I. High Minnis bridleway

A. Effect of award

A.1. In the present application, the award of a public bridleway in an inclosure award made under the authority of the Inclosure Act 1845 is conclusive evidence of the creation of the right of way. Under s.105 of the 1845 Act, every:

> …Direction…specified and set forth in such Award as aforesaid shall be binding and conclusive on all Persons whomsoever.

A.2. S.65 of the 1845 Act provides that:

> …the Valuer shall form and complete such Parts of the said public Roads and Ways as shall be newly made; … .

A.3. S.67 of the Inclosure Act 1845 provides that:

> When and so soon as two or more of her Majesty's justices of the peace for the county, riding, division, or jurisdiction in which the lands to be inclosed shall be situate shall certify any of the public roads and ways to be set out in pursuance of this Act on any inclosure to be sufficiently formed and completed such roads shall thenceforth be kept in repair by such persons and in such manner as the public roads within the said parish are or ought by law to be kept in repair; and every such certificate shall, at the quarter sessions of the peace to be holden for the said county, riding, division, or jurisdiction next after the date thereof, be filed of record by the clerk of the peace.

A.4. No certificate is known of the way having been 'sufficiently formed and completed' under s.67 of the Inclosure Act 1845, but it seems reasonable to assume that such certificate was granted, and the way is publicly maintainable.

Cubitt v Maxse

A.5. In *Cubitt v Maxse*,[1] the Court of Common Pleas considered a claim of public right of way over a road awarded across Effingham Common under a local Act of 1802 incorporating the Inclosure (Consolidation) Act 1801.[2] There was evidence that the road, while fenced off, had never been formed, nor declared by the justices to be formed,[3] in accordance with s.9 of the 1801 Act. Nor had the public taken to the road except in a handful of isolated cases. The court found that the road had not become a highway, Keating J (Brett J and Grove J in agreement) observing that:

> The object of the general Act was that the roads set out should not be highways repairable by the parish until they had been formed and completed under the direction of the surveyor.[4]

1 (1873) LR 8 CP 704

2 41 Geo. 3, c.109

3 'Formed' is understood to mean laying out the road on an even surface, and provided with a foundation which usually would require metalling.

4 at p.713

A.6. What is striking about this and contemporary cases is that they approach the question on the basis, not of whether the public should have a right of way, but whether the burden of maintenance should be thrown upon the parish. Brett J said:

> The persons here interested are the local public, whose interest it is that the road should be completed strictly in accordance with the Act of Parliament before it is put upon them as a highway.[5]

The contemporary perspective was that it were better that there should be no public way at all, than that there should be a way which must be maintained by the parish notwithstanding that it had not been properly made up. One might postulate an alternative consideration — which is that the public should get the right of way agreed under the award, just as the former commoners got their allotments of land.

A.7. Brett J rejected a submission that the way could become a highway without liability to repair on the part of the parish. However, he added that:

> It may be that, if the public take to a road before it is completed, they cannot afterwards on account of its incompleteness say it is not a highway. That might give rise to a very different question, but one which does not arise here.[6]

R v Inhabitants of Enford

A.8. In *R v Inhabitants of Enford*, a decision of the Quarter Sessions, the Hon. Sir Patrick Devlin sitting as chairman,[7] the court was required to decide whether the upper part of Water Lane, Enford, was publicly maintainable.[8] It was not contested that Water Lane was a public carriageway. This road too had been set out in an inclosure award incorporating the 1801 Act, but there was no evidence of any declaration by the justices under s.9.

A.9. Sir Patrick said[9]:

> The principle embodied in this maxim certainly carries the prosecution some distance towards its goal. In Rex v. Inhabitants of Haslingfield (1814) 2 M & S. 557; 105 English Reports 489,[10] which was also a case arising under the Inolosure Act, Ellenborough C.J. at 561 stated the rule thus :— "The general rule certainly is that where a person is required to do an act, the not doing of which would make him guilty of criminal neglect of duty, it shall be intended that he has duly performed it unless the contrary be shown."[11] Here by the

5 at p.715

6 at p.716

7 Sir Patrick subsequently was appointed as a law lord, sitting as Baron Devlin. At the time of the judgment, he was a High Court judge and therefore heard the case on circuit sitting with justices of the peace. Although, as a Quarter Sessions judgment, it is not binding on any court, yet as a considered, written decision of an eminent High Court judge, it attracts considerable persuasive authority.

8 The inhabitants of the parish had been indicted for non-repair: the highway authority (Wiltshire County Council) answering the charge.

9 p.4

10 www.commonlii.org/uk/cases/EngR/1814/403.pdf

11 In *Haslingfield*, it was claimed that an inclosure award had allowed, under notice, for a road to be transferred to the jurisdiction of the parish of Haslingfield, yet the parish of Harston had continued to maintain it. Ellenborough CJ continued: 'But in this case there is negative evidence, viz. that the parish of Haslingfield have continued to repair, which does away the presumption that all has been duly performed, because if that were so they ought not to have continued to repair.'

> terms of section 9 if the surveyor neglects to complete and repair the roads within the time specified he is to forfeit the sun of £20. We think therefore that the presumption, in the absence of evidence to the contrary, is that the surveyor did complete and repair any road which needed repair.

A.10. Sir Patrick continued by examining whether it could be presumed that the surveyor applied to the court for a declaration. He said:

> But it appears to us upon a closer examination of the section that the duty imposed on the justices under it was not merely judicial but that they were given a quasi-administrative task of the sort that was more commonly imposed upon them in past centuries than it is today. …
>
> We think that the effect of [the s.9 duty] is to put upon the justices the duty of seeing that the surveyor did what the section required him to do. …the justices were themselves expected to take the initiative in the matter. The surveyor being under their control and supervision and accountable to them, it was for them to enquire whether there was any surplus or not to be dealt with in accordance with the section and to satisfy themselves that he had performed his duty. The way in which they were to express their satisfaction was by the making of a declaration in their special sessions. … Since we are entitled to presume that the surveyor did not conduct himself in such a manner as to forfeit £20 we must also be entitled to presume that he conducted himself in such a manner as to satisfy the justices of what he had done; it would follow then that as a matter of duty they would make the appropriate declaration under the section.

A.11. Sir Patrick concluded:

> We are satisfied that…the procedure laid down by the Act is such as to raise a probability that if there was no forfeiture, — and this the principle certainly requires us to presume, — then there was a declaration; — and that that probability is sufficiently high to require very little further evidence to satisfy us that it amounts to proof.

A.12. In the case, the ‘sufficient further evidence’ was evidence of repairs carried out by the predecessor rural district council.

A.13. It is suggested that ‘sufficient further evidence’ was only considered by the court because the defendant highway authority was indicted on a nominally-criminal charge of failure to repair the highway.

Conclusion

A.14. It cannot now be said whether the application way was set out in the 1854 award as a new bridleway, or whether it followed the line, or approximate line, of an existing bridleway across the common.

A.15. It is suggested that, so far as the valuer was under a duty under s.65 of the 1845 Act to ‘form and complete’ a new bridleway, he did so — but that the duty was hardly onerous, because the only requirement was to ensure that, so far as the allottees of the lands crossed by the bridleway were under a duty to fence them, the valuer had to ensure that gates were left for the use of the public. Indeed, it may be that even this trivial burden was

not addressed by the valuer, because the allottees necessarily were allowed time to fence their allotments. In other words, it may be that there was nothing for the justices to certify.

A.16. In *Cubitt v Maxse*, the court found that a road set out in an inclosure award under an Act incorporating the 1801 Act had not come into existence, but in that case there was evidence that the road had not been formed, nor come into regular use by the public.

A.17. In *R v Inhabitants of Enford*, the court was prepared to assume that, where the surveyor appointed under the 1801 Act was under a duty to form the road and to seek a declaration of the justices to that effect, it had been properly done (in the absence of evidence to the contrary).

A.18. Under s.9 of the 1801 Act, the inclosure commissioners are:

> *…to nominate and appoint one or more Surveyor or Surveyors, with or without a Salary, for the First forming and completing such Parts of the said Carriage Reads as shall be newly made, and for putting into complete Repair such Part of the same as shall have been previously made… .*

In that event, the surveyor is under a duty to make and put into repair the new public roads, and to seek a declaration of the justices that this has been done. Whereas, under the 1845 Act, the valuer is under separately-stated duties under s.65 to 'form and complete' any new stretch of road or way, and under s.67 to seek a certificate of the justices that the road or way is in good repair. It is suggested that, under the 1845 Act, a new road or way was capable of coming into existence regardless of whether a certificate had been given in order that the parish would assume liability to repair.

A.19. It is noted that the application way has been shown on four successive editions of the Ordnance Survey County Series twenty-five inch plans (see application historical document summary), marked as a footpath, with dates of survey and revision spanning the period 1871 to 1939. This strongly suggests that the application way was used by the public as soon as the land was inclosed, and continued to be used by the public until the way failed to appear on the definitive map and statement, and ceased to appear on large-scale maps.[12] In that respect, the application way is little different to the public roads set out in the award: they were brought into use and have continued in use since the award (the application way exceptionally having fallen out of use within the post-war period).

A.20. It is suggested by the surveying authority that some of the public footpaths set out in the award were not brought into use.

Awarded no.	**Location**	**Public right of way no.**	**Comments**
12	Sandgate Rd to Wheelbarrow Town	none	not shown on Ordnance Survey County Series plans
13	From Sandgate Rd to Canterbury Gate	none	not shown on Ordnance Survey County Series plans

12 The application way is shown on the 1:25,000 map sheet 61/14–A published in 1948, sheet TR14–B published in 1949, sheet TR14–C published in 1961 (all of these sheets depended partially on pre-War revision). It does not appear on the current Ordnance Survey *Explorer* map.

14	Sandgate Wood	none	shown on Ordnance Survey County Series first and second edition plans
15	Rhodes Minnis across Gate Ln	HE45	in use
16	Rhodes Minnis	none	not shown on Ordnance Survey County Series plans
17	Rhodes Minnis	HE46	in use

A.21. Three of the appointed footpaths do not appear on any Ordnance Survey County Series plan, one appears on the first two editions of the plan, and two remain recorded public rights of way today.

A.22. What distinguishes the application way is that, in common with footpaths 14, 15 and 17, the way can be shown to have been brought into use following the award.

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