

RE NEWNHAM LANE, ASTON CANTLOW

ROW/3254955

**STATEMENT OF CASE
ON BEHALF OF THE TRAIL RIDERS FELLOWSHIP**

DEFINITIONS AND ABBREVIATIONS

1. The following Definitions and Abbreviations are adopted:

Warwickshire CC	Warwickshire County Council
TRF	Trail Riders Fellowship
The Order	Warwickshire CC Definitive Map Modification Order (Parish of Aston Cantlow) Sheets SP16SW, SP16SE, SP15NE (Order No. 1 2019 Path No. AL223)
The Route	The order route which runs from Aston Cantlow to Newnham as marked green (A), (B), (C), (D), (E), (F), (G), (H) on the Order Map
DMS	Definitive Map and Statement
MPVs	Mechanically-Propelled Vehicles
BOAT	Byway Open to All Traffic
LGA 1929	Local Government Act 1929
NPACA 1949	National Parks and Countryside Act 1949
CA 1968	Countryside Act 1968

HA 1980	Highways Act 1980
WCA 1981	Wildlife and Countryside Act 1981
NERCA 2006	Natural Environment and Rural Communities Act 2006
[WaCC/¶#]	A reference to the Statement of Case of Warwickshire CC, by
[WaCC/App#]	paragraph number(s) or Appendix Number]
[TRF/¶#]	A reference to this, the TRF's, Statement of Case by
[TRF/App#]	paragraph number(s) or Appendix Number]

INTRODUCTION

2. This is an inquiry held under paragraph 7 Schedule 15 WCA 1981 for the purpose of a decision by the Secretary of State as to whether or not to confirm the Order. The Order, if confirmed, will add a bridleway to the DMS along the Route.
3. The TRF objects [TRF/App1]: in a nutshell, there is not – still less has there been shown to be – anything wrong in the DMS; the route is an unclassified county road which has vehicular rights. The route was not recorded on the DMS for the simple reason that it was vehicular (and not of such a character as to fall within the categories of vehicular highways which should have been recorded on the DMS).
4. The Order was not made following any application by an individual under section 53(5) WCA 1981. It was made by Warwickshire CC in purported pursuance of its duty under section 53(2). Warwickshire CC bear the onus of satisfying the Secretary of State that the DMS needs to be modified. Warwickshire CC's position is necessarily premised on a claim that it had discovered (new) evidence so as to satisfy section 53(3)(c)(i) (cf. [WaCC/¶1.6]). That claim will obviously have to be scrutinised. But what is this new evidence? On the one hand, no documentary evidence has been adduced which is inconsistent with the route being vehicular (such documentary evidence that the route carries equestrian rights only which has been adduced is ambivalent or weak at best). On the other hand, such user evidence as has been adduced naturally only reaches back so far in time (and user evidence inherently cannot be inconsistent with the route carrying vehicular *rights*; at most it could establish that it was not so *used* in any particular period). Moreover, for a period of approaching 4 decades (2021- c.1984/5), at least, the user

evidence all speaks with one voice and is more or less common ground: the route has been used by vehicles, extensively so. Moreover again, the TRF says it is clear that it has been used with the acquiescence of the landowner(s) and with the acquiescence and indeed positive encouragement of Warwickshire CC.

5. More fundamentally, the case advanced by Warwickshire CC is advanced on the premise that a mistake was made when the DMS was compiled. In one sense, any DMMO involves such a premise. But the point is far more stark in the present case. Here, the mistake which is alleged is not one of mere omission, nor even one of careless commission: for it is clear from the documents that when the first DMS was compiled exactly the issue which is now raised – viz. that the route should be recorded as a bridleway (rather than being not recorded) was raised and resolved in accordance with the statutory procedure under NPACA 1949, with the conclusion being that it should not be recorded as a bridleway because it was known to be an unclassified county road. Thus, Warwickshire CC's application presumes that it now knows better – some 6 decades after the event - the status of the route than the persons involved in the elaborate statutory procedure surrounding the original composition of the DMS, including its own then County Surveyor (see e.g. [WaCC/App52]). Moreover, Warwickshire CC argument is premised on the assertion – without any evidence – that it, as surveying authority, was then ignorant as to the status of routes listed in its own record of unclassified county roads. The result is surely a highly perverse submission, premised not only on there having been a gross misapprehension of the provisions of NPACA 1949 but also on a gross misapprehension of the status of routes recorded in its own record of unclassified county roads. Still more perverse, in the face of the simple and obvious explanation for the DMS as it now stands: viz. the vehicular status of the route.

6. The TRF's position is thus:

- 6.1. The Order should not be confirmed. The DMS correctly records no public right of way, since this is a public right of way which does not fall within the categories of public rights of way which are or were to be recorded on the DMS: it is a public vehicular right of way which is (and was) not '*used mainly for the purpose for which footpaths and bridleways are so used*' (i.e. not within the definition of a BOAT under section 66(1) WCA 1981) (the TRF's primary case); or

- 6.2. Subject to that, if an Order is to be made, it should be an Order to add a BOAT to the DMS along the Route (the TRF's secondary case); and
- 6.3. In any event, Warwickshire CC has not discharged the onus of showing that the DMS should be changed (nor is this a case where it can properly be said that evidence has been discovered for the purposes of section 53(3)(c)(i)).
7. As set out in more detail in this Statement of Case:
- 7.1. It is clear that the route was and is a public highway maintainable at public expense. It was known as such when a handover map and schedule was prepared for the purpose of the handover of highway functions from Rural District Councils to County Councils pursuant to the LGA 1929 (see [WaCC/¶3.28]; [WaCC/App43-44]; [TRF/App4]; [TRF/App5]). Warwickshire CC thus *expressly* accepted maintenance responsibility for the route. As will be set out in more detail below, the appearance of the route on the handover schedule, of itself, should be interpreted as substantial positive evidence of its vehicular status: while it is logically possible that a mere bridleway might have been included in the handover record, as a matter of practical probability it is much more likely that it was so included because it was vehicular. Its subsequent treatment, particularly as respects the DMS process bears this out.
- 7.2. Consistently with this, during the survey process for the DMS pursuant to NPACA 1949, the Route was obviously known to be a public highway: the route forms one terminus for each of other public highways which are recorded on the DMS: AL81 (BR), AL88 (BR), AL83(FP) and AL83a(FP), all of which¹ would be cul-de-sacs as respects public rights of way if the Route was not a public highway.
- 7.3. Notwithstanding that the surveyors etc. therefore were well aware that the Route was a public right of way, the route was not recorded on the DMS. There is a single obvious explanation for this: it was not so recorded because it was not among the classes of highways which were to be recorded on the DMS, because it was vehicular. The DMS was never intended to record routes which were, to put it loosely, mainly vehicular. Thus, a road (in the ordinary sense of the word, connoting

¹ Possibly excepting AL83.

a mainly vehicular highway) would not qualify for appearance on the DMS under the original provisions of NPACA 1949 unless it was in the character of a RUPP (i.e. mainly used for non-vehicular traffic) nor would it have qualified as a BOAT under WCA 1981 (i.e. a route where the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used). The DMS process in the instant case exactly bears this out. The question of whether it should be included as BR was squarely raised and addressed, including in the face of objections. It was not because it was an unclassified county road. The statements for BRs and FPs which would be dead-ends but for connecting to it, were consistently phrased as joining the ‘Aston Cantlow – Newnham road’ viz. a description which would naturally suggest a vehicular route.

- 7.4. User evidence attests to the use of the route by vehicles, including MPVs, dating back as far as one might reasonably expect as respects living memory, viz. to the 1970s at least. It is to be inferred that such use continued before then: the lack of positive evidence is attributable to the passage of time; there is no particular reason to suppose that vehicular use arose from nothing at some particular point before that; and as per the above, the route must have been known to have been vehicular at the time of the original survey.
 - 7.5. The user evidence is evidence of reputation which bears out and reinforces the above conclusion. This was a vehicular route, but moreover, it was known and used as such.
 - 7.6. In any event, the user evidence attests to a long period of user by vehicles, ample to establish the existence of a vehicular highway by prescription at common law or deemed dedication under section 31 Highways Act 1980. The effect of section 66 NERCA 2006 is that user by MPVs after 2 May 2006 cannot be relied on for these purposes. Conversely, a 20 year period (or sufficient period at common law) prior to 2 May 2006 will and there is ample evidence of that.
8. This Statement of Case proceeds as follows:
- 8.1. The relevant statutory background, first as to the DMS (i.e. NPACA 1949, CA 1968 and WCA 1981) then as to highways maintenance records (i.e. LGA 1929, HA 1959 and HA 1980).

- 8.2. The handover records associated the LGA 1929 in this case.
- 8.3. The definitive map records in this case.
- 8.4. Road mileage returns, to rebut the suggestion that Warwickshire CC did not know the status of its unclassified roads and ‘green lanes’.
- 8.5. User evidence
- 8.6. Warwickshire CC’s approach to the route in recent years
- 8.7. Prescription / deemed dedication
- 8.8. A brief response to WaCC’s analysis of documents pre-dating the handover records.

STATUTORY BACKGROUND

Definitive Map and Statement

- 9. The recording of minor public highways began with NPACA 1949, which obliged surveying authorities to carry out a survey of the area to create and maintain a DMS showing three categories of highways (i) footpaths; (ii) bridleways; (iii) roads used as public paths (‘RUPPs’). NPACA 1949 was amended by CA 1968 to require surveying authorities to reclassify each RUPP either as a footpath, bridleway or as a BOAT. The reclassification process was still in train when the relevant provisions of NPACA 1949 and CA 1968 were replaced by the relevant provisions of WCA 1981. These provisions are usefully summarised in Kind v SoS for Environment [2006] 1 QB 113 at [2-23] per Lightman J. The function of the NPACA 1949 was to record routes for the benefit of equestrians and benefits, with certain vehicular routes (RUPPs) only also being recorded as incidence thereof: see Suffolk v Mason [1979] AC 705 and R v SoS for the Environment ex parte Hood [1975] QB 891.

National Parks and Countryside Act 1949

- 10. Section 27 required surveying authorities to carry out a survey of all land in their area over which public rights were alleged to subsist and to prepare a draft map of its area showing certain rights of way wherever in its opinion they subsisted or were reasonably alleged to have subsisted at the relevant date. Section 27(1) required the recording of

footpaths and bridleways; section 27(2) required the recording of RUPPs. Section 27(6) defined terms as follows:

‘footpath’ means a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road;

‘bridleway’ means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right of way to drive animals of any description along the highway;

‘public path’ means a highway being either a footpath or a bridleway;

‘road used as a public path’ means a highway, other than a public path, used by the public mainly for the purposes for which footpaths and bridleways are so used.

11. Section 29 required the draft map and statement to be publicised and provided for the determination of objections as to anything contained or omitted from the draft map and statement.
12. Section 30 provided for a provisional map and statement (reflecting the draft map and statement subject to any modifications by virtue of the above determinations), to which landowners etc. could make further objection by application pursuant to section 31.
13. Section 31 provided for preparation of the DMS (being the provisional definitive map and statement subject to any amendments arising from applications under section 31).
14. Section 32(4) provided that the DMS was conclusive as to the particulars stated therein to the extent therein set out: in summary, (i) where the DMS showed a footpath, the DMS was conclusive evidence that a footpath existed; (b) where the DMS showed a bridleway or a RUPP, the DMS was conclusive that the public had a right of way on foot and on horseback, but in either case, this provision was without prejudice to any question whether the public had any right of way other than the rights specified.
15. Section 33 required surveying authorities to review and revise the DMS at periodical intervals having regard to certain events, including the discovery of new evidence.
16. At [TRF/App2] is approved guidance which was circulated contemporaneously as to the approach to be adopted by surveying authorities to these provisions.

Countryside Act 1968

17. The Countryside Act 1968 simplified the surveying procedure by providing for two stages rather than three. Paragraph 9 Schedule 3 required surveying authorities to reclassify each RUPP (whether or not shown on the DMS) as a footpath, bridleway or BOAT (and not to use the expression RUPP). By paragraph 9(2)(b) Schedule 3 recording of a BOAT was conclusive evidence of the existence of a right of way for vehicular and all other kinds of traffic. Paragraph 10 Schedule 3 provided:

‘The considerations to be taken into account in deciding in which class a [RUPP] is to be put shall be (a) whether any vehicular right of way has been shown to exist; (b) whether the way is suitable for vehicular traffic having regard to the position and width of the existing right of way, the condition and state of repair of the way, and the nature of the soil, (c) where the way has been used by vehicular traffic, whether the extinguishment of vehicular rights of way would cause any undue hardship.’

Wildlife and Countryside Act 1981

18. Section 53 WCA 1981 Act provides:

(2) As regards every definitive map and statement, the surveying authority shall ...

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and

(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

(3) The events referred to in subsection (2) are as follows:

.....

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

(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies;

(ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or

(iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

.....

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.

19. Section 54 WCA 1981 required surveying authorities, as soon as reasonably practicable after the commencement date, to review RUPPs remaining on their DMSs and make modifications as follows: (i) if a public right of way for vehicles had been shown to exist as a BOAT; (ii) if (i) did not apply, and bridleway rights had not been shown not to exist, as a bridleway; (iii) if neither (i) nor (ii) applied, as a footpath.

20. Section 66 WCA 1981 provides as follows:

(1) In this Part—

“bridleway” means a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway;

“byway open to all traffic” means a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used;

“definitive map and statement” has the meaning given by section 53(1);

“footpath” means a highway over which the public have a right of way on foot only, other than such a highway at the side of a public road;

“horse” includes a pony, ass and mule, and “horseback” shall be construed accordingly;

“public path” means a highway being either a footpath or a bridleway;

“restricted byway” has the same meaning as in Part II of the Countryside and Rights of Way Act 2000;

“right of way to which this Part applies” means a right of way such that the land over which the right subsists is a public path or a byway open to all traffic;

“surveying authority”, in relation to any area, means the county council, county borough council, metropolitan district council, or London borough council whose area includes that area.

² Viz. as set out in section 48(4) CROWA 2000 ‘(4) In this Part— “restricted byway rights” means— (a) a right of way on foot, (b) a right of way on horseback or leading a horse, and (c) a right of way for vehicles other than mechanically propelled vehicles; and “restricted byway” means a highway over which the public have restricted byway rights, with or without a right to drive animals of any description along the highway, but no other rights of way.’

21. Schedule 14 sets out the procedure for an application to modify the definitive map and statement. In short, upon an application having been made, there is a duty on the surveying authority to investigate the application and thereafter determine it and if it appears that the definitive map and statement should be changed, the authority makes an order accordingly.
22. Schedule 15 sets out the procedure in relation to confirming a modification order. In short, an order does not take effect until confirmed by the SoS (para. 2). The modification order must be publicised and in the event of objections, the order must be specifically confirmed usually following a public inquiry (para. 7). If at this stage, it appears that a different order should be made, there is a further opportunity for representations and usually a further public inquiry (para. 8). There is provision for a statutory appeal to the High Court within 42 days of any order taking effect (para. 12).

Countryside and Rights of Way Act 2000

23. Section 47(2) provided that every right of way which immediately before commencement was shown as a RUPP should after commencement be treated as a restricted byway (i.e. a highway with rights for all traffic, including vehicular traffic, other than mechanically-propelled vehicular traffic).

‘Handover maps’ and ‘lists of streets’

Local Government Act 1929 and ‘handover maps’

24. The provisions of LGA 1929 transferred to County Councils the responsibility for all highways in Rural Districts for which the District Council was the highway authority. Such highways were termed ‘*county roads*’ (section 29(1)). There was a definition of ‘road’ in the LGA 1929 (section 134) which provided that ‘*unless the context otherwise requires ‘road’ means a highway repairable by the inhabitants at large...*’. Prima facie, ‘road’, therefore, included highways which did not necessarily carry vehicular rights (contrary to the normal meaning of road as connoting a vehicular highway – cf. Oxford v Austin [1981] RTR 416; Lang v Hindhaugh [1986] RTR 271; Cutter v Eagle Star Insurance Co. Ltd [1997] 1 WLR 1082).

25. Section 29(1) LGA 1929 provided

‘The council of every county shall be the highway authority as respects every road in the county which at the appointed day is a main road, or which would, apart from this section at any time thereafter have become a main road, and every such road and every other road as respects which a county council become by virtue of this Part of this Act the highway authority, shall be termed a county road...’.

26. Section 30(1) LGA 1929 provided

‘As from the appointed day, every county council shall be the highway authority as respects such part of the county as is for the time being comprised in any rural district and as respects the highways therein and as such shall have all such functions under the Highways Acts 1835 to 1885, as were exercisable by rural district councils who by virtue of the Local Government Act 1894, became successors of highway boards and rural district councils shall cease to be highway authorities...’

27. Section 31 LGA 1929 provided:

‘(1) As from the appointed day, the county council shall be the highway authority as respects all classified roads which, immediately before the appointed day, were vested in the councils of urban districts within the county.’

...

‘(6) Where after the appointed day any area, being or forming part of a rural district, is by a provisional or other order constituted an urban district, the order may provide that any unclassified roads within that area shall continue to be county roads and where the order contains such a provision as respects any roads the order may provide for contributions being made by the urban district council to the county council towards the cost of the maintenance and repair of those roads of such amounts as may be agreed between the councils or, in default of agreement, determined by the Minister of Transport.’

28. Section 32(1) LGA 1929 provided

‘Where an urban district has a population exceeding twenty thousand, the urban district council may claim to exercise the functions of maintenance and repair of any county road within their district’.

29. Section 134 LGA 1929 provided:

‘unless the context otherwise requires... ‘Road’ means a highway repairable by the inhabitants at large and, save as in this Act otherwise expressly provided, includes any bridge so repairable carrying the road...’.

30. There was no requirement for the Rural District Council to list or map the highways which were ‘*handed over*’ to County Councils. However, in practice, there was usually some form of record relating to the highways handed over, typically in the form of a map and a schedule (as with Warwickshire CC).

31. However, although as stated above, bridleways and footpaths fell within the scope of the handover of functions, typically handover maps and schedules were lists of vehicular highways. In the context, this is no great surprise: first, the exercise of identifying and recording bridleways and footpaths had not yet happened – this was the gap which the surveys under NPACA 1949 was yet to fill; and second, it will have been predominantly or exclusively vehicular highways which highway authorities will have regularly had occasion to maintain. See further:

- ‘Highway Authority Records’ Sugden, J. (1995) RWLR 9.1 pp. 1-9 – who concludes at page 5 *‘Whilst the position seems clear enough in a legal sense, albeit somewhat obscurely worded, the correct meaning of ‘county road’ never seems to have been adopted by the staff of county surveyors’ departments who actually administered the highways. They invariably used the term county road to mean a carriageway for which the highway authority. Unlike the municipal engineers’ idea of a street, a county road did not have to be surfaced but it certainly excluded footpaths and bridleways.’* (emphasis added).
- Motoring Organisations Land Access and Recreation Associations ‘Unsealed Unclassified Roads’.
- DETR advice letter 24 August 1998 at [WaCC/App65].
- R v SSE and Somerset County Council ex parte Masters (2000) 79 P&CR 338 at [23-25] per Hooper J.
- TRF v SoS for Environment, Food and Rural Affairs [2015] EWHC 85 (Admin) at [11] and [20] per Collins J.
- Section 6 Consistency Guidelines, particularly 6.2.8 – 6.2.9.

Highways Act 1959 and 1980 and ‘Lists of Streets’

32. Section 38(6) HA 1959 provided:

‘The council of every borough and urban district shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at public expense; and every list made under this subsection shall be

kept deposited at the offices of the council by whom it was made and may be inspected by any person free of charge at all reasonable hours.’.

33. Section 295 HA 1959 provided:

“‘street’ includes any highway and any road, lane, footpath, square, court, alley or passage, whether a thoroughfare or not, and includes any part of a street.’.

34. Thus, it seems, a list of streets pursuant to HA 1959 should include highways other than those carrying vehicular rights. These provisions originally only applied to highways in urban areas – thus, ‘lists of streets’ originally are likely to have included highways which were in the nature of ‘urban streets’ in the sense that this would ordinarily be understood.

35. Section 36 HA 1980 replaced section 38 HA 1959, making similar provision for a ‘list of streets’:

‘The council of every county, metropolitan district and London borough and the Common Council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are highways maintainable at the public expense.’.

36. Section 329(1) HA 1980 defines ‘street’

‘except where the context otherwise requires... ‘street’ has the same meaning as in Part III of the New Roads and Street Works Act 1991’³.

37. Section 48(1) New Roads and Street Works Act 1991 provides:

‘(1) In this Part a “street” means the whole or any part of any of the following, irrespective of whether it is a thoroughfare—

(a) any highway, road, lane, footway, alley or passage,

(b) any square or court, and

(c) any land laid out as a way whether it is for the time being formed as a way or not.

Where a street passes over a bridge or through a tunnel, references in this Part to the street include that bridge or tunnel.’.

38. Notably, the provision for a ‘list of streets’ became applicable to *all* ‘streets’ for which County Councils were responsible⁴ – that is to say, not just ‘streets’ properly so understood as connoting an urban thoroughfare but, *prima facie*, given the definition, all rural highways, including footpaths and bridleways. Again, if that is the correct

³ The definition of ‘street’ was amended by New Roads and Street Works Act 1991, s 168(1), Sch 8, Pt I, para 15. As originally enacted, the definition was as follows: “‘street” includes any highway and any road, lane, footpath, square, court, alley or passage, whether a thoroughfare or not, and includes any part of a street’.

⁴ In fact, by the Local Government Act 1972, County Councils had already been obliged to maintain lists of streets.

interpretation of the statute⁵, it appears that most or many highway authorities did not understand or proceed on that basis: cf. again:

- ‘Highway Authority Records’ Sugden, J. (1995) RWLR 9.1 pp. 1-9 at pp. 8-9
- Fortune v Wiltshire CC [2010] EWHC B33 (Ch)

THE APPROACH TO THE EVIDENCE

39. Section 31 HA 1980 provides:

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

(cf. para. 2-068 Encyclopedia of Highways Law notes on this section).

40. The documentary evidence is one side of the coin. The user evidence is the other. See *‘If you know nothing about a road except that you find it is used, then the origin of the road is, so to speak, to be found in the user...’* (Folkestone Corporation v Brockman [1914] AC 338, HL per Lord Dunedin; cf. Fortune v Wiltshire CC [2013] 1 WLR 808, CA at [17] per Lewison LJ).

‘HANDOVER MAPS AND SCHEDULES’

41. There is an extract of the relevant part of the Handover Map at [WaCC/App43] and extracts from the Schedule at [WaCC/App44] and [WaCC/App45]. The complete map and schedule is at [TRF/App4].

⁵ HHJ MacCahill QC proceeded on the basis that this was the correct interpretation in Fortune v Wiltshire CC [2010] EWHC B33 (Ch). The Court of Appeal proceeded on the same assumption by virtue of a concession made by Counsel for the authority (although he seemed to have in mind a contrary argument: *‘[Counsel for Wiltshire CC] also accepts, for the purposes only of this appeal, that Mr Laurence is correct in saying that the list of streets had to include all four categories of highways listed by him.’*). Fortune v Wiltshire CC, itself, instanced the phenomenon of authorities not considering that footpaths or bridleways should be included in their ‘list of streets’ in that Wiltshire CC’s list of streets apparently failed to list any footpaths or bridleways.

42. The Schedule falls into two parts: roads listed numbered 1-72A and footpaths listed 73-92. The inclusion of the latter makes it clear that the handover schedule was not limited only to vehicular routes. Further, the column heading '*Other Roads, including Bridle Roads*' implies that a '*Bridle Road*' might have been included in handover schedule.
43. However, it is abundantly clear that the handover schedule did not *generally* include bridleways and footpaths: this can be seen at a glance by comparing the order map [WaCC/App3.5] with the handover map extract [WaCC/App43]: none of the footpaths AL83, AL83, AL90 or the bridleways AL81 or AL88 were on the handover map or listed in the handover schedule, but these were shown as public footpaths and bridleways in the first iteration of the DMS and clearly existed as physical routes at the time of the handover map, as can be seen from the base OS map. Of these public highways, only the order route was shown on the handover map. Moreover, the definitive statement lists in excess of 200 public bridleways and footpaths in the Alcester district (see [TRF/App3B], the statement for public bridleways and footpaths running from AL1 to AL197, but with there also being quite a few entries such as AL164a, AL164b). The TRF has sought to obtain from Warwickshire CC the complete original definitive map of which [WaCC/App57] is part. It will then be possible to see at a glance the full extent to which public footpaths and bridleways did not form part of the handover records, by comparing the full definitive map to the full handover map.
44. The footpaths referred to in the handover schedule [WaCC/App45] are thus at most a small subset of actual public footpaths in the area. It may be possible to identify these footpaths in due course, but the clear inference is that there was some specific reason why these footpaths appeared in the handover record: perhaps, they were in the nature of quasi-urban footpaths; perhaps, they had some form of surfacing.
45. Conversely, Warwickshire CC has not attempted to demonstrate that any of the other routes in the roads part of the handover schedule are other than routes carrying vehicular rights. Warwickshire has not advanced any reason, still less any compelling reason, why, if as they say, the Route was a public bridleway only, it was singled out for inclusion in the handover schedule in contrast to the very many other public bridleways in the area.
46. A conclusion can be drawn: while in this particular case, there is a logical possibility that the Route could have been included in the handover schedule notwithstanding that it was,

on Warwickshire's case, a public bridleway, as a matter of practical probability it is far more likely that it was so included because it was known to be vehicular, just as with other roads which became unclassified county roads.

DEFINITIVE MAP

47. There is a burden of some substance to displace the presumption that surveyors and surveying authority knew what they were doing: Trevelyan v SoS Environment [2001] 1 WLR 1264, CA at [38] per Lord Phillips (in the context of an application to delete a right of way):

‘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.**’

48. As was emphasised at the beginning of this statement of case, this is not a case where it is said that an error arose in the original definitive map because the surveying authority had not properly turned their mind to the question. Here, the very issue which is now raised was raised and resolved formally pursuant to the statutory provisions of NPACA 1949.

48.1. [WaCC/App46-47] is the parish survey and schedule. The map bears annotations, presumably those of the person who walked the route. This is obviously at an early stage of the survey process (cf. [TRF/App2 at section 3(g)]). The markings are therefore very much provisional (and may be derived from no more than the physical appearance of the route). The marking ‘Uncl. Co. Rd. (Unmetalled)’ on the plan [WaCC/App46] may well have been added later but it must relate to the Order Route and the fact that the Order Route was known to be an unclassified county road (noting that the pencil marking, although very approximate, follows the line of the Order Route as also marked

on the handover map, including the part marked ‘not used’ rather than joining what became BR AL88). Consistently, the schedule [WaCC/App47] has been annotated ‘Partly Unmetalled County Road.’.

48.2. The draft map [WaCC/App49] is then also annotated ‘Uncl. Co Rd’. Warwickshire CC refer to the ‘BR’ marking on the base map, but this is of very limited relevance: the function of such markings on OS maps is not to indicate what rights are carried. The Order Route is not marked or numbered (and consistently does not appear in the draft statement [WACC/App50] – i.e. it is not proposed to be shown to the DMS, for which there is only one obvious reason: it was known to be vehicular, it being an unclassified county road. It was known to be a highway: if it was considered to be a footpath or bridleway or even a road used mainly as a public path (then usually marked CRF or CRB), it had to be shown on the DMS. The draft statement for AL88 (a marked BR which joins the order route) shows clearly what the surveying authority had in mind ‘*From a County Road through Newnham, 140 yards south-south-west of Redlands Farm, north-westwards for 80 yards, then south-westwards for 490 yards to the Newnham-Aston Cantlow road.*’. The ‘Newnham-Aston Cantlow road’ must be the order route. The way in which it is referred to is the same as other (presumably vehicular) roads (e.g. the ‘Aston Cantlow – Wilmcote Road’ for AL89, the ‘Aston Cantlow-Billesley Road’ for AL90).

48.3. [WaCC/App51] is said to be an objection to the fact that the order route did not appear as a BR on the draft DMS. [WaCC/App52] is the response of Warwickshire CC’s County Surveyor. This was a formal statutory procedure under section 29 NPACA 1949, not a decision to be lightly undertaken, and was subject to possibility of further challenge. It is highly unlikely that Warwickshire CC’s County Surveyor made such a decision – as seems to be suggested by Warwickshire CC now – in ignorance of the status of the route. Rather there is again a clear and obvious explanation: the route was known to be vehicular.

48.4. [WaCC/App53] is a further objection along the same lines, which appears to have gone so far as a hearing, presumably under section 29(3) NPACA 1949.

The person holding the hearing (*'a person appointed by the authority'* as per 29(3) NPACA 1949), seemingly a Mr Oldham (i.e. a different individual to Mr Watson the County Surveyor) came to the same conclusion: the route should not be recorded as it was an 'unclassified county road and as such cannot be included in the survey', a conclusion which is only explicable on the basis that the route was therefore considered to be vehicular.

- 48.5. Both objectors appear to have been satisfied by the respective decisions in that there was available a further challenge procedure under section 29(5) NPACA 1949.
- 48.6. The modified definitive map and statement [**WaCC/App54-55**] then remained in the same form as respects the order route: viz. the order route – notwithstanding it was known to be a public highway – was not to be added to the DMS. The provisional definitive map [**WaCC/App56**] was also prepared accordingly (pursuant to section 30 NPACA 1949) whereby there was yet another opportunity for affected landowners *vel sim.* to challenge its contents.
- 48.7. The actual DMS was then compiled on the same basis – viz. with the order route not added as a BR or FP (or RUPP) [**TRF/App3B**]. Again, as with the draft statement, the entries for the intersecting BR and FPs are significant: the statement for BR AL88 was in the same terms "*From a County Road through Newnham, 140 yards south-south-west of Redlands Farm, north-westwards for 80 yards, then south-westwards for 490 yards to the Newnham-Aston Cantlow road.*"; the statement for BR AL81 was '*From the Aston Cantlow – Wilmcote road... to the Aston-Cantlow – Newnham road, 540 yards south-west of Newnham.*'; and for FP AL83a '*From AL83... to the Aston Cantlow – Newnham road...*'. Each of these references to the 'Aston Cantlow – Newnham road' is a reference to the order route.
49. So one can see in terms that Warwickshire CC as surveying authority squarely considered the question of whether the route should be added to the DMS as an FP, BR or RUPP and decided – not only as a matter of its own procedures – but in the face of two objections that it could not. In order to not include it, Warwickshire CC must have been satisfied that it was vehicular: if there was such a thing as an unclassified county road which only

carried equestrian rights, such a thing would have been included on the DMS as a BR. The inevitable inference is that Warwickshire CC – who had *expressly* accepted maintenance responsibility for this route by virtue of the handover records – knew the route to be vehicular.

50. There are some important further corollaries:

50.1. From that point in time forward, at least, Warwickshire CC must be taken to have *treated* the route as if it were not a mere BR, FP or RUPP, but rather a vehicular unclassified county road: for that was the basis on which they had declined to add it to the DMS.

50.2. From that point in time forward, any member of the public who inspected the DMS would have inevitably come to the same conclusion: not least because as matters appeared on the definitive map, the FPs and BRs AL81, AL83a and AL88 were ostensibly dead-ends so far as the marked rights were concerned, but on inspection of the statement, such a person would quickly see that at those ostensible dead-ends, they joined the ‘Aston Cantlow – Newnham road’, not so marked as a FP/BR, which any user would take to be vehicular.

ROAD MILEAGE RETURNS

51. Warwickshire CC’s case presumes that it – and its County Surveyor – were careless or ignorant as to the status of the routes for which it had expressly assumed maintenance responsibility by the handover records and as to the status of unclassified county roads in its area. This is obviously inherently unlikely in itself, not least because the nature of the rights would likely affect the maintenance responsibility.

52. At [TRF/App5] are a series of annual analyses by the Society of County Treasurers and County Surveyors’ Society of Highways Analysis. These appear to derive from returns (Forms 197) from County Councils to the Ministry of Transport. By 1963-4, County Councils were required to give a separate figure for ‘Green Lanes’ which according to the notes were ‘*unsurfaced roads with right of passage for vehicles, included on Ministry of Transport form 197 (Roads)*’. Warwickshire CC did not give a separate figure for Green Lanes in that year, but did give a figure of 71 miles in the following year, 1964-5. While it is not – as things stand possible to identify that a particular individual route was within

this 71 miles – this quashes any suggestion that Warwickshire CC were not well aware generally of the status the routes in question.

USER EVIDENCE

53. There are a number of user statements which appear in [WaCC/App60] attesting to vehicular user. The TRF is submitting several more with this Statement of Case. In [TRF/App7], there is a combined bundle of user statements which attest to vehicular user, both those appearing in [WaCC/App60] (at [TRF/App7A]) and then the new statements (at [TRF/App7B]). In [TRF/App8], the periods which these user statements speak to are charted.

54. Below is a tabulation of user statements which already appear in [WaCC/App60].

Name	Page	Use start	Use end	Frequency
Lillington, Richard ⁶	[60.51]	2000	2006	6/year ⁷
Hawker, Richard ⁸	[60.54]	1986	2005	2-6/year
Broome, M ⁹	[60.56]	1990	2004	1-2/year
Dinsdale, Tim ¹⁰	[60.59]	2003	2005	2-3/year
Gunster, David ¹¹	[60.62]	1995	2006	5/year
Porter, Lee	[60.64]	1999	2006	12/year
Hayter, D.	[60.67]	1983	2006	10/year
Hallows, Jack ¹²	[60.70]	1985	1995	2 in total

⁶ Q5 – refers to grading in the last few years; ‘at start, midpoint (across field) and end there are UCR signs’. Q19 ‘Members of the TRF have been using the route with vehicles for decades.’

⁷ Q11 – ‘although at one time during 2003/2004 I was using the route on a weekly basis as I took unsurfaced roads on my way home from work every Friday afternoon.’

⁸ Q5 ‘... This is a former unsurfaced unclassified county road and the W. M. TRF [sc. West Midlands TRF] have been aware of its number – E 5341 – by reference to various County Council sources including County Engineer’s records. It was confirmed by Paul Williams at Rights of Way Forum, 17 March 1999, Item 13 “That E Road are vehicular routes already recognised and recorded on the County Highway Record.” That would also apply @ Compton Scorpion; three gates [illegible].’. Q8 ‘Remains of a gate @ A, but gate never been on site since at least 1986 – only the post.’

⁹ Q16 refers to ‘At the lower end of the route (roadside) it said that it was proposed that the route become a BOAT. Then a plaque was affixed calling it an unclassified county road.’. Q19 refers to use by ‘Members of the West Midland TRF.’

¹⁰ Q19 ‘It’s known as a UCR and shown on TRF maps, both West Mids TRF + Worcester TRF.’

¹¹ Q19 refers to use by ‘Members of the Worcestershire Trail Riders Fellowship between 1995 and 2006.’

¹² Q5 ‘I have ridden this track twice in company with fellow members of the West Midlands branch of the TRF and on each occasion from west to east. I cannot recall in which years the two occasions fell, let alone on what dates. The only feature of the track that I recall is the fairly steep muddy (usually) climb up the escarpment about 500 metres from the beginning of the track. To the best of my recollection the line followed is as marked on the enclosed map.’

Bluteau, Andre ¹³	[60.73]	2006	2007	2/year
Chance, Robert ¹⁴	[60.77]	1996	2008	2-3/year
Taylor, Paul ¹⁵	[60.81]	2001	2008	3/year
Lupton, Stephen ¹⁶	[60.85]	2006	2007	2/month
Guilfoil, Peter	[60.89]	1999	2008	2-3/month
Wright, David	[60.93]	1982	2008	2/month
Banner, M. ¹⁷	[60.96]	1982	2008	?/month
Savage, James ¹⁸	[60.142]	1985	2006	2/year
Fairclough, Roger ¹⁹	[60.148]	1992	2006	4 total
Williams, M. ²⁰	[60.151]	1970 approx	1990 approx	4-6/year
O'Brien, Christopher ²¹	[60.154]	1999	2006	2/month
Cookson, Peter	[60.156]	1980	2006	2/year
Hughes, Jonathan	[60.159]	1979	2006	5-6/year
Holmes, Richard ²²	[60.196]	4/2007	11/2008	6/day
Archer, T. ²³	[60.204]	1988	2018	Varies

55. Below is a tabulation of the new WSs submitted with this Statement of Case.

Jeffers, Alan		2013	2020	7/year
Coulson, Aleck		1994	2021	3-4/year

¹³ Q5 'The route is that of the E5341 on the List of Street of Warwickshire County Council.'

¹⁴ Q5 'The route is that of the E5341 on the List of Street of Warwickshire County Council.'

¹⁵ Q5 'The route is that of the E5341 on the List of Street of Warwickshire County Council.'

¹⁶ Q5 'The route is that of the E5341 on the List of Street of Warwickshire County Council.' Q9, Q10 refers also to use on foot (in addition to by vehicle). Q16 'Route is clearly marked and signed as an unclassified road.'

¹⁷ Q5 'The route is that of the E5341 on the List of Street of Warwickshire County Council.' Q16 refers to signs 'WCC unclassified road signs.'

¹⁸ Q19 refers to use by 'Other members of the Midland Rover Owners Club Ltd and members of GLASS.'

¹⁹ Q5 refers to 'recently been graded'. Q14 refers to 'Checked with R of W at Warwickshire CC.' (permission given). Q16 refers to 'Your [sc. Warwickshire CC] UCR plates at both ends.'; Q19 refers to 'my wife has driven the route twice in her own car.'

²⁰ Q5 'Route as per map in County Records office. I can't remember any gates on this road and the base of the road was unsurfaced.' Q19 refers to use by 'other members of the West Mids TRF.' The attached map is annotated 'Route of Road E5741 supplied by County Record office in about 1974.'

²¹ Q19 'I am a member of the TRF (West Midlands) and we have details of members using this route in the 1970s'

²² Richard Holmes lives on the route. Q14 'Current road signs and highway laws indicate permission. Searches of area when purchasing house indicated route to be public highway.' Q16 refers to 'Highway Notices – public footpath, unclassified road etc.' Q19 refers 'As we live on the route we see approx traffic as follows - offroad leisure vehicles = 1 / week; horses 6 / day; other vehicles including ours = 8-10 / day; walkers = 6 / day.'

²³ 'Frequently 1988-2000, less frequently since.'

Kirtley-Payne, Gary		1990	2020	6/year
Corkery, Michael		2010	2021	3/year
Bosworth, Stewart ²⁴		2003	2021	See details ²⁵
Trewitt, Daniel		2012	2021	1/month
North, Sam		2016	2021	1/month
Whitehouse, Martin		1999/2000	2019	6-8/year
Bennett, David			2021	
Evans, Robin		2004	2021	1/month
Annand, Jeffrey		2014	2018	
Williams, Gregory		11/76	10/2021	1/month ²⁶
Young, Martin		2016	2021	2/year
Lillington, Richard		2002	2020	<1 / month
Wright, David		1974	2021	
Reid, Simon		2006	2019	6/year
Buswell, Mark		2016	2020	6 times?
Simkins, Andrew		1990	2021	10 times
Felton, Garrett ²⁷		2014	2021	1/month
Canning, Jonathan		2018	2020	1-2 times?
Stepney, Gregory ²⁸		1974	2020	Varied, see fn.

²⁴ Q12 'Warwickshire County Council had a sign showing the road as an unclassified road and this information was also public facing on their own website. The road was described as a 'E'road on the WCC website.'

²⁵ Q10 'My usage of the unclassified road has varied throughout the months of the years I have used the route. As a recreational trail rider I have used the road typically on more than once a month in the spring and summer. My usage over the winter is more dependent on weather and as such, in certain months such as December and January I have not used the road.' Q14 'Over the years there have been some traffic regulation orders in place restricting some mechanical vehicle use. Also there have been clear post signs in place by Warwickshire County Council. These are a white disc with a black arrow and the words 'Unclassified road' on them. These have been at both ends of the road.' Q15 'WCC signs displaying it as an unclassified road have been present throughout. Temporary traffic regulation signs in place when orders were in place'. Q21 'The road is an important link in a small network of unclassified roads in South Warwickshire for me as a motorcyclist. It allows me to divert from the sealed public roads in the area and travel between Newnham and Aston Cantlow (and return). I have ridden the road throughout the year on my motorcycle and I have always been able to travel its length easily on my motorcycle. As a vulnerable road user, the route affords me greater protection and risk of injury from travelling on the sealed road network. I also stop to enjoy my lunch on occasion on the route and enjoy the wonderful views.'

²⁶ Q7, Q10 also on foot and by bicycle. Q11 'Pleasure. Traveling to Stratford.'

²⁷ Q20 'During an event held at Ragley Hall in July 2019, I took several groups of motorcycles along this road as part of a guided ride out. I took groups in both directions, without the need for consent, safe in the knowledge that it is a public right of way.'

²⁸ Q21 'I secured my first motorcycle at the age of 14 -1974. This renewed my father's interest in motorcycling and I was regularly a passenger and later at 17 a rider with my father exploring the rights of way and green lanes of Warwickshire. A regular route – close to our family home in Bishopton Lane off the A34 Birmingham Road was to the green lane running between Newnham/Aston Cantlow and return. We often commented to each

56. In summary, there is a wealth of user evidence *directly* establishing vehicular user as far back as the beginning of the 1970s. The ‘absence’ of user evidence pre-dating the 1970s is not to be interpreted as in any way indicating that vehicular user only started in the 1970s. It is simply that due to the passage of time, evidence reaching further back is not available. Moreover, on the one hand, one has the outcome of the definitive map process – viz. that the route was not a mere FP, BR or RUPP but rather an unclassified county road – in the early 1960s and on the other hand directly attested user at the beginning of the 1970s. In the intervening period there was not only no impediment to vehicular user, but moreover, a vehicular user could, if necessary, point to the contents DMS as showing the (vehicular) status of the route.
57. Warwickshire CC place a good deal of emphasis on the existence of a ‘clap gate’ (at or around point (E) – cf. [WaCC/App61] - which appears to have been removed by a group of vehicular users (four-wheeled vehicle users, it seems), with Warwickshire CC believing that this happened in 1984/5. There appears to be a suggestion that this precluded vehicular users from using the route (and for this reason it is implied that those attesting to use with vehicles cannot be believed): so Warwickshire CC says ‘*while it [sc. ‘the clap gate’] could be negotiated by walkers, horse riders and pedal cyclists, it was too narrow for vehicles to pass through...*’. But any gate which could accommodate a horse rider or pedal cyclist could equally well accommodate a motorcyclist. There is no inconsistency between the existence of the clap gate and those users attesting to use on motorcycles before 1984/5.
58. The incident where the gate appears to have been removed was not a ‘*calling into question*’ of the public rights to use the route: the route was already known and accepted to be a public highway, which had been used – on the evidence – by two-wheeled MPVs both before and after 1984/5. The main value of this aspect of the evidence is that the relevant landowner(s) did not thereafter challenge the public’s continuing use of the route with vehicles, at least not in such an overt manner as to amount to a calling into question

other on the sign that stated Newnham only - when the reality was that the lane – (E5310 & 5341) was passable at all times of the year but could be more challenging from Aston Cantlow in winter up to the ridge line. My father continued to ride green lanes until 2013 as a weekly activity in retirement - especially the one at Newnham as it was the most accessible. I continue to use his motorcycle and have incorporated this route in rides out in memory of my childhood with my son. Not on a weekly or monthly basis but possibly 4 times a year - as it is now further from my current home address.’

of the status of the route. Most eloquently, the relevant landowner did not re-erect the gate: that is, from the perspective of both two-wheeled *and* four-wheeled MPVs, the overt stance of the landowner was to the effect that he *accepted* the (extensive) public vehicular use which thereafter happened. Moreover, it can be inferred that the position of Warwickshire CC must have been that the status of the route was that it was a public vehicular route, as can be seen from both the point that the letters from the NFU at [WaCC/App62] [WaCC/App63] cannot have gained any traction at Warwickshire CC: Warwickshire CC do not suggest in any way that it did and moreover as set out in the next section Warwickshire CC, in effect, thereafter positively asserted the public's right to use the route with vehicles.

WARWICKSHIRE CC'S APPROACH TO THE ROUTE IN RECENT YEARS

59. It is abundantly clear that Warwickshire CC – consistently with its acceptance that the route was a (vehicular) unclassified county road historically – continued in recent years to continued to adhere to that position and, indeed, openly asserted this.

59.1. A number of the user evidence forms refer to the existence of signs marked 'Unclassified County Road' at either end of the routes. Those can only be taken as intended to indicate that the route was a vehicular route. If Warwickshire CC had intended to indicate that the route was only a bridleway, such signs could only be positively misleading.

59.2. Warwickshire CC made a number of emergency traffic regulation notices and temporary traffic regulation orders [WaCC/App64] whose terms were essentially premised on the acceptance that it was a vehicular route: thus [WaCC/App64.1] prohibited (2007) all non-pedestrian use for 21 days, referring to '*an alternative route ... available to vehicular traffic.*'; [WaCC/App64.2] prohibited motorised traffic for 21 days (2008), referring to '*an alternative route*'; [WaCC/App64.3] prohibited motorised vehicles for a period of just short of 18 months (2008-10). [WaCC/¶5.3.3] says that these are not evidence of the status of the route: this is correct, insofar as nothing precludes a TRO restricting e.g. vehicular traffic over a highway which in fact does not carry vehicular rights but it is incorrect in the suggestion that it is not evidence of the status of the route: it is at least evidence as to how

Warwickshire CC saw the route in that if they believed that it was non-vehicular, steps would have been taken to prevent such use altogether.

- 59.3. In response to what appears to have been some damage to the route from motor vehicles, Warwickshire CC appears to have carried out some ‘*remedial and improvement work*’ [WaCC/¶5.2.2]: i.e. they not only addressed the effect of motor vehicle use but having done so, the route remained open to vehicular use.

PRESCRIPTION

60. There are two forms of prescription for the purpose of public highways:

- 60.1. Prescription at common law;
- 60.2. Prescription by section 31(1) HA 1980.

61. For prescription at common law: R (Godmanchester Town Council) v SoS Environment, Food and Rural Affairs [2007] UKHL 28, [2008] 1 AC 221 at [32-35] per Lord Hope

52 Deemed dedication may be relied upon at common law where there has been evidence of a user by the public for so long and in such a manner that the owner of the fee, whoever he is, must have been aware that the public were acting under the belief that the way has been dedicated, and the owner has taken no steps to disabuse them of that belief. The 1932 Act, which the Highways Act 1980 replaced, was enacted to clarify the law. No definite time was required at common law for a dedication to be inferred. In *Mann v Brodie*, at p 386, Lord Blackburn observed that a very short period of public user would often satisfy a jury.’.

62. For statutory deemed dedication, Section 31(1) HA 1980 provides:

- (1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been **actually enjoyed by the public as of right and without interruption for a full period of 20 years**, the way is to be **deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it**.

- (1A) Subsection (1)— (a) is subject to section 66 of the Natural Environment and Rural Communities Act 2006 (dedication by virtue of use for mechanically propelled vehicles no longer possible), but (b) applies in relation to the dedication of a restricted byway by virtue of use for non-mechanically propelled vehicles as it applies in relation to the dedication of any other description of highway which does not include a public right of way for mechanically propelled vehicles.

- (2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date **when the right of the public to use the way is brought into question**, whether by a notice such as is mentioned in subsection (3) below or otherwise.

63. See further as to the proviso in 31(2) HA 1980: R (Godmanchester Town Council) v SoS Environment, Food and Rural Affairs [2007] UKHL 28, [2008] 1 AC 221 at [32-35] per Lord Hoffman, particular:

‘... “intention” means what the relevant audience, namely the users of the way, would reasonably have understood the landowner’s intention to be. The test is, as Hobhouse LJ said, 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 10 App Cas 378, 386, to “disabuse [him]” of the notion that the way was a public highway...’.

And [57] per Lord Hope:

... As for the proviso, the essential point is that the presumption of dedication at common law involves a dialogue between the landowner and the public. It is conducted by acts on the part of the public which indicate an assertion of its right to use the way and, if he wishes to deny the public that right, by acts on the part of the landowner to indicate the contrary. As Lord Blackburn said in Mann v Brodie 10 App Cas 378, 386, he must take steps to disabuse the public of the belief that the way has been dedicated to public use. Whether the steps that he has taken to communicate this fact to the public are sufficient for that purpose is, of course, a question of fact for the inspector. But the landowner must communicate his intention to the public in some way if he is to satisfy the requirements of the proviso.’.

64. I.e. what is required for the proviso is some substantial overt acts of the landowner sufficient to disabuse the public of the belief that they are exercising a public right.

65. See further generally, including as to ‘*calling into question*’

- Encyclopedia of Highways Law 2-064 (commentary on section 31 HA 1980)
- Consistency Guidelines, section 5.

RESPONSE RE OTHER DOCUMENTS REFERRED TO IN WACC’S SOC

[WaCC/¶3.1]	Henry Beighton 1725
[WaCC/App7]	The route is not shown. Newnham is shown, without, however, <i>any</i> depiction of ways reaching it. Aston Cantlow is also marked, but again, without any depiction of ways reaching it. A good deal of the ways which are marked are

	<p>stubs of routes. The map cannot have been intended to purport to be a comprehensive depiction of highways. As [WaCC/¶3.1.3] observes, public vehicular highways which may well have been such at the time of this map are either not shown or only partially shown.</p>
<p>[WaCC/¶3.2-3]</p> <p>[WaCC/App8-14]</p>	<p>Inclosure Act and Award</p> <p>The absence of an Inclosure Award Map and the inherent unreliability of a reconstruction of such, makes any attempt to draw any positive inference from these documents fraught with difficulty, as Warwickshire CC recognise. What can be said is (i) Warwickshire CC have not been able to establish that the route in question was not set out as a carriage road (since they have not been able to identify all of the roads which were so set out); (ii) the positive attempt to identify the ‘bridle or churchway’ with part of the order route is extremely speculative; even if the guess as to its approximate location were correct, there may well have existed such a way in the vicinity of a carriageway; (iii) Warwickshire CC have not attempted to try to demonstrate that a churchway is not apt to describe a vehicular route.</p>
<p>[WaCC/¶3.4-7, 3.9-3.16, 3.18-20]</p>	<p>Various maps</p> <p>No significance. There is, however, a general point of some significance. The order route would fulfil an important general function: there is no other direct route between Aston Cantlow and Newnham. The order route is a likely route for someone wishing to make that journey (whether by foot, by horse or with a vehicle) it is a reasonably direct route, while respecting field boundaries to the extent that these remained relatively constant.</p>
<p>[WaCC/¶3.8]</p>	<p>Plan of Lord Abergavenny’s Estate 1804</p> <p>This shows that the order route existed as a way in 1804, and probably in 1776, from (E)-(H). The likelihood is that it existed as a way beyond (E) (since the absence of depiction is simply a function of the extent of the mapped area, and there is no apparent reason why the route should stop at (E)). Warwickshire CC’s floats an inference that its depiction suggests that it may not have been a vehicular route, but that is an inference without any real basis: nothing suggests that the mapmaker was concerned to distinguish the rights over any particular route.</p>

[WaCC/¶3.18]	<p>‘Copy of Plan One Deed’</p> <p>Warwickshire CC say that this has been supplied by a current landowner. It is not known who this is and whether they are a supporter of the order. The order route is shown as to approximately (A)-(E). It is annotated ‘bridle road’ (NB ‘bridle road’ rather than e.g. ‘bridleway’). From the copy of the plan, it is not clear that this annotation was on the original. There is nothing to indicate that this was intended to indicate what rights were carried.</p>
[WaCC/¶3.21]	<p>Sale Catalogue Aston Cantlow Estate 1918</p> <p>[WaCC/¶3.21.5] <i>‘It would be expected that if the route were a public road then it would be excluded from the sale as are other public vehicular highways...’</i> is tendentious and without any reasoning. Why should it be expected that public vehicular highways should be excluded? Why vehicular highways rather than public highways of other status?</p> <p>If the base-mapping is an OS map or used similar conventions, the function of the annotation BR is not to indicate what rights are carried. See the extract from Oliver ‘Ordnance Survey Maps’ [TRF/App6].</p>
[WaCC/¶3.22]	<p>Victoria County History</p> <p>The quotation continues <i>‘[Newnham] is said to have had a larger population (of some 300) when the Wilmcote stone quarries were in operation.’</i> I.e. historically, quite a substantial population centre, unlikely to only have been serviced by one lane. This history is obviously not concerned with the question of identifying public rights of way.</p>
[WaCC/¶3.23]	<p>Aerial photographs</p> <p>The distinction between G-H clearly (visible) and other sections of the route (not so clearly distinguishable) is likely to be no more significant than that G-H had some form of surfacing. Of course, by this time, the full route had already been recognised in the handover map and schedule prepared under the LGA 1929 and Warwickshire’s own case is that there existed at least a public bridleway.</p>
[WaCC/¶3.24]	<p>OS maps</p>

	<p>The function of the annotation to the OS map is not to indicate what rights are carried. [WaCC/¶3.24.1.5] is thus tendentious insofar as it seeks to promote the inference that the route did not carry vehicular rights by comparison with the depiction of other vehicular routes. The depiction and annotation is no more than an indication of the physical appearance of the route.</p>
[WaCC/¶3.26]	<p>Finance Act 1910 plans</p> <p>These show nothing conclusive. The annotation BR is that of the base (OS) map, not an indication of status. The fact that a route is <u>not</u> shown as part of the hereditament of any particular individual in a FA 1910 record <u>is</u> strong positive evidence of the existence of a public (vehicular) right of way: this is the point made in <u>Robinson Webster (Holdings) Ltd v Colin Agombar & ors</u> [2002] 1 P & CR 20: this is because the fact that it is not privately owned suggests that it is part of the general public (vehicular) road network. But there is no such converse inference, or at least no converse inference of substantial strength, the other way – i.e. that because a route is within a private hereditament: since, of course, there may exist a public vehicular highway over private land (as will often be the case with a route which has e.g. arisen by prescription). Further it is clear that deductions were made in respect of public rights of way, but it cannot be shown what those were attributable to. It would not be an offence to fail to claim a deduction or a lesser deduction than the true status of the route. So no inference of any weight can be drawn from that aspect either.</p>