

ROW/3321510: bridleway ER16 stub appeal (at Ringwould/Langdon, Kent)

Comments of the British Horse Society on the surveying authority's statement on the appeal

Introduction

1. The British Horse Society is grateful for the statement of Kent county council, as surveying authority, on its appeal. It responds as follows.
2. References to paragraphs in brackets are to paragraph numbers in the authority's statement, and references in the form 'III.H', 'III.H.1' or similar are references to items in the appeal, as the case may be, unless otherwise stated. References to the appeal way or route are to the line A–C.

A. Ground (a)

A.1. *The authority was mistaken to conclude (para.130¹) that evidence of the appeal route on older maps 'only indicate a physical route on the ground', and that 'these maps were unlikely to be concerned with differentiating between routes which were public or private'.*

A.2. The authority states [10] that:

...it is reasonable to consider that older maps created for military purposes would unlikely [*sic*] be concerned over private or public rights when preparing plans for the purpose of fighting an invasion, and that private estate maps should be given minimal weight when considering whether a route shown on these plans were considered public or private routes.

A.3. That might be a defensible position in relation to a way shown on certain older maps, without any further context (it is not necessarily one with which we would agree). We observe, however, that the older maps in evidence include privately-published maps such as the Greenwood map (appeal, item III.E), which was not created for military purposes, while private estate maps should be given such weight as they individually merit.²

A.4. The contextual point overlooked by the authority is that the way shown on those older maps, along the route X–A–C and including the appeal way, was recorded as a public bridleway on the definitive map and statement prepared under Part IV of the National Parks and Access to the Countryside Act 1949, save for the omission of the short section A–C, and plainly always has been a public bridleway (at least between X and A, leaving undecided how the bridleway connected to Ringwould Road at B, C or otherwise).

A.5. The only possible interpretation consistent with the authority's analysis is that, historically, the public used the way shown on older maps X–A, and then continued

- 1 Para.130 of Appendix B of the authority's report on the application for a definitive map modification order.
- 2 For example, a private estate map which marks a way as a 'public bridleway' ought to be given great weight, as showing that, *prima facie*, the estate recognised the way as such.

straight on in a direct line along A–B towards Martin — notwithstanding that this line was not shown on the older maps, and not part of the historic route continuing along Hangman's Lane³ — and never continued along the route which was shown on older maps as the continuation A–C.

A.6. One therefore must conclude (on this analysis) that, for those who used X–A with the intention of continuing along Hangman's Lane, they without exception, on arrival at A, nevertheless ignored or were deterred from the short 60 metre road or track (physically defined as such on the older maps) ineluctably onwards to C and the continuation along Hangman's Lane opposite, and instead opted to continue straight on for 140 metres to B, only to undertake an almost complete (340°) reversal of direction and return almost the same distance to C along Ringwould Road. And as the older maps account for a period from 1709 to 1820 (at the most conservative assessment), this astonishingly circuitous practice continued for at least a century, and more probably from much earlier times until very recent times. The authority does not suggest what invincible measures were used by landowners over hundreds of years to prevent access along the defined track or road over the 60 metres A–C, or why landowners might have considered it profitable to have undertaken these measures over hundreds of years to prevent the acquisition of a public right of way — but they must have been remarkably effective.

A.7. We submit that the more probable analysis is that the public did use the road or track X–A–C over a period of time spanning at least a century, and probably much longer, and it became a highway long ago, and remains one. There is no evidence or suggestion to the contrary.

B. Ground (b)

B.1. *The authority was mistaken to conclude that the omission of the appeal way in the Railway plans implied that, ‘the surveyor of these plans did not consider A–C a route of note (such as a public highway)’. In addition, new evidence shows that the appeal way was recognised in one such plan (the North Kent Railway 1846).*

B.2. The authority notes [14–17] that the appeal way appears on the plan for the North Kent Railway (1846: at III.H), which was not among the evidential items included with the application to the surveying authority for the order, but that it is excluded from the other, later plans — whereas the way A–B is visible on at least two of those plans. It concludes that the later omissions are significant.

B.3. In our appeal, we suggest (III.H.7) that the omission may be because the appeal way was well beyond the limits of deviation of the later proposed railways and of no concern to the surveyor.

B.4. We maintain that position. It is often the case with evidence in connection with rights of way claims that positive identification of a right of way can be of assistance in supporting the claim, whereas absence of identification may not be prejudicial. We submit this is one such case. The appeal way lies outside the limits of deviation of the planned railway, and the surveyor was selective in what was shown. Indeed, the surveyors of the London Chatham and Dover Railway (Extensions to Walmer and Deal) (1861), and the Deal and Dover Railway (1864), also did not identify any form of track along the line A–B — so that, on their plans, neither the way A–B nor A–C is recognised.

³ Hangman's Lane is an old bridleway from Ringwould Road opposite C to Winkland Oaks and Sutton, now recorded as bridleway EE451. See appeal, I.G.

B.5. We also suggest a further explanation. The older maps (III.A to III.E) indicate that the way X–A was unenclosed (being shown with a pecked or broken casing). The plan for the North Kent Railway (1846: III.H) suggests that the appeal way, and perhaps the immediately following part of the way from A towards X, was at that time enclosed. This interpretation is supported by the Ordnance Survey drawings (III.B) and the Ordnance Survey Old Series one-inch map (III.D), the tithe maps (III.F: dating from around 1840) and the Ringwold estate map (III.G: 1846). The North Kent Railway plan was coæval with those documents.

B.6. The next following plan, for the London Chatham and Dover Railway (Extensions to Walmer and Deal), was drawn in 1861 (III.H), and shows no enclosure. Nor do the Ordnance Survey boundary plans (III.I) dating to around 1870, nor the Ordnance Survey County Series first edition large-scale plan (III.J), surveyed in 1871. If, by the date of the 1861 railway plan, the way X–A–C had become a wholly unenclosed, possibly annually-cultivated, field path, it is unsurprising that it would have been omitted from the 1861 and later survey plans, because it was both outside the limits of deviation and no longer a significant physical feature — whereas it may be that the way A–B remained a well-defined track which (on the view of at least some of the later plans' surveyors) merited recording.

B.7. It also is possible that, by the middle of the nineteenth century, Hangman's Lane had become much less used, and the majority of user of the way X–A now continued along A–B. There is some support for this view from the present state of Hangman's Lane between C and the railway level crossing, which is choked with trees of considerable size and girth,⁴ which may well have grown undisturbed since the late nineteenth century.⁵ In the proceedings of the Wingham Highway Board for 1878–79, discussions are minuted about 'the Bridle Path at Little Sutton⁶ which is now entirely closed by the Embankment of the Dover & Deal Railway', and 'requesting the Board to use their influence that the same might be left open.' The Board stated (incorrectly) that the Dover & Deal Railway had power to close the bridle path, but undoubtedly, a crossing was provided (in time), and the Board was wound up in 1880.⁷ The closure of Hangman's Lane for a prolonged period at this time, without significant concern, is suggestive that it saw limited use, and that use of the way A–C also had declined accordingly.

C. Ground (c)

C.1. *That the authority was mistaken to conclude that the only value attributable to the Ordnance Survey boundary records is that these confer 'no positive indication of this route being of highway status'.*

C.2. We agree that the Ordnance Survey boundary records contained in the appeal do not confer positive indication of the appeal way being a highway.

4 See www.geograph.org.uk/photo/5109633.

5 On the Ordnance Survey County Series large-scale plans (III.J), the path is shown definitively as in the adjacent field to the south-west of the lane on the third edition, and arguably so on the first and second editions.

6 *i.e.*, the detached part of Sutton parish.

7 See the application document analysis for the application for a definitive map modification order for Hangman's Lane, at IV.L, available at: www.craddocks.co.uk/apps/hangmanslane/index.htm. This application was granted and Hangman's Lane north-west of C is now bridleway EE451.

C.3. The appeal way is marked on the Oxney boundary remark book in the form of a track or path. The authority states [20] that, 'there is no labelling of the appeal route itself and it is given no status.' This is correct. But other ways are given status only where they are integral to the boundary marked — notably, 'C.R.' (centre of road), 'C.Lane' (centre of lane) — and even then, the label is not necessarily an indication that the way is public. Exceptionally, the way A–B, although not part of any boundary, is annotated 'Footpath': essentially an optional, descriptive annotation.

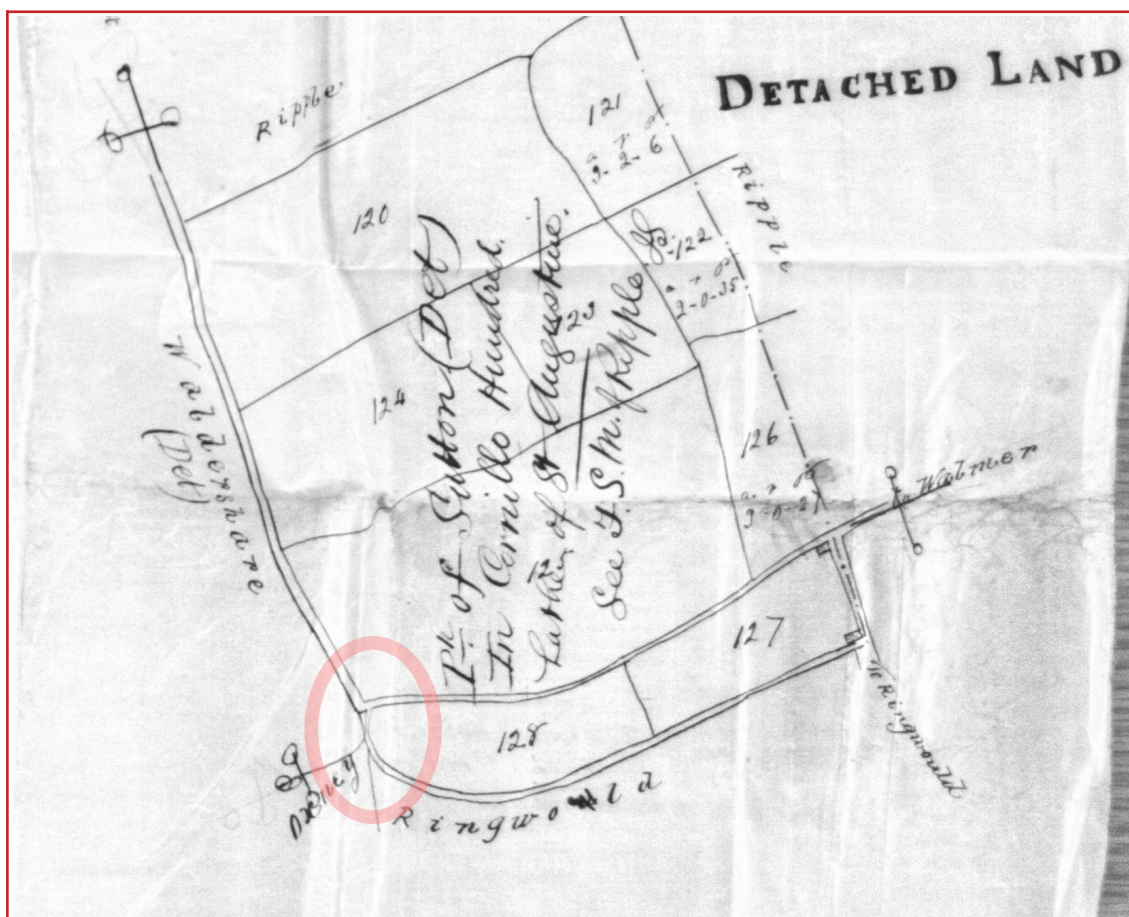
C.4. The appeal way is not annotated because, at the time of the Oxney perambulation, the meresman (the parish representative for the parish boundaries: in this case, the meresman for Waldershare) appeared to advise that the boundary was mered to (*i.e.* aligned to) the root of the hedge adjacent to the appeal way, at a distance of two feet outside the line of the root.

C.5. However, as we have noted in the appeal (III.I.7), the third edition Ordnance Survey County Series large-scale plan (III.J) records the parish boundary as 'C.F.P.' — *i.e.* along the 'centre of footpath', corresponding to the appeal way. This suggests a later revision of the information recorded in the Oxney boundary remark book, so as to mere the parish boundary to the appeal way itself.

C.6. We have also discovered a boundary field sketch map for the parish of Sutton, showing the detached part of Sutton.⁸ While this is based on a tracing of the tithe map for Sutton (III.F), the map is not altered in the vicinity of the appeal way, notwithstanding that the parish boundary between Sutton (detached) and Oxney follows the appeal way. The map shows the appeal way as an enclosed feature X–A–C (although we accept that, by the time of the survey, it may have ceased to be enclosed).

⁸ National Archives: OS 28/292.

Sutton boundary field sketch map



C.7. Taken as a whole, we submit that the boundary data are slightly supportive of the appeal. The appeal way is identified as a physical entity in the two records which are concerned with the boundary which lies adjacent to it (*i.e.* the boundary between the then parishes of Oxney and Sutton (detached), but none of the records informs the question of whether the appeal way is a public right of way.

D. Ground (d)

D.1. *That the authority gave insufficient weight to the representation of the appeal way on certain of the Ordnance Survey county series 1:2,500 maps.*

D.2. The authority states [22] that, 'the appeal route is not labelled in the majority of the Ordnance Survey County Series maps'.

D.3. This is unsurprising: the appeal way has a length of 60 metres, and is hardly likely to attract its own label as 'F.P.' or 'B.R.' — this would not fit within the space available.

D.4. The appeal way is however shown on each edition of the Ordnance Survey County Series large-scale plan up to and include the third edition — by which edition, as noted above, the way is marked 'C.F.P.', meaning that the parish boundary is said to be mered to the centre line of what is described as a footpath.

D.5. By the fourth edition, revised in 1938, the appeal way no longer is shown, and the parish boundary is annotated as mered to a 'defaced' feature. This is likely to mean that

neither the former hedge, nor the path, remained clearly defined on the ground, or there was a suspicion that what did remain was not on the historical alignment.

D.6. The absence of labelling on the first and second edition plans is of no significance, because footpaths and bridleways were not annotated as such on first edition plans, and the appeal way was too short to merit its own label on the second edition plan. At that time, the parish boundary was described as merged to the adjacent hedge, and therefore the appeal way is not identified in the mereing.

D.7. We do not doubt, as the authority implies [26, and appendices C and D], that some private footpaths were shown on Ordnance Survey 1:25,000 and other maps. However, for the reasons addressed at item A above (*i.e.* in relation to Ground (a)), we submit it is of no relevance here.

D.8. Accordingly, we submit that weight can be given to the physical representation of the appeal way on the first three editions of the Ordnance Survey County Series large-scale plan. In addition, the revised mereing of the parish boundary, on the third edition plan, to the 'footpath', is suggestive of a public right of way of considerable antiquity — but the reliance which can be placed on this aspect is limited by the earlier mereing to the hedge instead of the footpath.

E. Ground (e)

E.1. *That the authority, in determining the application in respect of the appeal way, was wrong to conclude that, 'it cannot confidently be said whether the way would be considered public or private.'*

E.2. The authority relies [28] on 'the considered documentary evidence itself [which] does not lead to it being reasonable to allege that the appeal route was considered a public highway.'

E.3. We submit that the authority must consider the documentary evidence in the particular context and history of the appeal way.

E.4. In a typical application for a definitive map modification order, the success of the application may well be predicated on whether there is sufficient documentary evidence of reputation as a highway, and if so, of what class of highway.

E.5. However, it is suggested that, in the present case, the decision-maker must have regard to the particular circumstances. These are that:

- the way X–A already is recorded as a public bridleway, and is likely historically to have been one since time immemorial;
- the way X–A plainly connects with Hangman's Lane, and some users (since time immemorial) are likely to have continued from X–A to C (by whatever route);
- the appeal way A–C is a short distance of around 60 metres;
- until about the middle of the nineteenth century, the appeal way A–C appears to have been enclosed, but from that time onwards, A–C was unenclosed save for a hedge or woodland on the south side;
- there is no evidence of any physical feature which would interfere with the use of the appeal way A–C save for any bounding hedge along the south-east side of Ringwould Road — but there is evidence that any such hedge, if it did exist, was

breached by a track or path along the line of A–C at least between 1709 and 1820 (see para.A.6 above);

- even into modern times, and up to the present day, a line is taken by the public between X–C (*i.e.* direct, avoiding A) in order to connect with Ringwold Road and Hangman’s Lane;
- ‘Neither the landowner of claimed route A–C nor their agent, responded’ to the authority’s invitation to respond to its investigation of the appellant’s application for a definitive map modification order,⁹ and therefore the appeal appears to be unopposed by the landowner.

E.6. In these circumstances, it is suggested that, taking the evidence into account, the only reasonable inference is that bridleway ER16 and Hangman’s Lane have been connected physically by a short path or track since time immemorial, save during the second half of the twentieth century onwards, and that the only plausible status of the connection is a public right of way.

E.7. As both ER16 and Hangman’s Lane are recorded as public bridleways, it further is suggested that the appeal way must be of the same status, notwithstanding that some evidential sources suggest it was regarded as only a footpath.

F. Ground (f)

F.1. *That the authority applied the wrong test in deciding whether to grant the application in respect of the appeal way.*

F.2. For the reasons addressed at item E above (*i.e.* in relation to Ground (e)), it is suggested that a reasonable allegation has been made of the existence of a public right of way between A–C. Relying on the judgment of Collins J in *R v Secretary of State for the Environment ex parte Norton and Bagshaw*¹⁰:

...it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist.

F.3. In our submission, the appeal satisfies that test.

F.4. Moreover, we point out that the surveying authority has resolved to make a definitive map modification order for the line A–B. There is no assurance that such order will be confirmed, and it may be referred to the Secretary of State for confirmation. In our submission, it is desirable that the authority is directed also to make an order for the appeal way, and in the event of any objection, both orders are referred to the Secretary of State for confirmation and considered together. This would avoid an outcome in which neither order is confirmed, notwithstanding that, plainly, bridleway ER16 must have a lawful outlet onto Ringwold Road along either A–B or A–C, or both.

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⁹ Appendix B of authority’s report on the application for a definitive map modification order, at [111].

¹⁰ See appeal, I.E.6.