The Motoring Organisations' Land Access & Recreation Association

Evidence of public road status

The view of the courts

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Introduction

The LARA report *Unsealed Unclassified Roads Their History, Status, and the Effect of the Natural Environment & Rural Communities Act 2006* covers the broad spectrum of how the traffic status of an unsealed unclassified road can be established if there is dispute in a particular case.

Where it is necessary to establish an unclassified road's level of public traffic status (i.e. is it a footpath, a bridleway, or a road for all traffic) the evidence frequently includes 'historical evidence', including how the road has been mapped over the years, and how people have used it in the past.

These issues quite often end up in court, and the view of the judges gives a clear guide as to how similar cases should be approached now.

These notes on evidence of status are not exhaustive, and are of course open to debate and challenge, but we believe that they represent mainstream views and offer a sound starting point.

1. Evidence in old maps

1.1. 'Old map evidence' of the status of alleged public highways is a lengthy and arcane subject, but this view of the court in Fortune summarises very well the approach that should be taken to a road's being mapped as part of the wider road network over a long period of time. This evidence is admissible to show the status of a road by virtue of s.32 of the Highways Act 1980:

1.2. *"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."*

1.3. The 1929 'handover map' (made for the highways change-over from rural districts to county councils) itself falls to be assessed for evidential weight under s.32, as does any other map or record made up to 1980. It is now particularly important to give sufficient weight to a road's being shown on commercial maps, over a long period, as part of the local road network (per Fortune v. Wiltshire Council [2012] EWCA Civ 334).

1.4. In Fortune, Lord Justice Lewison at paragraph 98, "*We deal first with the argument that the judge should have ignored what he called the "small scale maps" entirely; and should have concentrated only on the large scale maps (i.e. principally the 1784 map). We reject that submission. First, it conflicts with the statutory instruction in section 32 of the 1980 Act which says that the court "shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified". Second, the consistency of treatment of Rowden Lane and Gipsy Lane in commercially produced maps for well over a century showed, if nothing else, the reputation enjoyed by Rowden Lane. Section 12 of the Planning Inspectorate Consistency Guidelines (2nd revision June 2008) (which Prof Williamson produced) concludes by quoting a paper by Christine Willmore dealing with old maps:*

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

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

1.5. Brand & Another v. Philip Lund (Consultants) Ltd (1989) Unreported. Ch 1985 B. No. 532. [The case concerned an alleged unrecorded public carriage road. Our emphasis].

1.6. "I must now examine those classes of evidence, and go first to the old maps. The earliest map which has been produced was engraved in 1770 by T Jeffereys, described as geographer to the King, and is based on a survey which took place in the years 1766 to 1768. It was republished in 1788, a copy of which has also been produced. The principal interest of this map, apart from its age, is that it shows Ramscote Lane along the same irregular angular line it followed right up to the 1972 diversion. Of subsidiary interest is that it shows the existence of Oak Wood, the smaller area of woodland near the Bellingdon end, but no other woodland adjoining it. Further, the section of the roadway which traversed open fields at the Chesham Vale end is shown with a hedge or fence along the south side.

1.7. "The next map is the 6 in 1822 Ordnance Survey map. As far as one can see from the copy supplied to me, this also shows the roadway in identical form with that shown on the 1770 map. There had been no change in it in the fifty years in between. One also notes from the 1822 map a number of other roads or tracks leading off, both east and west, from the road running north from Chesham through Chesham Vale to a Y-fork north of the Vale. The third map and next in order of time is the map published by A Bryant in 1825. This map does not show Ramscote Lane and hence reliance is placed on it by the defendants to the counterclaim. But the map does not show several of the other roads to which I have just made reference. To my mind, this map was, as one of the expert witnesses said, an early example of an AA road map. It catered for those long distance travellers who were concerned with through routes and not with every detail of local topography. Undoubtedly it shows some lanes and bridle-ways. but does not purport, as I would see it, to show every such way. I regard this map as of no assistance in the enquiry I am making. The fourth map is the tithe map of 1843 and its accompanying index. This map was made by or on behalf of the Tithe Commissioners for the purposes of their functions under the Tithe Act 1836. That Act abolished tithes in kind and substituted for them a tithe rent charge on the land. The commissioners fixed a yearly rental value which each plot of land was to bear. By reference to this, the annual tithe was fixed in much the same way as rateable value determines the amount of the rate a hereditament has to bear. The map is not primarily a survey of roads, though they have to be shown on the map or the map would be unintelligible. Where the roadway is enclosed on both sides it bears no plot number, nor would one expect it, as such land is barren and not tithable. But where the road runs across open land or where it is fenced on one side only, the track is included in the surrounding or adjoining plots, the plot as a whole being not totally barren. The map shows Ramscote Lane in the position it was on the earlier maps. Behind Ramsey Cottage it is shown very narrow, but I am unable to draw the inference that it had narrowed since 1822. The map is not a precise plan as to roads The section over the open fields is shown with a hedge on one side, as in the earlier maps. Much discussion in the case has centred

on plot 1489. which includes the track at the lower end, just before the final section leading to Chesham Vale. This is shown in the index as 2 acres 1 rood and 20 perches, in the ownership and occupation of James Field (Vale), and described as "in common field, arable". It was suggested that the owner would have objected to the inclusion it if had been truly a highway, for by its inclusion he is condemned to pay tithes on a rent charge of two-and-threepence for the vicar and ten-and-ten-pence for the impropriators, not insignificant sums in those days. I find this reasoning unconvincing. As the site of the track clearly occupied only a small part of the entire plot of over 2 acres, James Field had no choice. The plot was as a whole productive and hence tithable. Of far greater interest, to my mind, is what the map discloses about the state of agriculture at this time. Down at Chesham Vale and also right up near Bellingdon, some of the strips or fields are shown unenclosed, including plot 1489, and a number of adjoining strips. These are survivals from open-field farming. a conclusion underlined by the sort of names attributable to them in the index: for example, in common field, acre piece and so on. Another interesting feature of the tithe map is that for the first time some woodland is shown on the area now owned by Lund Consultants, mainly in what is now called Stubbings Wood.

1.8. *"The next map is the 25 in Ordnance Survey map of 1877, together with an extract from the Ordnance Survey Book. The roadway is clearly shown in the same position, through White Hawridge Bottom. It is still fenced or hedged on one side. At the lower end it is described in theSurvey as a road. Stubbings Wood is now much more extensive and includes a central section of nearly 4 acres, which has previously been described in the tithe index as Stubbings Field, arable, 1440. Moving to the next map, twenty years later in 1898 came a new edition of the Ordnance Survey. The road is now called Ramscote Lane. Further, the section of Lund Consultants' land called Ramscote Wood has appeared on an area of over 18 acres, previously designated as arable. Similarly with the section now known as Garretts Wood. Another feature clearly shown on this map is a gate across the Lane, near the Chesham Vale end. The existence of such a gate, unless locked, is not inconsistent with the existence of a vehicular highway. It may simply be a means of restraining cattle and horses.*

1.9. *"Next, by 1925 when the next edition of the Ordnance Survey came along, the section of the woodland known as Peppers Hill Plantation, on the north side of the track which now passes through the wood, had appeared, linking Ramscote Wood with the old Oak Wood. We have now reached modern times. I have described it as it now exists — the lane, that is. These maps show that for a period of over two hundred years the lane has existed and there is no reason to suppose that it did not exist for a long period before 1770. The depicting of a track on the Ordnance Survey maps is not in itself evidence of the existence of a right of way. It merely purports to show the physical features on the ground. However, its existence for so long unchanged is not without significance and may lend support to the inference that public rights exist over it."*

2. The traffic that uses and has used the road

2.1. In Fortune v. Wiltshire Council [2012] EWCA Civ 334, Lord Justice Lewinson cited with approval (at paragraph 17) Lord Dunedin in Folkestone Corporation v. Brockman [1914] AC 338, "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 ..." His Lordship was speaking of user going to show dedication, but equally, user (traffic) goes to show status. The traffic using a road over a period is evidence of reputation as to the status of that road. Given that motor vehicle use of a road that is not a public vehicular road has been an express statutory offence since the commencement of the Road Traffic Act 1930, a continuing pattern of public motor traffic on a publicly maintainable road that is not shown on the definitive map and statement, where there has been no sustained challenge to that traffic (e.g. a prosecution under the Road Traffic Acts) then this raises a strong presumption that this public motor user derives from an established public right. That public right is strongly consistent with the recording of the road as a publicly repairable road, but not recording it on the definitive map and statement as a public path: Calder Gravel Ltd. v. Kirklees MBC (1989) 60 P&CR 322.

2.2. Also in Fortune (at paragraph 11), Lord Justice Lewison cites Lord Diplock in Suffolk CC v. Mason [1979] AC 705, on the nature of different classes of highway: "At common law highways are of three kinds according to the degree of restriction of the public rights of passage over them. A full highway or 'cartway' is one over which the public have rights of way (1) on foot, (2) riding on or accompanied by a beast of burden and (3) with vehicles and cattle. A 'bridleway' is a highway over which the rights of passage are cut down by the exclusion of the right of passage with vehicles ..."

2.3. Where the traffic on an unclassified road is 'cartway traffic', that is on foot, on horseback, and with vehicles (before NERCA 2006, any vehicles other than pedal cycles; before 1968 any vehicles) then the equestrian and foot traffic is a component of cartway traffic, and cannot be counted separately from vehicular traffic.

2.4. Thus current and recent traffic is an indicator of the status of an unclassified road in the absence of historical, status-express, evidence. The testimony of past users of the road is also good evidence of reputation. In 2012 it is increasingly unlikely that there will be user witnesses back to 1929 (handover) or 1930 (the Road Traffic Act and the statutory offence of driving a motor on a public path). A person could have driven a motorcycle legally at 14 in 1929. That person would be 98 years of age in 2013. Where in 2013 there is testimony of persons who have driven (or ridden or walked) an unclassified road for a period of years in the past, without challenge or prosecution, that is evidence of reputation that the road was regarded and used as a public vehicular road. The further back this period of use and knowledge extends, the stronger the evidence of reputation.

2.5. The evidence of reputation afforded by the traffic that has used, and uses, an unclassified road does not stand in isolation. It must be weighed alongside any map and document evidence (including the council's own road records) and the road's position in the local network.

2.6. This traffic over the decades is not necessarily showing deemed dedication of a highway along the recorded 'publicly maintainable road' after the road came to be recorded in the first place. The road was then already a highway. If there is sufficient evidence that in (e.g.) 1929, a road on the handover map, which was later recorded as an unclassified road, was then only a public footpath or bridleway, post-1929 user may be sufficient to show post-1929 deemed dedication of a higher public right of way.

3. Evidence of reputation

3.1. In AG v. Woolwich (1929) JP 173, in determining the status of a disputed road, Shearman J, "*Apart from that there is what I may call local reputation and name … But still it is important as showing the reputation.*"

3.2. In Trafford v. St Faith's RDC (1910), Neville J, "*Take anybody who has any knowledge of a countryside, if he is a person of any intelligence at all, he will be able to say with confidence of some roads that they are public roads, and of others that they are private roads.*" This is with regard to a contemporaneous knowledge. Knowledge in 1961 must be stronger as to then-status than the knowledge of persons 50 years later.

3.3. In AG v. Watford RDC (1912) JP 764, Parker J, "*He did this as of right, because he thought, and it was generally reputed in the neighbourhood … I am satisfied that he used this portion of the lane as of right and because it was a reputed public highway.*"

3.4. In Commission for New Towns v. J J Gallagher [2002], Neuberger J at paragraph 83, in directing himself as to the tests to be applied, "_… *I have to ask myself whether, bearing in mind that the onus of proof is on the Commission, I am satisfied on the balance of probabilities that the use and reputation of Beoly Lane was …*"

4. The 'through route presumption'

[This is not argued to be a legal presumption; it is more one of common sense and experience.]

4.1. Part 2 of PINS's *Consistency Guidelines* states:

Rural Culs-de-Sac

2.48, 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.

2.49, 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.

4.2. Expanding this guidance a little further is of assistance. In Eyre v. New Forest Highway Board (1892) JP 517, the Court of Appeal under Lord Esher, MR,

considered an appeal against a decision of Wills J, who had rejected an application by Mr Eyre that Tinker's Lane in the New Forest was not a publicly repairable highway and should not be made up by the Board. Lord Esher commended Wills J's summing-up as "... copious and clear and a complete exposition of the law on the subject; it was a clear and correct direction to the jury on all the points raised."

Wills J: "*It seems that there is a turnpike road, or a high road, on one side of Cadnam Common; on the other side, there is that road that leads to the disputed portion, and beyond that if you pass over that disputed portion, you come to Tinker's Lane which leads apparently to a number of places. It seems to connect itself with the high road to Salisbury, and with other more important centres, and I should gather from what I have heard that there are more important centres of population in the opposite direction. You have heard what Mr Bucknill says about there being that better and shorter road by which to go. All that appears to me on the evidence is that, for some reason or other, whether it was that they liked the picturesque (which is not very likely), or whether it is that it is really shorter; there were a certain portion of the people from first to last who wished to go that way. It is by the continual passage of people who wish to go along a particular spot that evidence of there being a high road is created; and taking the high roads in the country, a great deal more than half of them have no better origin and rest upon no more definite foundation than that. It is perfectly true that it is a necessary element in the legal definition of a highway that it must lead from one definite place to some other definite place, and that you cannot have a public right to indefinitely stray over a common for instance... There is no such right as that known to the law. Therefore, there must be a definite terminus, and a more or less definite direction…*

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

4.3. There are three often-cited cases on culs-de-sac and whether such can be (public) highways: Roberts v. Webster (1967) 66 LGR 298; A.G. v. Antrobus [1905] 2Ch 188; Bourke v. Davis, [1890] 44 ChD 110. In each of these the way in dispute was (apparently) a genuine dead-end with no 'lost' continuation. Fundamental argument

in each was whether or not a cul-de-sac (especially in the countryside) could be a (public) highway. In each case the court took the point that the law presumes a highway is a through-route unless there are exceptional local circumstances: e.g. a place of public resort, or that the way was expressly laid out under the authority of statute, such as an inclosure award. In A.G. (At Relation of A H Hastie) v. Godstone RDC (1912) JP 188, Parker J was called upon to give a declaration that a cluster of minor roads were public and publicly repairable highways. "*The roads in question certainly existed far back into the eighteenth century. They are shown in many old maps. They have for the most part well-defined hedges and ditches on either side, the width between the ditches, as is often the case with old country roads, varying considerably. There is nothing to distinguish any part of these roads respectively from any other part except the state of repair. They are continuous roads throughout and furnish convenient short cuts between main roads to the north and south respectively [note the similarity of logic here with Wills J in Eyre]. It is possible, of course, that a public way may end in a cul-de-sac, but it appears rather improbable that part of a continuous thoroughfare should be a public highway and part not. It was suggested that there might be a public carriageway ending in a public footpath and that Cottage Lane and St Pier's Lane are public carriageways to the points to which they are admittedly highways, and public footpaths for the rest of their length. I cannot find any evidence which points to this solution of the difficulty, and so far, at any rate as evidence of the user of the road is concerned, there is no difference qua the nature of that user between those parts of the roads which are admittedly highways and those parts as to which the public right is in issue*."

4.4. The matter was also touched upon in Brand & Another v. Philip Lund (Consultants) Ltd (1989) Unreported. Ch 1985 B. No. 532 [LARA emphasis below].

"*Before I come to the evidence I should deal with certain submissions of law. supported by a number of authorities which have been placed before me by Mr Marten for Mr and Mrs Brand. The first one is that a public vehicular highway is and normally must be used to go from one public highway to another. In support of that, there was cited the well-known case of Attorney General v. Antrobus [1905] 2 Ch 188. That case concerned a path or track leading to Stonehenge. It was held to be not a public highway. I cannot accept the proposition precisely as stated. The position as I see it is this, that generally a public right of way is a right of passing from one public place or highway to another. Here the claimed right is from one highway (at Bellingdon) to another (at Chesham Vale). Hence I do not have to consider the position as to cul-de-sacs and tracks, as in the Antrobus case. The part of the formulation that I do not accept is the wording that it normally must be used to go from one public highway to another. In my judgment, it does not have to be shown that it is normally used to go from one end to the other. It may normally be used by people going from either end to and from premises fronting on to it and less frequently used by persons traversing its whole length. The user necessary to establish a right of way is to be considered separately from the way itself.*"

4.5. Although it is not a 'precedent', it is useful to note the view of Inspector Dr T O Pritchard, when tasked to consider the true status of a through-route that currently 'changes status' part-way. He said it is "*... Improbable for part of a continuous route to be part footpath and part carriageway*", expressly taking the Godstone case as authority. [FPS/A4710/7/22 723, of 31 March 1999].

5. The topography of roads as evidence of status

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

"Quite different were the experts called on behalf of Lund Consultants. The qualifications of Dr. T M Williamson include the following. He says: 'The study of the English landscape has been my principal activity and interest for the last ten years. I read History and Archaeology. Subsequently, I studied the development of the land scape of North Essex for the degree of Ph.D., which I was awarded in 1984. Since 1984, I have been employed as Lecturer in Landscape History at the University of East Anglia, Norwich. I have written two books, and published a large number of articles in academic journals, relating to various aspects of archaeology and landscape history.' He began by visiting Ramscote Lane, to make observations and measurements, and produced a report which contains a full description of the lane as it now exists and what can be deduced from those signs as to its earlier use. I have already cited from it as regards the Bellingdon Lane end. There are two other parts which I found especially illuminating. First, he is dealing with the section up from Chesham Bottom to White Hawridge Bottom, and he said at page 15: 'This section of the lane thus once led along the southern side of a small open-field, and this is strong evidence for both its antiquity, and its status. The farmers who held land in this field would not have each possessed separate private access to their tiny strips: this would have been impossible. They would have needed some common access way, to bring in carts and ploughs, and to take out crops after harvest. They would, in short, have needed a public vehicular highway, and this, of course. is what Ramscote Lane provided'. That is his description of that part of it. At this point I can deal with a point taken in the defence to counterclaim that access was by consent of the descendant's predecessors in title. A number of witnesses were cross-examined on the lines that, though no-one can recall permission having been sought and given, it might have been. This shows, if I may say so, a lack of historical appreciation. If the tenants had customary enforceable rights in the fields, it is inconceivable that they did not have rights of access to them. Indeed long unchallenged user ripens into a public unchallengeable right. I can now turn to Dr. Williamson's comments on the steep way through Lund Consultants' land, not always, it will be recalled, a way through woodland. He says: 'As the track proceeds uphill, it becomes a hollow way; that is, it lies in a deep hollow. Hollow ways on this scale are sometimes said to be the result of deliberate excavation, to facilitate the negotiation of steep slopes. In some cases this is true. Indeed it might just conceivably be true in the case of Ramscote Lane, but I personally doubt it. Deliberate cuttings are usually only a feature of major, long-distance roads — medieval 'King's Highways', or (more usually) post-medieval Turnpike roads. Most hollow ways, including this one, are the result of centuries of erosion on unpaved roads. Traffic loosens the surface and prevents vegetation from holding it; rain washes the debris downhill. A well-developed hollow way like this is unlikely to be less than 300 years old, and may be older. Hollow ways are not usually a feature of footpaths; large-scale erosion demands the regular passage of wheeled vehicles. There are indications that attempts have been made to surface this section of the lane in a number of places. Some of these attempts look relatively recent, some seem rather older. In particular, there are areas where flints appear to have been pushed into the surface: something more likely to have occurred in the 19th century, or earlier, than in this century. The later attempts, by contrast, take the form of brick and other rubble. Most do not look particularly recent, although I would not like to be

too definite about this. I find it hard to believe that anyone would go to such lengths to improve the surface of what was only a footpath or bridleway: in my experience, this kind of thing is usually only done when lanes are being used for traffic. The track is here, and indeed throughout its length, extremely muddy'. He summarises his report as follows:

"'The evidence provided by field survey, and by early maps, leaves no doubt that Ramscote Lane is an ancient public road. Among other functions, it provided medieval farmers in the hamlet ofBellingdon with access to arable holdings in an open-field in White Hawridge Bottom. The width of the lane, the nature of its boundaries. and the degree of erosion which it exhibits at various points along its length are all consistent with a medieval origin. These and other features also indicate that it had the status of a road, rather than a field path. Roads of this length in the medieval landscape were public, rather than private features, and Ramscote Lane continued to function as a public road throughout the post-medieval period. It appears as a road on 18th and 19th century maps, and sporadic attempts made to improve the road surface suggest that it was still being used by wheeled traffic during the 20th century'. I found his report cogent and convincing and completely unshaken in cross-examination.

"Finally there is Dr. Baines, a man who has lived in Chesham all his life, been active in local government for much of it, and has a keen interest in local history. He told me that 'road used as a public path' would have been the appropriate categorisation of Ramscote Lane under the 1949 Act, but the County surveyor of the day was very much against using it whatever the circumstances, always preferring 'footpath and bridleway'. He (Dr. Baines) makes the common-sense point, as Dr. Williamson, that before the advent of the motor-vehicle there was a greater need of roads like Ramscote Lane linking hamlets and avoiding long detours. Horses and carts were a slow means of transport, so that distances, which now one covers quickly and conveniently, would previously have been unacceptable. His final conclusion was this: 'I have known Ramscote Lane since before 1934, when it became our town boundary, and frankly I am surprised that its highway status should now have been called into question'."

5.2. Fortune v. Wiltshire Council [2012] EWCA Civ 334.

Lord Justice Lewison:

"(100) The second main argument rests on topography. According to Prof Williamson Rowden Lane and Gipsy Lane (which were two parts of the thoroughfare found by the judge) meet in an acute V-shaped junction. The argument is that it would have been very difficult (although not impossible) for a horse and cart to negotiate the V-shaped junction. If Rowden Lane and Gipsy Lane had been used as a connected through route, then horses and carts would have had to have cut the corner. If they had done this with any regularity then there would have been visible traces of cart tracks, which the map-makers would have recorded. The judge dealt with this point as follows (§ 676):

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

"(101) As we have pointed out, many of the commercial maps (including the Ordnance Survey map of 1828) showed a junction at a less acute angle than that to which Prof

Williamson spoke. At least two maps (including the 1784 map on which Mr Laurence relied heavily) showed a bulge which could have represented a place for carts to manoeuvre. In addition as the judge pointed out in the quoted passage, the width of Rowden Lane and Gipsy Lane (as compared with Rowden Farm Lane) might have left space for at least smaller two wheeled carts to make the turn. It must also be recalled that the judge had a site view of which he took full advantage. We are not persuaded that the point about the 'V' shaped junction, even if correct, is of such force as to outweigh all the other material that led the judge to his conclusion.

"(102) In addition it must not be forgotten that one strand in the Council's case was that the disputed section of Rowden Lane was a vehicular highway even if it did not form part of a through route. Mr Harbour had said that there was sufficient attraction along its length to cause the public to use it with vehicles. Prof Williamson appears to us to have accepted this. Thus the question whether vehicles would have negotiated the junction at point K with more or less ease was not determinative of the case."

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

5.4. Eyre v. New Forest Highway Board (1892) JP 517.

Wills J: "*It seems that there is a turnpike road, or a high road, on one side of Cadnam Common; on the other side, there is that road that leads to the disputed portion, and beyond that if you pass over that disputed portion, you come to Tinker's Lane which leads apparently to a number of places. It seems to connect itself with the high road to Salisbury, and with other more important centres, and I should rather gather from what I have heard that there are more important centres of population in the opposite direction. You have heard what Mr. Bucknill says about there being that better and shorter road by which to go. All that appears to me on the evidence is that, for some reason or other, whether it was that they liked the picturesque (which is not very likely), or whether it is that it is really shorter; there were a certain portion of the people from first to last who wished to go that way. It is by the continual passage of people who wish to go along a particular spot that evidence of there being a high road is created; and taking the high roads in the country, a great deal more than half of them have no better origin and rest upon no more definite foundation than that.*"