Section 36(6) of the Highways Act 1980 requires every highway authority to make and keep up to date, a list of streets within its area which are highways maintainable at the public expense.

Hooper J rejected as irrelevant a counter argument that SSE's conclusion was one which could not lawfully be reached in the light of *Stevens v SSE 1998*. He found that SSE's decision to treat the handover documentary evidence as a relevant consideration had not been one that no reasonable tribunal could have taken on the evidence available, i.e. it was not 'Wednesbury unreasonable'[9]. It should be noted that it is unsafe to hold that the fact that a road does not appear to have been accepted by the new highway authority at the time of handover necessarily suggests that it can not have been a highway.

6.9 The evidential strength of handover and similar documents is that they are conclusive evidence of the highway authority's acceptance of maintenance responsibility, a commitment that would not normally have been undertaken lightly. However, Inspectors should be mindful that these documents were principally for internal administrative use, were not readily available to the public and did not purport to be a record of rights. Consequently, while such evidence may weigh in favour of the existence of public rights, their evidential weight will be for the Inspector to decide in the context of other evidence.

Highways Act 1980 Section 56

6.10 It is sometimes argued that a successful claim against a highway authority under HA80, s56, at the Magistrates' Court and is a legal event which establishes a public right. The Court's decision may be legal evidence of a maintenance responsibility, and may be evidence in support of public rights; but it is not, in itself, conclusive in that respect.

Deposited Maps of Admitted Rights of Way

6.11 Under s31(6)of the Highways Act 1980 a landowner can deposit with the appropriate Council a map of their land on a scale of not less than 6 inches to the mile with a statement indicating what ways (if any) over the land they admit to have been dedicated as highways. If this is done, a statutory declaration by the owner or his successors in title should be lodged within 10 years to the effect that no additional way (other than specifically indicated in the declaration) has been dedicated. Similar statutory declarations should be made every subsequent 10 years.[10] As this procedure was first introduced in the Rights of Way Act 1932, records of any statutory declarations made can go back many years. In the absence of proof to the contrary, a properly made statutory declaration of this type is sufficient evidence to rebut the intention of the owner or his successors in title to dedicate any additional highway during the associated relevant period. Councils are required to keep a register of these deposits and declarations for public inspection.[11]

[9] Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1KB223

[10] This figure was amended from six years to 10 years by the Countryside and ROW Act 2000 and came into force in England on 13 February 2004 and in Wales on 31 May 2005. Transitional provisions apply to deposits and declarations made prior to the change.

[11] Brought into force in England on 1 October 2007 (Statutory Instrument 2007/2334) and in Wales on 15 January 2006

6.12 Following the 1932 Act, many local authorities began to produce lists and maps usually only of non-vehicular rights of way, which may survive in more or less detail. Such documents may reflect the view of the authority, and may provide supporting evidence of the status of a way, but are not conclusive.

Parish Records

6.13 Prior to 1894 when the Local Government Act transferred responsibility for the maintenance of public highways to Rural District Councils, such responsibility generally belonged to the parish. Relevant Acts often included provision for the use of locally available materials and there was a statutory requirement upon parishioners to fulfil a fixed annual labour commitment. The final responsibility for maintenance lay with the local Surveyor of Highways who was obliged to keep a detailed account of public monies expended. Some of these records survive, usually in county archives. Under the 1862 Act parishes could combine to form Highway Boards, and their records are also found in county archives.

6.14 It is generally accepted that longer distance use of horse drawn vehicles increased significantly during the late 18th and early 19th century. Some highways which had been adequate for hoofed traffic were unsuitable for wheeled traffic and consequently fell into disuse. Parishes were often reluctant to expend time, money and effort for the benefit of travellers who merely passed through. It was frequently the maintenance of highways, which was the main point of contention in legal wrangles concerning the highway network, not the rights to use a particular highway.

6.15 Because of the reluctance of some parishes to spend money on highway maintenance, a rebuttable presumption can arise from an entry in a local Highway Surveyor's Account Book. However, it is necessary to check that the highway can be identified accurately from the records. Some of the names used may since have been changed, corrupted or, like some highways, have fallen into disuse.

6.16 More recent parish records are also of great importance, particularly those relating to the Parish Survey from which the Definitive Map followed. These usually include a statement which accompanied the Draft Map, a survey card and also the relevant contemporary parish council minutes.

Deeds of Sale (Conveyance or Transfer)

6.17 The inclusion of a specific reference to a public right of way within (or adjacent to) land being conveyed is of some evidential value. However, it should be borne in mind that the conveyance or transfer was essentially dealing with private rights of property and was not prepared with a view to defining public rights. Similarly, the inclusion in a conveyance or transfer of mutual private rights for the purchaser and others over the land is not conclusive evidence that there is no public right over it. Mutual private rights might have been included by the conveyancer out of

abundant caution. The evidence provided by a conveyance or transfer needs to be considered along with all other relevant evidence.

6.18 Sales particulars, as opposed to the actual conveyance document, should be treated with special caution. The art of embellishment in advertising is not a newly acquired skill. Nevertheless, if a public right of way were admitted, a convincing reason for disregarding the entry would need to be provided before it could be entirely discounted.

SECTION 7 INCLOSURE AWARDS

REFERENCE MATERIAL

Statute

Pre-1801 Private Inclosure Acts

Inclosure Consolidation Act 1801

Post-1801 Local Acts (see Note below)

General Inclosure Act 1836

Inclosure Act 1845

Note The evidential significance of Private and Local Acts can be established only by careful study. Inspectors should therefore request extracts that are long enough for them to interpret quoted extracts within their context. In particular, a copy of any 'definitions' section contained in the Act concerned should be obtained.

Case Law

Roberts v Webster [1967] 66 LGR 298, 205 EG 103 – evidential weight of Inclosure documents

R v SSE ex parte Andrews [1993] JPL 52 [1993] – interpretation of sections 8,and 11 of the 1801 Act (*Andrews 1993*)

Dunlop v SSE and Cambridgeshire County Council [1995] 70 P & CR 307, 94 LGR 427 – definition of a 'private carriage road'

Buckland and Capel v SETR [2000] 1 WLR 1949, [2000] 3 All ER 205 – procedure when an award is '*ultra vires'*

Cubitt v Maxse [1873] LR 8 CP 704 – 'setting out', public acceptance

Hall v Howlett (1976) EGD 247 – setting out a new private road almost conclusive that there was no pre-existing public road in the same position

Logan v Burton [1826] 5 B & C 513 – 'stopping-up' in old enclosures

Micklethwaite v Vincent [1893] 69 LT 57 – propriety of an award not at issue after so many years

Fisons Horticulture Ltd v Bunting and others [1976] 240 EG 625 – unchallenged long-standing awards upheld

Commission for New Towns v J J Gallagher Ltd [2003] 2 P & CR – definition of a private carriage road in an inclosure award (incorporating the 1801 Act provisions) in relation to evidence of a pre-existing public carriageway

Meldale Ltd v Ludgershall Parish Council (2007) – an interesting exercise in construing a pre-1801 inclosure act and award by the Adjudicator to HM Land Registry (available on www.bailii.org)

Parker v Notts CC and SSEFRA (2009) – another judicial view of the construction of a pre-1801 inclosure act and the inference that the proper procedures were carried out.

R (oao Andrews) and Secretary of State for Environment, Food and Rural Affairs [2015] EWCA Civ 699 (Andrews 2015) – places a purposive interpretation upon the terminology used in section 10 of the 1801 Act

Planning Inspectorate Guidance

Rights of Way Advice Note No.11 – Guidance on *Dunlop* etc

Other Publications

Articles in Section 9 (Evidence of the Existence of Highways) of the Rights of Way Law Review.

GUIDANCE

Introduction

7.1 Between 1545 and 1880 the old system in parts of England and Wales of farming scattered arable strips of land and grazing animals on common pasture was gradually replaced as landowners sought to improve the productivity of their land. The process of inclosure began by agreement between the parties concerned, although locally powerful landowners may have had significant influence on the outcome. By the early eighteenth century, a process developed by which a Private Act of Parliament could be promoted to authorise inclosure where the consent of all those with an interest was not forthcoming. The process was further refined in the nineteenth century with the passing of two main general acts, bringing together the most commonly used clauses and applying these to each local act unless otherwise stated.

7.2 The four articles noted above (*) offer detailed insights into the inclosure process and highlight the difficulties faced today in interpreting these late 18th century and early 19th century documents.

7.3 The significance to rights of way casework arises from the evidential value of inclosure awards as legal documents giving effect to the creation or extinguishment of public highways[12], depending on the powers given to the Inclosure Commissioners. Awards and maps may also provide supporting evidence of other matters, such as the existence or status of public rights of way over land adjacent to but outside the awarded area.

7.4 By the time Parliament brought the inclosure process to a close in 1876, it was estimated that over 5200 Private Inclosure Acts had been passed covering almost seven million acres with even more covered by agreements. In assessing inclosure evidence, it should be remembered that the process evolved over several centuries, that different Inclosure Commissioners and surveyors were involved with different levels of expertise, operating in different parts of the country at different times with different local practices and traditions. It therefore cannot be assumed that the interpretation of one map and award can be unequivocally applied to another, even in an adjacent parish.

The Inclosure Process

7.5 Inclosure was achieved by different means during different periods, broadly (but not exclusively) in the following phases:

1500s onwards Inclosure by agreement

1600s onwards Local inclosure acts

[12] Note that pre-1835 the term "highway" did not usually include footpaths or bridleways.

After 1801	Local inclosure acts operating together with the provisions of the Inclosure Consolidation Act 1801 (unless expressly stated not to apply)
After 1836	Local inclosure acts operating together with the provisions of the General Inclosure Act 1836 (unless expressly stated not to apply)
After 1845	Few local acts, mostly inclosure under the Inclosure Act 1845

7.6 In general, the process involved a number of distinct stages (although each individual Act should be checked since procedural variations do occur, especially in earlier inclosures); these were:

1. The Act
2. Appointment of the Inclosure Commissioners
3. Survey (in fact this may have pre-dated the Act)
4. Advertisement
5. Division, including setting out highways (marking on the ground)
6. Hearing objections to the above
7. Allotment of lands to individuals
8. Hearing objections to the above
9. Final Award
10. Enrolment of the Award
11. Making up of highways under the supervision of a surveyor
12. Justices' declaration that the highway was satisfactorily made up and thereafter publicly maintainable

7.7 The point at which the public acquired the right to use the highway may have arisen at the enrolment stage or, as in the case of *Cubitt v Maxse 1873*, upon the Justices' declaration (which was never made in that particular case); each individual Act should be checked.

Evaluating inclosure evidence

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.

7.9 The facts set out in an inclosure award carry significant evidential weight *(Roberts v Webster [1967]),* but they are not always easy to determine.

The problem often relates to the exact meaning of the words used and these matters have been the subject of prolonged debate. For example, the meaning of the word 'private' continues to be a much debated issue. Also of fundamental importance has been the correct interpretation of the language of Sections 8 and 10 of the 1801 Act and the applicability of Section 11.

7.10 The following approach to dealing with inclosure awards is recommended:

1. <u>The land to be inclosed</u>

i) Is the land in question that described in the Act?

ii) Is the route across old inclosures or across land being newly inclosed?

2. <u>The route in question</u>

i) How does the award describe the route? Check the width awarded, the description of the right, the route description and whether the route is said to be for the benefit of any particular persons.

ii) How is it depicted on the inclosure map? Was it a pre-existing way?

iii) How are other routes described in the award and depicted on the map?

3. <u>The extent of the Commissioners' powers</u>

i) Consider the terms of the relevant act and establish the extent of the Commissioners' powers in relation to highways and other roads. If the awarded highway in question does not fall within the scope of those powers it should be regarded as *ultra vires*[13] unless there is good evidence to show it was a pre-inclosure public highway. If it was a pre-existing way, what did the act say was to happen to these?

ii) If the setting out of the way in question was *ultra vires,* consider whether the way was 'made' (in the sense of being physically constructed), and whether there is evidence that it was subsequently used by the public. If it was, then this may be evidence from which it could be concluded that a public right of way has been dedicated and accepted.

iii) If the setting out was *intra vires*[14], consider whether any other event was required by the act or award <u>before</u> the way became a highway (as distinct from before becoming maintainable at public expense), for example, a declaration by the Justices of the Peace that a carriageway had been *"fully and sufficiently formed, completed, and repaired" (see 7.17 below)*. In the case of *Cubitt v Maxse 1873* not all the required events had occurred and therefore

[13] *'ultra vires'* – beyond the authority conferred by law
[14] *'intra vires'* – within the relevant powers

no public rights accrued. Note that the requirement in Section 9 for a way to be "made up" applied only to public carriage roads.

iv) What is the quality of the map showing the route? Is it at a large scale? can its accuracy be ascertained?

7.11 Inspectors should normally accept that an award based on the 1801 Act and not shown to be *ultra vires* is very strong evidence of the legal status of the highways described, although in *Jacombe v Turner (1892) 1QB 47* and *Collis v Amphlett (1918) 1Ch 232* an inclosure award was found to be only conclusive as to matters within the Commissioners' jurisdiction. In the 1893 case of *Micklethwaite v Vincent* where an inclosure award dated 1808 was at issue, the Court of Appeal held that *"Even if the Commissioners in this case have acted* ultra vires*, it would be impossible to hold that the award at this distance of time could be impeached."*

7.12 A highway may have originated as a private road or path but later became public through express dedication or use by the public leading to presumed dedication. The case of *Reynolds v Barnes* (1909) 2Ch 361 is one such example. However further evidence would be required to demonstrate subsequent dedication to the public.

Inclosure by agreement

7.13 Agreements to enclose land could be informal or formal, the latter often being confirmed by a legal court and the former, by their very nature, being unlikely to be evidenced by records still existing today.

7.14 Formal inclosure agreements were usually made between the lord of the manor and the principal farmers and landowners, and were normally drawn up by a local solicitor. Without the powers to do so under an Act of Parliament, the parties concerned would have had no authority to alter existing public rights of way. However agreements may provide evidence of pre-existing highways or of dedication by the landowner (if there is corresponding evidence to show acceptance by the public).

Local inclosure acts

7.15 A Private Act of Parliament to inclose land authorised the process, defined (in broad terms) the land to be inclosed and set out the procedures to be followed by, and the powers available to, the Commissioners.

7.16 These Acts were many and varied and each must be studied to ascertain its precise terms.

Inclosure Consolidation Act 1801

7.17 In 1801 Parliament determined to simplify the process of Private Bills by standardising the clauses most frequently used so that these would be automatically incorporated into Local Acts, thus making them shorter and allowing for more efficient passage through the Parliamentary process.

7.18 Sections 8 and 9 of the 1801 Act included a set of provisions relating to public carriage roads including a minimum width requirement (30 feet) and the appointment of a surveyor to oversee the making up of the roads to a satisfactory standard followed by a declaration to that effect by the Justices. Commissioners were also empowered to stop up roads running through old enclosures but were required to obtain an order from the Justices to do so. Where a local inclosure act imported section 11 of the 1801 Act, any pre-existing roads on the lands being inclosed would be extinguished unless these had been 'set out' in the award by the Commissioners.

7.19 Section 10 dealt with "private roads, bridleways, footways, ditches, drains, (etc.)". The Court of Appeal has held that the term 'private' in section 10 qualified only 'roads' and was not used to qualify all other items listed in the section. The items listed after '*private roads*' which Commissioners were empowered to set out and appoint could therefore be either public or private.

7.20 Section 44 of the 1801 Act applied its powers and provisions to all local Acts (passed after 2 July 1801) unless the latter specified otherwise. In such cases, the provisions of both the local Act and the 1801 Act should be examined.

The General Inclosure Act 1836

7.21 Even after the 1801 Act, the passage of Private Acts continued to be difficult and expensive. Pressure to provide a more efficient system resulted in the 1836 Act which authorised inclosure without an Act of Parliament, on standard terms contained in the 1836 Act, if two thirds of the landowners agreed.

The Inclosure Act 1845

7.22 The 1845 Act enabled landowners to dispense with the need for an Act of Parliament to authorise inclosure. They could proceed by agreement under the 1836 Act under the direction of an independent national body of Commissioners operating a code agreed by Parliament. Sections 62–68 of the 1845 Act set out similar provisions to the 1801 Act although the minimum width requirements accorded with the Highways Act 1835: 20 feet wide for a new public cartway, 8 feet for a public horseway and 3 feet for a public footway beside a carriageway or cartway.

7.23 The Act required the Inclosure Commissioners to produce an Annual General Report for the approval of the Principal Secretary of State and both Houses of Parliament. The schedules published at the end of these Annual Reports itemised the progress of each inclosure, giving the date when each key stage was confirmed by the Commissioners.

7.24 Between 1845 and 1852 the Inclosure Commissioners could authorise the inclosure of certain lands without first obtaining the prior consent of Parliament; such inclosures are not included in the same Schedules attached to the Annual Reports but are listed separately as 'Cases Authorised by the Inclosure Commissioners not requiring the previous

Authority of Parliament'. However this practice ceased with the passing of an "Act to amend and further extend Acts of Inclosure, Exchange and Improvement of Land" in 1852.

Presumption of Regularity (paragraph 2.20 refers)

7.25 One consequence of the complexity of the inclosure process is that there may not be evidence to confirm that each stage in the process was completed in its entirety. It is, for example, frequently the case that records of declarations by Justices of the Peace are not available. Although an Inspector may usually rely on a presumption that the correct procedures were followed at the time unless there is evidence to the contrary, this cannot provide a remedy where it is reasonably certain that the legal requirements were not complied with. However an omission may not always be fatal to the case and it might be appropriate to consider the possibility that public acceptance of an awarded highway, if supported by the evidence, occurred nevertheless.

7.26 The cases of *Micklethwaite v Vincent 1893* and *Fisons Horticulture Ltd v Bunting and others 1976* show that the Courts generally uphold long-standing awards that were not challenged at the time.

Recent case law

7.27 Inclosure awards can be evidence of the existence, or repute, of highways at the time they were made. Two relatively modern judgments are useful though previous authority establishes the point (for example, *R v Berger* [1894] 1 QB 82).

7.28 First, in *Roberts v Webster* (1967) 66 LGR 298, Widgery J (as he then was) considered an 1859 inclosure award made under the Inclosure Act 1845. The case concerned an appeal against a decision of the justices at the quarter sessions which had involved them deciding whether a highway existed before 1835 so as to decide whether the highway was publicly maintainable. The justices' decision was based on the award as evidence that the highway existed in 1859. Widgery J stated:

"It seems to me that the inclosure award of 1859 is very powerful evidence indeed to support the view that Pipers Lane at that time was reputed to be a public highway....If they (the justices) concluded, as they did, that the inclosure award was such a powerful piece of evidence that they should infer from it that a highway existed over this road in 1859, I can see no fault in their doing so. Indeed, speaking for myself, I am prepared to say that had I been sitting with the justices at quarter sessions, I feel sure that I should have adopted the same view."

7.29 Second, *Hall v Howlett* (1976) EGD 247, the question was whether an overgrown lane was an obstructed public highway. Evidence was given that under an inclosure award a "private carriage road and driftway" was created over the line of the lane in question. Widgery CJ said:

"Then we were shown what on any view must be an important matter, namely an inclosure award.... 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. 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."

However, see the more recent case of *Gallagher 2002* below.

7.30 There were two judgments in the 1990s *(Andrews 1993* and *Dunlop 1995)* which had a major impact on the controversy concerning interpretation of inclosure evidence. The judgement in *Andrews 1993* in relation to section 10 of the 1801 Act was overturned by the Court of Appeal in *Andrews 2015*.

7.31 In *Andrews 1993*, Schiemann J decided that:

- the power in Section 8 'to divert, turn and stop up ....' was an ancillary power to be exercised if existing highways interfered with the proper functioning of the new highway system

- existing public footpaths across newly enclosed land (which are not specifically mentioned in Sections 8 and 10), being in the category "old and accustomed roads" (within the meaning of the proviso to Section 8) are not stopped up by the award. (Schiemann J also set the *Logan v Burton [1826]* judgment in context)

- it was inappropriate to rule on the 'setting out' issue.

[Note: although not specifically mentioned, it may be reasonable to assume Schiemann J's references to footpaths also apply to bridleways.]

In *Andrews 2015* the Court of Appeal held that, in construing the 1801 Act as a whole and setting the Act in the context of events prior to its enactment, a purposive approach was to be taken to the language used in section 10 and that the powers conferred by that section included the setting out of public bridleways and footpaths.

7.32 The Court of Appeal considered it unnecessary to address the question of whether Commissioners could set out bridleways and footpaths at widths of less than the 30 feet minimum specified in section 8 of the 1801 Act. Given that there is no minimum width requirement specified in Section 10 and that the bridleways at issue in *Andrews 2015* were set out at widths of 15 feet and 10 feet respectively, it is implicit in the judgement in *Andrews 2015* that Commissioners were empowered to set out public bridleways and footpaths at widths of less than 30 feet.

7.33 In *Dunlop* in 1995 Sedley J decided that the words 'private carriage road' were deliberately used in the [Glatton with Holme] inclosure award as a term of art distinguishing the particular road according to the extent of the particular rights over it from the public carriage roads on which all subjects enjoyed right of vehicular passage. Earlier in the judgment, as a conclusion arising from his study of 18th and 19th century publications,

Sedley J had concluded "*This history furnished compelling evidence for the construction advanced on the applicants behalf, namely, that both in the Act of 1801 and the Glatton with Holme Inclosure Award of 1820 public and private carriageway roads were deliberately distinguished, and that the distinction signified differential rights of user, embracing all the monarch's subjects in the former case and a limited if unspecified class in the latter."*

7.34 This judgment has been strongly criticised (see below) and some seek to limit its application. In the latter context it has been argued that ... [the judgment] *does not, and indeed could not, offer a conclusive interpretation to be used on all occasions. Other documents, or even the same document given different evidence, may give rise to a different meaning for the same phrase [*private carriage road*]. In any event such investigations at best can only decide the legal status of the actual award subject to the decision*. This is an expert opinion, but nevertheless it may do less than full justice to Sedley J's reasoning (see Section 3 'Case Law' for the argument in principle). The language of the judgment permits only one interpretation of the words 'public' and 'private' when used to describe the status of a carriage road. The terms refer to the lawful class of user. This interpretation applies equally to both the 1801 General Act and the Glatton with Holme Award 1820. Two rebuttable inferences appear to arise:

- The terms 'public' and 'private', when used in the 1801 General Act, have the same distinction in respect of any other highway so described in it e.g. private road, public bridleway etc. It would be perverse to argue otherwise.

- The terms when used in any other local acts which derive from the 1801 General Act probably have the same meaning as that in the Glatton with Holme Award.

7.35 There is a strongly held opinion that these inferences are wrong because the judgment itself is wrong. It is argued by some that the terms 'public' and 'private' refer to maintenance responsibilities, since maintenance rather than rights dominated highway disputes during the inclosure period. However, this has not been tested in the Courts and Inspectors should look very carefully at arguments concerning the meaning of the words 'public' and 'private', particularly in the context of the inclosure award in question.

7.36 There is also an assertion that the absence of definition in an award of the class of user entitled to use a private carriage road is evidence of a public right. For the reasons given by Sedley J in his judgment, this is a self-defeating argument.

7.37 Use of the term 'private' in a local act does not exclude the possibility that some form of public right existed. That may be obvious from the language of the award itself, e.g. the description of a highway as a 'public bridleway and driftway and private carriage road.' In some instances it is explicit in the award that the public have full rights of use over the 'private' road. In other cases it may be that the class of authorised vehicular user has, in subsequent case law, been held to constitute 'the public' (see guidance on

'Dedication'). In yet further cases, there may possibly be evidence of subsequent user unrelated to the language of the award. Nonetheless, despite all these possibilities, when the term 'private carriage road' is used in the 1801 Act or in a local act, the term of itself does not confer or infer a public right of passage by vehicle.

7.38 Despite the criticism of this judgment, Inspectors should follow it unless and until a Court holds otherwise.

7.39 In *Gallagher* in 2002 the case concerned the status of a lane claimed to be a public vehicular highway but which was shown in an inclosure award of 1824 as a "private carriage road". Neuberger J accepted other evidence was sufficient to show that the route was a public carriageway prior to (and since) the date of the award and *"in the light of the provisions of the Inclosure Act 1801, that, if (the) lane was a public carriageway at that time, the Inclosure Award cannot have deprived it of that status."* However he did not dissent from the interpretation of "private carriage road" adopted by Sedley J in the Dunlop case, that it meant and still means "a private road (as opposed to a public highway) for carriages."

Concluding Comment

7.40 Inclosure documents can provide conclusive evidence of public rights of way. However, the lack of consistency between different maps and awards with their corresponding Act(s) of Parliament, means that every case must be examined individually in the context of all the local circumstances and the prescribed details of the process, all of which may vary.

SECTION 8 TITHE COMMUTATION DOCUMENTATION

REFERENCE MATERIAL

Statute

Tithe Commutation Act 1836 ((as amended by the Tithe Act Amendment Act, 1837)

Case Law

Robinson Webster (Holdings) Ltd v Agombar (2001)(9 April 2001 HC 000095): weight attached to evidence of occupation of land by the parish officers

Attorney – General v Antrobus [1905] 2 Ch 188: Whether or not a piece of land is a road *is one of the matters material to the preparation of the award and plans.* This is subsequently qualified by… *I must not be understood as deciding that, in my opinion, the tithe map would be evidence on any matter (although it is a public document) which is not within the scope and purview of the authority of the Commissioners who made it*

Copestake v West Sussex County Council [1911] 75 JP 465: The tithe map is not admissible as evidence of the extent of a public right *... It was the business of the person responsible for making this map to ascertain what land in the parish was, and was not, titheable. It was not their business to define the extent of public rights of way.* However, this would not be regarded as correct today. (See *Maltbridge Island Management Co v SSE* below)

Maltbridge Island Management Co v SSE and Hertfordshire County Council [1998] EWHC Admin 820: Sullivan J held that evidence based on an analysis of Tithe Maps and Apportionments may be admissible as to the existence or non-existence of a public right of way. The weight to be attached is a matter for the Inspector. It cannot be conclusive. He also approved the passage in Sauvain, 2nd Ed, p47, paragraphs 2-72

Kent County Council v Loughlin [1975] JPEL 348, 235 EG 681: The judgment asserts that *on the question of whether there was a road at the specific place the tithe map was of much importance.* The judgment continues that the absence of a lane from the tithe map is sufficient to show that the lane did not exist as a road at the time, but Lord Denning MR acknowledged that it could have existed as a footpath. (But see also *Gallagher*)

Giffard v Williams (1869) 38 LJ Ch 597: It is impossible to treat the tithe map otherwise than as a public document

Smith v Lister (1895) 64 LJ QB 709: Accepts both first and second-class maps as evidence

Stoney v Eastbourne Rural District Council [1927] 1 Ch 367: The judgment maintains that ..*to say that an ordinary pasture or arable field, over which a right of public footpath exists, has its titheability confined to other parts of the field, not including the small strip of land covered by the footpath, seems to me quite contrary to common sense and to the documents which we have before us*

Attorney – General v Stokesley Rural District Council [1928] 26 LGR 440: If produced from proper custody, tithe maps may, in cases where the question is whether a highway was dedicated to the public before or after 1836, be used in conjunction with evidence of uninterrupted user within living memory as evidence that the way was dedicated to the public

Webb v Eastleigh Borough Council 1957: Although maps may be evidence of the existence of a highway, they are not evidence of the legal boundaries of the highway

Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77: Tithe maps make no distinction between a public and a private road, their object is to show what is titheable and the roadways are marked upon them as untitheable parts of land whether they are public or private

Attorney-General v Beynon [1970] 1 Ch 1, a tithe map was stated to be admissible evidence for determining the physical boundary of a road

Commission for New Towns v J J Gallagher Ltd [2002] 2 P & CR 24: A lane, owned by two people, farmed as pastureland with tithe rent-charge apportioned to it is not inconsistent with it being a public carriageway

Other Publications

'Rights of Way: A guide to law and practice' by John Riddall and John Trevelyan (published by the Open Spaces Society and the Ramblers' Association), pages 139 and 140

The Tithe Surveys of England and Wales, by Roger Kain and Hugh Prince, CUP 1985

The Tithe Maps of England and Wales, by Roger Kain and Richard Oliver, CUP 1995

The Planimetric Accuracy of Tithe Maps, *The Cartographic Journal* vol 13 part 2 (Dec 1976) pages 177-183

Tithe Surveys for Historians' by Roger J P Kain and Hugh C Prince (published by Phillimore & Co. Ltd) 2000

Instructions issued by the Tithe Commissioners to the tithe map surveyors for the purpose of the Tithe Commutation Act 1836 (PRO IR18 14586)

'Conventional Signs to be used in the Plans made under the Act for the Commutation of Tithes in England and Wales (British Parliamentary Paper 1837 XLI 405)

Relevant articles may be found in the Rights of Way Law Review

GUIDANCE

Introduction

8.1 The 1836 Act converted tithes (the tenth part of the annual produce of agriculture), provided for the support of the priesthood and religious establishments, into a tithe rent-charge, a monetary payment based on the seven year average price of wheat, oats and barley. This was normally done parish by parish and resulted in some 12,000 documents which apportioned the payment fairly over the different lands in the tithe district. The apportionment of tithes was recorded in a schedule and on a map. Files containing correspondence pertaining to the production of the documents occasionally survive in local record offices.

8.2 Tithe documents are solely concerned with identifying titheable land. Apportionments are statutory documents which were in the public domain and tithe maps have been treated by the courts as good evidence as to whether land was titheable or not titheable. However, tithe maps were not intended to establish or record rights of way. There are a number of reasons why land might not have been subject to tithe in addition to the possibility of it being highway land. One of these was that the land was barren, but other examples include land held either by the church or some other religious community, or land which had only recently been converted to productive land from previous barren heath or waste land. It is dangerous to assume the maps to be proof of something that it was not the business of the Commissioners to ascertain, or to lay down rigid rules for their interpretation. Tithe commutation documents vary considerably from one to another in quality and detail.

8.3 The referenced article 'Interpreting Tithe Map Evidence', includes a useful extract from the instructions issued to the tithe map surveyors, and provides a helpful insight into the subject. The remaining 'other publications' provide additional insight into the tithe commutation process. However, the importance and interpretation they place on the depiction of a route as a separate parcel of land is not altogether agreed.

Case Law

8.4 While there appears to be some divergence of opinion between some of the judgments, this is not necessarily the case. Both *A – G v Antrobus* and *Kent County Council v Loughlin* relate to roads which would have crossed someone's titheable landholding and which were not shown on

the tithe map (negative evidence). In *Copestake v West Sussex County Council* the road was shown bounded on either side by the fences of old enclosures (positive evidence). In the former cases, but not the latter, the presence, or not, of a road was clearly a material matter, as it would have affected the productivity of the landholding and hence the rent payable. (See also *Gallagher*.)

Evidential Value

8.5 Tithe documents can generally give no more than an indication as to whether any way is public or private. This is because a private right of way can diminish to no less an extent than a highway the productiveness of the land for tithe assessment. Nevertheless, the absence of a route from a Tithe Map does not necessarily mean that no highway existed. It may simply mean that its existence had no effect on the tithable value of the land (see also 'Status' below). Where tithe maps are shown to have been based on earlier parish or estate maps (see below at 8.10, they may have evidential value relating to the purpose for which they were originally produced.

First and Second Class Maps

8.6 The Tithe Commissioners appointed Lieutenant R K Dawson as the Assistant Tithe Commissioner and Superintendent of the surveys. He produced advice and instructions on the technical specifications for the maps which, in part, led to the amendment of the Tithe Commutation Act.

8.7 The amending Act of 1837 established two classes of tithe map. First class maps had the Commissioners' seal attached, showing them to be reliable as a true record of matters relating to the purposes for which the map was designed. However, second class maps, which failed in some, often minor, way to meet the stringent test for first class status, are not necessarily inferior from a cartographic point of view. Both first and second class maps have been accepted by the courts as evidence.

8.8 Following the amendment to the 1836 Act, the Tithe Commissioners revised their instructions on the form of maps, setting out that the most acceptable plans would be the plain working plans containing little ornamentation and colour. (See below with regard to copies.) Whilst First Class Maps still had to conform to the prescribed technical specifications in terms of surveying techniques, the Commissioners no longer considered it essential for a system of conventional signs to be used.

8.9 Maps may have been newly prepared for the tithe survey, but existing maps could also be used as a base. These varied from estate maps to Township and Parish Maps, some of which may have dated from many years prior to the tithe commutation process. The decision on whether or not to commission a new survey was entirely a matter for the landowners concerned.

Statutory Copies

8.10 The 1836 Act required three maps to be produced: an original and two statutory copies. The original was retained by the Tithe Commissioners; one copy was for the relevant diocesan office and the second copy was for local deposit in the tithe district. The original map may be less colourful than the copies produced for local use and there may be variations between the maps. Some of the variations may be due to copying error and some may be deliberate (for example the use of extra colour or adornment). It is therefore important to identify which copy of the map is being examined. The original maps are generally the ones to be found in the Public Record Office.

Other Related Documents

8.11 Each Tithe Map will have been accompanied by an Apportionment giving the details of the way in which payment of the commuted tithes had been divided up or 'apportioned'. In addition there may be a file of incidental notes and documentation containing information on a variety of related matters and in varying detail. Either of these documents may provide information which can assist in the interpretation of the map in relation to the existence of highway rights. Without reference to these documents, the value of the evidence of the map alone may be affected.

Colouring of Roads

8.11 The colouring of a road (usually sienna) on a tithe map is not, in itself good evidence of public vehicular rights. There is general agreement among the RWLR authors that the colouring on maps varies. It is therefore important to establish whether there is a key or other information in the tithe documents which provides an explanation. In the absence of such an explanation or other corroborative evidence the colouring is arguably of little evidential value in itself.

Status

8.12 Both public and private roads had the capacity to diminish the productiveness of land for the assessment of tithe. It follows therefore that the inclusion of a road under the heading 'roads and waste' is not, in itself, good evidence that it was public. However, the annotation of a road 'to' or 'from' a named settlement is suggestive of public rights. Where a road is shown braced to adjacent titheable land, this indicates that the parcels have been measured together and tithe apportioned accordingly. It is not inconsistent with the existence of highway rights (see *Gallagher)*. The Award will sometimes establish the ownership of the way depicted, but again, this does not preclude the existence of highway rights. It is unlikely that a tithe map will show public footpaths and bridleways as their effect on the tithe payable was likely to be negligible.

Concluding Comment

8.13 Tithe maps are generally good evidence of the topography of the roads they portray, especially those which form boundaries of titheable land.

They may not necessarily be good evidence either of public rights or the nature of any public right that may exist. The full value of a particular map can only be determined by careful consideration of all the available tithe documents, including any relevant contemporaneous instructions or keys, and by comparing it with other reputable maps of the time to establish the relevance of the way to the overall road network. However, as statutory documents, where they do provide evidence it should be given the appropriate weight bearing in mind the original purpose of the documents concerned and the issues identified above.

SECTION 9 TURNPIKES

REFERENCE MATERIAL

Statute

Enabling Acts relating to specific turnpikes

General Turnpike Act 1766

General Turnpike Act 1773

General Turnpike Act 1822

Highways and Locomotives (Amendment) Act 1878: Particulalry Sections 13 and 16 which deals with the status of roads which ceased to be turnpikes after 31 December 1870. The sections are sub-headed "Disturnpiked roads to become main roads, and half the expense or maintenance to be contributed out of county rate" and "Power to reduce main road to status of ordinary highway".

Case Law

Northam Bridge Co. v London and Southampton Rail. Co. (1840) 1 Ry & Can Cas 653: A turnpike road is a road on which a turnpike is lawfully erected and on which the public are bound to pay tolls. The distinctive mark of a turnpike road is the right of turning back anyone who refuses to pay toll

R v French (1878) 3 QBD 187: Approves and follows the above judgment

Austerberry v Corporation of Oldham (1885) 29 Ch D 750: It is doubtful whether a highway subject to the condition that the public shall pay tolls to the owner for using it can be dedicated to the public

Midland Rail Co. v Watton (1886) 17 QBD 30: It would be incorrect to describe a road as a turnpike merely because the proprietors take toll for the use of it, without being subject to any statutory liabilities in respect of it, such as are imposed on the trustees of turnpike roads

R v Winter (1828) 8 B & C 785: R v Mellor (1830) 1 B & Ad 32: R v Thomas 1857: If a road had been a highway before the legislature made it a turnpike road, it remained as an ordinary highway if the powers of the Turnpike Act expired. If a road was first made under the Turnpike Act, upon the expiring of the Act the public right of passage was at an end unless some other means were taken to renew or continue the right

Other Publications

Halsbury's Laws of England Vol.21

Pratt and McKenzie's: Law of Highways (21st Edn.) London (Butterworth) 1967– pages 12 & 13

Burns' Justices of the Peace and Parish Officer 1800 (19th Edn.)

Statutory Authorities for Special Purposes: Sidney and Beatrice Webb 1922 (reprinted in 1963) – Chapter III deals with The Turnpike Trusts

The Turnpike Road System in England: 1663 to 1840. Dr William Albert 2007

GUIDANCE

Introduction

9.1 Turnpiking was mostly concerned with the repair and improvement of existing roads, with repairs being carried out by a Turnpike Trust. The creation of a Turnpike Trust for a particular road did not remove the statutory duty of maintenance from the Parishes through which the road passed. In general Turnpike Trusts were created for a fixed term, often 21 years, with the statutory authority being periodically renewed by Act of Parliament. The Enabling Acts contain a great deal of information and should be read in full; relying on selective passages can be misleading. It is also important to establish what general legislation was in force at the time the turnpike lapsed.

9.2 There is little guidance on turnpikes other than the relevant case law and that contained in specialist publications on highway law, such as Pratt and McKenzie and Halsbury, Vol.21, Two books which cover the subject in some detail are listed above (S & B Webb and Dr W Albert).

Statute

9.3 The first Trusts to be established by statute were administered simply by Justices of the Peace in various counties, and the first toll-gate, set up at Wadesmill in Hertfordshire, was administered by the Quarter Sessions. From 1706 the number of Turnpike Trusts increased steadily to a maximum in 1835 of over 1100 Trusts, responsible for over 20,000 miles of roads.

9.4 Where a highway or turnpike had been lawfully diverted, the 1773 Act made provision for the liability for maintenance of the old section of road to be transferred to the new section of highway or turnpike with the liability to maintain the former section being extinguished. The 1773 Act also made provision for the erection of direction posts at cross roads, for depth posts at fords and for mile stones inscribed with the names and distances of the principal towns found on the road.

9.5 The 1822 Act made specific provisions for the disposal by sale of turnpike roads that had become superfluous and allowed the trustees to stop up any former roads, or such parts of them, which in their judgment had thereby become useless or unnecessary. However, roads leading to towns, villages, mills, churches, etc., to which the new roads did not

directly lead, were to be kept open either as private or as public ways. While this does not appear to be covered in the previous legislation, Burns indicates that similar provisions were in force in 1800.

9.6 The provision of milestones or mileposts along turnpike roads became a requirement following the passing of the General Turnpike Act of 1766 but was common in many local enabling Acts from 1744.

9.7 Despite examples of well-run Trusts and some roads being kept in good repair, the proper financial control and regulation of the Turnpike Trusts in general was poor, and led to numerous General Acts of Parliament at various times to try to improve the procedures. It is therefore necessary to be clear on the date of the Trust in question, and all the relevant legislation which may affect it and which may have been in force at the time, when evaluating the evidence.

Case Law

9.8 The contention that the term 'turnpike' could apply to any route where toll was collected was disposed of by *Austerberry v Corporation of Oldham* and *Midland Rail Co. v Watton,* which make it clear that a turnpike can only be dedicated under statute. Case law also shows that turnpikes reverted to their original status when the turnpike ceased to operate. It is therefore important to establish the pre-turnpiking status of the way (see 'Status', next).

Status

9.9 Under the 1878 Act roads disturnpiked after 31 December 1870 were converted into main roads. Disturnpiked main roads could be declared by county authorities to be ordinary highways. This does not mean that all ex-turnpikes carry public rights. If a route was a public highway prior to becoming a turnpike, it automatically reverted to its original status. However, if a road was created specifically to be part of a turnpike and the enabling Act did not specify that it was to be a highway in perpetuity, the public right of passage would expire when the turnpike expired, unless this happened after 31 December 1870 or unless some other means were taken to renew or continue the right. The argument that a route cannot be public if the public have to pay to use it does not apply to turnpikes, where the collection of tolls was authorised by statute for the purpose of repair.

9.10 It is important to read fully the enabling Act of Parliament to determine the status of the route prior to turnpiking, and to determine if any new roads were authorised to be set out. It is also important to read the subsequent Acts that renewed the Turnpike Trust until its eventual winding up. The enabling Act will generally specify the lifespan of the Turnpike Trust (usually 21 years). The Acts will provide an indication of the status of the route prior to turnpiking and the powers of the Trustees to create new routes, to stop up others, to deviate the line of the turnpike and what was to happen to the former route if the turnpike was diverted. The enabling and renewal Acts will also give details of the tolls to be levied and may provide local authorisation for the erection of toll houses,

toll bars and mileposts. The enabling Act may cover more than one route and may also refer to other roads in the vicinity to which the turnpike connects.

Concluding Comment

9.11 Turnpike roads were public carriageways, and many retained this status when the turnpike ceased to operate. Others which were not public roads prior to turnpiking reverted to their original status when the relevant Turnpike Act lapsed or when the Trust was wound up. Some were stopped up. The status of former turnpikes is not always readily apparent and often can be established, on a balance of probability, only by a careful study of all the relevant evidence. The physical evidence of the route on the ground may now bear no resemblance to the physical conditions pertaining before or during the time of the turnpike, and assumptions made on the basis of current physical characteristics should be treated with caution.

SECTION 10 RAILWAY AND CANAL DEPOSITED PLANS

REFERENCE MATERIAL

Statute

Special Acts of Parliament

Railways Clauses Consolidation Act 1845: Inspectors should be familiar with the following clauses:

Clause 10:	Certified true copies of the plans and books of reference, and alterations of, to be received as evidence of the contents thereof
Clauses 46-51:	Crossing of Roads and construction of bridges

Case Law

Monmouthshire Canal Company v Hill (1859) 4 H & N 421: A towpath is legally part of a canal

Grand Junction Canal Company v Petty (1881) 21 QBD 273: Any dedication to the public along a towpath is a limited dedication and cannot set up a right to prevent or limit the use of the towpath

Dartford Rural District Council v Bexley Heath Railway Co. [1898] AC 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

Other Publications

'Rights of Way: A guide to law and practice' by John Riddall and John Trevelyan Fourth Edition (published by the Open Spaces Society and the Ramblers' Association) page 33 - towpaths

Woolrych – A treatise of the law of ways: including highways, turnpike roads and tolls, private rights of way, bridges, ferries and railways in relation to highways and turnpike roads 1847(2nd Edn.): Chapter X (concerns the 1845 Act)

Article in Section 9 (Evidence of the Existence of Highways) of the Rights of Way Law Review.

GUIDANCE

Introduction

10.1 Individual railway and canal schemes were promoted by Special Acts. The process for Canal Schemes was codified in 1792 by a Parliamentary Standing Order and these arrangements were extended to cover Railway Schemes in 1810. The requirements for railways were expanded in the 1845 Act, with public rights of way which cross the route of a railway to be retained unless their closure has been duly authorised. Therefore, although it was not the primary purpose of the deposited plans to record rights of way, they can provide good evidence in this context.

Evidential Value

10.2 Both canal and railway deposited documents were in the public domain. The statutory process required for the authorisation of railway schemes, and to a lesser extent canal schemes, was exacting and the book of reference and deposited plans made in the course of the process needed to be of a high standard. In particular, railway plans, which were normally specifically surveyed for the scheme, usually record topographical detail faithfully. They have been admitted by the courts as evidence of public rights of way. Where available, surveyor's notes can provide useful information regarding the then function of a particular way.

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. The material available relating to canal schemes is generally more limited, both in quality and scope, than that for railway schemes.

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.

Status

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. Unless

the existing roadway was less than 25 feet (in which case section 51 of the 1845 Act set the minimum by reference to the average available width for the passage of carriages within 50 yards of the point of crossing), the minimum width for bridges carrying roads over the railway in the 1845 Act (section 50) is 25 feet (7.62 metres) for public roads and 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. The minimum dimensions of bridges carrying the railway over roads are set out in section 49 of the 1845 Act. There were no specified widths for bridleways or footpaths. Section 47 of the 1845 Act set out the requirements for the gating of crossings on the level. If a manned level crossing is shown, the associated route is likely to be a public vehicular road. Canal maps and their associated books of reference do not always differentiate between public and private roads. A towpath is legally part of a canal but may also be a highway.

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. Bridleways and footpaths which are not shown on the plan are sometimes described in the associated book of reference. Canal plans and their associated books of reference record roads, but do not normally record bridleways and footpaths. Any public rights along a towpath are generally limited to footpath.

Concluding Comment

10.7 For the above reasons deposited plans can be good evidence to support a claim that a highway existed at the time they were made. Where this is not the case, they are still useful in establishing that a particular route existed.

SECTION 11 PART 1 - FINANCE ACT 1910

REFERENCE MATERIAL

Statute

Finance (1909 – 1910) Act 1910

Inspectors should be familiar with the following sections:

Sections 7 –10; 35, 37 & 38:	Exceptions
Section 25:	Allowable deductions
Sections 26 & 27:	Valuation of land for the purposes of the Act
Section 30:	Duties of Commissioners to keep records

Case Law

Robinson Webster (Holdings) Ltd v Agombar [2001] EWHC 510 (ch) (9 April 2001) – weight attached to evidence of non-inclusion of a route in the taxable land of a hereditament

Maltbridge Island Management Co v SSE (31/7/98) – whether weight may be attached to Finance Act evidence

Fortune v Wiltshire CC [2012] EWCA Civ 334 – significance of the exclusion of a route from adjacent hereditaments when weighed with all other relevant evidence

Other Publications

'Valuation Office Records Created under the Finance (1909-10) Act 1910', National Archives Information Leaflet no. 68

'Land and Society in Edwardian Britain', Brian Short, Cambridge University Press, 1997

Maps for Family and Local History, The records of the Tithe, Valuation Office and National Farm Surveys of England and Wales, 1836 – 1943, Geraldine Beech and Rose Mitchell, published by The National Archives, second edition, 2004

The National Archives Research Guide, National Farm Surveys of England & Wales, 1940 – 1943

The National Farm Survey 1941 – 1943; State Surveillance and the Countryside in England and Wales in the Second World War, Brian Short,

Charles Watkins, William Foot and Phil Kinsman, published by CABI Publishing, 1999

The following articles, which are of interest, have appeared in the RWLR

'Rights of Way and the 1910 Finance Act,' - Zara Bowles, RWLR Sept 1990 (see below at 11.2);

'Uncoloured roads on 1910 Finance Act maps,' David Braham Q.C. May 2002

GUIDANCE

Introduction

11.1 The 1910 Act provided for the levying of tax ('Increment Value Duty') on the increase in site value of land between its valuation as at 30 April 1909 and, broadly speaking, its subsequent sale or other transfer. There was a complex system for calculating the 'assessable site value' of land, which allowed for deductions for, among other things, *the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user and to the right of common and to any easements affecting the land* (Section 25(3)).

11.2 Whilst numerous articles of relevance have appeared in the RWLR, 'Rights of Way and the 1910 Finance Act' by Zara Bowles (RWLR Sept 1990) provides a short overview of the Act in relation to public rights of way. However, some of the views and conclusions expressed should now be seen as questionable as subsequent research has informed general understanding of these records. Professor Short's book and the National Archives leaflet set the historical context.

Evidential Value

11.3 Evidence of the possible existence of a public right of way in Finance Act documentation usually arises in one of two ways-

- reference to it in one or more of the various documents forming part of the valuation process, or
- exclusion of a route from the assessable parcels of land shown on the map record.

Reference to a possible route in the documentation

11.4 An early part of the valuation process was the completion of a 'Form 4' by the landowner. This form asked whether the relevant unit of land ownership (these were known as 'hereditaments') was subject to any public rights of way or any public rights of user. Information from Forms 4 was copied into Field Books in the District Valuation Office before the valuers went into the field to inspect and assess the hereditaments. In these books, and in other forms such as Form 36, sent back to landowners with the provisional valuation, and Form 37, the office copy

of Form 36, the distinct categories were run together into 'public rights of way or user'. Information from the Field Books (which are kept in the National Archive at Kew), including deductions in value for 'public rights of way or user', was copied into the relevant columns in the Valuation Books, which are normally now found in Local Record Offices. Working plans (see below at 11.7), sometimes with detailed annotations, were completed in the field and the final record plans, which normally show only hereditament boundaries, were compiled from them.

11.5 Although direct evidence of the acknowledgment by a landowner of a public right of way from an entry on a Form 4 may be considered to be very strong, the vast majority of them were destroyed after the transcription of their information into the Field Books. However, evidence of the existence of a public way across a hereditament may be deduced from, for example, a Field Book entry showing a deduction under 'public rights of way or user', with further clear hand-written details, such as use of the words 'public footpath'. The position of such a way may be shown by annotations on the working plans or written information in the Field Book. But where hereditaments were large and crossed by numerous paths it may not be possible to conclude from written information that a particular route was referred to. Even where field plans are annotated, and paths marked as 'public', it may be unclear when and by whom annotations were made. Evidence from Field Books and plans may provide good evidence of the reputation of a way as public, but care should be exercised when drawing conclusions from material not known to be provided directly by or on the authority of the landowner.

11.6 It has been asserted that the term 'public right of user' refers to private rights of way, but, apart from some apparently anomalous entries on a few surviving Forms 4, there is no evidence of this use of the term. It would normally refer, when distinguished from a public right of way, to a non-linear public right, such as a right of recreation. A private right of way is normally a form of easement, and a deduction for such a way would be expected to be found under the heading of easements.

Exclusion of a route on the map record

11.7 Working copies of the plans are normally found in Local Record Offices. Most final record plans are in the National Archive. They are based on large-scale Ordnance Survey plans. The 1910 Act required all land to be valued, but routes shown on the base plans which correspond to known public highways, usually vehicular, are not normally shown as included in the hereditaments, i.e. they will be shown uncoloured and unnumbered. 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.* The practice would also be compatible with s.25(3) which states that *The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to… any public rights of way.* 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 dealt with by deductions recorded in the forms and Field Books; however, there may be other reasons to explain its exclusion. It has been noted, for example, that there are some cases of a private road set out in an inclosure award (see section 7) for the use of a number of people but without its ownership being assigned to any individual, being shown excluded from hereditaments; however this has not been a consistent approach. 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.

11.8 In his article 'Uncoloured roads on 1910 Finance Act maps' (RWLR May 2002) David Braham Q.C. considers the significance of exclusion of a route from assessable land. This approach received judicial endorsement in the case of *Fortune v Wiltshire CC [2012]* in which Lewison J gave careful consideration to the interpretation of routes excluded from adjacent hereditaments. In essence he concluded that the Finance Act records are not definitive; they are "simply one part of the jigsaw puzzle" to be considered along with other relevant material particular to each case.

Concluding Comment

11.9 Documents and plans produced under the Finance Act can provide good evidence regarding the status of a way. In all cases the evidence needs to be considered in relation to the other available evidence to establish its value; this is particularly important where a deduction for a public right of way is shown in the Finance Act records but its line is not apparent. 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. It must be remembered that the production of information on such ways was very much incidental to the main purpose of the legislation.

SECTION 11 PART 2 – FARM SURVEY RECORDS

11.10 When the Second World War began in September 1939, Britain needed to increase food production at home. The Minister of Agriculture and Fisheries ("MAF") was empowered under Defence (General) Regulation 49 to set up County War Agricultural Executive Committees ("County War Ags") which had the authority to direct what was grown, take possession of land, terminate tenancies, inspect property, and organise farm workers. To assist with this 85% of the agricultural area was surveyed between June 1940 and early 1941 with farms classified in terms of their productivity; however, only summary statistics survive from this survey.

11.11 In April 1941 MAF authorised a survey of every farm and holding of five acres or more, giving rise to the following documents:

- A Farm Record with information on conditions of tenure and occupation; the natural state of the farm, including fertility; the adequacy of equipment, water and electricity supplies; the degree of infestation with weeds or pests; and the management condition.
- A census return for 4 June 1941 including statistics of crop acreages, livestock numbers and information on rent and length of occupancy.
- A map of the farm showing the farm boundaries, on an OS base map.

11.12 The National Farm Survey began in spring 1941 and was largely complete by the end of 1943, being undertaken by the district committees made up largely of farmers who visited and inspected each farm, interviewing the farmer. Copies of the documents produced by the survey, as well as background information on the purpose and organisation of the survey, are held by The National Archive.

11.13 Section B of the Farm Survey form includes two questions relating to 'roads', identifying as 'good', 'fair' or 'bad' under B.4., the "Situation in regard to road" and B.7., the "Condition of farm roads". B.4. seems to refer to the position of the farm in relation to access to and from the public road network for the transport of goods to and from the farm (B.5. similarly refers to railways). B.7. refers to the condition of farm roads, however, the inclusion of a particular route is unlikely to be identified on the relevant map; even then it is possible that public rights could co-exist with any private rights and so the value of the record is questionable. There are instances where a road is excluded from the farm boundaries but, from a sample, these appear to be known vehicular highways. B.7. was frequently crossed through if there were no internal roads.

11.14 The records do provide reliable information regarding land ownership and tenancy at the time they were compiled; it is often referred to as the second Domesday survey. It is possible that information regarding rights of way might arise from the Survey, although, from an investigation of the records for several areas of the country, it seems unlikely. In any event the primary purpose of the records should be borne in mind when determining the weight to be given to any evidence arising.

SECTION 11 PART 3 – WAR POWER CLOSURES

Permanent Closures or Diversions of Rights of Way

11.15 Powers are available to the Secretary of State for Defence under the Defence Act 1842 and Defence Act 1860 to permanently stop up or divert public footpaths, public bridleways or Restricted Byways[15]. There is no opportunity to object to such a closure or diversion, although any such action taken under the 1842 Act requires the Secretary of State to provide an alternative path or way; under the 1860 Act, the provision of an alternative path is optional. These nineteenth century statutes remain in force (as evidenced by their amendment by subsequent legislation), and have been used to stop up or divert public rights of way in the vicinity of military airfields and communications sites in the 1980s and 1990s[16].

11.16 Section 13 of the Military Lands Act 1892 allows application to be made to the Magistrates Court for the closure or diversion of a footpath (but not a bridleway) which crosses or runs inconveniently or dangerously near to any land leased by the military under the Act. Before making an Order, the Court must be satisfied that a convenient new path will be provided for public use.

11.17 Section 8 of the Land Powers (Defence Act) 1958 allows the Secretary of State to permanently stop up or divert any highway where the land is to be used for the purposes of an installation provided or to be provided for defence purposes, or used by a manufacturer of aircraft wholly or mainly for the manufacture of aircraft used for defence purposes, and the Secretary of State is satisfied that, for the land to be used effectively without danger to the public, it is necessary that the highway must be stopped up or diverted.

Temporary Closures of Rights of Way

11.18 The Land Powers (Defence Act) also provides for the temporary closure or diversion of rights of way for the limited purposes outlined in paragraph 3 above.

11.19 Provision was made for the temporary closures of highways during the First World War under the Defence of the Realm (Acquisition of Land) Act 1916. Orders made under Section 6 of that Act could not remain in force for more than 12 months following the end of the War, unless the consent of the Railway and Canal Commission was obtained. Under the Treaty of Versailles, the First World War ended on 28 June 1919. Unless an Order made under the 1916 Act had been extended in operation, the latest date upon which it could have any effect would be 28 June 1920.

[15] Amendments made by the Restricted Byways (Application and Consequential Amendment of Provisions) Regulations 2006

[16] Molesworth airfield (1985); Menwith Hill (1985); RAF Upper Heyford (1990) and RAF Lakenheath (1999)

11.20 The Emergency Powers (Defence) Act 1939 was intended to only operate for one year, but continued in force throughout the whole of the Second World War, and until 24 February 1946. The Act provided for the making of Defence (General) Regulations for a wide variety of topics, including the temporary stopping up or diversion of highways; in addition, the regulations permitted County Agricultural Executive Committees to authorise the ploughing of rights of way, subject to their eventual restoration and the provision of diversions.

11.21 After the war, the Requisitioned Land and War Works Act of 1945 provided for orders to be made for the permanent stopping up or diversion of highways which had been temporarily stopped up or diverted under the 1939 Regulations. The Requisitioned Land and War Works Act of 1948 extended the scope of this power to encompass highways which had in practice been temporarily closed or diverted but for which no formal order had been made under the Regulations. In both cases, the power to make such orders was intended to be available only until two years after the war period[17]. However their provisions[18] continued to be operative until terminated by the Land Powers Defence Act, 1958 with effect from 31st December 1958. Objections to orders made under the 1945 and 1948 Acts were heard by the War Works Commission; some records survive in both national and local archives.

11.22 The 1958 Act included a power to vary or revoke orders made under the 1945 Act without any time limitation. However, where such a proposal was published before 31st December 1960 to vary an order made under the 1945 Act (because a condition requiring the provision or improvement of an alternative highway had not been satisfied and therefore the stopping up or diversion had not come into operation) then the highway could remain closed pending the coming into operation of the variation order, or for a further six months if the variation was disputed and subsequently rejected by the War Works Commission.

11.23 The Land Powers (Defence Act) 1958 also applied the provisions of the Town and Country Planning Act (1947) to situations where the land is required to be used for defence purposes. Any stopping up or diversion proposed under these provisions can be permanent or temporary but introduced the now well-established procedures for advertisement of such proposals.

Practical considerations

11.24 Unless extended by due process, any temporary closures of rights of way made under emergency powers during the First or Second World Wars

[17] This was defined as the period during which the Emergency Powers (Defence) Act, 1939 and the Supplies and Services (Transitional Powers) Act, 1945 were in force. The latter Act was originally brought in to last for 5 years until 10th December 1950 but each year after that Parliament extended the Act for a further year until, on 25th March 1959, the Emergency Laws (Repeal) Act repealed the whole of the Supplies and Services (Transitional Powers) Act 1945 (with two exceptions which are not relevant here).

[18] And those of the Supplies and Services (Defence Purposes) Act, 1951 in relation to the stopping up or diversion of highways across or adjoining defence land.

would have ceased to have effect on 28 June 1920 or 31 December 1958 as appropriate.

11.25 In individual cases, there may be some local belief and reputation that wartime closures had a permanent effect; this is not the case with regard to closures under the 1916 Act or the regulations made under the 1939 Act. Similarly, the general authority to close and plough up rights of way ceased to have effect when the enabling regulations were repealed. Only in those cases where further legal action was taken could the temporary wartime closures become permanent.

11.26 The requirement for action to be taken under the 1916 or 1939 Acts to close a route provides evidence of the existence of public rights prior to that closure, and the orders made normally deal authoritatively with the previous status of the right of way in question. Such orders can therefore be a very useful and persuasive source of evidence in connection with the existence and nature of public rights.

SECTION 12 MAPS (COMMERCIAL, ORDNANCE SURVEY, ESTATE ETC) AND AERIAL PHOTOGRAPHS

REFERENCE MATERIAL

Statutes

Survey Act 1841

Case Law

Hollins v Oldham 1995 C94/0206, unreported. Judicial view on cross roads: '*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 on payment of a toll and, secondly, other types of roads which are called cross* roads … *This latter category, it seems to me, must mean a public road in respect of which no toll was payable'*.

Kent County Council v Loughlin 1975 (see also Section 8) Denning LJ stated *'The county council archivist produced maps between 1769 and 1819. None showed Fairly Lane at all, but they were to so small a scale that they showed only public carriageway roads'.* This remark is taken by some to mean that Lord Denning considered that all highways on pre-1820 maps are public highways. However, it is unlikely that he was generalising on all highways on such maps.

Attorney General v Antrobus (1905) – Judicial view on whether OS maps are evidence of a way being public or private: *"Such maps are not evidence on questions of title, or questions whether a road is public or private…..in my opinion admissible on the question whether or not there was in fact a visible track at the time of the survey".*

Clode and Others v LCC 1913 - Judicial views on some commercial maps *'I do not think that the Horwood maps were admissible in evidence ... they were apparently but the speculations of a publisher, not official productions, put forth as topographical guides to parts of London. In my opinion these maps are not admissible for that purpose, the maps were just a private adventure for the purpose of profit on the sale of them'.*

Attorney General v Horner, 1913 – Some judicial views on the Ordnance Survey map of 1874. '*Such maps are not evidence on questions of title, or questions whether a road is public or private, but...set out every track visible on the face of the ground and are in my opinion admissible on the question of whether or not there was in fact a visible track at the time of the survey'.*

Merstham Manor Ltd v Coulsdon UDC 1936 Some judicial views on various maps '*The road is again shown on the map of 1802 by Faden and again in Greenwood's map of 1822 and 1823; but, of course, these maps only show it as a road. There is nothing in the maps to show whether or not the*

topographer-author was intending to represent the road on his map as a public highway. All the Ordnance Survey maps show the road, but it was admitted by Mr Godley, a witness from the Ordnance Survey Department, that they show any road which is there on the surface whether it is a public highway or not'.

Masters v SSE [1999] WL 809077: the inferences that can be drawn from thickened casing lines or 'shading' on the south and east sides of roads shown on OS maps. Where evidence is presented which shows that, on the basis of detailed comparison with other public roads in the locality, the shading of the route in question resembles the way other known public carriageways were depicted by OS, the inference may be drawn that the status is similar.

Commission for New Towns v J J Gallagher Ltd [2003] 2 P & CR: Contains a useful discussion on the value of a wide range of mapping evidence in a case where the expert witnesses were Dr Hodson and Professor R Kain

Norfolk County Council v Mason [2004]: Contains a discussion on the value of a number of different map sources as evidence.

Planning Inspectorate Guidance

Rights of Way Advice Note No.4 – meaning of 'cross road' See paragraph 2.24 et seq.

Other Publications

'Rights of Way: A guide to law and practice' by John Riddall and John Trevelyan (published by the Open Spaces Society and the Ramblers' Association Chapter 6.4).

'OS Maps – a concise guide for historians' - R Oliver 1993. As well as providing a concise history of the OS, it includes a lengthy chapter on the depiction of detail on OS maps, comprising a comprehensive dictionary from 'Accuracy' through to 'Zincography.' This is a very useful book for detailed information on OS maps.

'Ordnance Survey instructions to field examiners and revisers and internal Circulars (various dates 1884 – 1961) list in detail the tasks of field examiners engaged in the revision of Ordnance Survey maps at various scales in relation to roads, bridle roads and footpaths.

'Ordnance Survey Maps – a descriptive manual' - J B Harley, 1975 - A comprehensive study of the development of OS maps.

'Maps and Air Photographs,' - G C Dickinson - The first chapter is particularly good on the different mathematical projections developed for maps.

'The Early Years of the Ordnance Survey,' - C Close (published in 1926 and reprinted in 1969), - The early history of the OS, by the Director of the OS from 1911 – 1920.

'Map of a Nation – A biography of the Ordnance Survey' – Rachel Hewitt 2010

'The Ordnance Survey of the United Kingdom' – T. Pilkington White, 1886 – A history of the OS by its serving Executive Officer. Available as a reprint on demand.

'Maps and Map-Makers' - R V Tooley 1952 – Chapter viii covers the County maps in detail.

GUIDANCE

Introduction

12.1 The fundamental problem with all maps is that they incorporate compromises in their efforts to represent a spherical surface onto a flat surface. Thus, no one map is capable of simultaneously representing accurately the four factors involved of distance, direction, area and shape. That said, the 17th and 18th centuries saw a tremendous surge in the development of the mathematical requirements of maps, and in the manufacture of the precision instruments required for the accurate assessment of bearing and level.

12.2 In many instances, the purpose of the presentation of a map at an inquiry is to support arguments regarding the status of a route. Any route on such a map needs to be assessed carefully against the route shown on the Order Map, to ensure that the routes substantially agree. The age of the map may also be significant in relation to its accuracy, as will the key attached labelling the types or status of the routes inscribed on the map.

12.3 Prior to the Rights of Way Act 1932 only those maps and records produced under express statutory authority , such as Inclosure and Tithe Awards, or deposited plans, were admissible as evidence in determining the existence or otherwise of rights of way. The 1932 Act first provided that *any* map, plan, history or other relevant document shall be taken into account, meaning that documents such as early surveys and Ordnance Survey maps became admissible evidence. Accordingly, the views expressed on such documents in some of the earlier case law should be read with this in mind.

Pre-1800 Maps and Atlases

12.4 The value of pre-1800 maps and atlases is variable, as they are generally compromised by a lack of sophistication. Colonel Close, a former Director General of the OS, considered that *picturesque and interesting as old county maps are, they leave a great deal to be desired on the score of accuracy ..... errors of up to 10% can be found in Elizabethan maps*'. Only a few were based on trigonometric surveys, or on a recognised mathematical projection.

12.5 The original six 'Great Post Roads' are shown on Thomas Gardiner's maps of 1677. Secondary roads are also shown on these maps branching off at the main Post Towns. The key attached to some of the maps shows several of these branch routes as 'By posts (foot and horse)'. However, if the key does not accompany the maps, they are unlikely to be good evidence regarding the status of these secondary routes.

12.6 Most of the county maps produced in considerable numbers in the second half of the 18th century were in response to an offer by the Royal Society of Arts of a prize of £100 for a map of any county on a scale of 1 inch to the mile. In 1765, Benjamin Donn won the £100 award offered by the Royal Society for his map of Derbyshire.

12.7 Many of these early map makers made use of trigonometric surveys in the production of their County maps, including Burdett for Cheshire and Derbyshire, Yates for Lincolnshire, Staffordshire and Warwickshire, Armstrong for Durham, Prior for Leicestershire, Hodskinson for Suffolk and Strachey for Somerset. Cary maintained a high standard with his maps, and in 1794 was employed by the Postmaster General to supervise the survey of 9000 miles of turnpike roads. Cary also employed Aaron Arrowsmith to be the land surveyor for his 'Map of the Great Post Roads between London and Falmouth,' produced in 1784. It was as a result of Cary's belief that he could copy OS maps without restriction that, in 1817, the OS took steps to copyright the maps it produced.

12.8 Although the second half of the 18th century saw considerable progress, both in the number of maps produced and in their technical accuracy, they were not always reliable for their topographical details. Dr Hodson maintains that *the greatest scope for error ... lies with the county map, few of which were surveyed entirely de novo.*[19] Nevertheless, in *Gallagher* Neuberger J was satisfied that the historical maps he was considering demonstrated that Beoley Lane had existed as an identified way since about 1722, accepting that old maps contained inevitable inaccuracies. He was less able to draw confident conclusions from any of the historical maps as to whether or not it was a public carriageway. The map on which he placed most reliance was that of Cary (dated post-1800).

12.9 However the evidential value of the older maps can be significant in helping to determine the location of a way, and may be helpful in determining the status of a route, especially in conjunction with other maps. Although the level of accuracy of sketch maps may be difficult to determine, they too can be of value in some circumstances.

Ordnance Survey Maps

12.10 The formation of the Ordnance Survey in 1791 reflected the experience gained in the military survey of Scotland by William Roy, the intellectual founder of OS, and was in response to a military need for accurate maps of southern England in preparation for a possible Napoleonic War. Whilst the earliest one-inch maps were produced in response to these military concerns, there was a shortage of trained military surveyors and many of the early maps were produced by local civilian surveyors. The suggestion that all road or ways shown on the first edition of the one inch maps are of roads or ways suitable for wheeled artillery is likely to be no more than a generalisation. However, the Old Series 1 inch maps did label turnpike roads and distinguished them from other roads by a thickening of the casing lines on the south and east side of the road.

12.11 Over the years, OS developed a variety of maps to meet the growing need for accurate and up-to-date maps of the UK and the production of maps for sale to the public became an activity of increasing importance to OS from the early twentieth century, although the sale of maps to the public had occurred throughout its existence.

[19] RWLR article 'The evaluation of older maps' July 1999, section 9.3, page 31

12.12 The first one-inch maps (1:63,360) were produced in 1801 and covered Kent, part of Essex and London. It was not until 1873 that the whole of the UK was covered. They were relatively unsophisticated monochrome maps, with relief indicated solely by hachures. Inspectors may also be presented with copies of the Ordnance Drawings, which were carried out for southern England over the period 1789 – 1840. They were drawn to a variety of scales, 2 inches, 3 inches and 6 inches to the mile. Some of the drawings were made 20 years before the relevant one-inch map was published. Some larger scale drawings show footpaths which did not appear on the printed map.

12.13 A demand for maps showing the countryside on a larger scale led to a six inch to the mile map of Ireland, (1:10,560). This was then extended to the rest of the UK. From 1840, the one inch maps of northern England and Scotland were reductions of the six-inch survey.

12.14 The industrial development of the Victorian era, followed by the rapid expansion of towns and communications, led to a demand for even larger scale plans. In 1858, it was decided to publish the whole of the UK on a scale of 1:2500 (approximately 25 inches to the mile).

12.15 The first edition OS maps, in the eyes of Colby, the Superintendent of the Survey, were *prodigies of excellence in comparison with earlier maps*, but it became apparent that some of the early one-inch maps suffered from errors as they *had been made in a hasty manner during the war*. This was particularly true regarding the maps for Lincolnshire, Hampshire and Lundy Island, although Colby had sought to identify, correct and eliminate inaccuracies found during the surveying process. In addition, the maps had been constructed using a mathematical projection which had some inherent inaccuracies at the extremes of the map to the north and south. To overcome this problem, the OS utilised a series of meridians for differing parts of England and Wales. As a result, roads and paths on adjacent maps at county boundaries do not always match precisely, and reflect the north/south errors in the projection. However, since this mismatch is created by the projection process used for the making of the map, the positional accuracy is not significant.

12.16 The process of refashioning the old County Series scale maps to National Grid standards was undertaken between 1948 and 1980. The process, referred to by the OS as 'Overhaul' or the 'Cotswold Adjustment', attempted to eliminate errors, particularly those of distortion and mismatching. The methodology used involved a degree of 'cut and paste' technique to align the former projection with the National Grid. Recent advances in global positioning systems and their ready availability have revealed positional discrepancies on the ground. These differences, where they occur, are normally of 3 – 5 metres, but can be up to 10 metres in places. However, the fact that satellite technology may demonstrate that all the objects in a given area are a few metres out in relation to their current depiction on a two-dimensional plan will have little impact upon the relative position of one feature to another on the ground. Any positional inaccuracy revealed by GPS technology does not detract from the usefulness of pre-GPS Ordnance Survey maps as a

record of what was observable on the ground at the time of the maps were surveyed.

12.17 The status of routes on early OS maps is still a matter of debate at inquiries. The following points may assist in reaching a decision on the evidence provided by a particular map.

12.18 Bench marks were located along a line of levelling, and often followed lines of communication. However, they can also be found on rocks in the middle of private land. Consequently it cannot be assumed that a bench mark is indicative of a public right of way.

12.19 Access for surveyors was governed by the Survey Act of 1841, which gave surveyors virtually unlimited access. Thus, the indication of spot heights along a route would not necessarily be proof of a public right of way.

12.20 The practice of annotating paths 'F.P.' on large scale maps from 1883 arose from an instruction to surveyors issued in February of that year (quoted by Dr R Oliver in '*OS Maps – a Concise Guide for Historians')* that '*the object of….'F.P. being that the public may not mistake them for roads traversable by horses or wheeled traffic'*. The inclusion of "F.P." gave rise in 1885 to letters being written to *The Times* complaining that the public were likely to view such annotations as indicating the existence of a public footpath. On behalf of the OS, Col. Pilkington-White responded that it was the practice to show paths on the ground, irrespective of whether they were public or private. From 1888, Ordnance Survey maps carried a disclaimer to the effect that the representation of a track or way on the map was not evidence of the existence of a public right of way[20].

12.21 An 1893 OS circular instructed that "*all footpaths over which there is a well-known and undisputed public right of way should be shown*". This instruction appears to be at odds with the disclaimer that the post-1888 maps carried and with the 1885 response of Col. Pilkington-White in *The Times*. The 1893 Circular was also issued after the 1893 Dorrington Committee had concluded that no inquiry by the surveyor could determine whether a path was a public or private one.

12.22 The Instructions to Surveyors (see 'Other Publications' above) set out the parameters under which the surveyors were to undertake their task. It was not until 1905 that surveyors were instructed that 'OS does not concern itself with rights of way, and survey employees are not to inquire into them.' However in the same paragraph of these Instructions, there is a note stating that '*A clearly marked track on the ground is not in itself sufficient to justify showing a path, unless it is in obvious use by the public'.* The 1905 instructions appear therefore to be somewhat ambiguous; subsequent instructions to surveyors contain equally ambiguous instructions as surveyors were given directions as to the

[20] On late 20th century OS maps which show those ways which are recorded in definitive maps and statements, the disclaimer is modified to acknowledge that some routes shown are public rights of way.

nature of paths that should and should not be recorded whilst maintaining that public rights of way were not the concern of OS.

12.23 The Dorrington Committee also recommended the adoption of a fourfold classification scheme for roads being shown on OS maps, with each classification being dependant on the width of the road at issue and the type of traffic each road could carry. In relation to what were to be shown as first and second class roads, the committee considered that it was '*desirable that the roads thus classified as first and second class should be of such a nature that the public are certain of having free access over them, not disturbed either by their physical condition or by their being private'* and that *'any of the roads in these two classes which are not repaired by an authority under legal obligation to maintain them, and are in consequence not highways, should be indicated by a slight modification of the characteristic adopted, such as dotted lines. This paragraph would apply principally to roads in public and private parks, private roads of good character, but not necessarily open to the public.*'

12.24 A number of other documents were produced in connection with the production of OS maps which can be of assistance in providing supporting evidence of the existence and status of some routes. Information on named routes may be found in the relevant Object Name Books, which provided details of the authorities for named features. Some of the County Series maps were accompanied by Books of Reference, which contain details of the numbered land parcels. Other sources of information include Boundary Remark Books and the subsequent Boundary Record Maps.

12.25 In 'OS Maps – a concise guide for historians,' Oliver states that *Footpaths and bridleways were not normally identified as such on 1:10,560 and larger scale mapping prepared before c1883, although occasional exceptions are encountered, e.g. on several 1:10,560 or 1:2500 first edition sheets in Yorkshire, North Riding and southern Durham. Otherwise, particularly on 1:10,560 maps, foot and bridleways, tracks and very minor roads look much the same.* Oliver also states that pecked lines were used for features which were not obstructions to pedestrians, which were indefinite, or surveyed to a lower standard than usual. They could also be used to indicate overhead details such as electricity transmission lines.

12.26 From 1884 onwards, on the large scale plans, those metalled public roads for wheeled traffic, kept in proper repair by the local highway authority, were to be shown with shaded or thickened lines on the south and east sides of the road. In a paper by Yolande Hodson 'Roads on OS 1:2500 Plans 1884-1914' (RWLR July 1999) explains the background to this practice and Dr Hodson remarks that the primary purpose of the shading of roads on the large-scale maps was to guide the draftsman in the preparation of revisions to the 1" maps. Although Dr Hodson concludes that shaded lines are not necessarily an indication that such roads shown in such a manner were public, the judgment of Hooper J in the case of *Masters* at first instance suggests that, in some circumstances, this may have been the case.

12.27 The 1" series of maps produced from the 1890s onwards (including the 'Popular' series) were marketed at the touring and walking public and paved the way for the current small-scale Explorer and Landranger series. These maps were produced to compete with the product of the commercial map makers in business at the time (primarily Bartholemew, whose ½" series had been extensively used by the military in the Great War as it contained a coloured road classification system). In 1912 a War Office Committee had recommended the introduction of a coloured system of road classification for OS maps which was used in the preparation of the Popular Edition (1919 – 1926). The Committee recommended that "*Carriage Drives, private roads and minor roads are never coloured*"; whereas on the popular edition the key stated "*private roads are uncoloured*".

12.28 Until 1931, the OS and highway authorities used different systems to classify roads. Although the numbers used in the Ministry/Department of Transport's national classification began to appear on 1:2500 maps from 1938 and on 1:10,560 maps from 1945, OS had begun publishing the half inch Ministry of Transport Roads Map series showing the national classification in 1922.

12.29 Most roads on OS current 1:25,000 and 1:50000 maps are coloured according to their category, as identified in the key/legend. However, some minor ways may be left uncoloured. These are known informally as "White Roads." The OS has consistently felt unable to identify the status of these minor ways which are described as "other road, drive or track."

12.30 The areas of each field were published on 1:2500 maps, with a parcel number to identify the particular field. Bracing indicates parcels that were measured together. A road braced with a private field may be suggestive of private status. But this would be no more than the surveyor's perception and would carry little evidential weight.

12.31 Public roads depicted on 1:2500 maps will invariably have a dedicated parcel number and acreage. It has been argued that all parcels which have the shape of a way and are so numbered and measured are therefore highways. This argument has not been substantiated. Such depiction is far from conclusive for the confirmation of highway status.

12.32 Later OS surveys and maps, especially the larger scale plans, provide an accurate representation of routes on the ground at the time of the survey. The inaccuracies of the earlier projection were virtually eliminated by the development of an alternative form of map projection. However, it should be emphasised that the depiction of a way on an OS map is not, of itself, evidence of a highway. The courts have treated Ordnance Survey maps as not being evidence of the status of a way. For example, in the case of *Attorney-General v Antrobus* [1905] 2 Ch 188 at 203, Farwell J stated in relation to an Ordnance map of 1874:

"*Such maps are not evidence on questions of title, or questions whether a road is public or private, but they are prepared by officers appointed under the provisions of the Ordnance Survey Acts, and set out every track visible on the face of the ground, and are in my opinion admissible*

on the question whether or not there was in fact a visible track at the time of the survey".

12.33 Similarly, in *Moser v Ambleside Urban District Council* (1925) 89 JP 118 at 119, Pollock MR stated:

"*If the proper rule applicable to ordnance maps is to be applied, it seems to me that those maps are not indicative of the rights of the parties, they are only indicative of what are the physical qualities of the area which they delineate.....*"

12.34 In *Norfolk CC v Mason* [2004] NR205111, Cooke J observed "*Throughout its long history the OS has had a reputation of accuracy and excellence……. It has one major, self-imposed, limitation; it portrays physical features, but it expresses no opinion on public or private rights—though no doubt it is obvious what a blue line labelled "M1" must mean*."

12.35 Nevertheless, the inclusion of a route on a series of OS maps can be useful evidence in helping to determine the status of a route, particularly when used in conjunction with other evidence (Section 2.16 to 2.21, 'Evidential Weight' refers).

Other post-1800 Maps

12.36 The 19th century saw a considerable increase in the production of maps in the UK. Estate Maps were normally compiled by professional surveyors and are therefore likely to be reasonably accurate. However, they would not necessarily include any public rights of way which crossed the estate. They usually form part of a collection of estate papers, which may be deposited in county record offices.

12.37 Bryant and Greenwood produced well-made maps, using surveyors and a triangulation system. Greenwood published surveys of 38 counties between 1817 and 1834, while Bryant covered 11 English counties between 1822 and 1835. There was considerable competition between them, with both publishing maps virtually simultaneously for Surrey (1822/1823) and Gloucestershire (1824). The competition between Bryant and Greenwood, and the other map makers, may explain why the standards of accuracy of some of the maps produced differ from county to county. Though Greenwood employed his own surveyor for his triangulation work, there was criticism by Thomas Hodgson, also a surveyor, that Greenwood's system of measuring distances for his maps was based on 'pacing' not 'chaining.' Hodson suggests that *the high costs of Greenwood's surveys and the speed with which they were done, reinforces the view that his topographical mapping was imperfectly executed*[21].

12.38 Other map makers producing County maps at the time included Baker, Campbell, Donald, Drinkwater, Ellis, Fryer, Green, Hennet, Hutchings, Jeffreys, Lindley and Crossley, Phillips, Price, Ruff, Swine and Teesdale.

[21] RWLR article 'The evaluation of older maps' July 1999, section 9.3, page 31

Most of these businesses collapsed due to the increasing competition from the OS.

12.39 Maps produced to record specific activities, such as mining and encroachment, are generally good evidence of what they portray.

12.40 In 1901, the War Office was using large numbers of the half-inch series maps produced by Bartholomew. These had been reduced from OS maps, but Bartholomew's maps included a new method of layer relief colouring, which was particularly popular with the War Office.

12.41 Some Motorists' or Cyclists' maps are occasionally quoted as evidence that routes had been used by vehicles prior to the date when the Road Traffic Act 1930 made the use of motor vehicles on bridleways and footpaths an offence without lawful authority. Certainly there is some evidence that the CTC (Cyclists Touring Club) corresponded with Bartholomew regarding routes used by their members. However, current evidence indicates that, although Bartholomew were highly regarded as map producers, they did not employ independent surveyors to carry out any surveys on the ground nor to determine the nature and status of the roads on their maps. Moreover, they do not appear to have examined the legal status of the routes on their Cyclists' Maps before colouring them for use as suitable for cyclists. Neither do they appear to have assessed the legal status of the roads on their Motorists' Maps prior to publication.

12.42 As a result of the OS taking HG Rowe and Co to the High Court in 1913 for infringement of its copyright, it was legally established that Rowe's New Road Map for Cyclists and Motorists was no more than a direct photographic reduction from the OS map.

12.43 Commercial maps are rarely sufficient in their own right to permit the inference to be drawn that a route is a highway. However, combined with evidence from other sources, they can tip the balance of probability in favour of such status.

Aerial Photography

12.44 Aerial photographs may be presented at an inquiry in order to confirm the existence of a route at the time the photographs were taken. Confirmation is often difficult, especially if confirmation of a footpath is sought from a single photograph. It must be borne in mind that it is hard to determine the correct orientation of the photograph unless the direction of the flight has been indicated on the back of the photograph. It is essential to try and find 3 points on the photograph which are shown on the map. The orientation of the photograph should be checked with a map and it must be remembered that the scale of the map and the photograph is likely to differ. The time of day a photograph was taken can be significant, as shadows can hide or distort the line of a narrow path. An oblique photograph may also hide a number of features which exist on the map.

12.45 An aerial photograph cannot be taken as evidence of what rights might exist over a route, only that a route might be discernible on the ground at the date when the photograph was taken.

Concluding Comment

12.46 Most maps are potentially helpful evidence of the physical existence of routes, especially if consistently shown. However, they are less helpful in terms of determining the status of the routes shown, and all mapping evidence is more helpful in conjunction with other evidence.

GLOSSARY OF ABBREVIATIONS

All ER	-	All England Law Reports
BOAT	-	Byway Open to All Traffic
Defra	-	Department for Environment, Food and Rural Affairs
CA	-	Court of Appeal
CA68	-	Countryside Act 1968
CC	-	County Council
CROW	-	Countryside and Rights of Way Act
DMO	-	Definitive Map Order
DMS	-	Definitive Map and Statement
DoE	-	the then Department of the Environment
EWCA	-	England and Wales Court of Appeal
EWHC	-	England and Wales High Court
HA 80	-	Highways Act 1980
JPL/JPEL	-	Journal of Planning and Environment Law
NT	-	National Trust
NERC	-	Natural Environment and Rural Communities Act 2006
OMA	-	Order Making Authority
OS	-	Ordnance Survey
P&CR	-	Property, Planning and Compensation Report
QBD/QB	-	Queen's Bench Division
QCs	-	Queen's Counsel
ROW	-	Rights of Way
RUPP	-	Road Used as Public Path
RWA32	-	Rights of Way Act 1932
RWLR	-	Rights of Way Law Review

SSE	-	Secretary of State for the Environment
SSEFRA	-	Secretary of State for Environment, Food and Rural Affairs
UCR	-	Unclassified Road
UEFs	-	User Evidence Forms
UKHL	-	United Kingdom House of Lords
UKSC	-	United Kingdom Supreme Court
WCA 81	-	Wildlife and Countryside Act 1981
1WLR	-	Vol. 1, Weekly Law Report
WO	-	Welsh Office

Contact Details

'A guide to definitive maps and changes to public rights of way (NE112)'

Natural England

http://publications.naturalengland.org.uk/publication/31038?category=211280

'Rights of Way: A guide to law and practice' by John Riddall and John Trevelyan

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Acts of Parliament, Regulations and Circulars are available from Government bookshops.

WEBSITES

UK Government – Departments covering relevant issues:
https://www.gov.uk/government/topics/rural-and-countryside

Natural England – the government's advisor on the natural environment:
https://www.gov.uk/government/organisations/natural-england