

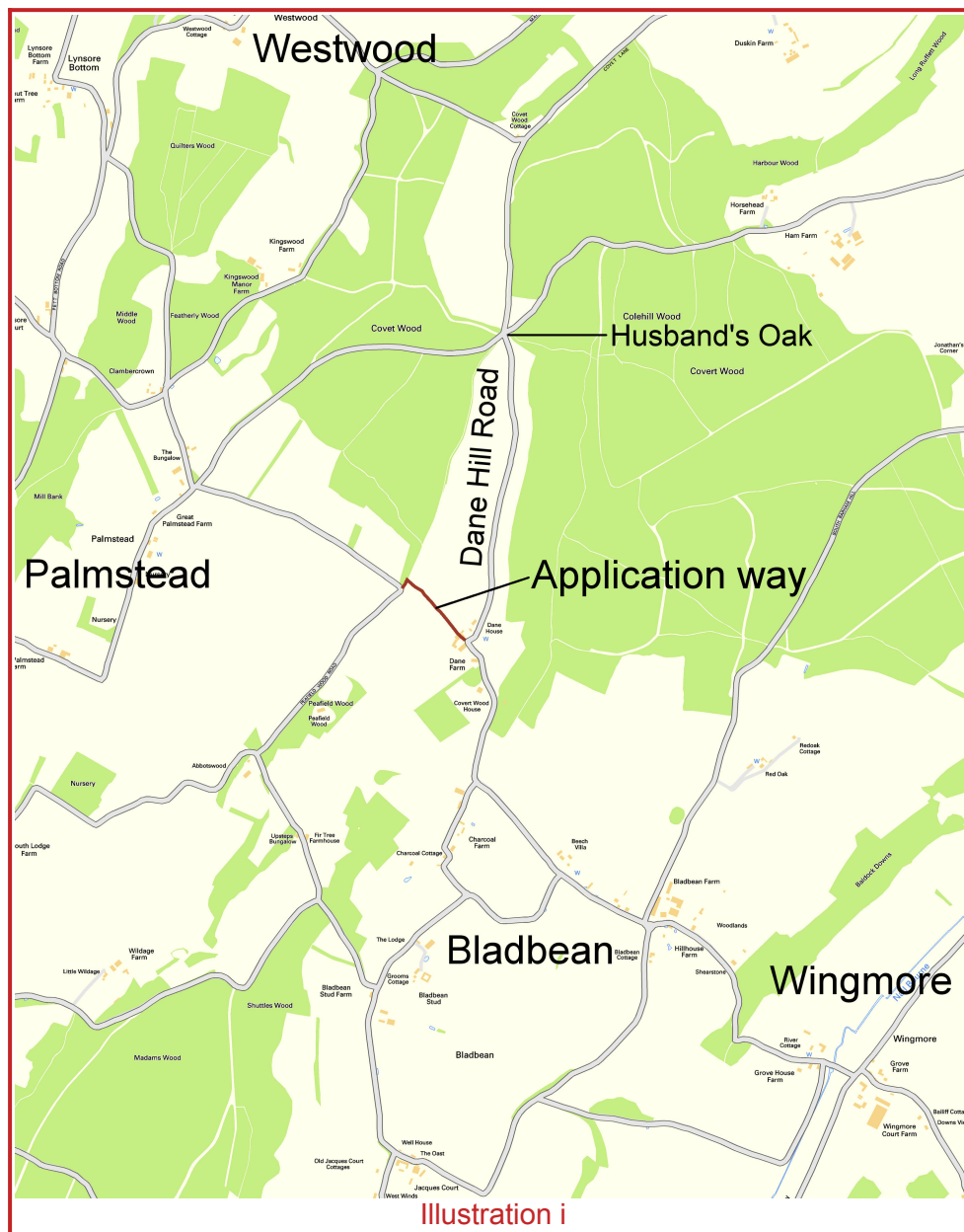
Dane Hill, Palmstead: para.4(1)¹ appeal

I. Introduction

A. Quick reference

A.1. **Location map:** (see application plan at item I.G below for scale representation)

Dane Hill location map



¹ Para.4(1) of Sch.14 to the Wildlife and Countryside Act 1981

- A.2. **Date of application to surveying authority:** 8 December 2018
- A.3. **Surveying authority reference for application:** PROW/CC/C410
- A.4. **Date of service of notice of determination:** 30 November 2023
- A.5. **Existing recorded public rights of way comprised in appeal way:** none
- A.6. **Parish of:** Barham²
- A.7. **Ancient parish of:** Upper or Great Hardres²
- A.8. **District of:** Canterbury³
- A.9. **Former rural district of:** Elham³
- A.10. **Hundred of:** Loningborough
- A.11. **Termination points:** [Dane Hill Road at Dane Farm](#) and [Peafield Wood Road \(at corner\)](#) (hyperlinks are to Google Streetview)
- A.12. **Termination points Ordnance Survey grid references:** [TR17594787](#), [TR17404802](#)
- A.13. **Postcode:** CT4 6LY
- A.14. **Ordnance Survey Explorer sheet:** 138
- A.15. **Ordnance Survey County Series 25-inch sheet:** Kent LVI/12

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C. The appellant

C.1. The appeal, the evidence for which is summarised in this document, is made by Hugh Craddock on behalf of the British Horse Society. I am appointed by the society as a volunteer historical researcher in relation to South and East Kent.

D. Locational details

D.1. This appeal relates to a way in the parish of Barham, Kent. The appeal way begins on Dane Hill Road at Dane Farm, in the parish of Barham (on the parish boundary with Elham), at A, a turn in the road from north-west to north-east (Ordnance Survey grid reference TR17594787), and proceeds north-west initially along a well-defined way between the buildings of Dane Farm and partly enclosed, uphill for 250m to join the track along the eastern boundary of Peafield Wood at B (TR17424805), then turning south-west to follow that track for 30m to the junction with Peafield Wood Road at C, a turn in the road from north-east to north-west (TR17404802). A total distance of 280m.

D.2. The points A to C are identified in the application plan at item I.G below.

D.3. The way is not currently recorded on the definitive map and statement. The appeal seeks to show that a definitive map modification order should be made to record the way as a byway open to all traffic (BOAT).

E. Application and determination

E.1. The application was made by the appellant⁴ on 8 December 2018 under section 53(5) of the Wildlife & Countryside Act 1981 ('the 1981 Act') to Kent County Council that a definitive map modification order be made under section 53(3)(c)(i),

4 i.e. the appellant acting on behalf of the British Horse Society.

...that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is... subject to section 54A, a byway open to all traffic[.]

E.2. Notice of the application was served on owners and occupiers on 12 December 2018, and certificate of service was given to the authority on 18 December 2018.

E.3. The application was registered by the authority in the register of applications with reference: PROW/CC/C410.

E.4. That application was refused in a determination dated 29 November 2023 and communicated to the appellant on 30 November 2023.

F. Nomenclature

F.1. The appeal way is described in the Highway authority list of streets (item III.S below) as Dane Hill Path, off Dane Hill Road, and in the local street gazetteer as Dane Farm Road.

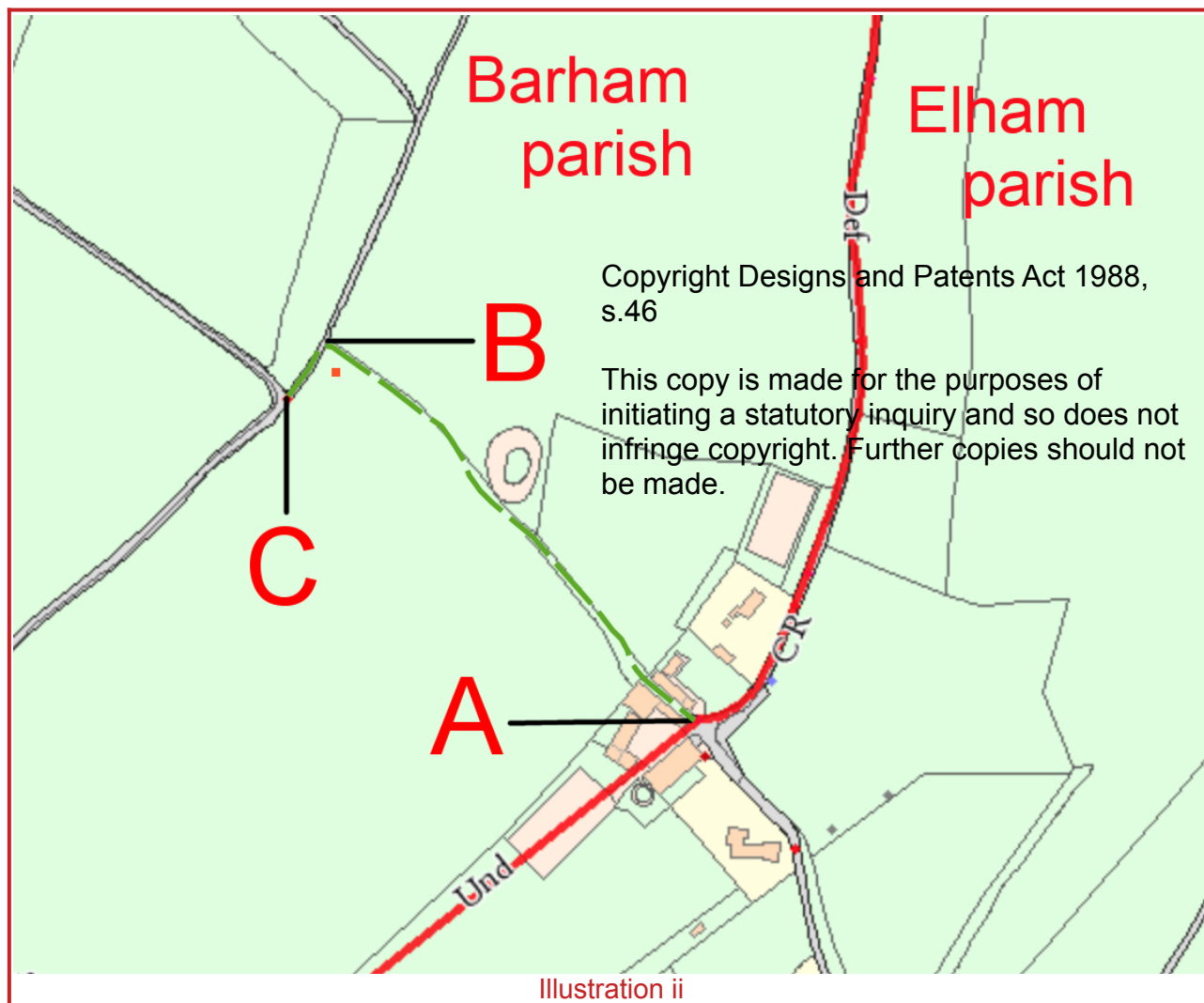
F.2. The appeal way joins Dane Hill Road at its foot (at A), and Peafield Wood Road at its summit (at C).

F.3. Dane Hill Road leads from Bladbean about one kilometre roughly north-west to Dane Farm, then about one kilometre north along the Barham/Elham parish boundary to Husband's Oak on the Barham to Palmstead road.

F.4. A tongue of Elham parish extends north on the east side of Dane Hill Road as far as Husband's Oak, so that Elham parish is to the east of the road, and Barham parish (notwithstanding that Barham village lies to the east) to the west: the appeal way therefore begins (at A) on the parish boundary, but lies wholly within Barham parish. The parish boundary along Dane Hill Road road also is that of the districts of Folkestone with Hythe (to the east) and Canterbury (to the west), and formerly of the rural districts of Elham (to the east) and Bridge-Blean (to the west). Formerly, Husband's Oak was the meeting place of the boundaries of the three parishes of Elham, Barham and Upper Hardres.

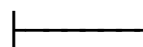
G. Application plan

Application plan



Map centred on B at TR174480

Scale: approx. 1:3,400 (when printed A4)



appeal way is marked — — —

60m

Parish boundary is marked — Barham (to west)/Elham (to east)

H. Grounds of appeal

H.1. This appeal is made against the determination of Kent County Council, as surveying authority, to refuse the appellant's application to that authority for a definitive map modification order in respect of the appeal way.

H.2. The authority's reasons for refusal of the application are not expressed entirely clearly. In the authority's decision statement, it is said⁵:

⁵ Decision statement dated 29 November 2013, para.7.

...that the claimed route is a full vehicular highway (carriageway) maintainable at public expense and recorded in the Kent List of Streets, and which should not be recorded on the Definitive Map and Statement as a Byway Open to All Traffic.

H.3. However, that statement does not directly address the statutory criteria in s.53(3)(c) (i) of the 1981 Act, for granting the application, 'that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist'.

H.4. It is plain from the authority's decision statement, and detailed report at Appendix B to the statement, that the authority is satisfied that a vehicular right of way not only is reasonably alleged to subsist, but does subsist.

H.5. Nevertheless, this appeal sets out in part III below the historical evidence in relation to the appeal way, in the expectation that the inspector will wish to reach his or her own conclusion on it.

H.6. It seems that the refusal of the authority to grant the application is founded in two elements.

H.7. The first is on the basis of 'discovery of evidence'⁶:

...the County Council considers that there has been no discovery of anything different, which would justify an Order being made to add the route as a BOAT to the Definitive Map and Statement.

H.8. The second is on the basis of the 'definition and character of a BOAT'⁷:

...the County Council considers that, whilst no one piece of evidence provides conclusive evidence as to the claimed route's status, the evidence as a whole indicates that the claimed route is a highway maintainable at public expense and contains public vehicular rights. Despite its current description in the List of Streets, there is no evidence that the route has had those public vehicular rights stopped up. In addition, the County Council considers that if the claimed route were to be maintained and freed of its current restrictions, it would not satisfy the definition and character of a BOAT.

H.9. The appeal is brought on the grounds that that the authority was incorrect to determine:

- that there had been no discovery of evidence in relation to the application; and
- that the appeal way does not satisfy the definition and character of a BOAT.

I. Background

I.1. The appeal way historically appears to be an integral part of the local road network. It forms a useful and logical connection in that network between the Elham Valley at Wingmore, Bladbean, Palmstead, Bossingham and Stone Street. Historical maps, including the Ordnance Survey surveyor's drawing, Canterbury (East) (item III.B below), the Ordnance Survey, Mudge-Faden one-inch map of Kent (item III.D below), Greenwoods' map of Kent (item III.E below), and the Ordnance Survey County Series 25-inch plans (item III.J below) show the appeal way as the continuation of approach roads from Bladbean and

⁶ Decision statement dated 29 November 2013, appendix B, para.76.

⁷ *Ibid*, para.83.

Palmstead. There were marked acute corners in these roads at A and C respectively, so that it appears that traffic avoiding the appeal way was required to perform an awkward and less frequently-used acute turn, which suggests that the appeal way was the dominant route.

I.2. The Tithe Commutation Act 1836 (item III.G below) shows the appeal way as excluded from assessment for rent charge, consistent with other public roads in the area. The plan for the Covert Wood sale (item III.I below) annotates the appeal way with a destination label, suggestive of a public road. The Bartholomew's map (item III.L below) shows the way in the 1904 edition as an 'Indifferent' road, but expressly annotated as 'passable for cyclists'.

I.3. In 1937, the Wye Cup (classic car) trial (item III.N below) demonstrates that the appeal way remained in use by motor vehicles, but consistent with the description of a 'road which is in very bad order and practicably impassable in the winter', as observed by the valuer in the field book prepared under the Finance (1909–1910) Act 1910 (item III.M below). The road continues to be shown in the post-war period on the Ordnance Survey one-inch map (New Popular edition/Seventh Series) (item III.O below).

I.4. On the National Parks and Access to the Countryside Act 1949 draft map of public rights of way (item III.Q below), the appeal way is marked up as a publicly-maintainable road, impliedly inappropriate to being recorded as a right of way on the draft map. That it is publicly-maintained is confirmed by the roughly contemporary Highway inspector's map (item III.R below), which shows the way as such. And that remains the case through to the present century, as the appeal way continues to be recorded in the Highway authority list of streets (item III.S below).

I.5. Unlike the majority of local roads and lanes, the appeal way was not tarred during the early years of the twentieth century, and consequently is likely to have fallen into very limited use by motor vehicles in the post-war period, as it neither had the appearance of an ordinary public road, nor (so far as we know) was signposted as such.⁸ The tight turns in Peafield Wood Road (at the top of the appeal way) and Dane Hill Road (at the bottom) became the established routes. Possible encroachments at Dane Farm, and gates placed and locked across the road, also have discouraged use.

J. Submissions on discovery of evidence and byway character

Discovery of evidence

J.1. There is no evidence that the appeal way has ever formally been considered for inclusion on the definitive map and statement for Kent. It appears that it was excluded from the draft map and statement prepared under Part IV of the National Parks and Access to the Countryside Act 1949 ('the 1949 Act') because it was considered to be part of the ordinary road network — see item III.Q below.

J.2. Therefore, there has been no prior discovery of evidence for the purposes of s.53(2) of the 1981 Act, and the evidence disclosed in the application was wholly new evidence.

J.3. However, the order-making authority has had regard to submissions which it has received from the Trail Riders Fellowship, which suggest that⁹:

⁸ C.f. the sign at the north end of Dane Hill Road, at Husband's Oak: '[Public Highway Gated road](#)'.

⁹ Decision statement dated 29 November 2013, appendix C, para.5.

There is a duty on OMAs to record BOATs in the DMS but only in circumstances where such a route was wrongly omitted from the DMS — i.e. following the ‘discovery...of evidence’ that it should be so recorded. BOATs are therefore a residual category that is not the focus of the legislation. Generally, where a right of way is an ordinary unclassified road recorded in an authority’s list of streets of highways maintainable at public expense, there will be no scope for the ‘discovery...of evidence’ that would justify an amendment to the DMS under WCA 1981 s.53(3)(c)(i).

J.4. Broadly speaking, it seems that the authority agrees with those submissions. The appellant maintains that those submissions are incorrect.

J.5. In the TRF’s view¹⁰:

The clear focus of the [1981 Act] legislation in this regard is upon rights of way on foot and horseback... . NPACA 1949 contained no mechanism by which vehicular rights might be recorded.

J.6. The TRF also makes reference to contemporary cases which voiced the same emphasis on according precedence to the recording of rights for pedestrians and riders.¹¹

J.7. However, this analysis is to misinterpret the function of both the 1949 and 1981 Acts.

J.8. The 1949 Act required surveying authorities to record on the definitive map and statement ways which were suitable for use by pedestrians and riders, either because they were for the exclusive use of such users being footpaths or bridleways, or because they were public roads (described as a RUPP or ‘road used as public path’) ‘used by the public mainly for the purposes for which footpaths or bridleways are so used.’¹² The recording of a public road therefore was within the design of the 1949 Act, provided that it was a public road mainly used by walkers and riders. However, the representation of a RUPP on the definitive map and statement was not conclusive whether the public had at that date any right of way to pass with vehicles.¹³

J.9. The 1981 Act adopted a similar design, but provided instead for a BOAT, defined as¹⁴:

...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[.]

10 *Ibid*, paras.6–11

11 *Ibid*, para.8 and fn.4, and paras.10 and 11.

12 Definition of road used as public path in s.27(6) of the 1949 Act. Note that a RUPP is ‘a highway, other than a public path’, not being a footpath or bridleway. But a bridleway is defined (also in s.27(6)) as ‘with or without a right to drive animals’, so that a droveway without a right for vehicles must (for the purposes of the 1949 Act) be a bridleway. Therefore, a RUPP must (at the time of the 1949 Act) have been a public road, or a road perceived to have been a public road (but inclusion of a RUPP on the definitive map and statement was not conclusive as to whether there were vehicular rights over it).

13 S.32(4)(b) of the 1981 Act.

14 S.66(1) of the 1981 Act.

J.10. In *Masters v Secretary of State for the Environment, Transport and the Regions and Somerset County Council*,¹⁵ Roch LJ (who gave the judgment of the court) said¹⁶:

The intention of Parliament in passing the 1949, 1968 and 1981 Acts is in my judgment clear. That purpose is that county councils should record in definitive maps and statements ways, including what Lord Diplock called 'full ways or cartways' for the benefit of ramblers and horse riders so that such ways are not lost and ramblers and horse riders have a simple means of ascertaining the existence and location of such ways so that they may have access to the countryside. Parliament intended that 'full highways or cartways' which might not be listed as highways maintainable at the public expense under the Highways Act 1980, should be included in the definitive map and statement so that rights of way over such highways should not be lost. Parliament's purpose was to record such ways, not to delete them.

...

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

As is apparent from the judgment, Roch LJ recognised that public roads (*i.e.*, 'highways over which the public have rights for vehicular and other types of traffic') were eligible to be recorded on definitive maps and statements if they satisfied the definition of a BOAT.¹⁷ But the judgment has had the effect that, whether a public road satisfies the definition of a BOAT depends on what has become known as the 'character test' formulated by Roch LJ.

J.11. It is submitted that there is no basis, as the TRF contends, that¹⁸:

...the statutory language and purpose does not suggest that BOATs are other than a residual category — introduced to address the problem of RUPPs.

J.12. Section 53 of the 1981 Act does not distinguish the circumstances in which a right of way — whether a footpath, bridleway, restricted byway or BOAT — is eligible to be added to a definitive map and statement.

J.13. Subs.(2)(b) provides that:

As regards every definitive map and statement, the surveying authority shall—

...

(b) as from [the commencement date¹⁹], 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

15 [\[2000\] EWCA Civ 249](#).

16 At [30] and [41]

17 Roch LJ refers to such ways 'which might not be listed as highways maintainable at the public expense under the Highways Act 1980'. Plainly, he does not intend to say that all such ways will not be listed.

18 Appendix C, para.16

19 28 February 1983

to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.

J.14. Subs.(3)(c)(i) provides, as regards such events:

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

...

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

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

J.15. Accordingly, the surveying authority is under the same duty to record on the definitive map and statement, a footpath, bridleway, restricted byway, or BOAT, on the discovery of evidence that such a right of way subsists, or is reasonably alleged to subsist.²⁰ There is nothing in the statutory language to suggest that the duty is in any way diminished in relation to public roads. But the discovery of evidence in relation to a public road does not trigger the duty, unless it is either a restricted byway or a BOAT — and in the latter case, in order to qualify as a BOAT, it must be a public road which satisfies the *Masters* character test.

J.16. The question for the authority, and now for the Secretary of State, therefore is simply whether there has been a discovery of evidence, and if so, whether the appeal way is a public road which satisfies the character test (as to the latter, please see below). There is no basis for adopting, as the TRF contends, any additional, discriminatory test in relation to the appeal way because it is a public road.

J.17. The authority, relying on the TRF's submissions, states²¹:

The claimed route was formally considered at the time the Draft Map was drawn up. It is shown on the Draft Map as an unclassified county road, specifically not to be recorded on the Definitive Map. It was, and is, recorded in the List of Streets and it is therefore already known to the highway authority as a road. ... Despite the documentation being submitted with the application, the County Council considers that there has been no discovery of anything different, which would justify an Order being made to add the route as a BOAT to the Definitive Map and Statement.

J.18. However, an application for a definitive map modification order may be founded in relevant new evidence, even where a determination has been made on a previous application in relation to the same way (although we do not accept there has been any such previous determination). In *R v Secretary of State for Environment ex parte Riley*,²² Macpherson J considered a decision by the Secretary of State to refuse to direct a surveying authority to make a definitive map modification order to upgrade a bridleway to

20 S.54A provides that no order to show on the definitive map and statement a BOAT may be made after the cut-off date (specified as 31 January 2031). However, this provision has not been brought into force, and would in any case have no effect until after the cut-off date.

21 Decision statement dated 29 November 2013, appendix B, para.76.

22 [1990] 59 P&CR 1

BOAT on the application of the claimant. The refusal was on the grounds that a decision had been taken to downgrade from RUPP to bridleway on a previous occasion,²³ on the basis of other evidence.

J.19. Macpherson J said²⁴:

‘The discovery by the authority of evidence’ means exactly what it says. And if there has been since the original 1968 Act classification, and thus the 1981–1984 Inquiry, evidence ‘discovered’ or ‘produced and laid before the Council at the appropriate time’ which is different from the original evidence, it matters not that the original evidence carried the day by itself in connection with paragraph 10(a) in 1981–1984.

J.20. The application on which this appeal is founded contains such new evidence which has been ‘discovered’.

J.21. There is no suggestion that the authority previously had made a proper determination, in relation to any evidence, that the appeal way was not eligible to be shown on the definitive map and statement (see paras.I.J.1 to I.J.2 above). It is submitted that the mere representation, by the surveying authority in connection with the preparation of the original draft map, that the way was a publicly-maintainable county road, was not such a determination but an administrative convenience.

J.22. The authority relies on its position that it knows, and for as long as is relevant, always has known, that the appeal way is a public road.²⁵ The appellant does not contest the authority’s position in this respect, although the authority’s documentation of the appeal way as a ‘path’ in the Highway authority list of streets (item III.S below) casts doubt upon the continuity of its position as to whether the appeal way is a road or a path.

J.23. But knowledge of the status of a highway is not a ground for declining to make a modification order in relation to the way. If it were, many applications for modification orders could be refused because, for example, the authority had signposted the way, had surfaced or lit the way, had cut vegetation along the way, or had diverted the way. Many urban footpaths and alleyways would be ineligible to be shown on the definitive map and statement, because they were already included in the list of streets. Indeed, because the authority holds many or all of the key documents in its own archives, it could be said that an application founded in historical evidence disclosed no new evidence because that evidence was already ‘known’ to the authority.

J.24. Our submission is that the authority has a duty to ‘keep the map and statement under continuous review’²⁶ and act on the discovery of evidence which shows that a BOAT subsists along the appeal way. If the authority’s position is that evidence that the appeal way satisfied the definition of a RUPP was already available to the authority in, say, 1950, at the time of the draft map, it did not act on it then, and it remains under a duty to act on it (now in relation to it satisfying the definition of a BOAT).

23 The downgrade was on a special review, under Pt.III of Sch.3 to the Countryside Act 1968 (the test for reclassification being set out in para.10).

24 P.9A of the transcript of the judgment.

25 If that is a correct statement of the position, it appears that, cognisant of its status, the authority also has acquiesced in the appeal way remaining unavailable to public use.

26 S.53(2)(b)

J.25. Alternatively, if the authority's position is that, say in 1950, the appeal way did not then satisfy the definition of a RUPP, but at some intervening point, began to satisfy the definition of a BOAT, then it did not act on it at or after the intervening point, and it remains under a duty to act on it.

J.26. Our submissions are supported by the judgment of Kerr J at first instance in [*R \(On the application of Roxlena Ltd\) v Cumbria County Council*](#),²⁷ in which he said:

Nor do I see anything in the statutory language which prevents an applicant... from relying, in an application made under section 53(5), upon evidence discovered years earlier but not yet acted upon by the authority concerned.

J.27. The Court of Appeal agreed.²⁸ Lindblom LJ (speaking for the court) said that²⁹:

In each case the occurrence of the specified 'event' is not simply the 'discovery' of the evidence in the sense of its being physically found. It also requires a consideration of that evidence, together with any other relevant evidence available to the surveying authority, which actually 'shows' the circumstance in subsection (c)(i), (ii) or (iii)...If the evidence has not been 'considered', a relevant event for the purposes of section 53(3)(c)(i), (ii) or (iii) will not have occurred. The event cannot occur until one of those three circumstances has actually been shown.

J.28. Accordingly, mere knowledge by the authority of the true status of a highway (if indeed such a state of knowledge subsists in the authority) is no answer to the duty to act under s.53: it is only evidence of the authority's delinquency in failing to act on that knowledge pursuant to the duty imposed under s.53(2)(b).

J.29. Lindblom LJ added³⁰:

Like the judge [at first instance], I also think there is no obstacle in the statutory provisions to the surveying authority taking into account previously discovered but unconsidered material in discharging its free-standing duty under section 53(2)(b).

J.30. In summary, the authority is under a duty to act on the application, because any evidence of the status of the appeal way known to the authority has not formally been acted upon and therefore remains capable of discovery; and in any case, the disclosure of new evidence in the application, not previously known to the authority, triggers the duty to act.

Byway character

J.31. The appeal way has remained on the highway authority's list of streets maintainable at public expense from inception³¹ to the present day.

27 [2017] EWHC 2651 (Admin): at [89] to [94]

28 www.bailii.org/ew/cases/EWCA/Civ/2019/1639.html

29 At [62]

30 At [67]

31 Presumably, since the duty first was imposed on highway authorities to maintain a list of publicly-maintainable streets for the areas of former rural district councils, under s.36 of the Highways Act 1980. But many highway authorities kept internal records of publicly-maintainable highways long prior to this date: see the Highway inspector's map (item III.R below) dating from 1952.

J.32. Defra circular 1/09 states that³²:

In relation to an application under the 1981 Act to add a route to a definitive map of rights of way, the inclusion of an unclassified road on the 1980 Act list of highways maintained at public expense may provide evidence of vehicular rights. However, this must be considered with all other relevant evidence in order to determine the nature and extent of those rights. It would be possible for a way described as an unclassified road on a list prepared under the 1980 Act, or elsewhere, to be added to a definitive map of public rights of way provided the route fulfils the criteria set out in Part III of the 1981 Act. However, authorities will need to examine the history of such routes and the rights that may exist over them on a case by case basis in order to determine their status.

J.33. The list of streets is maintained by the highway authority under s.36(6) of the Highways Act 1980. The list should include every publicly-maintainable highway in the authority's area. Inclusion in the list therefore is not proof that a way is a carriageway. However, the usual practice in Kent and elsewhere was and remains to include in the list, in rural areas, only those ways which were and are considered to be publicly-maintainable carriageways. The inclusion of the appeal way in the list is therefore evidence of some weight that the way is a carriageway.

J.34. The entries in the present and recent lists of streets refer to the appeal way as 'Dane Hill Path' and 'Adopted path' (see Highway authority list of streets at item III.S below). These annotations appear to be a convenience of highway officers which has no legal significance. It is notable that few if any entries in the list of streets in truly rural areas are for highways which are only footpaths or bridleways.

J.35. A BOAT is defined³³ as:

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[.]

J.36. In *Masters*,³⁴ Roch LJ decided that, where a way had fallen into disuse, a way satisfies the definition of a byway open to all traffic if its character makes it more likely to be used by walkers and horse riders than vehicular traffic because the way is more suitable for such use than by vehicles.

J.37. The circumstances in relation to the appeal way are very similar to those pertaining in *Masters*.³⁵ In both cases, the way is obstructed and use is discouraged. The decision of the Court of Appeal in *Masters* is one which, on the facts, ought to be applied to the appeal way.

J.38. Kent County Council, as surveying authority, suggests that³⁶:

32 www.gov.uk/government/publications/rights-of-way-circular-1-09, para.4.42.

33 S.66(1) of the Wildlife and Countryside Act 1981.

34 See para.I.J.10 above

35 See the extract from para.18 of the Secretary of State's reasons for his decision to confirm the definitive map modification order under challenge in the case, at [6].

36 Decision statement dated 29 November 2013, appendix B, para.81.

It cannot be assumed that vehicular use would not be the predominant use if the route were open and available for such traffic and maintained at a suitable level.

That³⁷:

...if the restrictions on the route were removed and the route was suitably maintained, there is nothing to suggest that it would not be used in the manner of a full vehicular road with the predominant use being motor vehicles.

And in conclusion that³⁸:

...the County Council considers that if the claimed route were to be maintained and freed of its current restrictions, it would not satisfy the definition and character of a BOAT.

J.39. The appellant submits that the authority's finding is unsustainable.

J.40. The appeal way has never been tarred. There is evidence that it was metalled (*i.e.*, that it was given a stone-based surface: see para.III.J.4 under Ordnance Survey County Series 25-inch plans at item III.J below). The appeal way lies steeply uphill from A. It can never have been an easy ascent or descent for horse-drawn vehicles. The valuer under the Finance (1909–1910) Act 1910 (item III.M below) described the farm holding thus: 'The land lies on either side of road which is in very bad order and practicably impassable in the winter', apparently with reference to the appeal way. The photographs from the Wye Cup (classic car) trial (item III.N below) vividly show the nature of the way in the winter of early 1937, and why the organisers chose to incorporate the hill in the trial as a challenge to competitors.

J.41. Yet that evidence, dating respectively from shortly before the First World War and shortly before the Second World War, is from a time when we can infer that the appeal way remained in regular use by vehicular traffic. As late as around 1950, the highway authority acknowledged the way to be an 'unclassified county road' inappropriate (in its view) to be recorded on the definitive map and statement (National Parks and Access to the Countryside Act 1949 draft map at item III.Q below), and it was identified on the Highway inspector's map (item III.R below) in 1952.

J.42. We can infer therefore that, during the first half of the twentieth century, if the appeal way was maintained at all, it was maintained as a metalled track which would have been barely suitable for vehicles in winter — a lure for motor car trials in the 1930s. As the authority acknowledges, the way has not been properly maintained for perhaps 70 years.³⁹ It cannot have been greatly used by motor vehicles up until the Second World War (even now, there is very little traffic on the roads with which it connects at A and C). It was sufficiently little used by motor vehicles after the Second World War, and perhaps so poorly surfaced, that the authority thought it necessary to draw to the parish council's attention that it was nonetheless an unclassified county road which did not need to be recorded on the definitive map and statement. Since then, the way has fallen into disuse.

37 *Ibid*, para.82

38 *Ibid*, para.83

39 *Ibid*, para.81

J.43. The authority asserts that, if the appeal way were properly maintained and obstructions removed, it might be used as any other minor road.⁴⁰ But this is unwarranted speculation for two reasons.

J.44. The first is that there is not the slightest prospect of renewed proper maintenance in an era of continuing austerity. The authority has not taken any action to maintain or even open the route to traffic since complaints were raised in 2016.⁴¹ Comprehensive maintenance, sufficient to restore the way to use by ordinary motor vehicles after an elapse of perhaps 70 or more years, has not been proposed by the authority, nor is there any evidence that it is desired by any party. It is, in short, not going to happen.

J.45. The second is that the way, never having been tarred, is not one which is likely to be used by modern ordinary motor vehicles. One only has to look at the photographs of the Wye Cup (classic car) trial (item III.N below), taken during a time when the way perhaps was lightly maintained by the authority, to conclude that few motorists would wish to use it today — even if it were signposted, and there were no gates closed across the way. Of course, there might well be use by adventurous four-wheel-drive motorists and by trail riders, but if so, there is no evidence or likelihood that such use would exceed use by pedestrians, cyclists, and horseriders, still less that the way would not satisfy the *Masters* character test.

J.46. The authority draws comparison with the decision of an inspector in relation to Finch Lane.⁴² The appellant does not accept that the refusal to confirm the order in that case was correctly decided. But in any case, the circumstances were very different. Finch Lane formerly was an ordinary suburban road⁴³ — tarred, lit, and with pavement. The road had been closed to vehicular traffic by means of a traffic regulation order made in 1973. Vegetation had been allowed to encroach on the road, and barriers at either end restricted use to pedestrians, cycles and horse riders.

J.47. The inspector concluded that⁴⁴:

Prior to the 1973 Order, Finch Lane was very much part of the ordinary road network... . The character or type of the Order route prior to 1973 was manifestly that of a vehicular highway mainly used by motor vehicles. The fact that the Order route has not previously been considered for inclusion on the Definitive Map and Statement corroborates that. The 1973 Order has not changed the underlying character of the route, although it has altered the current balance and pattern of use.

The inspector concluded that Finch Lane does not satisfy the definition of a BOAT.

J.48. But the appeal way has not been part of the 'ordinary road network' since before the Second World War, if indeed, since long before that. Unlike the majority of country lanes, it was not tarred (perhaps because it was lightly used and the steep hill would have posed challenges to securing a good, permanent sealed surface). The character of the appeal

40 *Ibid*, paras.81–82

41 *Ibid*, para.59. Both the gates photographed in September 2018 presented at Illustration iv and Illustration vi at p.22 were locked at the time the photographs were taken.

42 Decision statement dated 29 November 2013, appendix C (ROW/3289014); The decision in Finch Lane is available at:
assets.publishing.service.gov.uk/media/650027ff1886eb0013977187/ROW_3289014_OD.docx

43 Albeit one which originally was a country lane.

44 Para.28

way is that of an unsurfaced country track. It is inconceivable that, if it were freely available to all highway users, it would be used by ordinary motorists — but undoubtedly it would be used by walkers, mountain-bikers and horse riders. This is the context in which the *Masters* character test must be applied, and the only possible conclusion to the application of that test is that the appeal way satisfies it.

K. Natural Environment and Rural Communities Act 2006

K.1. The appeal seeks to show that the appeal way is a public carriageway. The whole of the appeal way is recorded as publicly maintainable in the list of streets held by Kent County Council under section 36(6) of the Highways Act 1980. The effect of section 67(2)(c) of the Natural Environment and Rural Communities Act 2006 is to exclude from extinguishment public rights for mechanically propelled vehicles where the way was shown in the highway authority's section 36(6) list immediately before commencement of section 67 (*i.e.* 2 May 2006). The way was so shown (Highway authority list of streets at item III.S below).

K.2. It therefore is submitted that the appeal way is a public road over which rights for motor vehicles have not been extinguished, and is eligible to be recorded as a BOAT.

L. Points awarded

L.1. Points have been awarded to each piece of evidence in relation to the appeal way, calculated according to the guidance in *Rights of Way: Restoring the Record*.⁴⁵

⁴⁵ Sarah Bucks and Phil Wadey, 2nd ed. 2017.

L.2. Points:

Item	Ref	Points
A Topographical Map of the County of Kent	III.A	1
Ordnance Survey surveyor's drawing, Canterbury (East)	III.B	1
Barlow-Hasted map of Kent	III.C	1
Ordnance Survey, Mudge-Faden one-inch map of Kent	III.D	1
Greenwoods' map of Kent	III.E	0
Ordnance Survey, Old Series one-inch map of Kent	III.F	1
Tithe Commutation Act 1836	III.G	3
Ordnance Survey boundary records	III.H	0
Covert Wood sale	III.I	2
Ordnance Survey County Series 25-inch plans	III.J	1
Elham Rural District Council minute book	III.K	0
Bartholomew's map	III.L	1
Finance (1909–1910) Act 1910	III.M	0
Wye Cup (classic car) trial	III.N	2
Ordnance Survey one-inch map (New Popular edition/Seventh Series)	III.O	0
Aerial photograph	III.P	0
National Parks and Access to the Countryside Act 1949 draft map	III.Q	3
Highway inspector's map	III.R	3
Highway authority list of streets	III.S	3
Total points		23

L.3. The purpose of the allocation of points is to provide guidance on the relative weight which the appellant considers might be accorded to each piece of evidence. No points are assigned to repetitive sources of similar character, whatever the individual merit.

M. Appellant's case

M.1. The courts have given guidance on how evidence of highway status is to be considered. In *Fortune v Wiltshire Council*,⁴⁶ Lewison LJ said, at paragraph 22,

In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from circumstantial evidence. The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB famously directed the jury in *R v Exall* (1866) 4 F & F 922:

'It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like

⁴⁶ [\[2012\] EWCA Civ 334](#).

the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.’

M.2. The Planning Inspectorate *Consistency Guidelines* recognise that several pieces of evidence which are individually lightweight in themselves (such as an historic map or a tithe map) may, collectively, convey a greater impact:

If, however, there is synergy between relatively lightweight pieces of highway status evidence (e.g. an OS map, a commercial map and a Tithe map), then this synergy (co-ordination as distinct from repetition) would significantly increase the collective impact of those documents. The concept of synergism may not always apply, but it should always be borne in mind.⁴⁷

M.3. The correct test under s.53(3)(c)(i) is whether:

...the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is...subject to section 54A, a byway open to all traffic[.]

The Secretary of State must therefore direct that an order be made consequent on this appeal where the evidence (of the application, taken with any other evidence) shows that there is a reasonable allegation of the existence of the appeal way.

M.4. While no single piece of evidence in the appeal is conclusive, the appellant believes that, taken as a whole, the evidence in this appeal demonstrates highway reputation, indicating that the route does indeed have highway status, and that there are vehicular rights.

M.5. The appellant has also shown that rights for motor vehicles have not been extinguished; that there has been discovery of evidence; and that the appeal way satisfies the *Masters* character test so that it qualifies to be recorded as a BOAT.

M.6. The appellant therefore submits that the Secretary of State should direct the authority to make the order requested in the application.

M.7. If the Secretary of State is minded to grant the appeal, the inspector is invited to direct the authority to make the order applied for, but also to direct the authority as to the time within which an order is to be made — an allowance of three months is suggested to be sufficient.⁴⁸

N. Modification of application

N.1. The appellant is concerned that, if an order is made relying on the application plan, the terminus at A might be said not to make a connection with the public road known as Dane Hill Road. It is not known what is the extent of the highway comprised in Dane Hill Road in the vicinity of A.

⁴⁷ [Consistency Guidelines](#): para.2.17.

⁴⁸ See the amendment to para.4(2) of Sch.14 to the 1981 Act, made by para.10 of Pt.I of Sch.5 to the Countryside and Rights of Way Act 2000.

N.2. Accordingly, if the Secretary of State is minded to grant the appeal, the inspector is invited to direct that an order be made such that the appeal way expressly is said to connect with Dane Hill Road.

O. Width of appeal way

O.1. No data are available reliably to indicate the width of the appeal way. Notably, on the Ordnance Survey County Series 25-inch plans (item III.J below), the appeal way is partly braced with the adjacent Peafield Wood Road to derive an area for the combined parcel.

O.2. It is proposed that a sufficient indication of width may be made by reference to the Ordnance Survey County Series map (the second edition dated 1896 and published 1898⁴⁹ may be more reliable than the first edition), which should be incorporated, by way of reference to width scaled off the map, in the definitive map modification order. The appellant's measurements are recorded below on p.20.

O.3. It is submitted that the first 60 metres of the appeal way from A in the direction of B has a width greater than the carriageway markings shown on the map, and can be said to extend to the width between the outbuilding on the north-east side of Dane Farm abutting the appeal way, across the marked carriageway, and extending to the same depth on the other side: about 20 feet or 6 metres. It is unlikely, both limbs of Dane Hill Road (from Bladbean and Husband's Oak) converging on the appeal way at A, that the continuation of that way forwards from A in the direction of B would be substantially narrower than either of those limbs. The practical extent of the appeal way can be seen in the photographs of use for the Wye Cup (classic car) trial at item III.N below.

49 maps.nls.uk/view/103681679

Width of appeal way

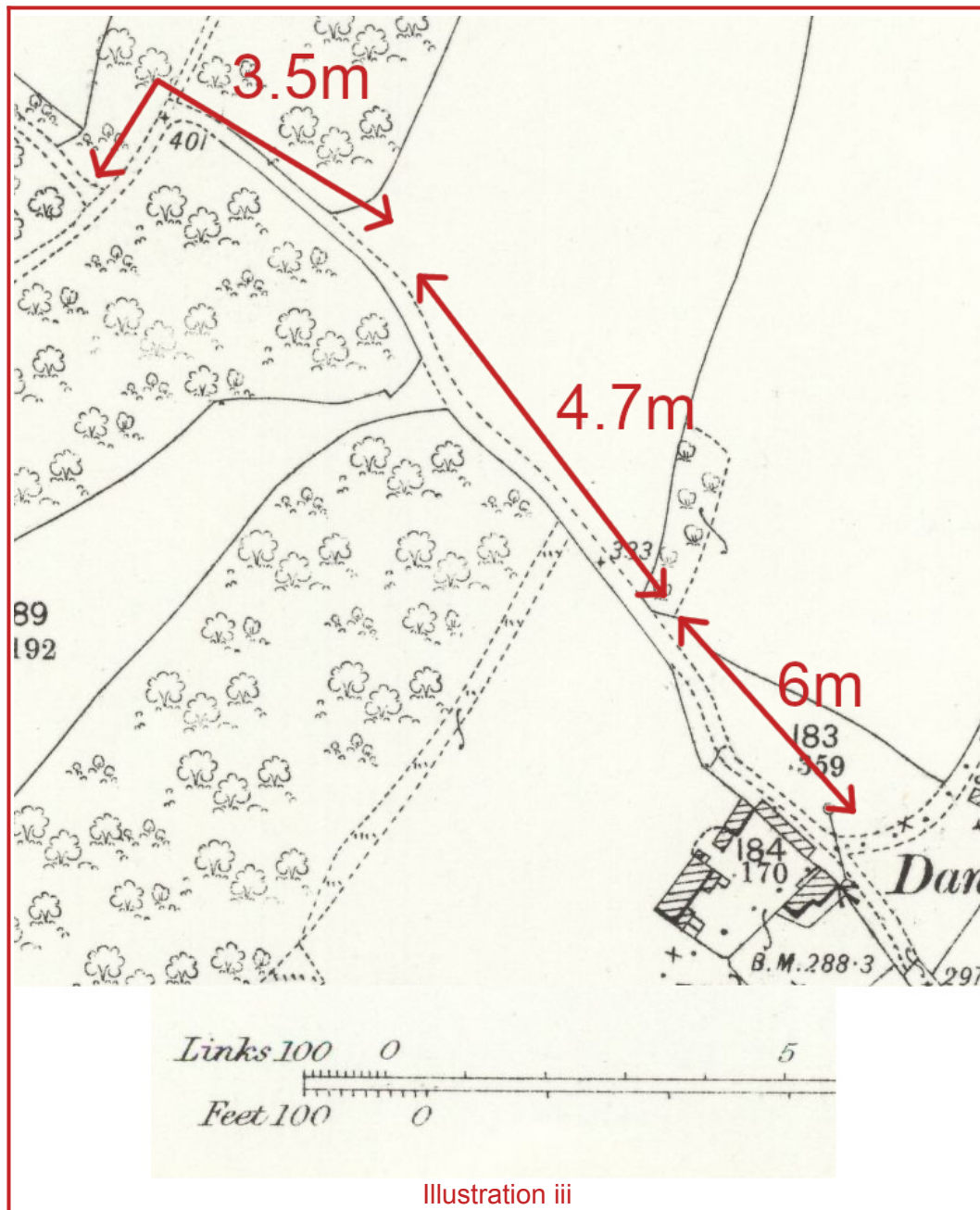


Illustration iii

P. Limitations

P.1. There is no evidence of any limitation, such as a gate, on the use of the appeal way which is consistently present in the documentary evidence contained in this appeal. It therefore is requested that an order arising from the appeal expressly states that there are no limitations on the public right of way.

Q. Law cases

Q.1. The following cases directly are cited in this historical document analysis, and copies of the judgment are annexed to the appeal.

Case	Reference	Citation
<i>Masters v Secretary of State for the Environment, Transport and the Regions and Somerset County Council</i>	I.J.10; I.J.36	[2000] EWCA Civ 249
<i>R v Secretary of State for Environment ex parte Riley</i>	I.J.18	[1990] 59 P&CR 1
<i>R (On the application of Roxlena Ltd) v Cumbria County Council:</i> (High Court) (Court of Appeal)	I.J.26	[2017] EWHC 2651 (Admin) [2019] EWCA Civ 1639
<i>Fortune v Wiltshire Council</i>	I.M.1; III.E.5	[2012] EWCA Civ 334
<i>Hollins v Oldham</i>	III.E.6	[1995] (unreported) C94/0206
<i>Giffard v Williams</i>	III.G.6	(1869) 38 LJ (Ch) 597
<i>Commission for New Towns & Anor v JJ Gallagher Ltd</i>	III.I.6	[2002] EWHC 2668 (Ch)

II. Along the way (i)



Illustration iv: At A, Dane Hill Farm



Illustration v: East from B



Illustration vi: Hunting gate near B



Illustration vii: From B towards C

Along the way (ii)



Illustration viii: Peafield Wood Road at C

III. Evidence

A. A Topographical Map of the County of Kent

A.1. **Date:** 1769

A.2. **Source:** British Library⁵⁰

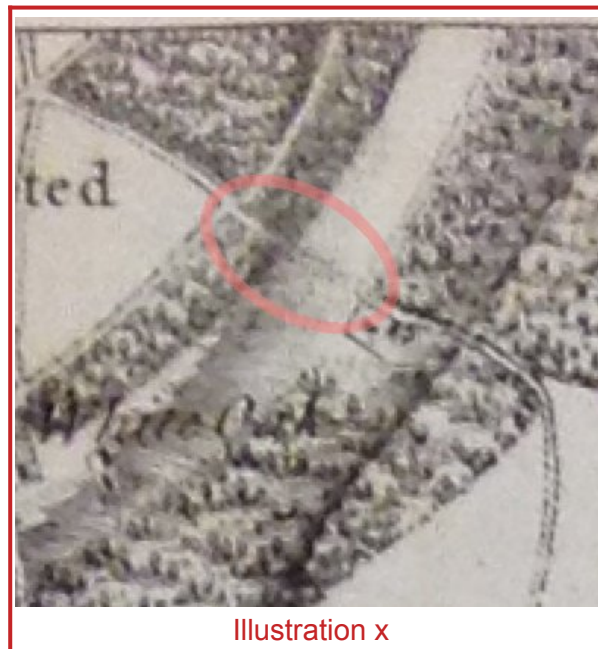
Andrews map: A Topographical Map of the County of Kent



Illustration ix

50 k.1.tab.21: copy of index map available at www.OLDKENTMAPS.CO.UK/K-060-i.htm .

Andrews map detail



A.3. **Description:** Original scale: 1:31,680 (two inches to one mile); orientation: unchanged (north).

A.4. This remarkable map comprises 25 sheets covering the county of Kent, surveyed and published by Thomas Kitchin, John Andrews, Andrew Dury and William Herbert. The maps are printed at a scale of two inches to one mile, although the purpose of the individual sheets appears to owe more to the desire to show potential clients' country estates than to give an accurate representation of the county at that scale.

A.5. Nevertheless, the Andrews map clearly identifies the appeal way from a road projecting east-south-east from 'Palmsted' to a cross-roads, continuing south-east, initially wooded and unenclosed, across a steep gradient indicated by closely spaced hachures, and terminating at a junction with a road at a corner adjacent to a farmstead or hamlet, so that the appeal way continues straight across the junction (with the alternative of turning left), as it does today.

A.6. **Conclusion:** The Andrews map recognisably shows the appeal way as a link in the local road network. The depiction of an extensive network of ways on the map confers no certainty about the status of any one way as a public route, and the surveying standards of the map do not inspire great confidence. However, the Andrews map is the first at any scale to document the appeal way, and suggests that the appeal way physically existed in the middle of the eighteenth century.

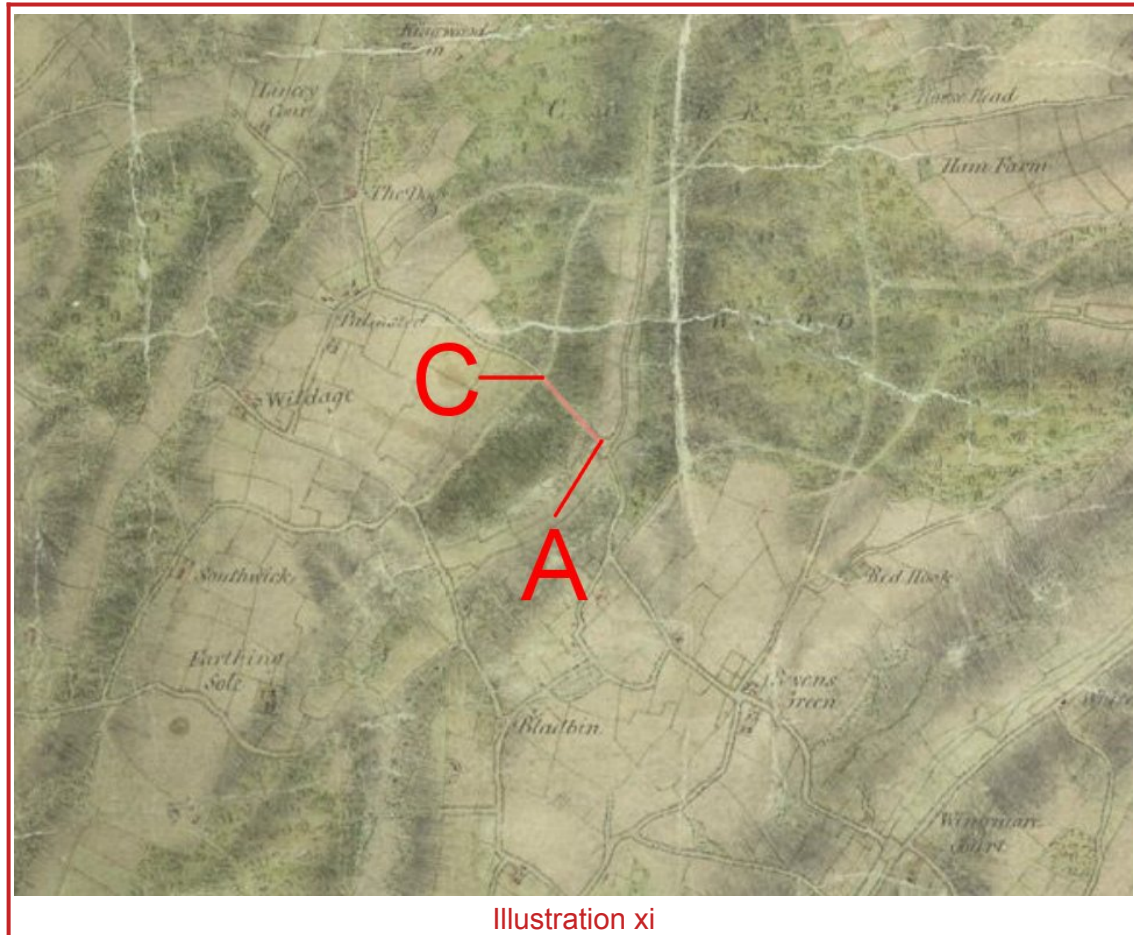
A.7. **Points:** 1 (first historical county map)

B. Ordnance Survey surveyor's drawing, Canterbury (East)

B.1. **Date:** 1797–99

B.2. **Source:** British Library website⁵¹; National Archives⁵²

■ Ordnance Survey Drawing (Canterbury East)



51 Sheet 107(E): www.bl.uk/onlinegallery/onlineex/ordsurvdraw/c/zoomify82432.html

52 MR 1/599

■ Ordnance Survey Drawing detailed



Illustration xii

Fair copy of topographical surveys 1799



Illustration xiii

B.3. **Description:** Original scale: believed to be 1:31,680 (two inches to one mile); orientation: unchanged (north).

B.4. Facing the threat of invasion, the English government commissioned a military survey of the vulnerable south coast. An accurate map of Jersey had already been made, soon after a French attempt to capture the island in 1781, but this had been restricted to government use only. The new maps were to be published at the detailed scale of one inch to the mile. Responsibility for what became an historic venture fell to the Board of Ordnance, from which the Ordnance Survey takes its name. From its headquarters in the Tower of London, engineers and draftsmen set out to produce the military maps by a system of triangulation. The survey of Kent was first to go ahead. It began in 1795 under the direction of the Board's chief draftsman, William Gardner. Critical communication routes such as roads and rivers were to be shown clearly and accurately. Attention was

paid to woods that could provide cover for ambush, and elaborate shading was used to depict the contours of terrain that might offer tactical advantage in battle. Preliminary drawings were made at scales from six inches to the mile, for areas of particular military significance, down to two inches to the mile elsewhere.⁵³

B.5. It seems that good copies were made of the drawings to be held by the War Office. These copies are now held in the National Archives, described as, 'Topographic Survey manuscript 'fair' copies of Kent & Sussex, surveyed by Gardner & Yeakell, at 3 inches to 1 mile'.⁵⁴ The conditions in which they have been stored, rolled, have ensured better preservation of the drawings.

B.6. The Ordnance Survey drawing and copy clearly identify the appeal way from a road projecting east-southeast from 'Palmsted' to a cross-roads, continuing south-east, initially wooded and unenclosed, across a steep gradient marked by closely spaced hachures, and terminating at a three-way junction with a road at a corner adjacent to a farmstead or hamlet, so that the appeal way continues straight across the junction (with the alternative of turning left), as it does today.

B.7. The south-west limb of Peafield Wood Road, and its continuation north-east along the eastern boundary of Peafield Wood to Husband's Oak, is shown without casing, and the casing for the appeal way appears unbroken at the crossroads. This suggests that the appeal way was considered to be the dominant route.

B.8. **Conclusion:** The Ordnance Survey drawing is the first reliable mapping showing the known ways in the vicinity of the appeal way. It is good evidence for the existence of a defined way along the appeal way. The drawing is not conclusive of the status of the appeal way as a highway, but the appeal way is shown as part of a through route. Moreover, as the basis for a military survey, the surveyor was interested in ways capable of being used by military transport, and the appeal way is therefore likely to represent a road.

B.9. **Points:** 1 (first Ordnance Survey map)

53 From the Curator's introduction to the Ordnance Survey drawings, British Library: www.bl.uk/onlinegallery/onlineex/ordsurvdraw/curatorintro23261.html.

54 *Topographical survey and early Ordnance Survey maps at the National Archives: Public Record Office*, Ivan Parr, published in *Sheetlines* (Charles Close Society), no 68 (December 2003), pp.35–43 at p.38

C. Barlow-Hasted map of Kent

C.1. **Date:** 1797–1801

C.2. **Source:** Kent County Archives, also formerly available at www.ancestry.com⁵⁵:
engraved by William Barlow in Edward Hasted's *The History and Topographical Survey of Kent*: published in 12 Volumes.

Barlow-Hasted map



Illustration xiv

55 Indexed at web.archive.org/web/20171021002558/freepages.genealogy.rootsweb.ancestry.com/~genmaps/genfiles/COU_Pages/ENG_pages/ken.htm

Barlow-Hasted map detailed

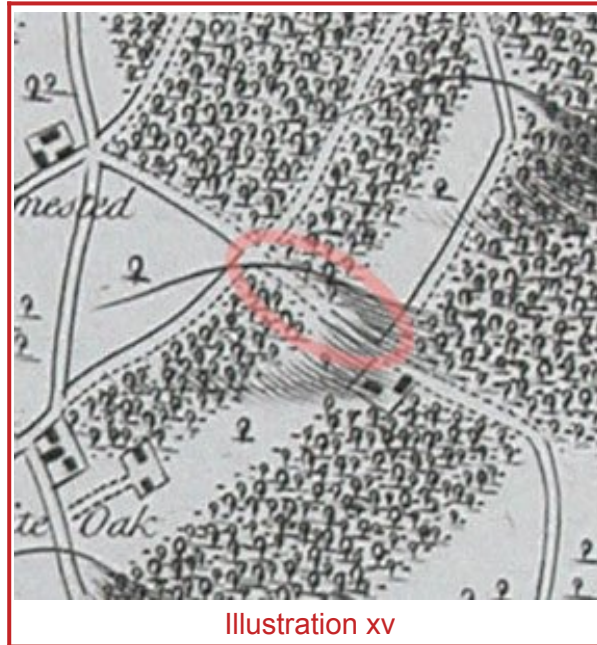


Illustration xv

C.3. **Description:** Original scale: not known; orientation: unchanged (north).

C.4. William Barlow's maps of Kent were incorporated within the first edition of Edward Hasted's *The History and Topographical Survey of Kent*. Each map represented one or more of the Kent hundreds (a mediaeval administrative unit): that shown here is an extract from the hundred of Loningborough. The maps are derived from Andrews' A Topographical Map of the County of Kent (see item III.A above), but with modifications.

C.5. The Barlow map clearly identifies the appeal way from a road projecting south-east from 'Palmsted' to a cross-roads, continuing south-east, initially wooded and unenclosed, across a steep gradient marked by closely spaced hachures, and terminating at a junction with a road at a right-angled corner adjacent to a farmstead or hamlet, so that the appeal way continues straight across the junction (with the alternative of turning left), as it does today.

C.6. **Conclusion:** The Barlow-Hasted map is good evidence for the existence of a defined way along the appeal route. The map was widely commercially published, and would tend to show through routes which were public highways, whereas certain minor routes of questionable public status (such as the track into woodland south-east from North Wingmore, now Whitehall Farm) are shown with lines across the junction with public ways. The use of hachures to show the steep gradient is confined to the land either side of the appeal way to stress the gradient of the way itself, so that the way itself must have been surveyed. However, it cannot be assumed that the status necessarily is any greater than bridleway.

C.7. The absence of the slightly staggered turnings at B and C can be explained by the small scale of the map, and the primitive surveying techniques.

C.8. **Points:** 1 (second historical county map)

D. Ordnance Survey, Mudge-Faden one-inch map of Kent

D.1. **Date:** 1801

D.2. **Source:** Kent County Archives, also available at Mapco.net⁵⁶

■ *Mudge-Faden map*



Illustration xvi

56 mapco.net/kent1801/kent51_01.htm

Mudge-Faden map detailed



Illustration xvii

D.3. **Description:** Original scale: one inch to one mile (1:63,360); orientation: unchanged (north).

D.4. This map of Kent was the first Ordnance Survey map to be published. It relied primarily on the survey data collected in the Ordnance Survey surveyor's drawing, Canterbury (East) (item III.B above). However, the map of Kent was not published by the Ordnance Survey until well into the nineteenth century: instead, this map was initially published on 1st January 1801 by William Faden, 'Geographer to the King', for sale to the public.

D.5. The Mudge-Faden map clearly identifies the appeal way from a road projecting south-east from 'Palmsted' to a cross-roads, continuing south-east, generally wooded and unenclosed, and terminating at a junction with a road at a right-angled corner, possibly showing a farmstead adjacent, so that the appeal way continues straight across the junction (with the alternative of turning left), as it does today.

D.6. The south-west limb of Peafield Wood Road is shown joining the appeal way at an acute crossroads, which implied an awkward turn to the north-west to continue to Palmsted. This suggests that the appeal way was considered to be the dominant route.

D.7. **Conclusion:** The Ordnance Survey map of Kent was prepared in response to an invasion threat, and primarily had a military purpose. However, this map was published privately by Faden for public and not military consumption. It is therefore likely to reflect the needs of the purchasing public, rather than purely military requirements.

D.8. The appeal way is shown as a link in the local road network, and its inclusion in the Mudge-Faden map is likely to indicate that it was a public road, whether carriageway or bridle-road.

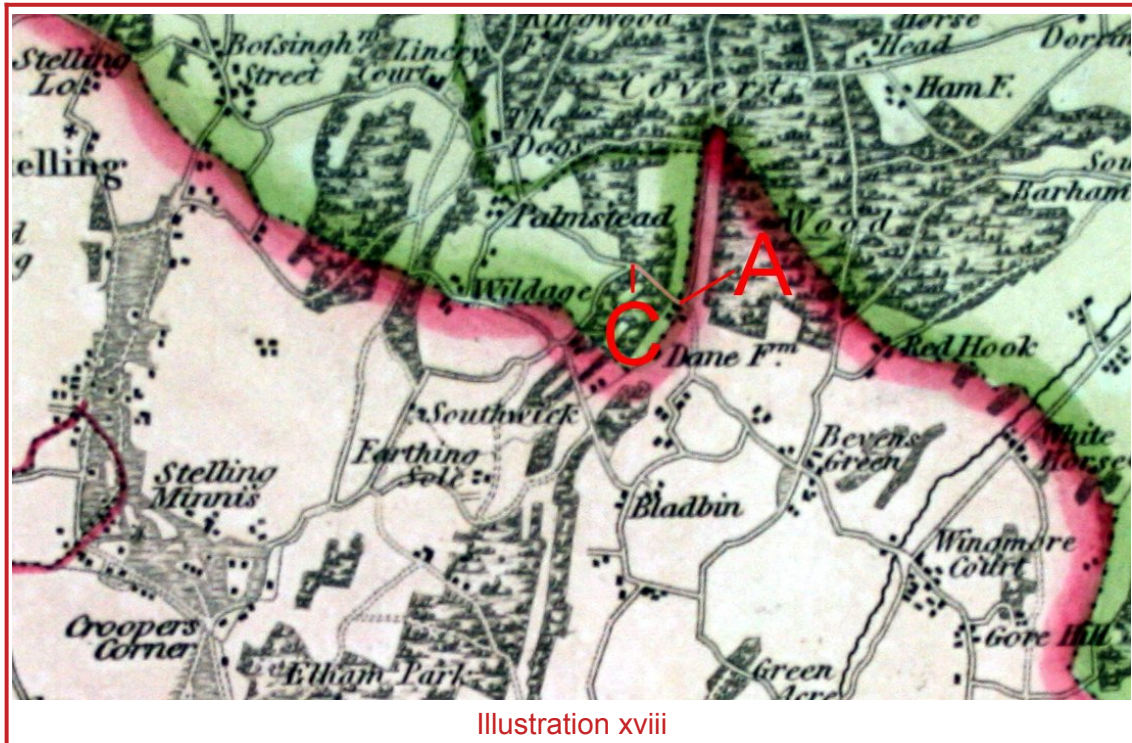
D.9. **Points:** 1 (third historical county map)

E. Greenwoods' map of Kent

E.1. **Date:** 1819–20

E.2. **Source:** Kent County Archives

Greenwoods' map



Greenwoods' map detailed



Greenwoods' map key



Illustration xx

E.3. **Description:** Original scale: one inch to one mile (1:63,360); orientation: unchanged (north). This copy appears to be state iii, published between 1821 and 1827.

E.4. Christopher and John Greenwood were among the notable firms of publishers in the period 1820–50 who attempted to produce large-scale maps of the counties in competition with the Ordnance Survey. In the long run their efforts were unsuccessful but before giving up the struggle they published between the years 1817 and 1830 a series of splendid large-scale folding maps of most of the counties based on their own surveys. Unfortunately, they were unable to complete the series, but published large scale maps of all the counties except Buckinghamshire, Cambridgeshire, Herefordshire, Hertfordshire, Norfolk, Oxfordshire and Rutland.⁵⁷

E.5. **Analysis:** In *Fortune v Wiltshire Council*,⁵⁸ in the Court of Appeal, Lewison LJ wrote in his judgment of the court:

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

E.6. In *Hollins v Oldham*,⁵⁹ HHJ Howarth (sitting as a High Court Judge) said, in relation to *Burdett's Map of Cheshire* dated 1777, which adopted the same classification as the Greenwood's map in relation to roads:

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

⁵⁷ From *Antique Maps*, C Moreland and D Bannister, 1983.

⁵⁸ [2012] EWCA Civ 334.

⁵⁹ [1995] (unreported) C94/0206.

either on horseback or by means of horse and carriage. The cost of such plans when they produced would have been so expensive that no other kind of purchaser could be envisaged. There is no point, it seems to me, in showing a road to such a purchaser which he did not have the right to use. Pingot Lane must have been considered, rightly or wrongly, by Burdett as being either a bridle way or a highway for vehicles.

E.7. It is accepted that not every road shown on the Greenwoods' map must (if it is not a turnpike) inevitably be a cross-road — undoubtedly there are exceptions, such as some (but not all) roads leading only to isolated farmsteads or country houses. But it is submitted that, where a road is connected to highways at either end, it is more likely than not to be shown because it was recognised as a cross-road and of utility to the public who might buy the map.

E.8. The Greenwoods' map clearly identifies the appeal way from a road projecting south-east from Palmstead to an acute turning to the south-west, continuing south-east, generally wooded and unenclosed, and terminating at a junction with a road at a right-angled corner, possibly showing a farmstead adjacent, so that the appeal way continues straight across the junction (with the alternative of turning left, this road following the parish boundary highlighted in pink), as it does today. The way is described in the key as a 'cross road'.

E.9. The south-west limb of Peafield Wood Road is shown joining the appeal way at an acute crossroads, which implied an awkward turn to the north-west to continue to Palmsted. This suggests that the appeal way was considered to be the dominant route.

E.10. **Conclusion:** The Greenwoods' map is good evidence for the existence of a defined route along the appeal way. The key describes the route as a 'cross road', which is suggestive of a public way, at least suitable for use on horseback.

E.11. **Points:** 0 (fourth historical county map — no further points scored)

F.2. **Source:** National Library of Australia⁶⁰

A historical map of the Stelling area in Kent, showing various villages and landmarks. Red letters 'C' and 'A' are marked on the map, connected by a red line. 'C' is located near Palmsted and Wildage, while 'A' is located near Wood and Red Hook. The map includes labels for Stelling, Minnis, Southwick, Farthing Sole, Bladbin, Wingmore Court, Gore Hill, White Horse, Bevens Green, Red Hook, Wood, Ham E., Horse Head, Covert, Kingwood T., West Wood T., Lincol Court, The Doo, and Bossingham Street.

Illustration xxi

version 2.0W December 2023

■ Ordnance Survey Old Series one-inch map detailed



Illustration xxii

F.3. **Description:** Original scale: one inch to one mile (1:63,360); orientation: unchanged (north).

F.4. This is the Old Series one inch map first published officially by the Ordnance Survey. The map reproduced here is state 4, from circa 1831, but believed to be unchanged (as regards the locality) from state 1. Although published some years later than the Ordnance Survey, Mudge-Faden one-inch map of Kent (item III.D above), the 'official' Ordnance Survey Old Series map was based on the same survey data, and is consistent with the Mudge-Faden map.

F.5. The Old Series map clearly identifies the appeal way from a road projecting south-east from 'Palmsted' to a cross-roads, continuing south-east, generally wooded and unenclosed, and terminating at a junction with a road at a right-angled corner, with a hamlet or farmstead adjacent, so that the appeal way continues straight across the junction (with the alternative of turning left), as it does today.

F.6. **Conclusion:** While the Old Series map is not conclusive as to the public status of the way, it was primarily intended for military use, and the surveyor was unlikely to map footpaths being of little military interest. The depiction of the appeal way, as a link in the local road network, is therefore suggestive of a public road or bridle road.

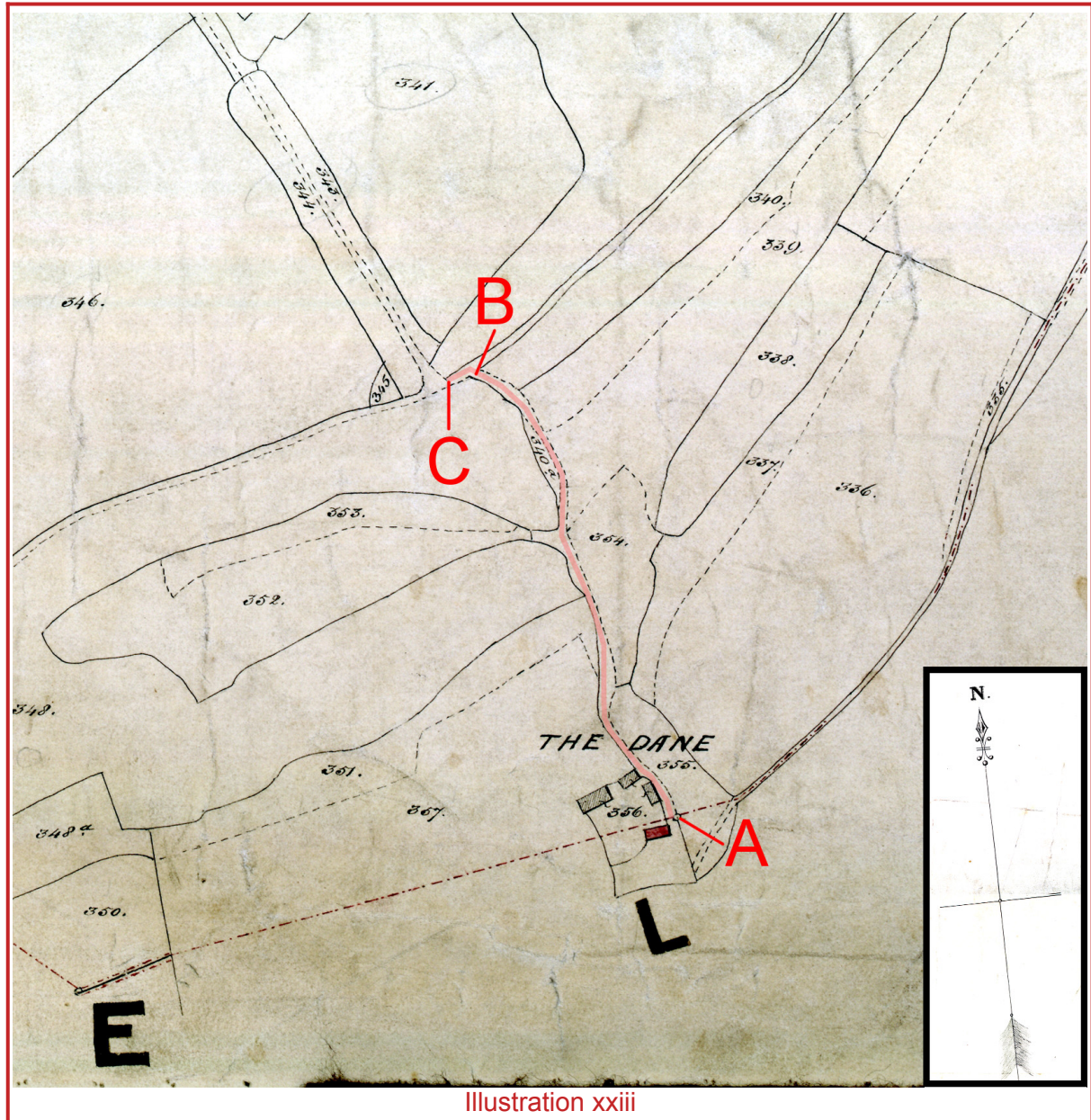
F.7. **Points:** 1 (second Ordnance Survey map)

G. Tithe Commutation Act 1836

G.1. **Date:** 1845

G.2. **Source:** Kent County Archives

Upper Hardres tithe map



Upper Hardres tithe apportionment

SUMMARY. (continued)
D.D.—London: Printed and Published (By Authority) by Shaw & Sons, 137 and 138, Fetter Lane.

LANDOWNERS.	OCCUPIERS.	TOTAL QUANTITIES.			TOTAL RENT CHARGE.		
		A.	B.	P.	£	s.	d.
Lumsdaine Rev ^d Edwin Landys (Glebe)	Lumsdaine Rev ^d E.S. } Church Yard } Roads and Waste }	38	3	38	20	"	"
		"	3	"	"	"	"
		29	2	1	"	"	"
		2037	3	29	440	"	"
	(Signed) Plomer Mount.						

Illustration xxiv

Elham tithe map

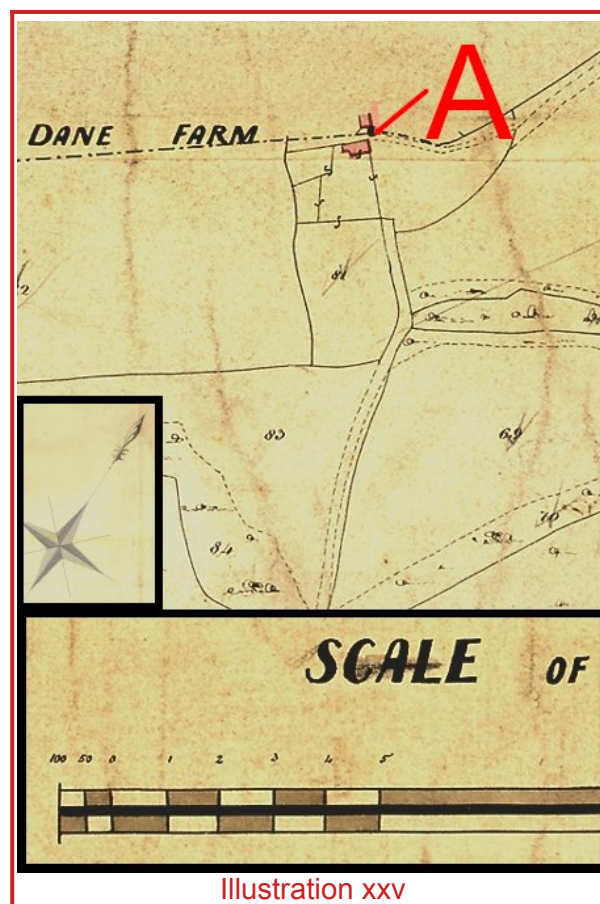
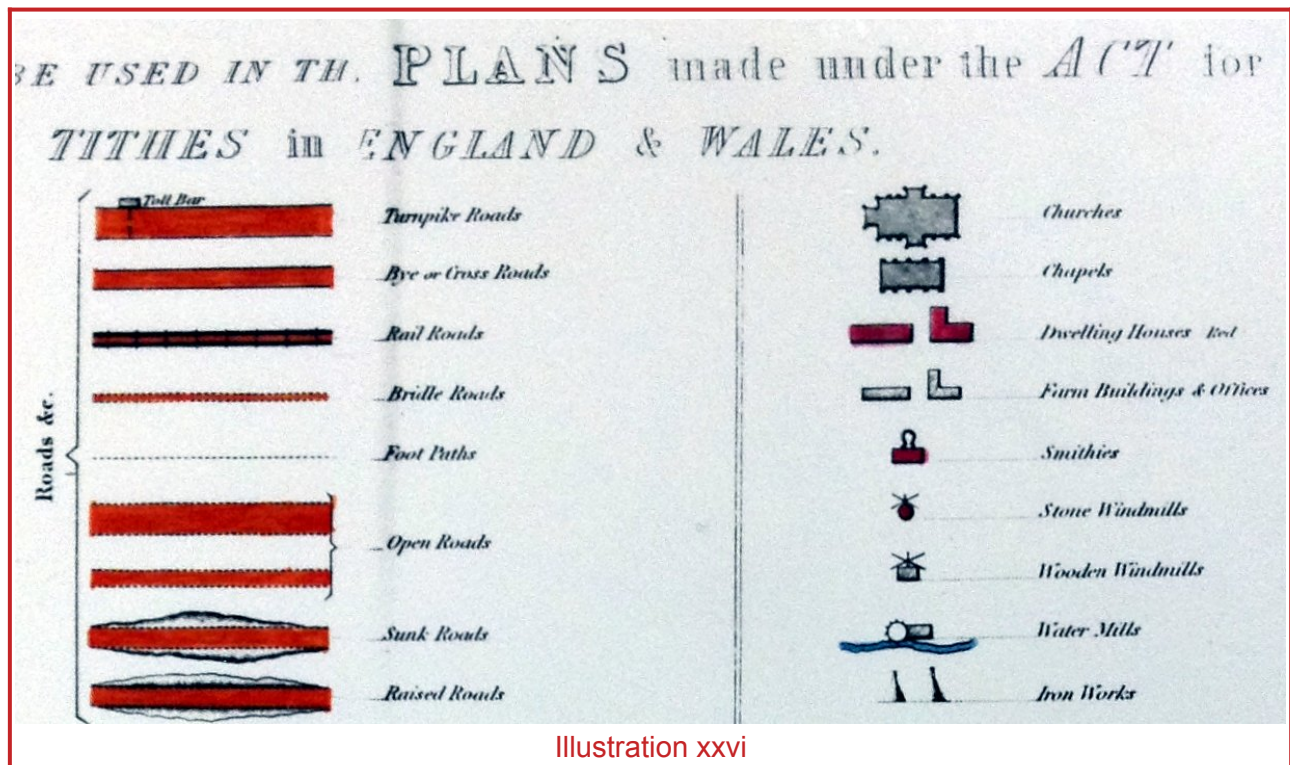


Illustration xxv

Dawson's conventional symbols



G.3. **Description:** *Upper Hardres*: original scale: three chains to an inch (but no scale bar); orientation: unchanged (top is north-northeast); *Elham*: original scale: three chains to an inch; orientation: unchanged (top is north-northeast)

G.4. **Background:** The Tithe Act 1836 enabled tithes (*i.e.* a tenth of the produce of the land) to be converted to a monetary payment system. Maps were drawn up to show the titheable land in order to assess the amount of money to be paid. An assessment of the tithe due and the payment substituted was set out in an apportionment. The 1836 Act was amended in 1837 to allow maps produced to be either first class or second class.

G.5. First class maps are legal evidence of all matters which they portray and were signed and sealed by the commissioners. They had to be at a scale of at least three chains to the inch. Second class maps, signed but not sealed, were evidence only of those facts of direct relevance to tithe commutation, and are often at six chains to the inch. Lt. Col. Dawson published a convention of signs and symbols to be used, which included bridle roads and footpaths, but this was not strictly adhered to⁶¹: an extract from the convention is shown at Illustration xxvi above.

G.6. The tithe process received a high level of publicity as landowners would be assiduous not to be assessed for a greater payment than necessary. In *Giffard v Williams*, it was said, referring to a tithe map and award:

...the Act of Parliament requires these things to be done, not in a corner, but upon notice in all the most public places; so that it is impossible to treat this

61 *Survey of lands (Tithe Act.)*, letter from Lt. Dawson, R.E., to the Tithe Commissioners for England and Wales, on the Nature, Scale and Construction of the Plans required for the Tithe Commutation Act, 29 November 1836 (copy held at the National Archives).

document otherwise than as a public one, and as public evidence that at that time the owner of the undivided moiety of this field was aware of the facts.⁶²

G.7. Non-titheable land deemed to be unproductive was usually excluded from the process. It is common therefore for no tithe to be payable on roads, although wide grass drovers' routes could carry a tithe as they were used as pasture. It was in the interest of the landowners for untithed roads to be shown correctly to minimise their payments. Foot-paths, bridleways and unenclosed tracks were more likely to be at least partially productive (for example as pasture). Therefore, although the process was not necessarily concerned with rights of way, inferences can be drawn from tithe documents regarding the existence of public rights, and in particular, public vehicular rights. In some cases highways are coloured yellow or sienna to indicate public status, and highways expressly may be described as such in the apportionment.

G.8. **Analysis:** The tithe map for Upper, or Great, Hardres, is a first class map.⁶³ It shows the appeal way from 'The Dane', where it commences on the north side of an enclosed parcel of land (south of the farm yard but outside the parish), and passes north-west, to the east of the farm yard, and continuing along a way defined by a fence or hedge on the west side, generally with no physically defined boundary on the east side, but marked on the map with a pecked line. At B, the appeal way joins another, fully enclosed, way, and briefly passes south-west along that way to the junction with another road at C.

G.9. The way appears to be excluded from the numbered parcels which appear in the tithe apportionment — a small parcel, no.340a, appears sandwiched between the way and the fence or hedge immediately to the west which would be incapable of definition if the appeal way were not excluded from assessment. No braces link the appeal way to neighbouring parcels. The tithe apportionment records a separate area for 'Roads & Waste' of 29a, 2r, 1p, and it may be inferred that the appeal way is included within this categorisation.

G.10. The use of dotted lines to bound the east side of the appeal way appears to follow the guidance of Lt. Col. Dawson that:

The boundaries and limits of all lands and parcels of land which are to be treated separately under the provisions of the Tithe Act, should be marked on the Plans, whether they be defined by fences or not. This will be more particularly requisite in cases which claim exemption from rent-charges under the Act; and where no boundary fences appear, the limits should be shown by a dotted line.

G.11. On the Upper Hardres tithe map, Dane Hill Road from Husband's Oak towards Bladbean is shown cutting off the corner in the vicinity of A. On the Elham tithe map, Dane Hill Road is shown on a similar alignment to other maps, although the appeal way is not shown or identified (presumably because it lies outside the parish).

G.12. **Conclusion:** It is sometimes said that the exclusion of a way from being rated as titheable is not an indication that the way is or is not public. However, in the circumstances of an unenclosed track across open farmland, it is submitted that the absence of any rating is likely to indicate that the way was public. If it were a private track, then the track undoubtedly would have had productive value, and ought to have been assessed as rateable assigned to the track's owner. First, because the track, being unenclosed and

62 (1869) 38 LJ (Ch) 597 at 604, per Stuart V-C.

63 See the entry for the tithe map held at the National Archives, [IR 30/17/167](#).

unmetalled, would be capable of being grazed by the owner. And secondly, because a private track could be abandoned at any time and the land farmed as productively as the neighbouring land (which was rateable) — it would be iniquitous for the rateable value of the track to be excluded from calculations.

G.13. But as a public road, one would expect the surveyor to assess either that the rateable value lay with the parish vestry (which was not liable to assessment), or that no-one had any express entitlement to it.

G.14. While other explanations for exclusion may be apparent, they are clearly not relevant here: for example, the owner of the track might have been exempt from tithes (glebe land for example) — but that should be obvious, and there is no reason here to infer that the ownership of the track was vested in some third party who was coincidentally exempt from tithes.

G.15. The omission of any parcel number from the appeal way is likely to indicate that the way is considered to be a 'road'. Accordingly, it is submitted that the track is among those features on the map which are assessed as part of the 'Roads & Waste', and was considered to be a public road.

G.16. **Points:** 3

H. Ordnance Survey boundary records

H.1. **Date:** 1867–9

H.2. **Source:** National Archives⁶⁴

■ Ordnance Survey boundary sketch map, Upper and Lower Hardres

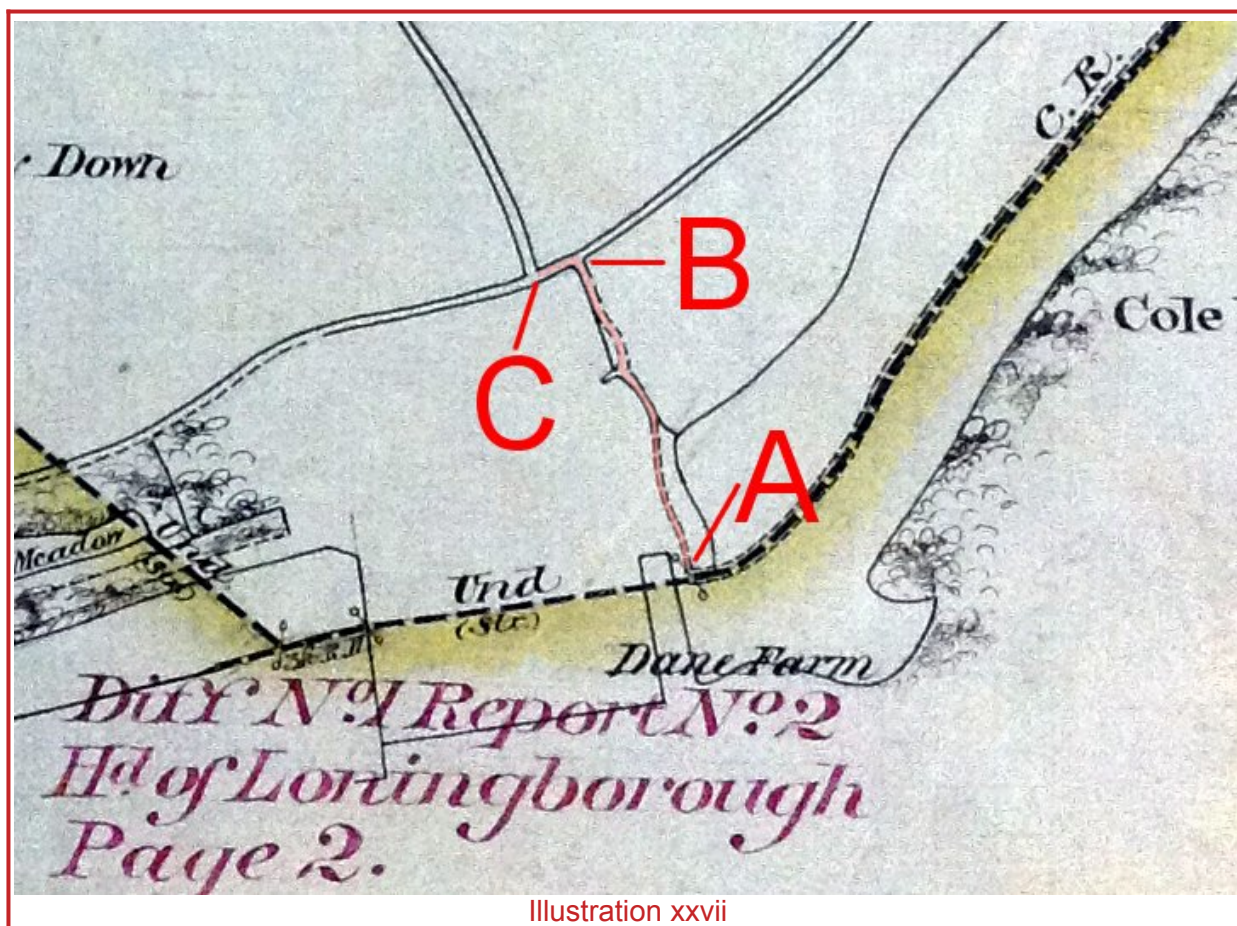


Illustration xxvii

H.3. **Description:** Original scale: 12 chains to one inch (1:9,504); orientation: unchanged (north).

H.4. The Ordnance Survey boundary maps date from the late 1860s, and record the Ordnance Survey's surveyors efforts to capture the precise location of parish boundaries from local knowledge. These maps were drawn up following perambulation of the boundaries by the surveyor accompanied by the parish meresman (that is, a senior resident of the parish who was specially tasked with knowledge of the parish's boundaries, and who very likely would have acquired such knowledge first hand from his predecessor as meresman).

H.5. The sketch map shows the parish boundary between Elham and Upper Hardres (as it then was) following Dane Hill Road to the corner of the road at A, and then projecting south-west, undefined, through Dane Farm. The appeal way is drawn as a distinct feature, north-northwest from A, unenclosed, towards B, where it joins with the enclosed track along the bottom of Peafield Wood.

64 OS 27/2840

H.6. **Conclusion:** The sketch map confirms the physical existence of the appeal way, but does not provide any confirmation of status.

H.7. **Points:** 0

I. Covert Wood sale

I.1. **Date:** 1868

I.2. **Source:** Kent County Archives⁶⁵

Covert Wood sale plan

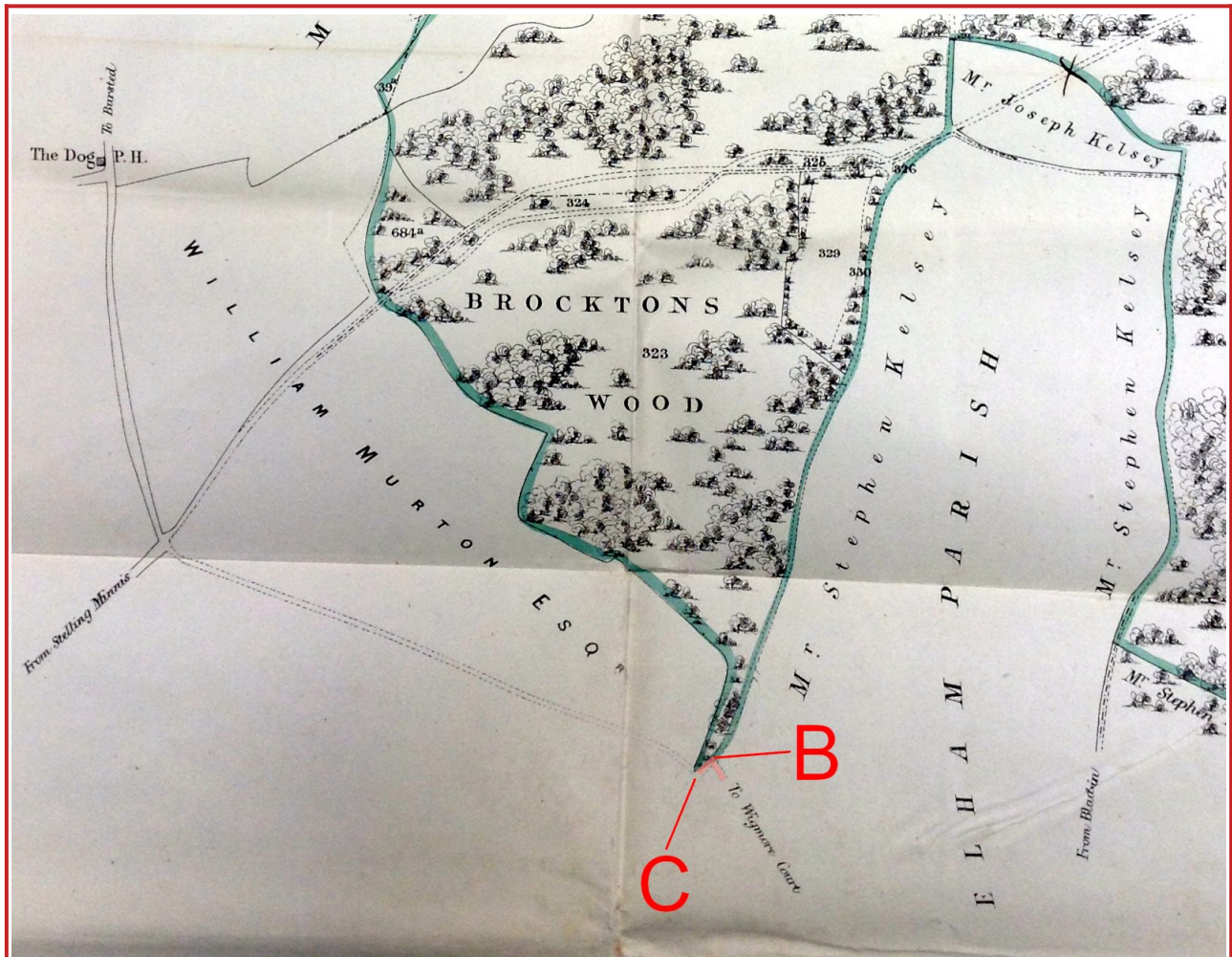


Illustration xxviii

I.3. **Description:** Original scale: unstated; orientation: unchanged (approximately north at top).

I.4. These particulars were prepared by Messrs. Cobb, auctioneers, for the sale of Covert and Brockton's Woods, by auction, on 26 June 1868.

I.5. A small part of the appeal way, between B and C, lies within the toe of Covert Wood, and is shown, in common with other roads on the map, as marked by double pecked lines.

⁶⁵ U55/SP/2228

In addition, however, the continuation of the appeal way towards A is annotated 'To Wigmore Court'. The annotation is a reference to what is now known as Wingmore Court Farm, which is approximately 2km south-east of Dane Hill Farm via Bladbean.

I.6. The use of a destination label on old maps generally is associated with public, rather than private, roads. In *Commission for New Towns & Anor v JJ Gallagher Ltd*, Neuberger J (as he was then) accepted the evidence of two expert witnesses⁶⁶:

...that the designation 'from X' or 'to X' on a road was indicative of highway status. A specific description of a lane as leading from one village to another, particularly when one bears in mind that it was a carriageway (albeit that its status as a public carriageway is in issue) does provide some support for the notion that it was a public carriageway.

I.7. The Planning Inspectorate *Consistency Guidelines* state (in relation to tithe maps) that:

...the annotation of a road 'to' or 'from' a named settlement is suggestive of public rights.⁶⁷

It may be noted that while the reference to 'public rights' does not in itself exclude the possibility of a footpath, the reference to a 'road' does, and implies a bridle or carriage road.

I.8. **Conclusion:** The annotation of the appeal way as leading to a nearby destination is some evidence that the way was regarded as a highway, and most likely as a public road. Such an annotation is particularly valuable in the context of an offer for sale on behalf of the landowner.

I.9. **Points:** 2

66 [2002] EWHC 2668 (Ch), at para.90: www.bailii.org/ew/cases/EWHC/Ch/2002/2668.html

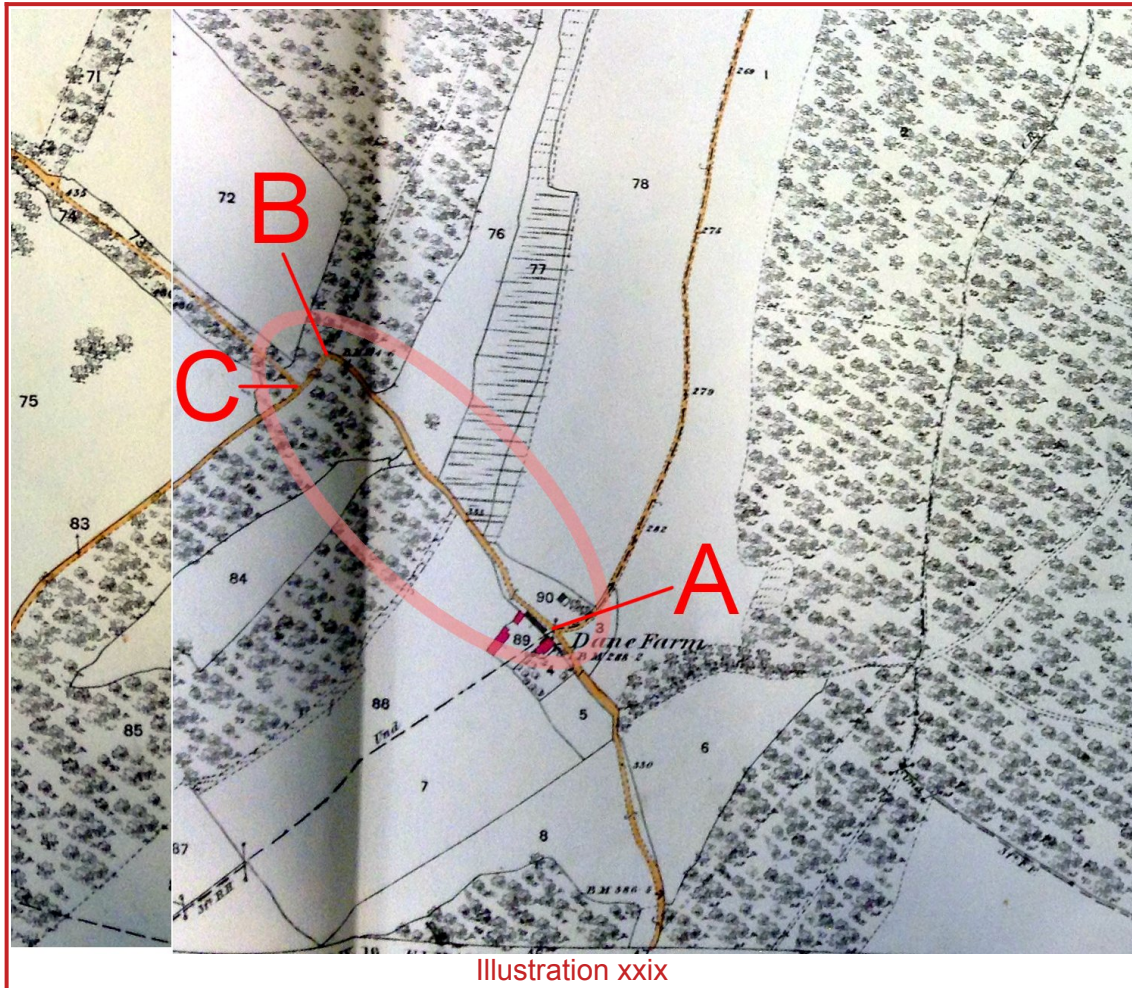
67 [Consistency Guidelines](#): para.8.2.13.

J. Ordnance Survey County Series 25-inch plans

J.1. **Date:** 1873–1946

J.2. **Source:** British Library⁶⁸, Bodleian Library/Google Books Library Project, National Library of Scotland⁶⁹

■ Ordnance Survey County Series first edition 25-inch plan⁷⁰

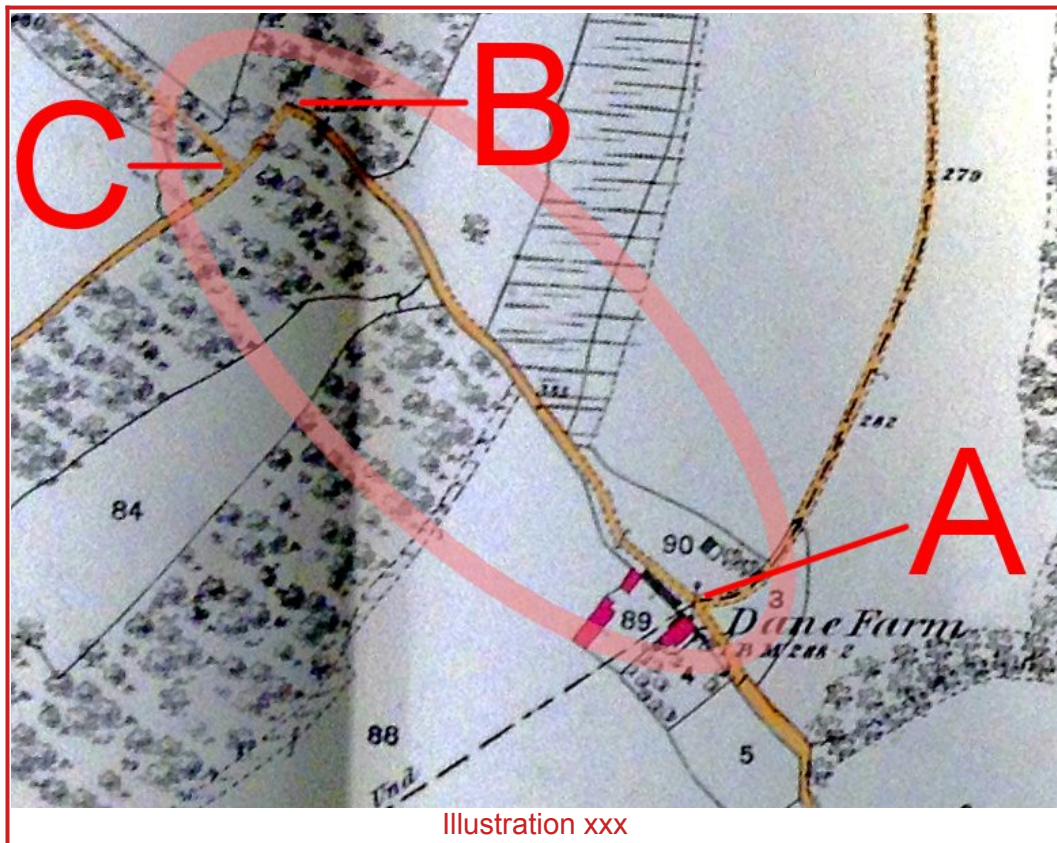


68 Sheet Kent LVI/12

69 The second, third and fourth editions are available [online](#).

70 Surveyed 1872, published 1873

Ordnance Survey County Series first edition 25-inch plan enlargement



Area book of reference

4 PARISH OF UPPER HARDRES.					
No. on Plan.	Area in Acres.	Remarks.	No. on Plan.	Area in Acres.	Remarks.
48	12.501	Arable & hop garden.	76	2.870	Pasture.
49	2.084	Pasture, &c.	77	2.795	Rough pasture.
50	.705	Pasture.	78	15.831	Arable, rough pasture, &c.
51	30.080	Wood.	79	.161	Road.
52	30.350	Arable.	80	.570	House, sheds, yards, garden, &c.
53	.684	Pasture, orchard, and sheds.	81	1.636	Pasture.
54	.373	House, garden, orchard, and ornamental ground.	82	27.635	Arable.
55	.586	Pasture, sheds, and pond.	83	.645	Road.
56	.801	Pasture.	84	2.192	Pasture.
57	.055	Road.	85	12.869	Wood.
58	.648	Pasture.	86	.018	Pasture.
59	11.027	Arable.	87	1.214	Arable.
60	.703	Brushwood.	88	4.253	Arable and rough pasture.
61	63.663	Wood.	89	.170	Houses, shed, and yard.
62	5.078	Pasture.	90	.353	Pasture, shed, &c.
63	9.710	Arable. brushwood.			

Illustration xxxi

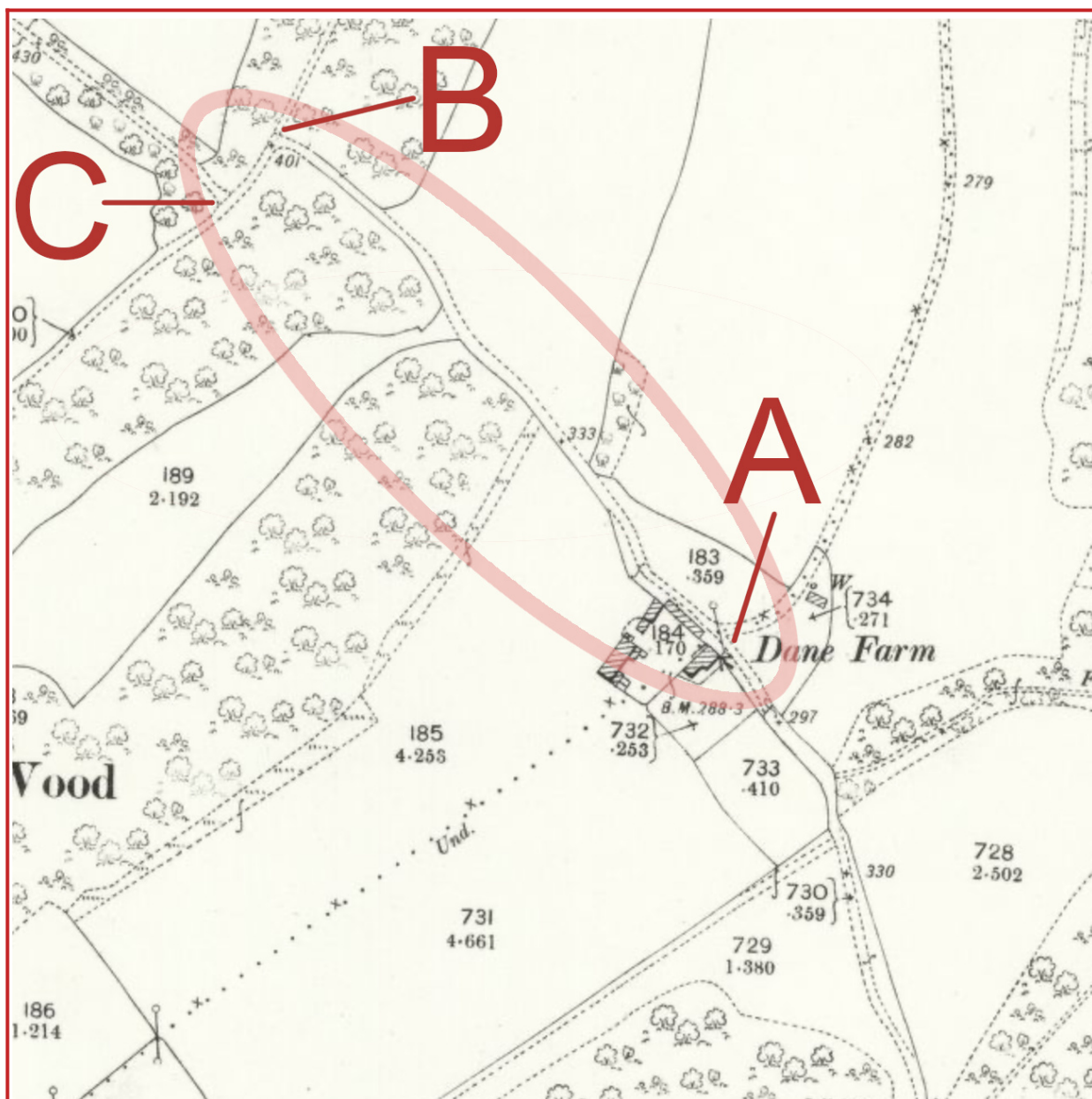


Illustration xxxii

71 Surveyed 1896, published 1898

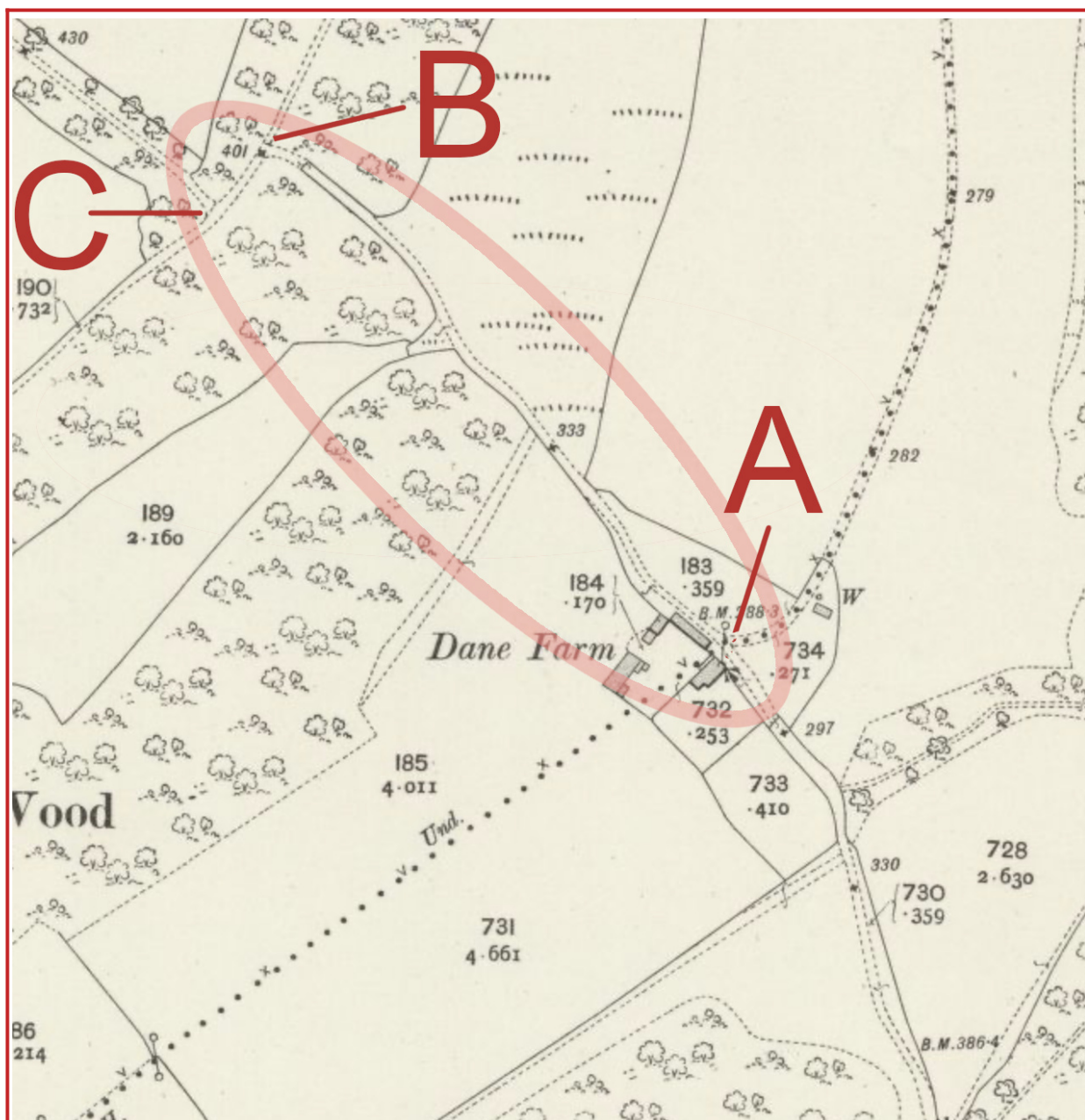


Illustration xxxiii

72 Surveyed 1906, published 1907

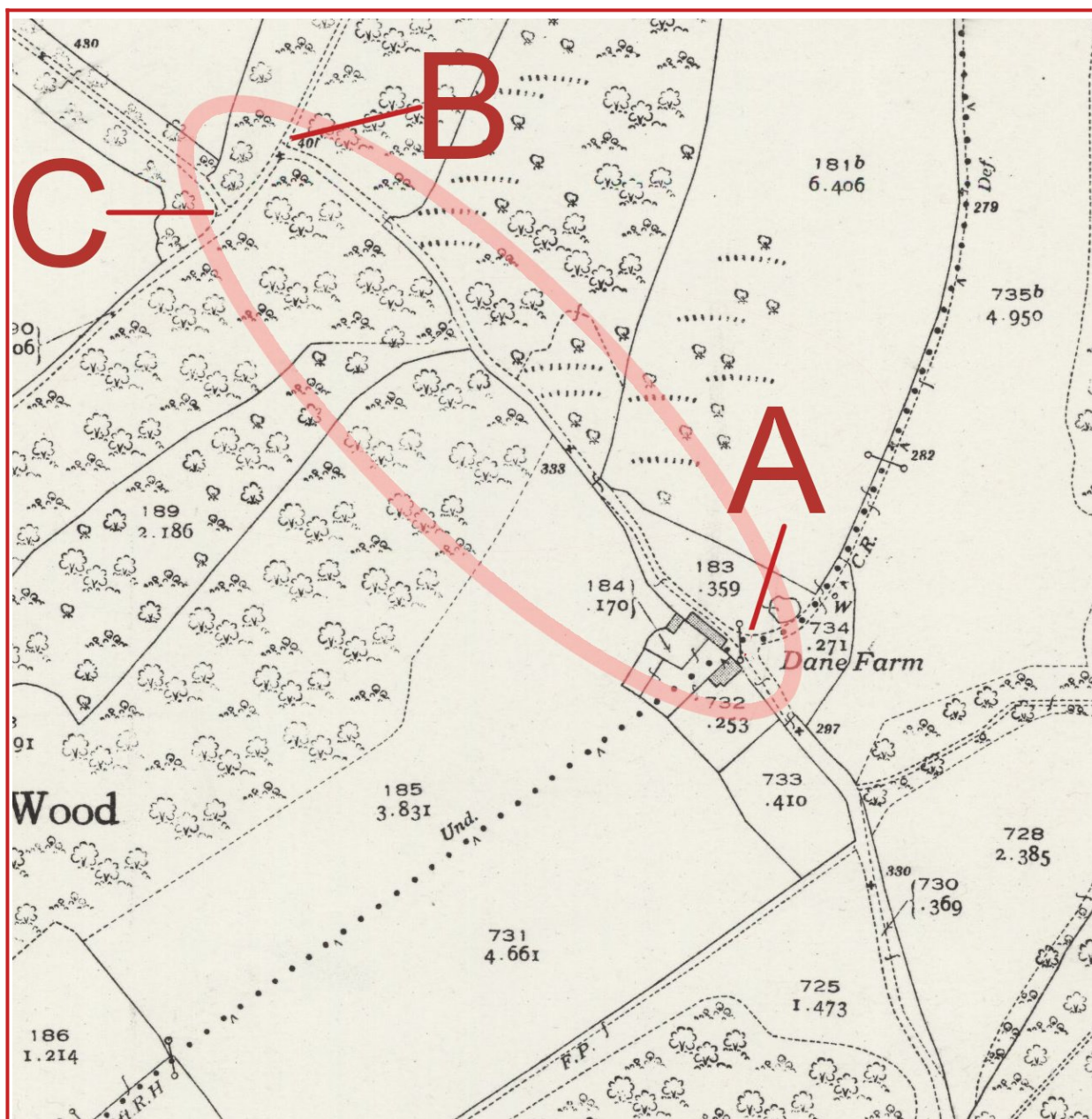


Illustration xxxiv

J.3. **Description:** Original scale: 25 inches to one mile (1:2,500); orientation: unchanged.

J.4. The appeal way is shown as a road or track, part enclosed, on the first edition of the Ordnance Survey County Series map at a scale of 1:2,500. It is coloured sienna, which shows that it was metalled for carriages and carts.⁷⁴ The way is divided into two for meas-

⁷³ Surveyed 1939, published 1946

⁷⁴ *Ordnance Survey Maps, a concise guide for historians* (3rd ed., Richard Oliver, 2013, p.115) describes sienna as indicating a 'carriage drive'. However, *Roads on OS 1:2500 plans 1884–1912* (Rights of Way Law Review, Yolande Hodson, pp.107–118) states that 'burnt sienna...was used to indicate a metalled surface', which is ascribed to *The national plans (the Ten-foot, Twenty-five inch and Six-inch Scales)* (HMSO, HStJL Winterbotham, 1934), at p.61. Dr Hodson adds that it is not possible to use sienna to

urement purposes by a small row of dots just to the south-east of the spot height labelled '333' (feet). The portion to the north-west continues to the junction with Peafield Wood Lane, and continues along the lane south-west to the parish boundary between Upper Hardres and Stelling: this portion is given parcel number 83. The portion to the south-east (towards Dane Farm) is braced with the enclosure immediately adjacent Dane Farm, and numbered 90.

J.5. In the area book of reference for the parish of Upper Hardres falling within the hundred of Loningborough,⁷⁵ parcel 83 is described as a 'Road', and parcel 90 as 'Pasture, Shed, &c.': '&c' would include the road.

J.6. No gate is shown across the road.

J.7. The position remains broadly similar on the second, third, and fourth editions published at the end of the 19th century through until shortly after the end of the Second World War. The appeal way continues to be shown as a defined route, and it is notable that the junction at A is suggestive (at least until the third edition) that for motorists approaching either from Husband's Oak, or from Bladbean, the most obvious direction to take would have been straight on along the appeal way — only a tight turn, to the left or right respectively, would have evaded what, for a motorist not familiar with the area, would have been an ineluctable passage along the appeal way.

J.8. A gate first is showing on the third edition map, slightly below B. On the fourth edition map, that gate has been removed, but replaced by new gates about a third of the way above A, and slightly short of the site of the former gate below B.

J.9. Spot heights are recorded along the appeal way on all four editions of the map.

J.10. **Analysis:** The marking of spot heights is consistent with the public status of the appeal way. An inspection of the third edition plan, leaving aside the order way, revealed that no spot height appears other than on ways recognised today as public roads.

J.11. We do not accept the statement in *Rights of Way Law: A guide to law and practice*⁷⁶ that:

The Ordnance Survey states that spot heights are positioned to meet the requirements of its surveyors when levelling an area and do not, and never have had, any bearing on rights of way along any road, track or path.

This statement is attributed to a 'Letter to Hereford and Worcester CC, 18 January 1996'. A letter sent at such a remove from the date of survey, over a century earlier, in circumstances where the majority of surveying guidance has been lost, cannot be reliable authority for the proposition.

J.12. A contemporary explanation is to be found in *A resumé of the publications of the Ordnance Survey for England and Wales*⁷⁷:

The Manuscript Plans⁷⁸...Bench Mark (B.M.) and surface level altitudes are then inserted on the plans, the lines of levels running along the principal roads.

distinguish public and private roads.

75 Part of the parish falls within the hundred of Bridge and Petham, which is allocated a discrete series of parcel numbers.

76 Riddall and Trevelyan, 4th ed., para.6.3.9.

77 Maj. F P Washington RE, 1890: reproduced in *Sheetlines* (the journal of the Charles Close Society), 67/21.

...In country 1/2500 levelling the Bench Marks occur about every third of a mile. In towns, about 15 to the linear mile are cut.

Surface levels are shown at any defined change of level between these Bench Marks.

J.13. While the appellant does not suggest that every way which is marked with spot heights on early Ordnance Survey County Series large scale plans must inevitably be a 'principal road', the annotation of such features along the order way, and the adoption of consistent practice on the sheet which depicts the order way, does provide some modest support for its status as a highway.

J.14. **Conclusion:** The treatment of the appeal way and Peafield Wood Road as a single parcel, numbered on the first-edition map as 83 (and given an area of 0.261 ha), is suggestive that it was considered to be of the same class as Peafield Wood Road, and therefore also a public road. The burnt sienna colouring shows that the way was metalled, and therefore maintained to carry significant wheeled traffic. The marking of spot heights also supports status as a public road.

J.15. The bracing of the lower part of the road with the adjacent roadside waste reflects that this part of the road was not, at that time, enclosed.

J.16. **Points:** 1

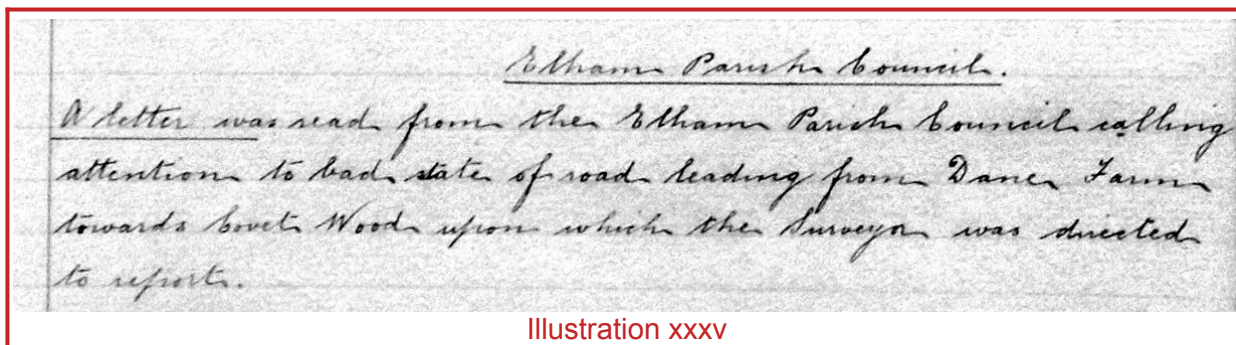
78 This section describes how the manuscript plans, having been structured from parish or tertiary triangulation, are filled out with detail from right line surveying entered in a field book.

K. Elham Rural District Council minute book

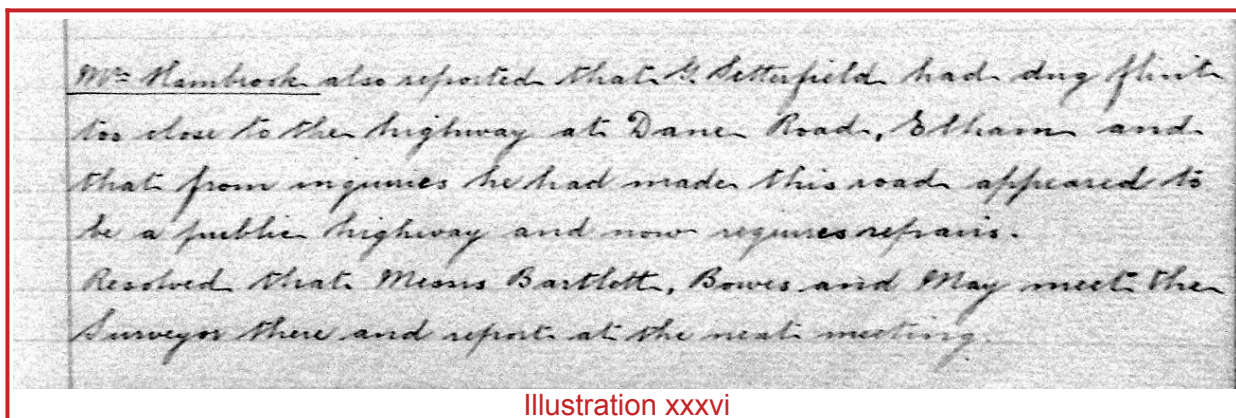
K.1. **Date:** 1898

K.2. **Source:** Kent County Archives⁷⁹

Elham Rural District Council minute, 5 January 1899



Elham Rural District Council minute, 2 February 1899



Elham Rural District Council minute, 2 March 1899

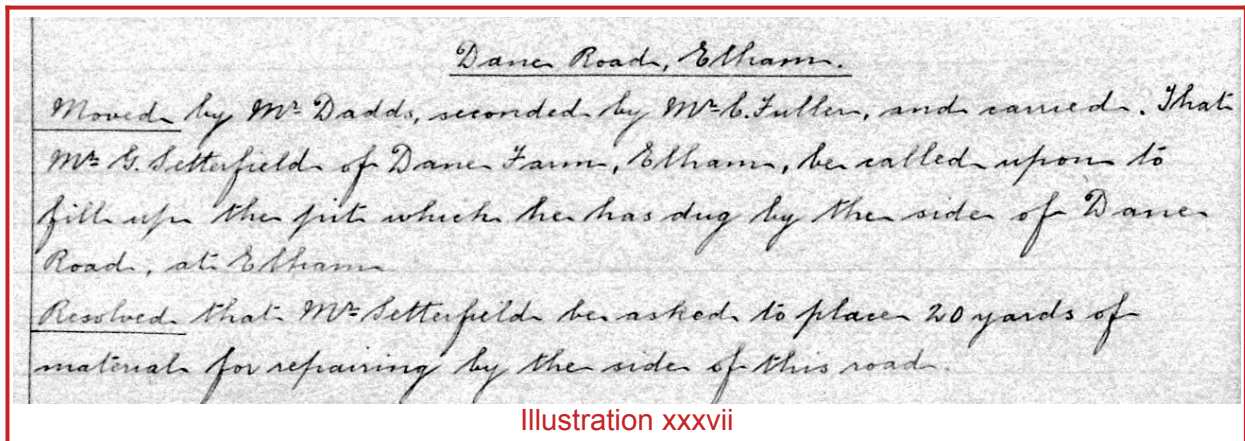


Illustration xxxvii

Elham Rural District Council minute, 30 March 1899

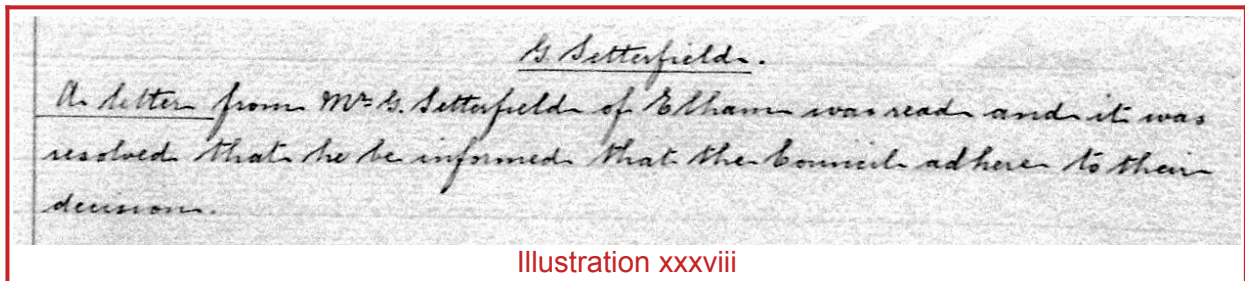


Illustration xxxviii

K.3. **Description:** The minute book records the proceedings of the Elham Rural District Council between 1895 and 1900. The following extracts appear to relate to the appeal way.

K.4. The first minute is recorded at the council meeting on 5 January 1899⁸⁰:

Elham Parish Council

A letter was read from the Elham Parish Council calling attention to bad state of road leading from Dane Farm towards Cove Wood upon which the surveyor was directed to report.

K.5. The second is one month later, on 2 February 1899⁸¹:

Mr Hambrook also reported that Mr Setterfield⁸² had dug flints too close to the highway at Dane Road, Elham and that from enquiries he had made this road appeared to be a public highway and now requires repair. Resolved that Messrs Bartlett, Bowes and May meet the Surveyor there and report at the next meeting.

80 p.372

81 p.378

82 Mr G Setterfield is described as the occupier of Dane Farm, hereditament 594, in the field book prepared under the Finance (1909–1910) Act 1910: see paragraph III.M.7 below.

K.6. The third is a further month later, on 2 March 1899⁸³:

Dane Road Elham

Moved by Mr Dodds, seconded by Mr C Fuller, and carried. That Mr G Setterfield of Dane Farm, Elham, be called upon to fill up the pits which he has dug by the side of Dane Road at Elham. Resolved that Mr Setterfield be asked to place 20 yards of material for repairing by the side of this road.

K.7. And finally, on 30 March 1899⁸⁴:

G Setterfield

A letter from Mr G Setterfield of Elham was read and it was resolved that he be informed that the Council adhere to their decision.

K.8. **Analysis:** The location of the road and the site of flints being dug is somewhat uncertain. On the one hand, the appeal way, at this time, was in the Bridge rural district, with the boundary with Elham rural district running along (generally the centre) of Dane Hill Road, the road along the valley to Husband's Oak. The appeal way therefore falls just outside the jurisdiction of the Elham Rural District Council.

K.9. On the other hand, the minutes tend to suggest a location along the appeal way:

- A 'road leading from Dane Farm towards Covet Wood' can only be the appeal way or Dane Hill Road — but the latter leads north parallel to Covet Wood, and terminates at Husband's Oak, a more likely descriptive label for its termination, whereas the appeal way leads into the southern end of Covet Wood.
- Dane Hill Road straddles the parish boundary between Elham (to the east) and Barham (to the west) — formerly, between Elham and Upper Hardres. It also straddles the district boundary between Folkestone with Hythe (to the east) and Canterbury (to the west) — formerly, between Elham and Bridge. It would be surprising if the surveyor had not identified that maintenance of Dane Hill Road was a shared responsibility with the Bridge Rural District Council.
- Mr Setterfield, presumably the tenant farmer, had 'dug flints' from 'pits which he has dug by the side of Dane Road at Elham'. Dane Hill Road follows a terrace of sand and gravel along the bottom of the Dane valley, where flints are unlikely to be found in any quantity adjacent to the road — whereas the appeal way ascends steeply up the chalk slopes of Dane Hill, where flints are likely to be plentiful.
- There is no evidence of pits alongside Dane Hill Road — but a pit does exist on the north side of the appeal way, approximately three-fifths of the distance between A and B. This pit did not appear on maps until the Ordnance Survey National Grid 1:2,500 edition of 1973 — but may have been overlooked in the earlier surveys for the County Series 1907 and 1939 editions, or may have been sufficiently filled in that it was not a feature visible at that time.
- The surveyor states that, 'from enquiries he had made this road appeared to be a public highway', which suggests a low level of familiarity with the way, and an uncertainty as to its status — factors which remain true to this day.

K.10. **Conclusion:** It would be surprising if the council had supervised the restoration of a road just outside its area, but it is suggested that it possibly did. The minutes must refer

83 p.384

84 p.390

either to Dane Hill Road (from Dane Farm north towards Husband's Oak) or the appeal way, and the circumstances appear proper only to the latter. Perhaps the surveyor's lack of familiarity with the way was partly because he overlooked that it was not within the council's area, and therefore he had not dealt with it before. Although a fundamental mistake of this kind seems unlikely, it also is equally unlikely that Mr Setterfield was digging for flint along Dane Hill Road north of Dane Farm,⁸⁵ and the protrusion of Elham parish to the north here is, and perhaps always has been, confusing.

K.11. Either way, the council must have erred — because the road in question was the appeal road and not in the council's area; or because the road in question was Dane Hill Road, and responsibility was shared with Bridge Rural District Council (the councils' common boundary being along the centre line of the road).

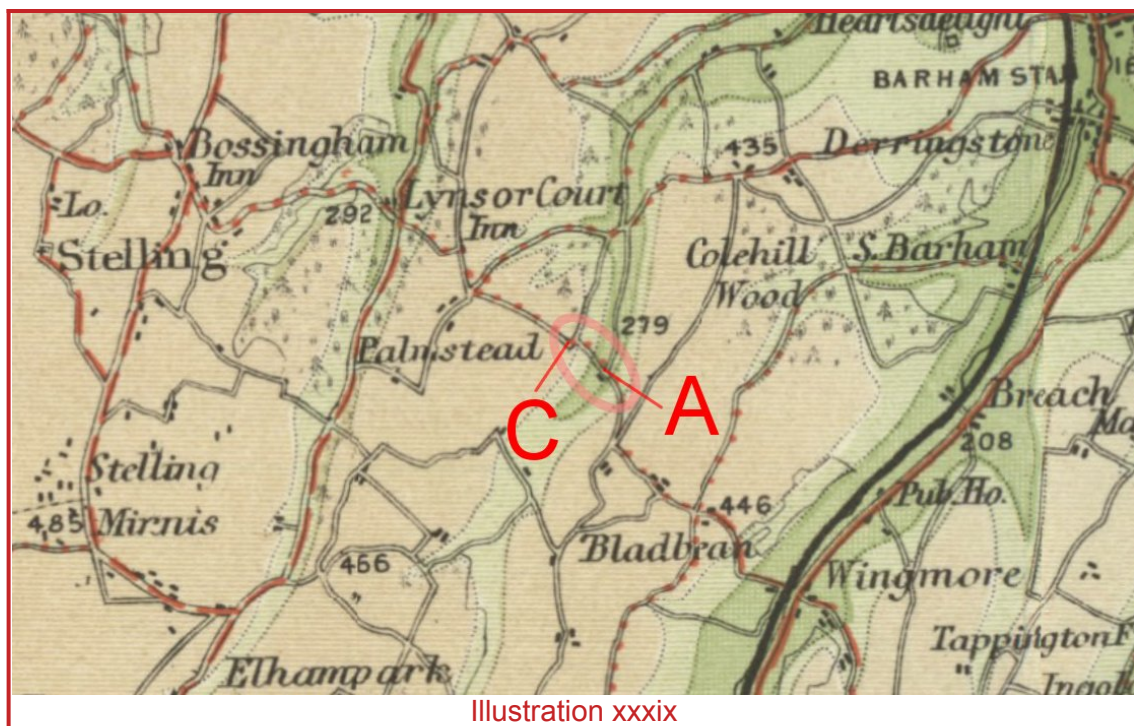
K.12. **Points:** 0

L. Bartholomew's map

L.1. **Date:** 1904 and 1922

L.2. **Source:** National Library of Scotland⁸⁶

Bartholomew's map: 1904



⁸⁵ Mr Setterfield cannot have been digging for flint along Dane Hill Road south-east of Dane Farm, because the first report refers to a 'road leading from Dane Farm towards Covet Wood'.

⁸⁶ maps.nls.uk/mapmakers/bartholomew.html

Bartholomew's map: 1922

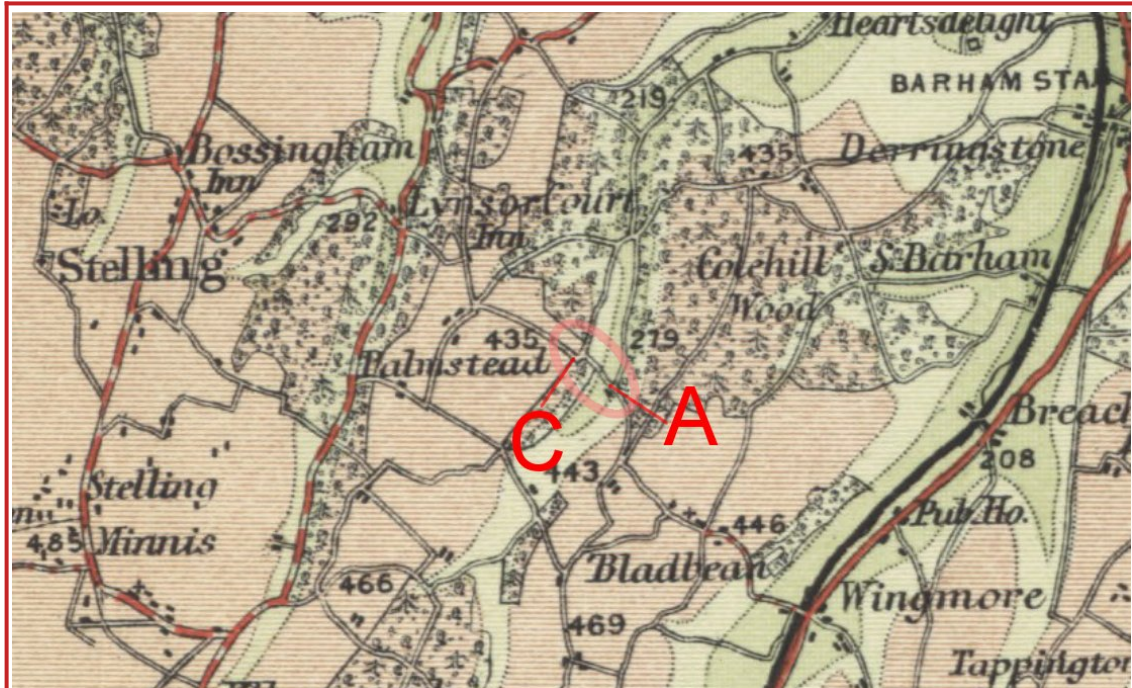


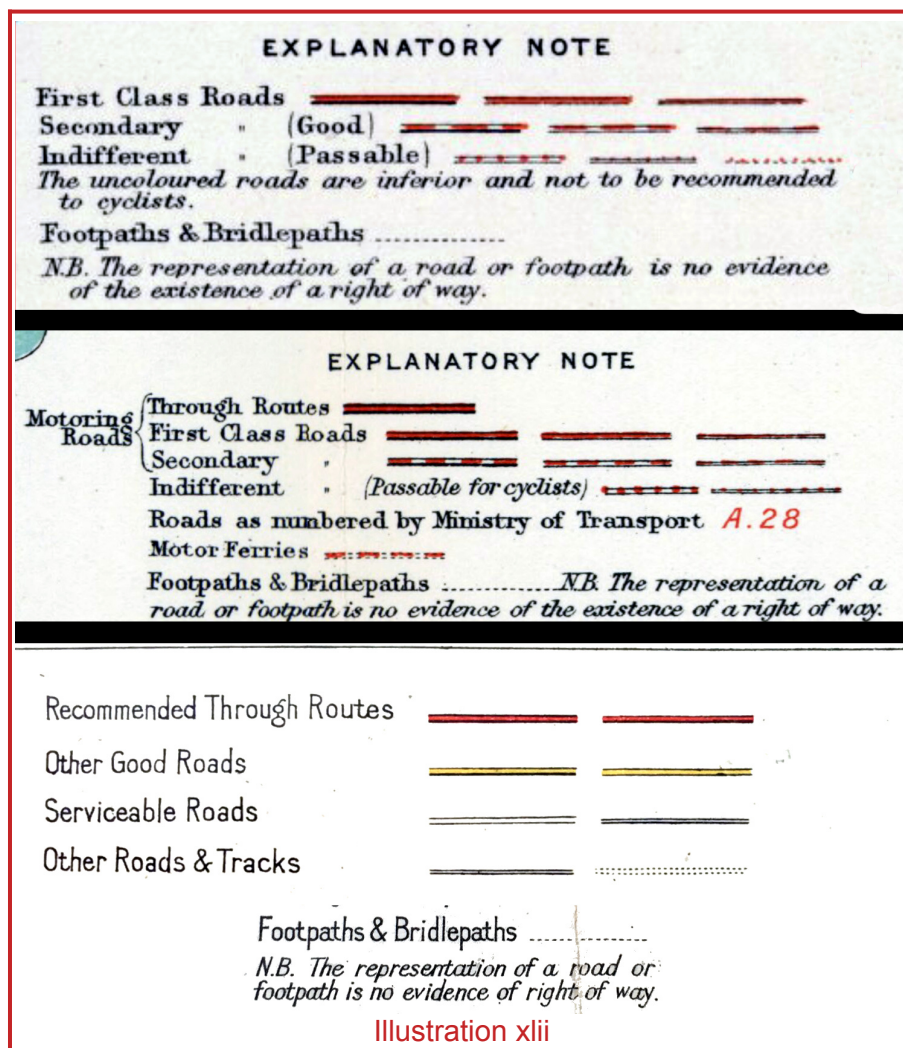
Illustration xl

Bartholomew's map: 1953



Illustration xli

Bartholomew's maps: keys to 1904, 1922 and 1954 editions



L.3. **Description:** Original scale: half inch to one mile (1:126,720); orientation: unchanged (north).

L.4. The appeal way is shown in the 1904 edition of the Bartholomew map as an 'Indifferent' road, expressly annotated as 'passable' for cyclists, but in the 1922 edition as, in effect, unsuitable for cyclists. It appears to be shown in the 1953 edition as a 'serviceable road' (in common with other local roads), although the key is not clear.

L.5. **Conclusion:** The 1904 edition of the Bartholomew map suggests that the appeal way was assessed as a road suitable for cycling. It is not known on what evidence such assessment was made.

L.6. Paragraph 12.41 of the *Consistency Guidelines*⁸⁷ notes that:

current evidence indicates that, although Bartholomew were highly regarded as map producers, they did not employ independent surveyors to carry out any surveys on the ground nor to determine the nature and status of the roads on their maps. Moreover, they do not appear to have examined the legal status

87 Planning Inspectorate: September 2015: www.gov.uk/government/publications/definitive-map-orders-consistency-guidelines.

of the routes on their Cyclists' Maps before colouring them for use as suitable for cyclists.

L.7. However, this seems to be a too simplistic approach: we do not know what criteria Bartholomew used to assess the suitability of individual roads for cycling, but it is unlikely that it may have made a decision using no more than published Ordnance Survey data, if its maps were to meet with a favourable reception among its target market of cyclists.

L.8. Accordingly, the classification of the appeal way on the 1904 edition as an 'indifferent' road, 'passable' for cyclists, is suggestive of some form of survey or user feedback which found the appeal way to be a suitable route for cycling in the early years of the twentieth century.

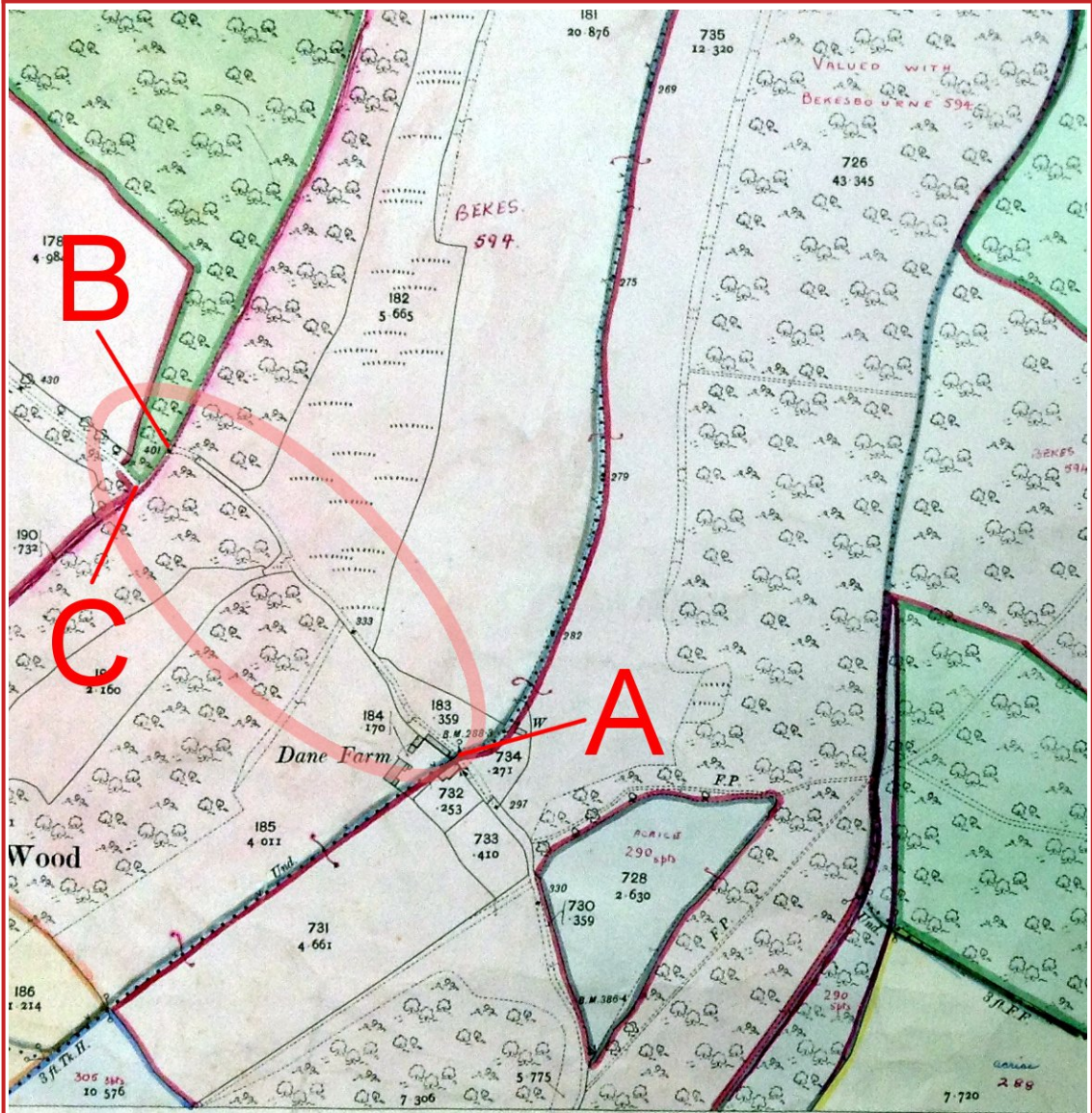
L.9. All three editions bear the disclaimer that:

N.B. The representation of a road or footpath is no evidence of the existence of a right of way.

The disclaimer means precisely what it says: that if a way is shown on the map, the publisher does not assert or claim that the way must be open to the public. It does not mean, as it often is asserted to mean, that the publisher's practice is to show any and all ways on the map regardless of status. The disclaimer is a defence against mistakes, not a statement of policy. Where a map was marked as showing particular roads as 'good' or 'passable' for cyclists, it hardly is likely that the publisher was indifferent to whether cyclists actually could use the road. Therefore, we submit that the 1904 map is some evidence that the appeal way was at that date, a public road in use, and suitable for use by, cyclists.

L.10. The appeal way continued to be shown as one of a network of local roads on the later editions in 1922 and 1953.

L.11. **Points:** 1



Field book entry (pp.1-2)

Concluding 587 Upper Broomfield + 332 Acres (Dane Hill)
332 Acres refers to Stone Quarry (partially)
& Broomfield 107

594 Reference No.
 Situation *Dane Hill*
 Description *Land*
 Extent *20 A. 21 3/4*
 Gross Value { Land, £
 Buildings, £10/5. Rateable Value { Land, £
 Buildings, £2/5/-
 Gross Annual Value, Schedule A, £
 Occupier *M. G. A. H. H. H. H.*
 Owner *M. G. A. H. H. H. H.*
 Interest of Owner *M. G. A. H. H. H. H.*
 Superior interests *M. G. A. H. H. H. H.*
 Subordinate interests
 Occupier's tenancy, Term *included in from (Dane Hill)*
 How determinable
 Actual (or Estimated) Rent, £
 Any other Consideration paid
 Outgoings—Land Tax, £ paid by
 Tithe, £ paid by
 Other Outgoings
 Who pays (a) Rates and Taxes (b) Insurance
 Who is liable for repairs
 Fixed Charges, Easements, Common Rights and Restrictions
 Former Sales. Dates
 Interest
 Consideration
 Subsequent Expenditure
 Owner's Estimate. Gross Value
 Full Site Value
 Total Value
 Assessable Site Value
 Site Value Deductions claimed
 Roads and Sewers. Dates of Expenditure
 Amounts

This farm consists of 59 A. 21 3/4 of arable & pasture land + 76 A. 0 26 3/4 of woodland - which is the pasture of Upper Broomfield & Broomfield - an old flour mill house, occupied by farm labour - 3 barns, 3 cellars, 3 1/2 rooms & cellar - outside wall - 1/2 of the mill - small enclosure Broomfield - well water. The mill is very old & dilapidated - there is a stone for stone, large flour mill & stone - the buildings are very poor. The house is on the side of the road which is in very poor state & practically impassable in the winter. The arable land about 42 A. - very poor land, chalk & stone - very shallow, mostly, remains heavy clay. Pasture about 17 Acres, practically valueless being very rough pasture land. Woodland - poor underwood land which has not been a shelter for years. Broomfield, one whole value at about £12 p.a. None is being dug & is not included in the valuation.

Area 136^a 0^a 10^a

(as before) £
 Add for Additional Value represented by any of the following for which any deduction may have been made when arriving at Market Value:—
 Charges (excluding Land Tax) *£249*
 Restrictions £
 GROSS VALUE £288

Illustration xlv

Field book entry (p.2 revealed)

Charges, Easements, etc.
£100 x 20 = £2000
£100 x 20 = £2000

Valuation.—Market Value of Fee Simple in possession of whole property in its present condition
£100 x 20 = £2000
£100 x 20 = £2000
 Difference Balance, being portion of market value attributable to structures, timber, &c. £111
 Divided as follows:—
 Buildings and Structures £91
 Machinery £
 Timber £20
 Fruit Trees £
 Other things growing on land £
 Market Value of Fee Simple of Whole in its present condition (as before) £660
 Add for Additional Value represented by any of the following for which any deduction may have been made when arriving at Market Value:—
 Charges (excluding Land Tax) *£249*
 Restrictions £
 GROSS VALUE £943

Illustration xlvii

Field book entry (pp.3-4)



M.3. **Description:** original scale: 1:2,500; orientation: unchanged.

M.4. The Finance (1909–10) Act 1910 caused every property in England and Wales to be valued. The primary purpose was to charge a tax (increment levy) on any increase in value when the property was later sold or inherited. The valuation involved complicated calculations which are not relevant for highway purposes. However, two features do affect highways. First, public vehicular roads were usually excluded from adjoining landholdings and shown as ‘white roads’. This is because s.35 of the 1910 Act provided,

No duty under this Part of this Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority.

A highway authority was a rating authority.

M.5. Secondly, discounts from the valuation could be requested for land crossed by foot-paths or bridleways.

M.6. All land had to be valued unless it was exempted by the Act. S.94 provided harsh penalties for making false declarations.

M.7. The way is recorded on two different valuation office maps. Both show the appeal way falling within Bekesbourne hereditament 594, Dane Farm, said (in the field book) to extend to around 20 acres.⁹¹ Unusually for this area, neither the appeal way, nor other

91 The extent of Dane Farm shown marked on the valuation office maps as hereditament 594 far exceeds 20 acres. It is not clear why there is a discrepancy. However, The entry for hereditament 594 is annotated in red as including hereditament 587 in Upper Hardres valuation district, and 322 in Acrise district. On page 2 of the field book, it is noted that, 'This farm consists of 59a, 3r, 24p of arable & pasture land & 76a, 0r, 26p of woodland...'.
 92

local roads known to be highways, are shown excluded from valuation, so that no conclusion can be drawn about the status of the appeal way.⁹²

M.8. The field book records, as part of an additional critical narrative pasted into the entry for Dane Farm, that:

The land lies on either side of fa⁹³ road which is in very bad order and practicably impassable in the winter.

M.9. No deduction is given for any public right of way on this hereditament.

M.10. **Conclusion:** The Finance Act valuation does not provide any assurance as to the status of the appeal way. It may be that the public roads across the property were excluded from the calculated area of the farm, but it is not possible to confirm because the area assigned to the hereditament in the field book does not obviously conform to the size of the hereditament shown on the valuation office map.

M.11. It is possible to conjecture that the 'practicably impassable' road referred to in the narrative is the appeal way: there are two candidates, Dane Hill Road and the appeal way. But the hereditament is described in the field book as accounting for around 20 acres, and Dane Hill Road bisects an area of farm land considerably in excess of this area; moreover, the land east of Dane Hill Road forms part of another hereditament in another valuation district, albeit one which is 'valued with' hereditament 594.

M.12. If the narrative refers to the appeal way (and the description of a road which is 'practicably impassable in the winter' is quite apposite to describe a way which was steeply inclined, remained untarred, and can be seen fitting this description in the photographs of the Wye Cup (classic car) trial at item III.N below), the way expressly was not described as a 'farm road' (the valuer apparently having set out to do so and having changed his mind), presumably because the valuer was aware that it was a public road.

M.13. **Points:** 0

N. Wye Cup (classic car) trial

N.1. **Date:** 1937

N.2. **Source:** Wheelspin⁹⁴; Motoring Picture Library⁹⁵

92 Some valuation offices adopted the practice, particularly in upland areas or areas of extensive common land, of not excluding roads from valuation hereditaments, but of excluding the area of such roads from the calculation of the area of the hereditament shown in the field book. That practice appears to have been adopted in respect of parts of the valuation office maps for sheet Kent LVI/12.

93 The crossed-out letters appear to be 'fa', i.e. the author intended to write 'farm road', but changed his mind.

94 'The Where and When of classic trials': wheelspin.info/research/classic-sections-dane/

95 motoringpicturelibrary.com/?s=danehill

Illustration xlviii

This photograph is not published online owing to copyright.

96 MG Musketeer team captain MacDermid climbs the appeal way, probably on the Wye Cup Trial, 21 February 1937. Published in *M.G. Trials Cars*, Roger Thomas, 1995, p.48, and incorrectly labelled as 'New Mill on the Lands End Trial'. Photograph by Bill Brunell. Source: Wheelspin.info

Illustration xlix

This photograph is not published online owing to copyright.

N.3. **Description:** Photographer Bill Brunell, noted for his records of pre-war classic car trials, took a number of photographs of motor cars climbing Dane Hill during what is believed to be the Wye Cup trial in 1937. The photographs⁹⁸ show vehicles on what appears to be an unsealed but presumably still partly metalled⁹⁹ track climbing steeply from Dane Farm.

N.4. **Conclusion:** The use of the appeal way for a motor car trial in 1937 is suggestive that the way was recognised as a vehicular highway at that time. While it is possible that the trial had recourse to sections on private land with the permission of the owner, it is unlikely that the appeal way — being a public highway — would have been used for the trial unless it were recognised as a public carriageway.

N.5. It further is suggested that the use of the way as part of the trial route would have been sufficiently high impact, in terms of noise and effect on the land immediately adjacent to Dane Farm and house (in late winter), an effect which is all too plain from the photographs, that it is highly unlikely that consent would have been obtained to its use for that purpose, if such consent were needed.

N.6. **Points:** 2

97 Ford V8 18 saloon climbs the appeal way, probably on the Wye Cup Trial, 21 February 1937. Photograph by Bill Brunell. Source: Motoring Picture Library.

98 No photographs are reproduced in the online version of this document owing to copyright, but they may be seen at the URLs given in footnotes 94 and 95.

99 The appeal way was recorded as metalled on the Ordnance Survey County Series first edition 1:2,500 map: see item III.J above.

O. Ordnance Survey one-inch map (New Popular edition/Seventh Series)

O.1. **Date:** 1945–1959

O.2. **Source:** VisionofBritain.co.uk¹⁰⁰, National Library of Scotland¹⁰¹

Ordnance Survey one-inch map, New Popular edition, first state: full revision 1936 with corrections

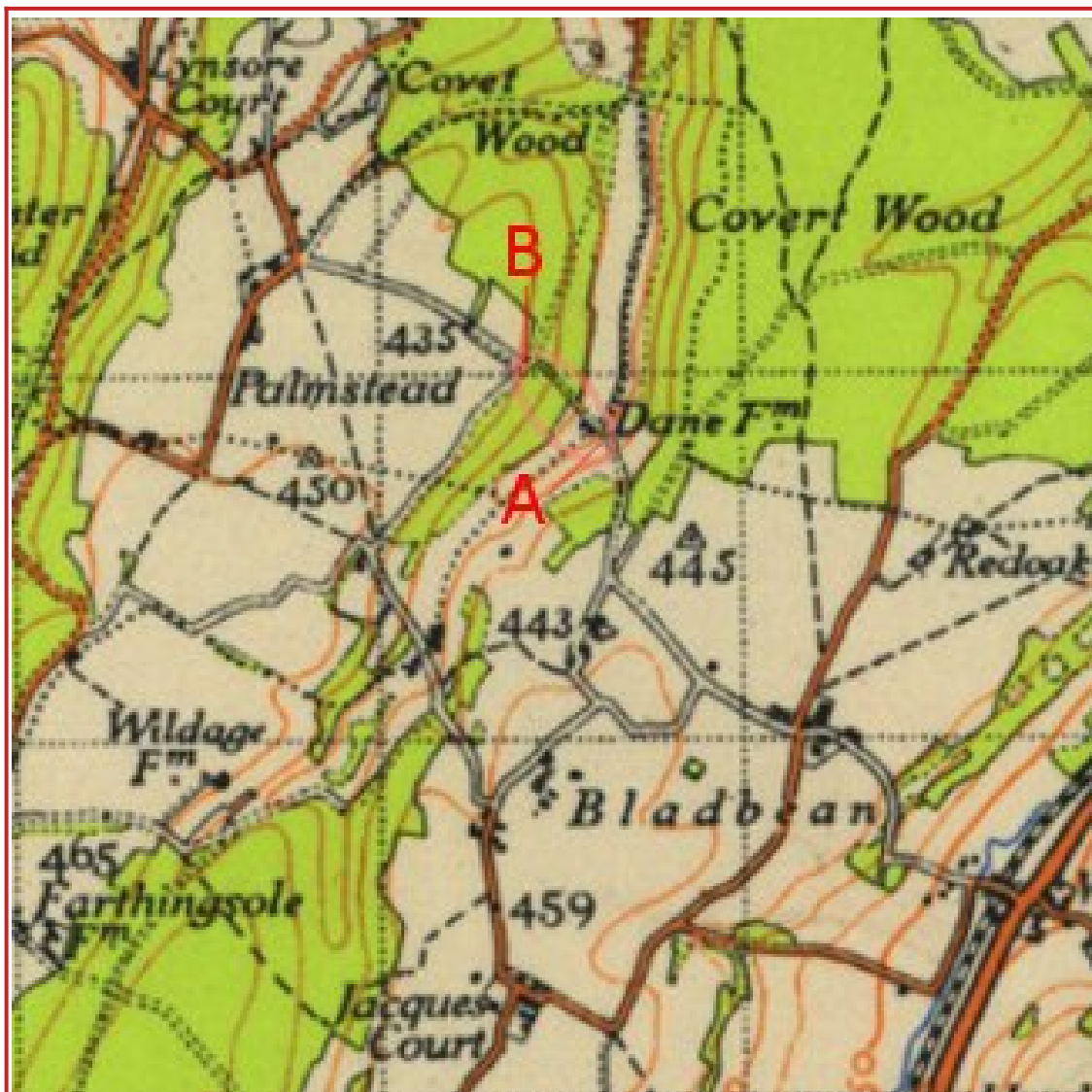
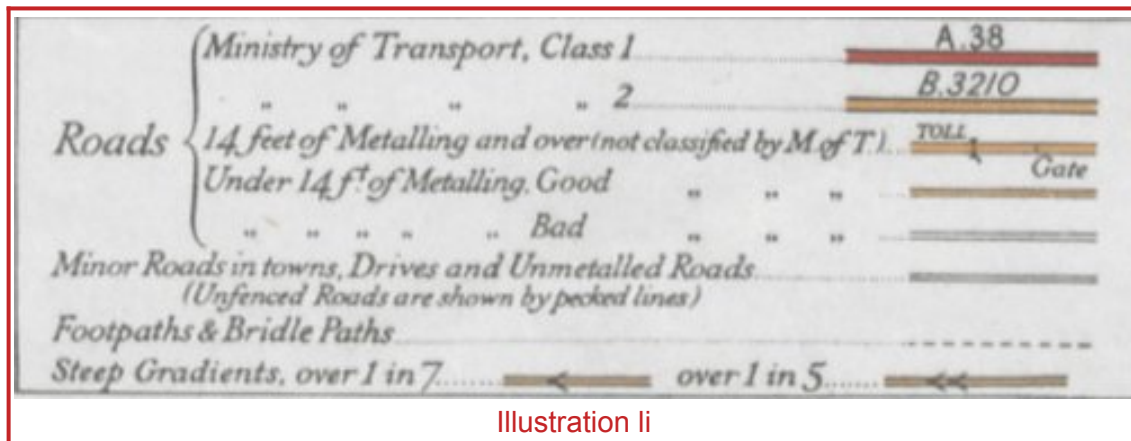


Illustration I

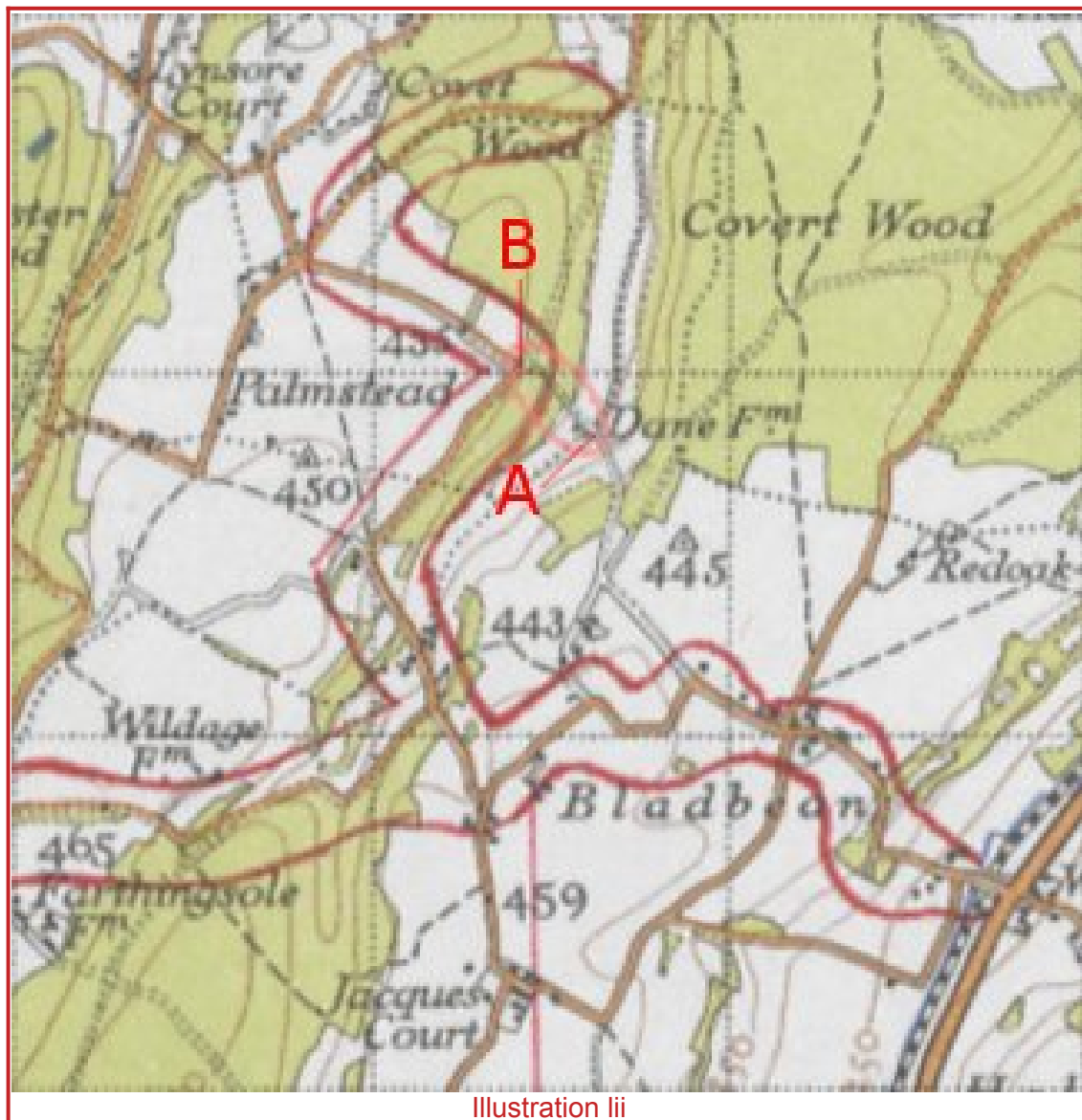
100 [www.visionofbritain.org.uk/maps/series?
xCenter=3399799.67719&yCenter=2750767.5958&scale=63360&viewScale=181417.4208&mapLayer=
europe&subLayer=new_pop&title=British%20War%20Office%20GSGS%204127%2C%20Ordnance
%20Survey%20Popular%20and%20New%20Popular%20Editions&download=true](http://www.visionofbritain.org.uk/maps/series?xCenter=3399799.67719&yCenter=2750767.5958&scale=63360&viewScale=181417.4208&mapLayer=europe&subLayer=new_pop&title=British%20War%20Office%20GSGS%204127%2C%20Ordnance%20Survey%20Popular%20and%20New%20Popular%20Editions&download=true)

101 [maps.nls.uk/geo/find/
#zoom=10.0&lat=51.26313&lon=1.17831&layers=103&b=10&z=1&point=51.19593,1.09831&i=1972371
17](http://maps.nls.uk/geo/find/#zoom=10.0&lat=51.26313&lon=1.17831&layers=103&b=10&z=1&point=51.19593,1.09831&i=197237117)

Key to Popular edition



Ordnance Survey one-inch map, New Popular edition, second state:
 published 1948, full revision 1936, roads 1947 with later corrections



Ordnance Survey one-inch map, Seventh Series, A edition, published 1959, fully revised 1957

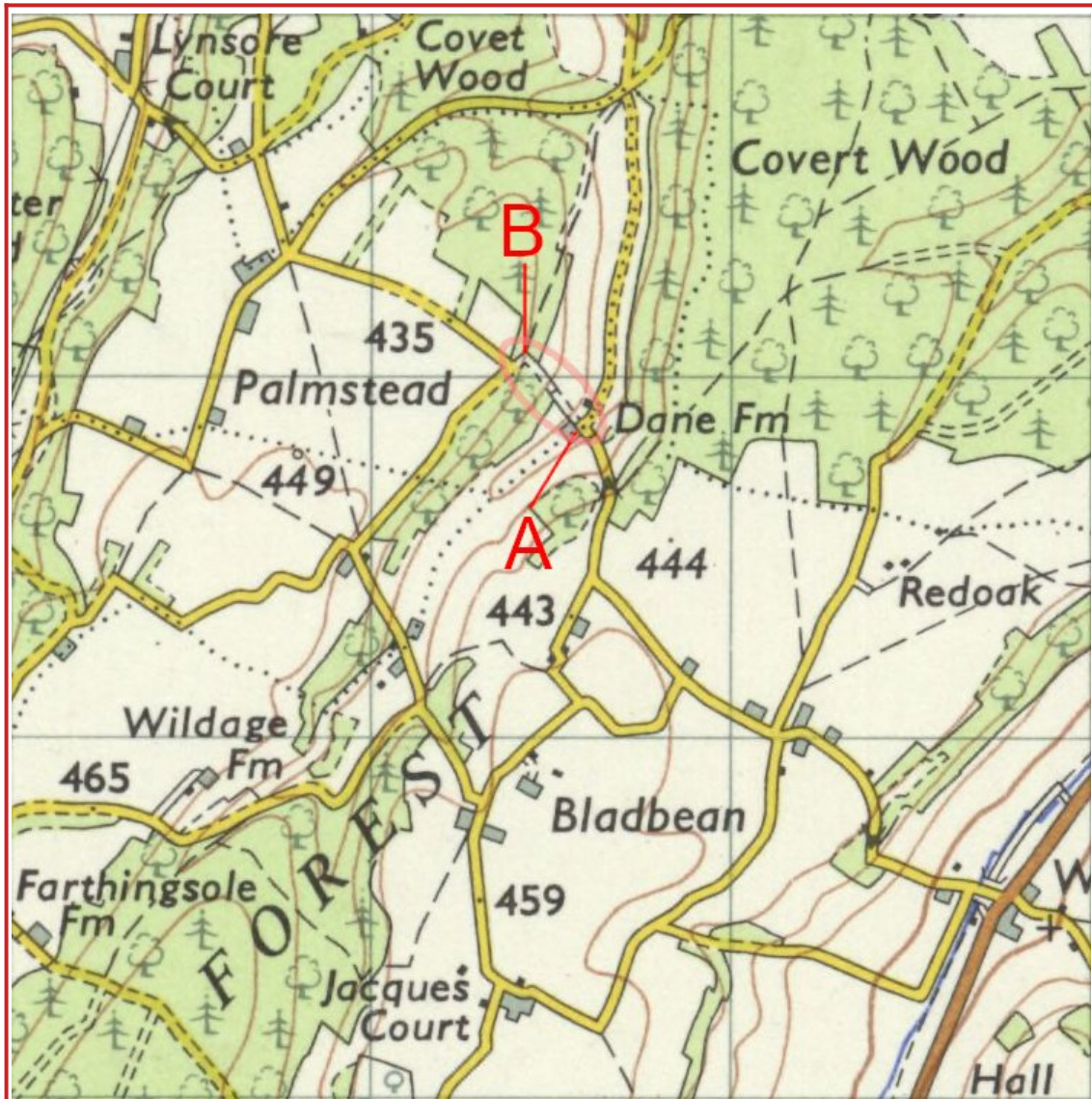


Illustration Iiii

Key to Seventh Series

Roads	Ministry of Transport, Trunk	A 2(T)
	" " " Class 1	A 28
	" " " " 2	B 2060
	14 ft of Metalling & over (not included above)	
	Under 14ft of Metalling. Tarred " "	TOLL
	" " " " Untarred " "	Gate
	Minor Roads in towns, Drives and Unmetalled Roads	
	(Unfenced Roads are shown by pecked lines)	
	Steep Gradients 1 in 5 or steeper <<< 1 in 7 to under 1 in 5 <<	
	Footpaths and Tracks	---

Illustration liv

O.3. **Description:** Original scale: one inch to one mile (1:63,360); orientation: unchanged (north).

O.4. The Ordnance Survey New Popular edition one-inch map shows the appeal way. The earlier state, published in 1945 based on pre-World War II surveys, shows neighbouring roads as 'Under 14ft of metalling, bad', while the appeal way appears to be classified as 'unmetalled'. In the later state, published in 1947 and based on post-war revision of roads, Peafield Wood Road is now shown as 'Under 14ft of metalling, good', but Dane Hill Road and the appeal way continue to be shown unchanged. The red line is identified on the margin of the map as 'Road grade rev' and identifies the copy as a 'superseded record copy' held by the Ordnance Survey.

O.5. The Seventh Series map shows the appeal way as an 'unmetalled road', with gates at A and half-way between A and B.

O.6. **Conclusion:** The New Popular edition map shows the appeal way as a connection between two local roads, and is classified as 'unmetalled'. The position is unchanged on the Seventh Series map, but gates are shown.

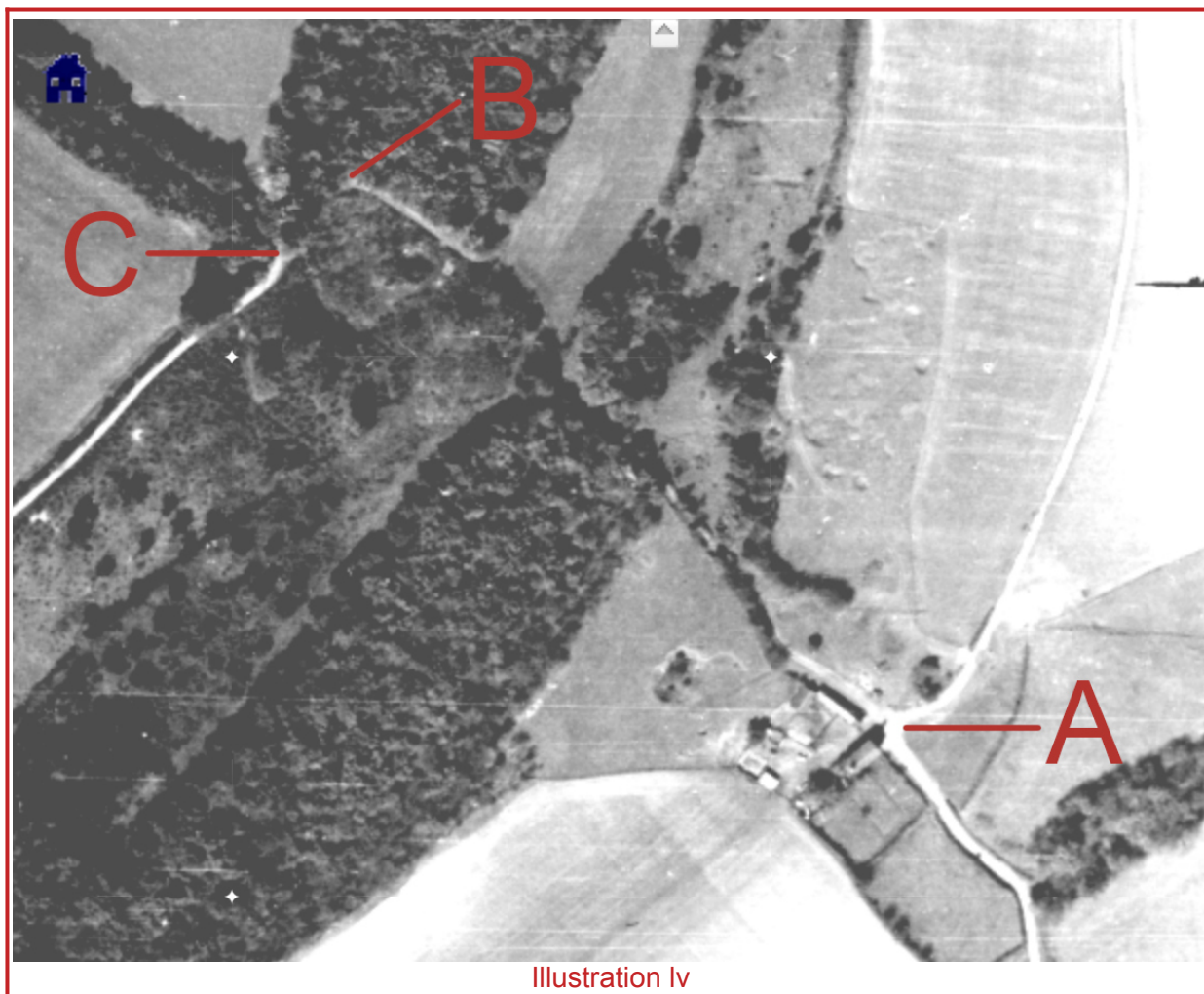
O.7. **Points:** 0

P. Aerial photograph

P.1. **Date:** 1946

P.2. **Source:** Kent County Council¹⁰²

■ 1946 aerial photograph



P.3. **Description:** Original scale: not specified; orientation: unchanged (north approximately at top).

P.4. The appeal way is visible in the photograph as a well defined way between A and C.

P.5. **Conclusion:** The photograph is not evidence of status, but demonstrates that the appeal way was in regular use during the immediate post-War period.

P.6. **Points:** 0

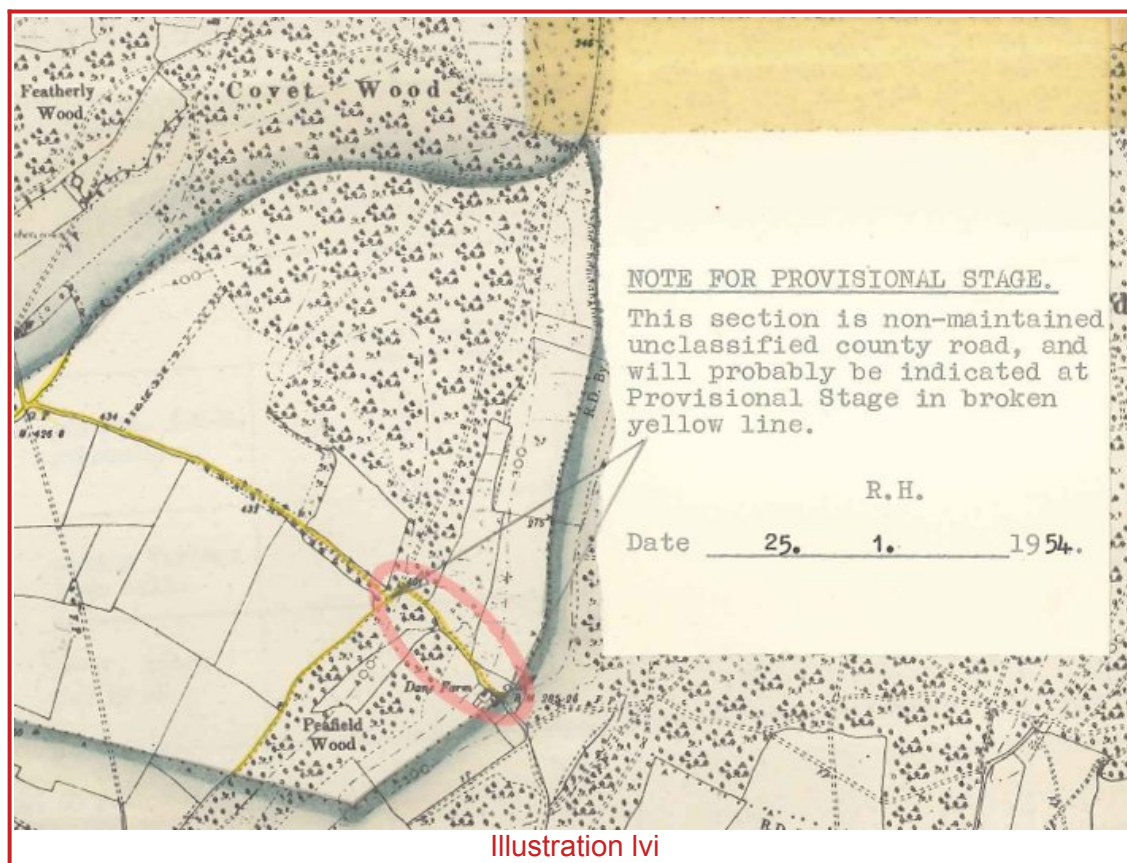
¹⁰² Kent Landscape Information System, via: www.kent.gov.uk/environment-waste-and-planning/planning-and-land/kent-landscape-information-system

Q. National Parks and Access to the Countryside Act 1949 draft map

Q.1. **Date:** 1950–54

Q.2. **Source:** Kent County Council (definitive map records)

Draft map



Q.3. **Description:** original scale: 1:10,560; orientation: unchanged.

Q.4. Part IV of the National Parks and Access to the Countryside Act 1949 required surveying authorities to prepare definitive maps and statements of public rights of way in their areas. The initial stage was to prepare a draft map, primarily based on information supplied by parish councils.

Q.5. The draft map for Upper Hardres shows county-maintained roads coloured yellow. The appeal way is coloured yellow, but marked and annotated:

NOTE FOR PROVISIONAL STAGE

This section is non-maintained unclassified county road, and will probably be indicated at Provisional Stage in broken yellow line.

R.H.

Date: 25.1.1954

Q.6. **Conclusion:** The draft map is a clear indication that the appeal way was, at the date of the draft map, considered to be a county road, but one which was 'non-maintained' — *i.e.* not maintained *de facto* by the highway authority.

Q.7. **Points:** 3

R. Highway inspector's map

R.1. **Date:** 1952

R.2. **Source:** Kent County Council¹⁰³

Highway Inspector's map

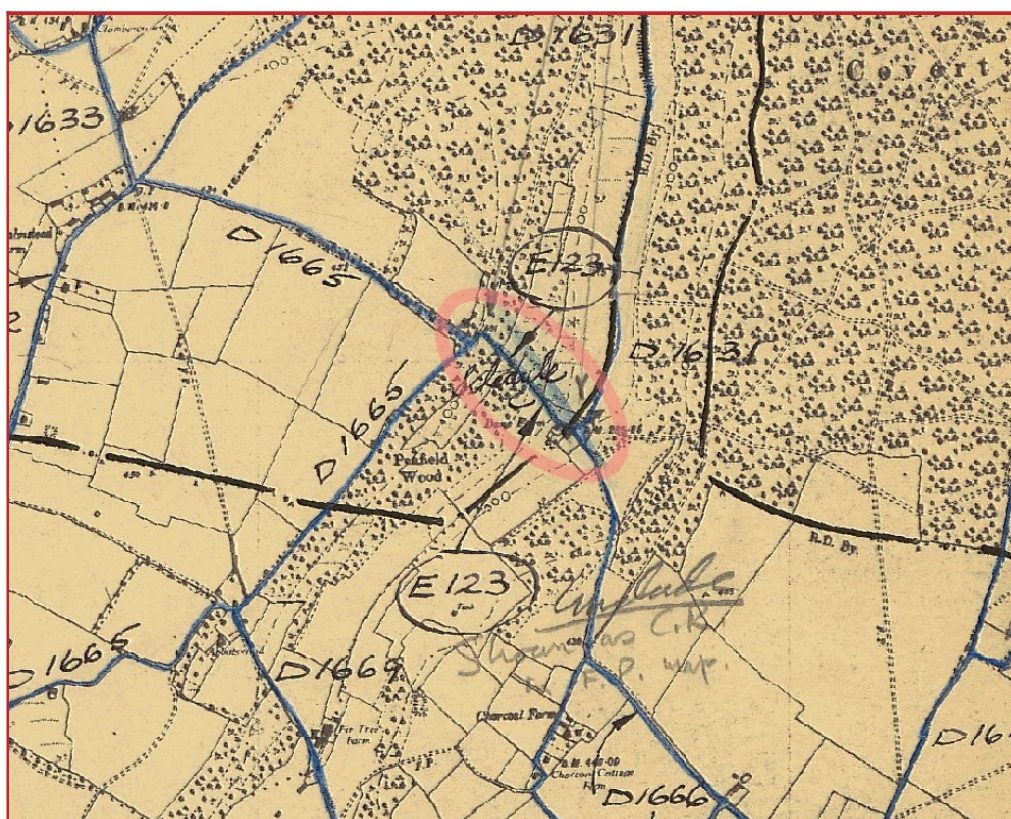


Illustration lvii

R.3. **Description:** original scale: 1:10,560; orientation: unchanged.

R.4. The county council, as highway authority, prepared a map of all roads in the county which were under the control of the council. It seems likely that these roads were publicly maintainable, but the council interprets those shown with a dashed blue line as non-maintained — *i.e.* not maintained *de facto* by the highway authority. However, given that many, if not most, of such ways appear to be pre-1835 in origin, it seems that the council distinguished those ways which were actively maintained, from those which were not (notwithstanding that the ways were publicly maintainable).

R.5. The highway inspector's map shows the appeal way as a public road, with the reference number E123. Unlike many other E-classified roads on the highway inspectors' map, this one is shown by a continuous blue line, *c.f.* a dashed blue line used elsewhere. The

¹⁰³ Highway inspector's map supplied by the council on request.

way is annotated 'Schedule C'. A pencilled annotation, which apparently refers to the E123, states:

Include

Shown as C.R. on F.P. map

R.6. **Conclusion:** The inspector's map shows that the appeal way was considered to be a public highway, and was allocated an unclassified road number consistent with its status. The use of a solid blue line suggests that the way was regarded as maintained.

R.7. **Points:** 3

S. Highway authority list of streets

S.1. **Date:** 2003–2014

S.2. **Source:** Kent County Council

Kent list of streets 2014

USRN	5602400	STREET NAME	DANE HILL PATH, OFF DANE HILL RD		
TOWN	BARHAM	DISTRICT	CANTERBURY	STATUS	PUBLIC HIGHWAY
USRN	34500323	STREET NAME	DANE HILL ROAD		
TOWN	ELHAM	DISTRICT	SHEPWAY	STATUS	PUBLIC HIGHWAY

Illustration Iviii

Gazetteer Detail							
FUEN	D1655	UN-NAMED		290 m			
		DANE FARM ROAD			NORTH EAST KENT		
	ADOPTED PATH			U	Created		
	FROM PARISH BDY TO J/W D1665			BARHAM			
				CANTERBURY HU			
	Proposed No			Unadopted No			
	NSG Ref 5602400			Map sheet TR14N			
				From OSGR	617600	147865	
				To OSGR	617415	148043	
Adoption detail							
	Date						
	Ref	HIC No					
Declaration detail							
	Date						
	Ref						
Handover detail							
	Date	01/03/00					
	Length	290 m					
Gazetteer							
Updated	08/06/1999 A						
from	UPPER HARDRES	NORTH EAST KENT	290	FROM PARISH BDY TO J/W D1665	TR14N	R	
to	UPPER HARDRES	CANTERBURY HU	290	FROM PARISH BDY TO J/W D1665	TR14N	R	
PROW Updates:							
Local Name Updates:							
Updated	19/02/1996 I						
from							
to	DANE FARM ROAD						

Illustration lix

S.3. **Description:** Every highway authority must keep up to date a list of streets in its area which are publicly maintainable.¹⁰⁴ ‘Street’ is defined to include a highway.¹⁰⁵

S.4. A street authority must keep a register of streets¹⁰⁶ to enable information to be recorded relating to street works. The register must include every street for which the street authority is the highway authority.¹⁰⁷ The highway authority is the street authority for

104 Highways Act 1980, s.36(6).

105 S.329(1) of the Highways Act 1980 provides that “street” has the same meaning as in Part III of the New Roads and Street Works Act 1991; s.48(1)(a) provides that “street” means...any highway...’.

106 New Roads and Street Works Act 1991, s.53, and the Street Works (Registers, Notices, Directions and Designations) (England) Regulations 2007 (SI 2007/1951), r.4.

107 Item 1 of the table in r.4(5) of the 2007 Regulations.

a 'maintainable highway', being a highway maintainable at public expense.¹⁰⁸ The data from the street works register are compiled into a local street gazetteer (which in turn are made available in the national street gazetteer).

S.5. The first, Illustration lviii, shows an extract from the 2014 list of streets, which includes an entry for 'Dane Hill Path, off Dane Hill Road'.

S.6. The second, Illustration lix, shows an extract from the local street gazetteer for Canterbury district, which includes an entry for the D1655 from an 'Un-named' road, also known as 'Dane Farm Road', which is described as an 'adopted path'.

S.7. Both entries bear the National Street Gazetteer reference 5602400, and so relate to the same highway maintainable at public expense, namely the appeal way.

S.8. **Conclusion:** The extracts demonstrate that the appeal way remains a highway maintainable at public expense.

S.9. The list for the county of Kent does not contain the majority of public rights of way, notwithstanding that most public rights of way are maintainable at public expense, and should be included in the list. While the list does contain some adopted paths in urban areas, there is no reason why a public right of way in a rural area would be entered in the list, but not included on the definitive map and statement. The history of the way demonstrates that it is a carriageway, and that it was included in the list of streets for that reason.

S.10. The reference in the current entry to the status of the way as an 'adopted path' appears to be the consequence of an inappropriate amendment to the entry in the list, presumably made in recent years in an attempt to reconcile the entry (which, as explained above, implies carriageway status) with the physical characteristics of the way following many years of neglect.

S.11. **Points:** 3

¹⁰⁸ S.49(1)(a) of the 1991 Act. 'Maintainable highway' is defined in s.86(1) of the 1991 Act.