
Order Decision

Site visit made on 19 July 2016

by Susan Doran BA Hons MIPROW

an Inspector appointed by the Secretary of State for Environment, Food and Rural Affairs

Decision date: 29 September 2016

Order Ref: FPS/J1155/7/106

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981 and is known as the Devon County Council (Footpaths No. 8, Northleigh, No. 3 Farway, No. 6 Colyton and No. 10 Southleigh) Definitive Map Modification Order 2013.
- The Order is dated 2 December 2013 and proposes to modify the Definitive Map and Statement for the area by deleting the paths as shown in the Order plan and described in the Order Schedule.
- There were 3 objections outstanding when Devon County Council submitted the Order to the Secretary of State for Environment, Food and Rural Affairs for confirmation.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. I made a site inspection accompanied by Messrs A and J Hurford, and Mr G Skinner representing the Stubbing Community Group (SCG), supporting the Order; Mr and Mrs Kimbell, opposing the Order (Mrs Kimbell representing the Ramblers'); and Mr Steenman-Clark representing Devon County Council (the Council), which adopted a neutral stance in respect of the Order.
2. The matter is being dealt with by way of written representations, and I have taken into account all relevant submissions received.
3. In this decision I shall refer to the footpaths as 'the Order route'.

Background

4. The Order route commences at Woodbridge Lane, point A on the plan attached to the Order, and runs in a generally easterly direction following the River Coly through points B-C-D where it meets Stubbing Bridge, then continues from point E through points F and G to H, Brinkley Bridge at Bonehayne and Purlbridge Road. It passes through the parishes of Northleigh (A-B), Farway (B-C), Colyton (C-D, E-F and G-H) and Southleigh (F-G), and effectively forms a continuous route.
5. It was added to the Definitive Map and Statement (DMS) on the basis of historic documentary evidence following a Public Inquiry held in 2008. Subsequently an application was made by SCG for its deletion from the legal record of public rights of way. That application was refused by the Council. However, following a successful Schedule 14 Appeal (further to two previous appeals that were quashed by consent order), the present Order which is before me for determination, was made.

The Main Issues

6. The Order has been made in consequence of the occurrence of an event specified in Section 53(3)(c)(iii) of the Wildlife and Countryside Act 1981 (the 1981 Act). This requires me to consider whether the evidence discovered, when considered with all other relevant evidence available, shows that there are no footpaths over land shown in the DMS as highways of any description, and that the map and statement require modification.
7. The DMS is conclusive evidence as to the existence of a public right of way, unless and until it is modified by an order under the provisions of Section 53 of the 1981 Act, in this case to show that the paths were included in error, there having been no public right of way over them when they were added to it.
8. Guidance¹ provides that *"The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement ... will need to fulfil certain stringent requirements. These are that:*
 - *the evidence must be new – an order to remove a right of way cannot be founded simply on the re-examination of evidence known at the time the definitive map was surveyed and made*
 - *the evidence must be of sufficient substance to displace the presumption that the definitive map is correct*
 - *the evidence must be cogent"*.
9. In considering the evidence, I also have regard to other relevant court judgements, in particular *Trevelyan*² and the following statement by Lord Phillips M.R., *"Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put into the balance, if it is to outweigh the initial presumption that the right of way exists"*.
10. The evidence in this case is documentary. Section 32 of the Highways Act 1980 requires that I take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and give such weight to as it as is considered justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

Approach

11. SCG argues that the *Trevelyan* case and Guidance (referred to above) are applicable where the evidential basis for adding a route to the DMS is unknown,

¹ Department for Environment, Food and Rural Affairs, Rights of Way Circular 1/09, Version 2 October 2009, paragraph 4.33

² *Trevelyan v Secretary of State for the Environment, Transport and the Regions* [2001]

unclear or has been forgotten. Accordingly, the evidence required to discharge the burden of proof relates to the length of time that has elapsed since the route in question was first added to the DMS, and the uncertainty of the evidential basis on which it was first recorded. Any new evidence adduced does not of itself have to be sufficient to alter the designation of the DMS, since the test (paragraph 6) requires consideration not only of the discovered evidence but of all other relevant evidence, as does *Trevelyan*. Further, where evidence on which a route was added to the DMS is known, the map itself provides no independent evidence and cannot provide the basis to presume the existence of other evidence to support the route as a public right of way.

12. As stated above, the Order route has only recently been added to the DMS. Accordingly, the evidence that led to its inclusion has not been lost in the mists of time, and it is not suggested that the proper procedures were not followed. Therefore, this situation differs to the *Trevelyan* case in that it considered a route added to the DMS several decades ago, and the reasons that led to its inclusion had since become unclear. Nevertheless, *Trevelyan* is consistent with the test in Section 53(3)(c)(iii) of the 1981 Act as regards the need to consider all of the evidence. Furthermore, I see no reason why appropriate weight should not be attached to the appearance of the Order route on the DMS itself since Section 56 of the 1981 Act provides that a DMS shall be conclusive evidence as to the particulars contained therein (paragraph 7).
13. In considering the evidence, and in view of the above, my starting point is that the Order route is presumed to exist. It is for those contending a mistake has been made to provide evidence which demonstrates that, on a balance of probability, no way existed over the Order route when added to the DMS.

Reasons

14. In summary, SCG's case is that in light of all the evidence now available, the inclusion of the Order route in the DMS was in error as too much reliance was placed on the Finance Act 1910 evidence; the absence in these records of any direct evidence from the landowners severely limits the weight that can be attached to them; and the Valuation Records demonstrate that the Field Book entries (in this case) cannot be relied on as evidence of public status. In addition, through ownership and occupancy data (that the land was held in strict settlement, tenanted, and/or mortgaged), SCG seeks to demonstrate there could have been no effective dedication of a public way prior to (or since) the compilation of the Finance Act records.
15. The Objectors maintain that the evidence adduced when considered with all of the evidence is not sufficient to meet the test for confirmation of the Order, nor is the new evidence cogent. In addition, Mr Kimbell argues that the Order route forms part of a longer way running through the Coly Valley, which he refers to as the "Coly Path". This links an existing public footpath from Colyton as far as Purlbridge with the Order route from Purlbridge to Woodbridge and on to Farway. He relies on Ordnance Survey (OS) map evidence, to which he maintains greater weight should be accorded as evidence of the public status of the routes portrayed.

Whether there is new evidence

16. The Order route's inclusion in the DMS was based primarily on the Finance Act evidence, supported by evidence of its maintenance at public expense as

recorded in various Council Minutes. In addition, OS maps and claims relating to the preparation of the DMS were considered.

17. Further 'new' evidence, in the sense that it has not been previously considered, has been adduced by SCG. This includes the 1845 Exeter, Dorchester, Weymouth Junction Coast Railway Plans and Book of Reference; extracts from the Finance Act 1910 Valuation Books, and further analysis of the Field Book evidence; the background to the Rights of Way Act 1932; and extensive documentation on the ownership and occupation of four properties.
18. Additional evidence adduced by the parties includes further research of the ownership and occupation data, OS mapping, Boundary Remark Books and Sketch Maps, and argument in support of their respective positions.
19. I address the new evidence below and shall consider whether it, together with all other relevant evidence available, shows that no public footpaths exist over the Order route.

Assessment of the evidence:

The Railway evidence

20. Although never constructed, a railway passing through the Coly Valley was proposed. Documents were drawn up and deposited in 1845 showing its intended alignment, the Plans showing the course of the railway with, either side of it, the 'limits of deviation'. The accompanying Book of Reference records the land ownership or occupation within those limits. These documents were in the public domain, and although their primary purpose was not to record public rights of way, they can provide good evidence particularly where a way crossed the proposed railway line itself.
21. In this case the Order route runs essentially parallel with the proposed railway and much of it lies outside the limit of deviation. Some parts, however, do fall within this area, on the north side of the proposed railway line, and the land here is recorded by reference to plot numbers in the accompanying Book of Reference.
22. SCG argues that no part of the Order route is shown on the Railway Plan. Nevertheless, footpaths which are not shown on a plan are sometimes recorded in the Book of Reference. It appears to be agreed between the parties that Colyton Plot 6 is one over which the Order route passes, and one in which a footpath is listed in the Book of Reference (as "Arable and Footpath"). They disagree, though, as to whether or not this is part of the Order route, SCG pointing out there is no map to identify where this footpath ran. However, it seems that other sections corresponding with the Order route are recorded – Southleigh Plot 3 in the Book of Reference ("Pasture Field and Footpath"), and a double pecked line on the Plan above Southleigh Plots 11 and 15 and thus outside the limit of deviation. This equates to F-G on the Order plan and is consistent with a double pecked line shown on the Southleigh Tithe Map of 1840 at the same location. I note the Order route and limit of deviation appear to be coincident through Southleigh Plot 3. In addition, the Railway Plan shows a gap in the river corresponding to point B, the location of a footbridge.
23. SCG places significant weight on the Order route's absence from the Railway documents as evidence consistent with there being no public footpath rights

along it in 1845. I am not aware of any requirement in the relevant Acts that public rights of way be indicated in the documents prepared, although the Ramblers' say the 1845 Railway Clauses Consolidation Act did not require private footpaths to be recorded. However, much of the Order route fell outside the area surveyed so would not need to have been recorded in any event, and only one or two features that correspond with parts of the Order route are shown. On balance, I consider this evidence attracts little weight in demonstrating there were no public footpath rights in existence along the Order route in 1845, or that there were.

Ownership and occupation evidence

24. The Order route crosses land held in different ownerships and this has been the case historically. Ownership and occupation evidence has been adduced for Hornshayne (lying to the south of C-D), Pookhayne (to the south of F-G), Blackacre/Purlbridge (G-H) and Perry Hill (south of A-B).

Hornshayne

25. Various wills and deeds, it is submitted, show Hornshayne was in settlement from at least 1728 to 1913. This included periods when it was partitioned, resettled, disentailed and resettled; periods when it was administered by trustees, in shared ownership; and a period of mental incapacity. From 1745-1946³, Hornshayne was tenanted. Therefore, for dedication to have taken place, SCG say it would have to have occurred prior to 1728.
26. However, the Ramblers' submit there are periods when a landowner and/or others held the property in fee simple, or in combinations as tenant in possession, under shared ownership, or together with trustees, and therefore had the capacity to dedicate⁴, or may have had the capacity to dedicate as permitted by the retrospective amendment to the Settled Land Act 1882⁵ (paragraph 36 below). In other words, there were many periods, of varying length, when dedication was possible.

Pookhayne

27. This property formed part of the Prideaux Estate from before 1750 until 1901 when sold to Samuel Tuke. SCG submits that the Estate was in settlement from 1740 to at least 1889 and probably until 1901, and was leased and tenanted from 1750 to 1921. This included several long leases during which the property was sublet and occupied by under-tenants. Consequently, during these periods the occupier would have needed the permission of the leaseholder, who would need the permission of the freeholder who in this case was a tenant for life and would not have had the capacity to dedicate. In addition, there are periods when it was mortgaged or subject to a disputed will which act as further bars to dedication.
28. The Ramblers' submit there are periods when Pookhayne was not (and/or probably was not, in the absence of conclusive evidence) under settlement and was held in fee simple⁶. And, that there is no definitive evidence it was

³ Also given as 1762 to 1946

⁴ Between 1728 and 1745, 1767 and 1772, 1772 and 1778, 1811 and 1813, 1813 and 1841, 1884 and 1897, 1897 and 1903, 1904 and 1913 and 1913 until its sale in 1946

⁵ Between 1882 and 1884

⁶ In 1740, between 1740 and 1763, 1763 and 1766, and possibly 1803 and 1826, in 1813, after 1875, between 1875 and 1902, 1902 and 1920

mortgaged for some periods claimed⁷, although it is argued that had it been mortgaged the mortgagor and mortgagee together would have had capacity to dedicate. Further, they argue a will does not show a lack of intention to dedicate (a settlement can only be established by a person who holds the fee simple and a will establishing a settlement must have been drawn up by the owner of the fee simple). Accordingly, if (or when) it was held in fee simple, the owner had the capacity to dedicate. They consider it is irrelevant that the property was occupied by lessees and tenants between 1750 and 1920.

Purlbridge/Blackacre

29. SCG submits that Purlbridge was in settlement from at least 1728 to 1902, was administered by trustees between 1766 and 1811, and was tenanted from 1698 to 1954. However, the two fields through which the Order route passes east of Pookhayne⁸ were part of the property Blackacre at the time of the 1843 Tithe map until sold to Mr Slade in 1902 when they became part of Purlbridge. These, it is submitted, were part of a mortgaged property from 1870 to 1877, and from 1878 to 1902. Purlbridge, including Blackacre, was tenanted from 1902 to 1954.

30. The Ramblers' say no evidence has been produced to show that before 1843, or from 1843 to 1870, the owner or owners of these fields lacked capacity, or demonstrated a lack of intention to dedicate. They say that Blackacre was mortgaged for most of the period between 1870 and 1902, and the mortgagor(s) and mortgagee(s) together had the capacity to dedicate. There is no evidence that Blackacre was held under settlement or mortgaged before 1870, or tenanted before 1902. Further, that Purlbridge was tenanted between 1902 and 1954 is irrelevant to the question of the capacity to dedicate.

Perry Hill

31. SCG accepts there are gaps in the settlement evidence for Perry Hill. However, they submit it was under settlement from the early 1500s to c1790, then either in trust, administered by trustees or in settlement from 1837 to 1899. However, there is no evidence of use during any period when the property may not have been in settlement from which any dedication can be inferred. It was leased or tenanted from 1529 to the 1680s, and 1695 to 1921.

32. The Ramblers' maintain there is no definitive evidence of settlement, only an implication as the property's ownership remained in the same family. There are gaps in the evidence such that if Perry Hill was held in fee simple it is probable there was an owner with capacity to dedicate. Further, whilst Perry Hill may have been leased/tenanted for the period claimed, this is no bar to the owner of the fee simple having the capacity to dedicate.

The remaining landholdings

33. No similar evidence has been produced for the remaining properties, Northleigh and Thorn Farms (A-B) and Farwood Barton (E-F). SCG, however, submits that the lack of capacity to dedicate established over one section of the Order route, negates the case for an inference of dedication over the remainder. I consider this below.

⁷ Between 1740 and 1789, 1878 and its sale in 1902

⁸ Which now comprise a single field, points G-H

Settled land, tenanted land and capacity to dedicate

34. The significance of SCG's evidence as regards ownership and occupation concerns the capacity to dedicate a public right of way. For the Order route to have become a public right of way by the time of the Finance Act 1910 valuation, it would have been on the basis of inferred dedication at common law⁹. This occurs where the landowners' actions (or inaction) indicate that they intended to dedicate a route for public use, and the public have accepted it. However, for this to occur, there must be a landowner or landowners with the capacity to dedicate a public right of way over the land. SCG argues there were no such landowners and therefore there was no capacity to dedicate before 1910 (or indeed afterwards).
35. In summary, their argument is as follows. When land is subject to a strict settlement there is no landowner with a capacity to dedicate against whom an intention to dedicate could be inferred. Apart from an express power in the settlement or from the statutory powers in the Settled Land Act 1925 (the 1925 Act), there can be no valid dedication unless all the interested parties under the settlement are of full age and capacity and concur, or can be presumed to have concurred. The landowner only has a life interest in the property and, prior to 1925, did not have the power to sell the land or grant rights over it without the agreement of the heirs and trustees. Therefore, without specific evidence that such an event took place, it is difficult to presume that dedication could take place. Accordingly, the presumption of dedication at common law may be resisted by demonstrating the land was in settlement at the material time so there was no landowner competent to dedicate.
36. Until the enactment of the 1925 Act, there was no power for a tenant for life to dedicate land within the settlement unless both the remainder man and tenant for life concurred in such a dedication or the settlement contained an enabling provision. The power conferred by the 1925 Act re-enacted Section 16 of the 1882 Settled Land Act (as amended) which provided for a tenant for life to dedicate a right of way, but this was restricted to building works. In addition, the wording of the relevant section required there to be a benefit to the settled land. The passing of the Rights of Way Act 1932 overcame these issues as regards the capacity to dedicate a public right of way on land being held in settlement or tenanted for long periods. It also provided for landowners to negate the usage of "convenience paths" (used by members of the community but which were not public) as public rights of way. This, SCG argues, would not have been necessary if these private rights of way, including permissive routes, those used by tolerance of the landowners, estate routes, access routes, shooting paths, customary ways or other types of private right of way, did not exist.
37. As regards lessees and tenants, SCG submits dedication cannot be implied unless the acquiescence of the freehold owner in the use by the public can be established. Accordingly, those people occupying the four properties did not have the capacity to dedicate a public right of way across the land during the period of the lease/tenancy. Furthermore, there is no evidence that the owners consented to, or acquiesced in any such dedication. Indeed, during the period when the land formed part of a settlement the owner would have been a tenant

⁹ There is no evidence of express dedication

for life and therefore would not have had the capacity to consent either expressly or impliedly to dedication a common law. Consequently, SCG submits, on this basis it would not have been possible to dedicate the entire Order route during the period 1695 to 1954.

38. It would appear from the above that, as regards land held in strict settlement, dedication could only occur in certain limited circumstances. These were where there was an express power in the trust instrument allowing such a dedication; under Section 16 of the 1882 Settled Land Act whereby unlimited power for the tenant for life to dedicate a right of way operated from 1882; or where the evidence shows that both the remainder man and tenant for life had agreed to dedication. Otherwise, the tenant for life had no capacity to dedicate, and this would have been the case when the land was concurrently leased or tenanted.
39. The parties refer to *R v Petrie* (1885), a case where there was evidence of user sufficient to raise an inference of dedication but where the land over which the alleged highway had been laid out was held under strict settlement. However, at some point the land had been conveyed out of the settlement such that there was evidence (in 1829) that the estate was held in fee simple and that there was an owner capable of dedicating the way. For SCG the relevance of this case is that the judgement holds that it was not possible to dedicate where the land was held in strict settlement. For the Ramblers', it is submitted it is for those disputing dedication to show that it was impossible to dedicate: if there is evidence that there was someone who might be able to dedicate, then this is sufficient to prove that dedication was possible.
40. *Petrie* is cited by Pratt and Mackenzie¹⁰, on the subject of settled land, whereby *"If evidence is given that during the whole course of the user the land has been in strict settlement, so that there never was an owner of the fee capable of dedicating, the inference of an intention to dedicate cannot be made. The onus lies on the person who seeks to deny the inference from such user to show negatively that the state of the title was such that dedication was impossible, and that no one capable of dedicating existed. But if, in answer to such evidence, it is shown that at any time during the continuance of the user, the land was, for however short a time, out of settlement, the presumption as to dedication is again let in..."*.
41. Unlike in the *Petrie* case, there is no direct evidence of user save for some post-dating 1910 by farmworkers, in the 1930s and 1940s, and by others said to have been by permission. There is reference in an OS Boundary Remark Book describing use of part of the way as a 'convenience path'. Indeed, SCG maintains that the Order route is such a path, one used by permission, rather than a public right of way.
42. Nevertheless, SCG appears to accept that if the land is not held in strict settlement then dedication is a possibility. They submit, however, that any such periods are covered by other bars to dedication, whether this is when it was tenanted or leased, under a mortgage or a will and so forth.
43. The Ramblers' accept the landowner must have the capacity to dedicate, but there is no stipulation that this must be throughout the whole period of user. They submit in relation to land under settlement, that although a limited owner may not have the legal capacity to dedicate, if for however short a time during

¹⁰ Law of Highways 17th edition (1923) page 47

that period of user that limitation on ownership is removed (such as the disentailing of the settled estate), the presumption as to dedication is (not may be) let in (paragraph 40 above). Under common law, it is not necessary for an owner to have the capacity throughout the whole period of user, or for any owner or owners along the Order route to have the capacity to dedicate throughout the whole of SCG's relevant period. So if there are periods, however short when any of the settled properties along the Order route are taken out of settlement and held in fee simple, an inference of dedication may be drawn against that owner. Any periods of capacity, however short, may be sufficient for dedication to be implied.

44. In the case of a claimed deletion, I do not consider it is necessary to demonstrate there was a dedication of the Order route, either express or implied, since the DMS is conclusive as to the rights recorded unless or until shown otherwise (paragraph 7). I consider it is for SCG to show that dedication could not have taken place, such that there is no public right of way. I accept that the land occupation history establishes that land ownership was limited for many years, and during those years it appears there was no capacity to dedicate. Nevertheless, the Ramblers' have highlighted that there were many periods when the land was not held under settlement and there was an owner or owners with the capacity to dedicate. Accordingly, it seems to me that it would have been possible for dedication of the Order route to have occurred during any of these times. As regards periods when it was tenanted, but not under settlement, there is no evidence that the landowners acquiesced in dedication of the Order route, but equally there is no evidence that they did not. In any event, it seems to have been normal here for the land to be tenanted, sometimes for long periods, and it seems to me very unlikely that the landowners would not have been aware of the use being made of their land. In my view, that the land was tenanted (when not under settlement) would not have been a bar to dedication.

Whether it would be necessary for all the landowners to be able to dedicate the Order route at the same time

45. SCG submits that if one landowner did not have the capacity to dedicate, or some other bar to dedication existed during a particular period, then the entire route could not have been dedicated during that period. Dedication in a piecemeal fashion at different times, of what would have been used as a through route, would not have been possible as it would have resulted in ways neither end of which terminated on a right of way¹¹.
46. According to SCG, prior to 1904 the only period when Hornshayne may possibly have been held in fee simple was 1772 to 1778. However, Pookhayne was in settlement and at other times mortgaged or under a will subject to court proceedings. It may have been held in fee simple from 1875, but the Blackacre fields were mortgaged. As a whole there were no landowners with the capacity to dedicate the entire route from 1745 until 1904, only 6 years prior to the Finance Act documentation. Further, as tenanted/leased land, it would not have been possible to dedicate the entire route during the period 1695 to 1954.
47. The Ramblers' argue there is no legal requirement for an inference of dedication to be drawn simultaneously against all landowners over whose land

¹¹ Relying on *Kotegaonker v Secretary of State for Environment, Food and Rural Affairs* (2012)

a public right of way runs or is alleged to run. It is entirely possible, they say, that the land at Farwood (E-F), where no evidence regarding capacity to dedicate has been adduced, had been dedicated. The principle in *Kotegaonker* would be applicable to points F-G, but not if E-F and/or G-H had been dedicated. In any event, they say all three sections between E and H could have come into being simultaneously before 1720, between 1740 and 1766, between 1803 and 1826 (and possibly from 1875 onward); and after 1902 there was no bar to dedication over any section. The same would be true for B-C, but not if A-B and/or C-D had been dedicated. Further, they maintain all sections between A to D could have come into being simultaneously before 1720, between 1740 and 1745, between 1811 and 1813, and after 1904.

48. I consider on balance that it is entirely possible that dedication could have occurred prior to 1910 over the entire route, not least during the period from 1904 onwards when SCG acknowledge the owners of these four properties held land in fee simple and did have capacity to dedicate. At common law no minimum period is required to be shown, and I am not persuaded that 6 years was an insufficient period for dedication to have occurred. By the time of the Finance Act 1910, when deductions were recorded for public rights of way, the Order route had existed as a through route on OS mapping (at least) since 1888.

OS Boundary Remarks Books and Sketch Maps

49. The 1886 Boundary Remark Book for Southleigh illustrates point F where a footbridge was located, this being the boundary between Southleigh and Colyton parishes. It is annotated "Repaired by Colyton The Foot Bridge and Path being for the convenience of Colyton parishioners". SCG interprets this as evidence there was an agreement in place between the Parish Council and the landowner/occupier as regards access, one limited to use by parishioners rather than by the public. SCG says the tenant, who was present, must have known of this arrangement.
50. In this case, both meresmen accompanying the OS boundary surveyor had replaced the usual meresmen. However, no evidence has been produced to demonstrate they were unsuitable for the role, or had insufficient knowledge as regards who was responsible for the maintenance of the footbridge. Neither has evidence been produced to support SCG's assertion regarding the tenant.
51. As regards the repair of the footbridge, I prefer the Ramblers' view that because the parish boundary bisected it, the annotation clarified which of the two parishes was responsible for its maintenance, in this case Colyton. I consider it would be unlikely that the Parish would have maintained a private or convenience path. However, the remainder of the annotation suggests its use was limited to a certain group of people. If SCG are right and in 1886 it was considered a 'convenience path', I do not consider this can be extrapolated to the remainder of the Order route from point D to A. The Order route passes through four parishes following the river valley and does not link with any of the ancient farmsteads, suggesting it was unlikely to be a private convenience path. SCG suggests the river was likely to have sporting rights, but have provided no evidence to this effect from which a conclusion can be reached that the Order route was a sporting path. I also note that the OS maps themselves showing the Order route (see below) were in the public domain and would have been known to the landowners.

52. OS Sketch Maps were prepared from the boundary information which was publicly displayed so as to enable queries to be investigated. Thus a feature shown on a Sketch Map repeated a feature shown in the Remark Book. The footbridge at B is shown on the Sketch Map for Farway and Northleigh parishes and in the Northleigh Boundary Remark Book, indicating that its position had been agreed by the OS Surveyor and meresmen. Its recording is consistent with the existence here of the feature shown on the 1826 Prideaux Estate Plan.
53. The footbridge at C is not shown in the documents as it was not shown in the Colyton Boundary Remark Book. SCG argues there would have been no reason to omit it, if it was there. However, although it appears not to have been there, or was not recorded in 1886, both a path and footbridge were recorded a year later when the OS 25-inch 1887/8 map was surveyed.
54. On balance the evidence of these OS records is of the physical existence of parts of the Order route and features along it, together with an inference of continuation, but it is not until 1888 that the whole of the route is recorded. I consider the interpretation of this below.

Ordnance Survey Maps and other evidence

55. Mr Kimbell submits that OS maps provide reliable evidence of the status of the ways they portray, such that the depiction of the Order route as a footpath (in its entirety for the first time) in 1888 and subsequently should be interpreted as evidence of its status as a public footpath. In reaching this conclusion he relies in particular on the evidence of internal OS instructions.
56. OS maps were originally produced for military purposes, but by the late 19th Century they were also intended for use by the public as evidenced by the map cover designs suggesting use by tourists, holiday makers and walkers. It is generally accepted, including by the courts, however, that OS maps provide good evidence of physical features, including paths, in existence at the date of the survey.
57. The full sequence of OS instructions no longer exists, and there are inconsistencies and apparent conflict in those that do exist, as well as with regard to OS policy. For example, from the mid-1880s the OS publicly denied its maps differentiated between public and private features, yet its internal documents included instructions to staff to distinguish reputable public roads from private roads, and to show public footpaths and omit private ones. From 1883, its surveyors were not to map convenience paths for use of a household, cottage or farm, or for the temporary use of workmen. The OS publicly stated that it did not concern itself with issues of private ownership, so whilst a footpath may be shown it was not shown as public or private. Further, the OS did not make enquiries regarding status.
58. Since 1888, OS maps have included a disclaimer which states that the representation of a road, track or footpath is no evidence of the existence of a right of way. It is generally accepted this applied to earlier maps as well.
59. I prefer SCG's view as regards OS mapping and consider that OS maps can and do show both public and private ways. However, they should be considered alongside all other evidence and can be helpful in determining the likely status of routes when considered together with other evidence, although in themselves they are not evidence as to status. Here, they provide good

evidence of the physical existence of the Order route, its alignment and physical features along it which the surveyor saw on the ground.

60. Mr Kimble provides an extract from a book of 1888 ('Vale of the Coly') written by WH Hamilton Rogers describing a route he walked in the area. He submits its description follows the River Coly along the alignment of the Order route – a path through the meadows between Purlbridge and Farway. SCG, on the other hand, considers it describes the existing path from Colyton as far as Purlbridge Cross, then taking a line well to the north of the Order route before reaching Woodbridge and then destinations west of point A. In any event, I do not consider this publication adds anything of substance to the argument that the Order route was wrongly, or rightly, recorded in the DMS.
61. Part of the Order route is shown on the Gordon Estate Map c.1850 between F and G and on the Southleigh Tithe Map 1840 between F and G; both maps indicating a crossing of the River at F. On the Farway Tithe Map 1839, a crossing of the River is shown corresponding with the Order route. The 1826 Prideaux Estate Plan also shows a section of the Order route between F and G with the line continuing beyond, suggesting a continuation, with a crossing of the River shown, as well as part of the route from A to B with a continuation shown beyond B. Together with the Railway evidence considered above, these maps are consistent in showing the same isolated sections/features of the Order route prior to its depiction as a whole on the 1888 OS map.

The Finance Act 1910 evidence

62. The 1910 Act provided for the levying of tax on the increase in site value of land between its valuation in 1909 and subsequent sale or transfer. As part of the complex calculations, deductions were allowed for, amongst other things, public rights of way or user. Evidence for the possible existence of a public right of way may be found by reference to it in one or more of the various documents forming part of the valuation process. However, this was incidental to the main purpose of the legislation.
63. Part of the process was the completion of a 'Form 4' by the landowner, which asked whether the land parcel, or hereditament, was subject to any public right of way or user. Information from the Forms was copied into the Field Books in the District Valuation Office before the Valuers went on site to inspect and assess the hereditaments. Form 36 was then sent back to the landowners with the provisional valuation. Information from the Field Books, including deductions in value for public rights of way or user was copied into the relevant columns of the Valuation Books. Working plans were completed in the field and final record plans, usually showing only the hereditament boundaries, were compiled from them. Most of the Form 4's were destroyed after the information on them had been transcribed into the Field Books.
64. Evidence from Field Books and plans may provide good evidence of the reputation of a way as public, but the records that are available may not provide direct evidence of the acknowledgement of such by the landowners.
65. SCG contends the information contained in the Field Books in relation to rights of way is unreliable and in the absence of the relevant Form 4s, it is not possible to be certain that what is recorded in the Field Book accords with the information provided by the owner or his agent. Furthermore, there are inconsistencies and discrepancies in many individual entries. Doubt is also cast

on the reliability of the Valuation Books, which it is suggested show it cannot be assumed the valuation process was completed. Accordingly, rather than being a public right of way, as stated above, the Order route was one of the many types of convenience paths in use at the time.

66. The Order route crosses 7 hereditaments. No Form 4s survive. The land was owned by Samuel Tuke, whom it is noted on the Farway Parish Survey card (in preparation for the recording of public rights of way on the DMS further to the 1949 Act), had maintained the route privately prior to World War I. The Field Book entry for Northleigh records, "these may exist but are not known to me" and for Perry Hill, "None. They may exist but are not known to me". Five of the 7 owners do not acknowledge public rights of way over their land and 2 of the 7 acknowledge a right of way, but do not say whether this is public or private.
67. In the absence of Forms 36 and 37, SCG argues the fact that the landowners did not appeal their provisional valuation cannot be evidence they accepted public rights of way as it is not known what information was provided in the valuation. If the deduction was based on inspection, then all that would have been apparent was the physical existence of a way.
68. The lack of Form 4 (paragraph 63) is by no means unusual, and there is nothing to suggest that the appropriate forms were not completed, returned and checked by the landowners (or their agents). I agree with the Ramblers' that the absence of the relevant forms in this case is no more significant than in any other. In any event there was no requirement for the landowner to acknowledge the public rights of way on his land. In this case it is neither known nor not known whether the evidence was supplied by the landowner(s) or his (their) agent(s). Yet it seems unlikely that the Form 4s were not issued as the entries recorded in the Field Books could only have been done so by reference to the forms. In the absence of clear evidence to the contrary, I take the view that it should be presumed that everything that should have been done under this statutory process was done properly, and the forms were correctly transcribed. I do not consider it likely that false deductions would have been recorded to which there was no entitlement, and landowners were able to challenge valuations they considered to be inaccurate. I consider that (and agree with the Ramblers') in this case, the Field Book shows deductions were made by the Valuer after consultation with the landowner or his agent at the site visit for a public right of way through every field crossed by the Order route. As regards the Valuation Books, it is rarely the case that they are fully complete, and the Ramblers' say this is the situation in Devon. Generally, the Field Books contain more detail than the Valuation Books.
69. SCG suggests that the evidence regarding the ownership and occupation of four of the properties crossed by the Order route adds further weight to the conclusion the Finance Act evidence cannot be relied on. However, much of SCG's argument concerning the Finance Act evidence was considered when the Order route was added to the DMS. What is new is the evidence relating to the land being under settlement – the ownership and occupation date considered above. However, I have concluded above that there was a period (from 1904) when there were landowners with the capacity to dedicate a public right of way before the Finance Act evidence was gathered, if not before.

Maintenance records

70. There is the reference in the OS Boundary Remarks Book for Southleigh referring to repair by Colyton Parish (paragraph 49). In addition, references to repairs to footbridges are documented in the Colyton Parochial Church Council Minutes and Axminster and Honiton Rural District Council (RDC) Minutes.
71. It is SCG's contention that the descriptions of the location of the proposed repairs are too vague and imprecise to allow accurate identification that these were actually on the Order route. Consequently this evidence should be given very little if any weight. Furthermore it is difficult to reconcile that such expenditure would have been incurred on a route which was not included on the maps prepared following enactment of the 1932 Rights of Way Act a few years later, and which was not claimed during the preparation of the DMS. In addition there is evidence of repair at private expense by Samuel Tuke prior to 1914 (see below).
72. As regards the RDC Minutes of 1926 concerning repair/replacement of the bridge if the expense was split, I consider that the explanation from the Ramblers', which by reference to the boundaries could only have been at point F, seems entirely plausible. That the bridge was on the boundary between the parishes is an understandable reason why one was prepared to replace it subject to half the cost being paid by the other: neither wishing to incur the full cost of repair at public expense. It seems highly unlikely that public monies would have been spent on a private bridge/footpath.
73. The Colyton PCC Minutes of 1922, if referring to bridges on the Order route would cover the section as far as C from H. Again it is unlikely the PCC would have been expending money on private bridges. SCG say the PCC was not a public body. However, the Minutes are stamped Colyton Parish Council and the PCC had a Footpath Committee.
74. SCG suggests the references could relate to a short period when there was a misunderstanding on the part of the Council. This is speculation. Overall, the evidence as regards maintenance appears inconsistent, nevertheless, repair at public expense is strong evidence of a public right of way.

Records leading to the preparation of the Definitive Map

75. As stated above, the Order route had not been shown on documents relating to the Rights of Way Act 1932. This Act enabled landowners to lodge statutory declarations of ways (if any) that they admitted to dedicating as highways. This is sufficient evidence to rebut the intention of the owner to dedicate any additional highways during the associated relevant period. None have been adduced in connection with land crossed by the Order route.
76. Neither Northleigh nor Southleigh claimed the Order route passing through their parishes. However, Farway Parish described the whole of it between points A and D (that is between highways) despite only B-C lying within the parish. Colyton claimed a path from Brinkley Bridge to Stubbing Bridge but seemingly on the north side of the River: the Order route lies mostly on the south side. The Order route did not appear on the Parish Survey maps and was not included in the Draft Definitive Map and no objections were made to its omission then or at the Provisional Map stage. This suggests that some of the parishes believed there to be some reputation of the Order route as a public right of way, but not one that was in regular or indeed recent use. It is noted that bridges along its alignment had been washed away and not replaced.

77. As SCG points out there would have been people on the Parish Council, or within the parishes, with memories extending back to 1910 (when the Finance Act documents were drawn up), which suggests it did not have the reputation of a public right of way. Further, for Farway parish the reason given for claiming it (later withdrawn) was that it was marked FP on the (OS) map, although this provides no evidential basis for claiming it as public.

Whether the evidence (when considered with all other relevant evidence available) is of sufficient substance to displace the presumption that the definitive map is correct, and whether it is cogent

78. As stated above, this is not a case of evaluating the evidence to determine whether or not a public right of way subsists: this was the test applied when the Order route was first added to the DMS. My role is to examine the evidence adduced and to consider it together with all other relevant evidence to establish whether there was no public right of way over the Order route in the first instance. This is a high hurdle to meet for those asserting that the DMS is in error.

79. Having regard to my findings above, I conclude that the new evidence when considered together with all available evidence is neither cogent nor of sufficient substance to displace the presumption that the DMS is correct. It follows in my view that, in this case, the test (paragraph 6) has not been met.

Other matters

80. A number of late representations were received supporting the retention of the Order route as a public right of way. However, I have not attached weight to these as they raised matters that are not relevant to my consideration of the relevant tests.

Conclusions

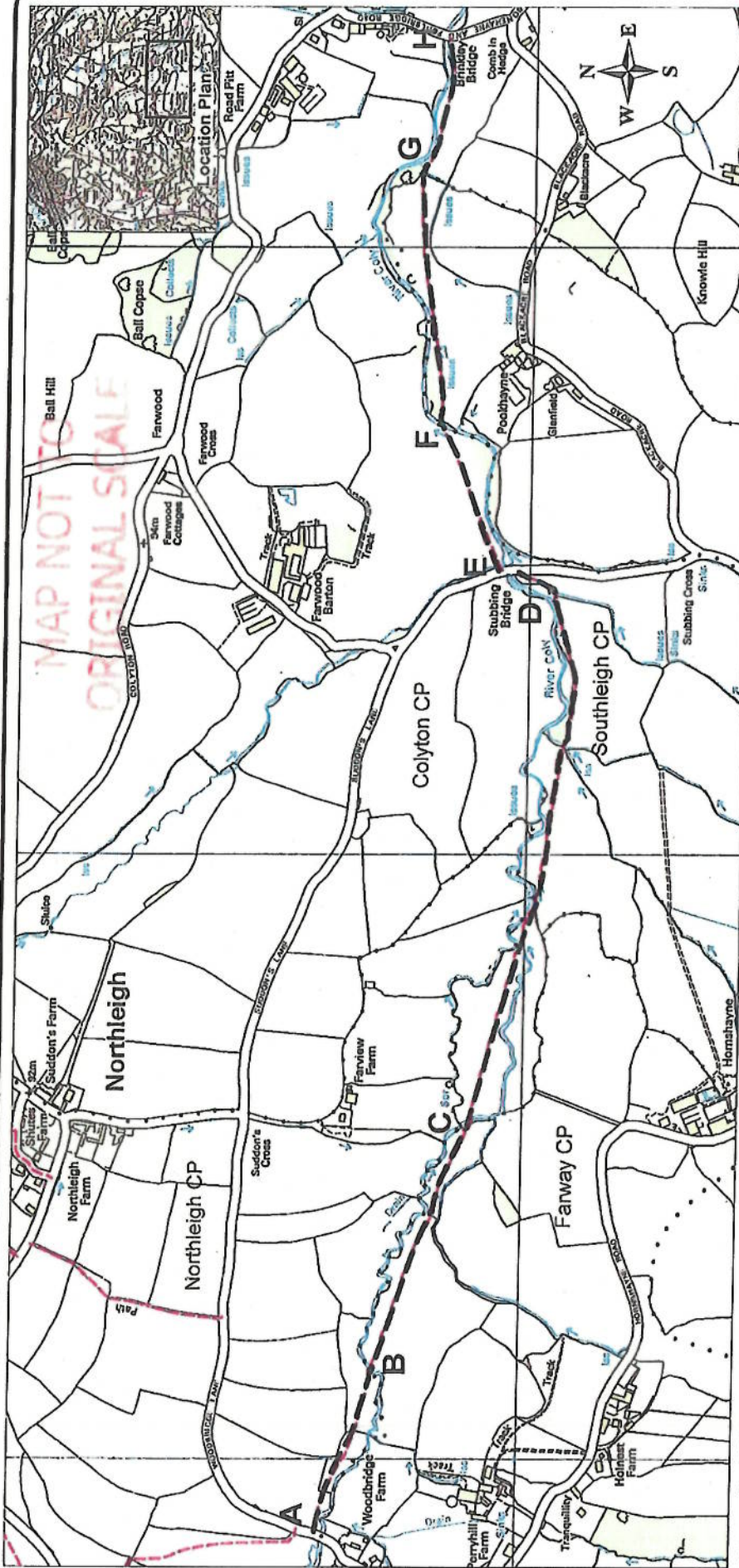
81. Having regard to these and all other matters raised in the written representations, I conclude that the Order should not be confirmed.

Formal Decision

82. I do not confirm the Order.

S Doran

Inspector



map ref: SY1895/1995/2095/2195/1894/1994/2094/2194

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DEVON COUNTY COUNCIL

FOOTPATH NOS. 8 NORTHLEIGH, 3 FARWAY, 6 COLYTON & 10 SOUTHLEIGH DEFINITIVE MAP MODIFICATION ORDER 2013

Notation

Footpaths to be deleted A-B-C-D, E-F-G-H
Existing footpaths



drawing number HCW/PROW/13/96

date Nov 2013

scale 1:10,000

drawn by NSC



David Whitton

HEAD OF HIGHWAYS, CAPITAL DEVELOPMENT & WASTE