Appendix 8
BBT Paper

Notes & Materials on the Deletion and Downgrading of Public Rights of Way.

This is not intended to be a text book setting down hard law. It is written from a practitioner's perspective and deals with the law and practice of bridleways and byways as derived from experience of 'the process' over thirty years.

Comments, criticisms and additional materials are welcomed so that these notes can be regularly updated. Please contact the author via the website below.

All guides to legal matters are vulnerable to error and going out of date. Whilst every care is taken in the preparation of these notes, readers should always take appropriate advice before committing to any course of action.

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The downgrading and deletion of public rights of way.

The definitive map and statement are 'conclusive' of the status of the public rights of way shown therein by virtue of s.56(1) of the Wildlife and Countryside Act 1981. That conclusivity is not a bar to a right of way shown in the definitive map and statement being deleted from the record, or 'downgraded' to a right of way of a lower status (e.g. a footpath rather than a bridleway) by means of an order made under the provisions of the 1981 Act. Deleting public rights requires evidence, and the courts have imposed quite stringent limits and requirements on the admissibility and weight of such evidence. It is no easy matter to delete public rights by an evidential modification order.

Deletion and downgrading orders.

1. Deletions and downgradings can only be effected through evidence that the status of the route as recorded in the definitive map and statement is wrong. There are no necessity or amenity criteria: those are matters for orders made under the provisions of the Highways Act 1980.

2. S.53(2)(1) of the 1981 Act requires that, "As regards every definitive map and statement, the surveying authority shall (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3)."

3. A deletion of a right of way would be by means of an order made under s. 53(2) and s.53(3)(c)(iii), "that there is no public right of way over land shown in the map and statement as a highway of any description ..."

4. A downgrading of a right of way would be by an order made under s.53(2) and s.53(3)(c)(ii), "that a highway shown in the map and statement as a

highway of a particular description ought to be there shown as a highway of a different description;."

The original definitive map-making process.

The 1949 Act.

5. The original process involved in recording a route on the definitive map was lengthy, inclusive, and afforded ample opportunity for participation. The definitive map was prepared according to the provisions of the National Parks and Access to Countryside Act 1949. S.27 required the relevant authority to survey land over which a right of way was alleged to subsist and to prepare a map showing such a right of way whenever, in its opinion, such a right of way subsisted, or was reasonably alleged to have subsisted, at the relevant date. In carrying out this duty, s.28 required the then county council to consult with rural district councils. S.29 required a draft map be prepared and advertised, and made provision for objections, and the determination by the county council of such objections. If such objections were received, the county council was empowered to modify the map. A process was then provided by s.29(5) for objections to any such modification to be dealt with by way of appeal to the Secretary of State. This might lead to a local inquiry under s.29(6). At the end of the objection-modification-objection process, s.30 required the preparation of a provisional map, and s.31 then entitled any qualifying person aggrieved to appeal to quarter sessions. After this stage, by s.32, the county council was to prepare the definitive map, and by s.32(4), inclusion of a right of way on the definitive map was deemed to be conclusive evidence that there was at the relevant date the right of way so designated. This lengthy and stage-by-stage process afforded ample opportunity for objections.

Guidance on 'Surveys and Maps'.

6. The 1949 Act did not in itself set out the detail and process to be followed in carrying out the survey and making the draft maps. This detail was supplied in: *Surveys and Maps of Public Rights of Way for the purposes of Part IV of the [NPACA] 1949. Memorandum prepared by the Commons, Open Spaces and Footpaths Preservation Society in collaboration with the Ramblers Association; recommended by the County Councils Association and approved by the Ministry of Town and Country Planning. January 1950.* This 16-page memorandum contains the type of guidance and system that would today be set out in a circular or statutory instrument; in 1950 both were comparatively rare, and the legend 'approved by the Ministry ...' must carry considerable weight as to this memorandum setting out what needed to be done to give effect to what Parliament intended must be done: creating a draft definitive map to a high degree of accuracy and completeness. Section 2, on page 4, explains, 'How to Prepare for a Rights of Way Map', and takes the responsible committee of the parish council or parish meeting through the process, step by step. Step (iii) is important. It guides the committee to 'consult any other maps and records which may help', and this list includes 'old Ordnance Surveys'. Clearly, Parliament (via the Ministry) was content that Ordnance Survey maps should be used in this process, even though the infamous 'disclaimer' as to the depiction of public rights was well known.

7. Three further important pieces of guidance are given on page 5. In relation to inclosure awards, "Many of these inclosure awards, however, are nearly 200 years old, so that even if they did not set out public paths over the commons enclosed, it is probable that paths freely used as public throughout living memory are public now, although they may not have been awarded." Clearly the Memorandum acknowledges that where no paths are shown in documentary records at a given date, paths could come into existence later than that date – the surveyors are advised to keep this in mind.

"If any of the earlier Ordnance maps are available they should be examined and compared with the latest edition. It will often be found that tracks which used to exist and are described by old witnesses as public are no longer in use and are not shown on the later editions, but if a path has once become public, mere disuse does not extinguish the public right." The surveyors are given clear guidance: look at the OS maps, both for tracks shown at the time of the survey, and for earlier tracks, which have disappeared, but which 'old witnesses' may believe to be public nonetheless. 'Old witnesses' in 1950-52 (when the bulk of surveying and recording took place) could readily have memory back to the 1880s, and could have knowledge told to them by their forebears (evidence of reputation) reaching back considerably further than that.

(iv) "Having examined all the documentary evidence, the next step will be to consider what footpaths and bridleways must be presumed to have been 'dedicated' as public rights of way because they have been used by the public as of right and without interference for not less than 20 years ... it must not be forgotten that, if public use for the necessary period can be proved, the fact that the path may have gone out of use recently ... makes no difference to its public status." Here the surveyors are directed towards finding out which routes have been used by the public for not less than twenty years – although this period could be right back at the beginning of the 'living memory of the oldest witnesses'. That being so, under the 1949 process, it was quite proper to record a path used by the public, for example, from 1903 to 1925 (twenty-two years) which had then fallen into disuse between 1925 and 1952 (a typical date of the survey) – that is for twenty-eight years. Such a period of disuse would start before the living memory of almost every witness in 2007, but the disuse would not 'undo' the original coming into being of the public right.

Further legal guidance on process.

8. The Open Spaces Society / Ministry Memorandum was not the only guidance available to the surveying authorities in the run-up to the first surveys for the definitive map. Messrs. Butterworths published in their *Annotated Legislation Service* a 'Statutes Supplement No. 65: [NPACA 1949]'. The guidance in this, at page 97, is clear:

"Such a right of way subsisted, or is reasonably alleged to have subsisted. The authority must form an opinion as to whether it is reasonably or unreasonably alleged. For this reason the memorandum *Survey of Rights of Way* [this refers to the OSS / Ministry paper] advises that the schedule prepared by parish councils and others should record the nature of the evidence, e.g., 'awarded', 'repaired at public expense', 'marked on Ordnance Survey map of 1912', 'uninterrupted public user (evidence of Mr X'). This information, although not required in the statement which is published, is of special importance to the surveying authority, not only to enable them to arrive at a decision on the inclusion of the path, but also in view of the provisions of s.29(2) under which they must be prepared to furnish owners within 14 days with the nature of any documentary evidence taking into account concerning any right of way on the draft map."

9. In one respect, Butterworths is wrong. S.29(2) does not refer to making 'documentary evidence' available to owners: it states in (2)(a), "as respects any documents in the possession of the surveying authority ..." 'Documents' is a rather wider category than 'documentary evidence', and would include user statements and field notes by surveyors of witness opinions. This being so, any parish entering a path on the survey sheets must have been able to furnish the 'documents' to the surveying authority. It would not seem likely that a parish surveying committee would make entries that it could not back up if and when requested (even if such documentation does not survive) – further, in the absence of evidence that entries were made without the evidence stated

within those entries, it should be presumed that what was done to achieve the statutory requirement was properly done: '*omnia praesumuntur rite esse acta*'.

The 'character' of the 1949 Act process.

10. The 1949 Act set up a process that was intended to be exhaustive in identifying and recording public paths and roads used as public paths. The standard of evidence needed to put a route on to the draft definitive map (via the survey process) was (per s.27) 'subsists or is reasonably alleged to subsist' – the same test that is applied to a path addition under the current Act of 1981. Once a route had been added to the draft map by the survey process, there was no further scrutiny of its status except where its addition was challenged under the statutory process. Where a challenge occurred, the status of the route was tested and it was found either to subsist – whereupon it remained on the map – or not to subsist – whereupon it was removed. All other routes remained on the definitive map simply on the original basis of 'reasonably alleged to subsist'. Their status was not rigorously examined, and neither did Parliament intend that it should be. The rigorous testing of status – so far as it occurred – was to remove routes in the formative process of the definitive map, not to include them. If a route was included on flimsy evidence; or if a route was included, yet fifty-plus years later we cannot see why; or if a route was included, yet fifty-plus years later the physical nature of the terrain makes the route seem highly unlikely ... none of this in itself has any bearing on the validity of such a route being on the definitive map. The time for challenge on the basis of a 'bad case for inclusion' was fifty + years ago, and that door is now firmly closed.

11. Lord Denning said in R v Secretary of State for the Environment ex parte Hood [1975] 1 QB 891 at page 899: "The definitive map in 1952 was based on evidence then available, including, no doubt, the evidence of the oldest inhabitants then living. Such evidence might well have been lost or forgotten by 1975. So it would be very unfair to reopen everything in 1975."

12. Consider how far back such 'oldest living inhabitants' evidence could reach. If in 1952 the knowledge of a person then 82 years of age was sought, such a person was born in 1870. Given that people started working then, particularly in rural areas, at a much younger age than now, that person's first-hand knowledge of rights of way might well be sound at 12 years of age: 1882. A lot could change in the way of use patterns, types of traffic, disuse, and unofficial stopping-up, in the 70 years up to 1952.

13. If what Lord Denning observed in Hood (1975) was true, just twenty-three years on from most surveys, it must be far more true approaching sixty years on from those surveys. The 1949 Act process does seem rather basic, hit-and-miss, and a bit open to creative surveying, when compared to the rigorous process applied to almost every path addition nowadays. But it was what Parliament intended should be done and nobody can now unpick the process that put any path on to the definitive map. If a person wishes to show that a path was put on the definitive map in error, then they need evidence of mistake that is external to, and more than, any perceived failure or misfire in the administrative process that put the path on the map in the first place. If a person comes up with evidence of mistake, then the way that evidence 'engages' with the original definitive map process is limited. It is now only a contest of 'evidence v. evidence', not of 'evidence v. original statutory process'.

Proving an error on the definitive map.

The burden of proof.

14. The starting point has to be, over fifty years after the original definitive maps were made, that the status of a route shown in the definitive map is correct. To delete or downgrade a public right of way shown in the definitive map and statement there must be evidence that a mistake was made in the original recording, and that evidence must be "positive evidence" of mistake (per Lord

Phillips at paragraph 38 of the judgment in Trevelyan v. SoS #2 [2001] The Times, 15 March 2001). The fact of the original recording of the way is in itself evidential (Trevelyan). In R oao Leicestershire County Council v. SoS for EFRA, 20 January 2003, [2003] EWHC 171 Admin, Mr Justice Collins said at paragraph 28," ... it is in the interests of everyone that the [definitive] map is to be treated as definitive and if the map has been so treated for some time, then it is obvious that it is desirable that it [the right of way in question] should stay in place." There is a three-stage test to be applied to alleged evidence of mistake (see below).

What is 'positive evidence'?

15. From *Black's Law Dictionary*, ninth edition. Direct evidence. Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption. Also termed positive evidence.

16. From an online law dictionary: Positive evidence is direct proof of the fact or point in issue, as distinguished from circumstantial proof; evidence that directly proves a fact, without an inference or presumption, and which in itself, if true, conclusively establishes that fact.

17. From *Black's Law Dictionary*, ninth edition. Circumstantial evidence. Evidence based on inference and not on personal knowledge or observation.

18. From an online law dictionary: Circumstantial evidence is also known as indirect evidence. It is distinguished from direct evidence, which, if believed, proves the existence of a particular fact without any inference or presumption required. Circumstantial evidence relates to a series of facts other than the particular fact sought to be proved. The party offering circumstantial evidence argues that this series of facts, by reason and experience, is so closely associated with the fact to be proved that the fact to be proved may be inferred simply from the existence of the circumstantial evidence.

19. *defra's* Circular 1/09 gives this guidance:

Deletion or downgrading of ways shown on the definitive map and statement.

4.30 The procedures for identifying and recording public rights of way are comprehensive and thorough. Authorities will be aware of the need to maintain a map and statement of the highest attainable accuracy. Whilst the procedures do not preclude the possibility that rights of way may need to be downgraded or deleted, particularly where recent research has uncovered previously unknown evidence or where the review procedures have never been implemented, it is unlikely that such a situation would have lain undiscovered over, what is in most cases, many decades without having been previously brought to light.

4.31 Once prepared, and until subsequently revised, the definitive map and statement is conclusive evidence in rights of way disputes. Authorities are under a duty to make an order modifying the definitive map and statement where they have evidence that a public right of way should be downgraded or deleted. They may discover evidence themselves or evidence may be presented with an application to modify the map and statement.

4.32 Notwithstanding the clear starting point in relation to the possible deletion or downgrading of ways described in paragraphs 4.30 and 4.31, the powers in section 53(3) of the 1981 Act include the making of orders to delete or downgrade rights of way shown on the definitive map and statement in cases where evidence shows that rights did not exist at the time when they were first shown on the map. In making an order the authority must be able to say, in accordance with Section 53(3) (c) (ii) or (iii), that a highway of a particular description ought to be shown on the map and statement as a highway of a different description; or that there is no public right of way over land shown in the map and statement as a highway of any description.

4.33 The evidence needed to remove what is shown as a public right from such an authoritative record as the definitive map and statement – and this

would equally apply to the downgrading of a way with "higher" rights to a way with "lower" rights, as well as complete deletion – will need to fulfill 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.

While all three conditions must be met they will be assessed in the order listed. Before deciding to make an order, authorities must take into consideration all other relevant evidence available to them concerning the status of the right of way and they must be satisfied that the evidence shows on the balance of probability that the map or statement should be modified.

4.34 Applications may be made to an authority under section 53(5) of the 1981 Act to make an order to delete or downgrade a right of way. Where there is such an application, it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map requires amendment due to the discovery of evidence, which when considered with all other relevant evidence clearly shows that the right of way should be downgraded or deleted. The authority is required, by paragraph 3 of Schedule 14 to the Act, to investigate the matters stated in the application; however it is not for the authority to demonstrate that the map reflects the true rights, but for the applicant to show that the definitive map and statement should be revised to delete or downgrade the way.

What is 'new evidence' (as per Circular 1/09, above)?

20. The 'discovery of evidence' is the first stage of the three-stage test to be applied in deletion and downgrading applications and orders. The phrase in common use is 'new evidence', and this seems to be a non-statutory term that has come into general usage. The statutory 'trigger evidence' requirement is set out in Kotarski v. Secretary of State for Environment, Food and Rural Affairs and Devon County Council [2010] EWHC 1036 (Admin). Mr Justice Simon:

> (21) Mr Hodgkin's third point raises a question about the meaning of the expression 'discovery by the authority of evidence'. He referred to a decision of Mr Andrew Nicol QC (as he then was) sitting as Deputy High Court Judge in Burrows v. Secretary of State for Environment Food and Rural Affairs [2004] EWHC 132 (admin). In that case Judge Nicol QC set out what in his view was required before the powers in s.53(3) (c)(iii) could be invoked.
>
> [26] ... It is plain that the section intends that a definitive map can be corrected, but the correction ... is dependent on the 'discovery of evidence'. An Inquiry cannot simply re-examine the same evidence that had previously been considered when the definitive map was drawn up. The new evidence has to be considered in the context of the evidence previously given, but there must be some new evidence which in combination with the previous evidence justifies a modification.
>
> (22) Mr Hodgkin submitted that there had been no 'new evidence' in the present case, since the evidence had been available when the definitive map had been drawn up.
>
> (23) I do not understand the passage I have cited from the judgment of Mr Nicol QC to suggest a different test to that specified in s.53(3)(c).
>
> (24) The precondition for the exercise of the statutory power of review is the discovery of evidence which (when considered with all other relevant

evidence) shows that particulars contained in the map and statement require modification. The discovery that there is a divergence between the two is plainly the discovery of such evidence, and it is unnecessary that it should be characterised as 'new evidence.' It is sufficient that there was the discovery of what the Inspector described as 'a drafting error', which was itself the result of what the Court of Appeal in ex. p. Burrows and Simms characterised as 'recent research.'

(25) I note that this approach is consistent with (a) the general approach of the Court of Appeal in ex. p. Burrows and Simms referred to in paragraphs 13 above and 'the importance of maintaining an authoritative map and statement of the highest attainable accuracy'; (b) a generally beneficial purpose that there should be powers to make definitive maps and statements consistent when they are found to be inconsistent; and (c) the decision of Potts J in Mayhew v. Secretary of State for the Environment (1993) 65 P & CR 344 at 352-3, in which he specifically rejected the argument that the s.53(3)(c) modifications should be restricted to cases where 'new evidence' had been discovered.

21. The key part in Mayhew appears to be (from the judgment transcript at page 6 of 8), "In my judgment, the 'event' in s.53(3)(c) is concerned with the finding out of some information which was not known to the surveying authority when the earlier definitive map was prepared. Were it otherwise, the surveying authority or a member of the public would be unable to take steps to correct a previously mistaken decision."

22. Plainly, and as was central in Mayhew, the discovery of documentary evidence regarding the status of a way is an event capable of triggering a definitive map modification order to delete public rights. For example, the discovery of a Quarter Sessions stopping-up order from 1947 regarding a way subsequently surveyed and recorded in 1952 would *prima facie* be strong positive evidence of that recording having been in error. But what of the situation where, in 2012, someone says that a path was fenced across in 1952, and before 1952,

and since? The surveying authority must be presumed to have known of the physical facts'. In s.27(1) of the National Parks and Access to the Countryside Act 1949, "Subject to the provisions of this Part of this Act, the council of every county in England and Wales shall, as soon as may be after the date of the commencement of this Act, carry out a survey of all the lands in their area over which a right of way ... is alleged to subsist ..." The survey *followed* the allegation of a right of way; the survey did not *provide* the allegation of a right of way. The whole survey process was based on 'on the ground' surveying.

23. Care needs to be taken in reading and applying the judgment in Kotarski. The decision letter by the Secretary of State's Independent Inspector (FPS/ J1155/7/63 of 30 January 2009 into the order made by Devon County Council states (paragraph 1) that the order was made under s.53(2) to "add the route to the map ..." in the situation where the route was already in the definitive statement. The decision letter is silent as to which clause in s.53(3) was relevant to the matter. The addition *de novo* of a public right of way is done under s. 53(3)(c)(i), but s.53(3)(c)(iii) does not only address the deletion of a right of way, "that there is no public right of way ....", but also has a second, discrete, limb, " .... or any other particulars contained in the map or statement require modification." On the face of it, this second limb of s.53(3)(c)(iii) is not available to add the missing route to the definitive map; rather it could only amend particulars already contained in the map.

24. Paragraph 26 of Kotarski: "In my view it is sufficient in the present case that the Council had recently discovered that there was a divergence between the definitive statement and the definitive map to bring the case within s.53(3)(c)(iii)." Either the order was based on the second limb of s.53(3)(c)(iii), or it was based on s.53(3)(c)(i) and this is a typographical error by the Learned Judge. Whichever, Kotarski is authority that a drafting error can be 'discovered evidence' to add a missing route to the map, and thus to effect a 'positional correction' (see below) of a route already on the definitive map. But it is hard

to see how a 'drafting error' can amount to evidence that there is 'no right of way' – the first limb of s.53(3)(c)(iii).

Tests to be applied to discovered evidence and all the available evidence.

25. The second- and third-stage tests to be applied to the evidence in downgrading/deletion cases are, per Lord Phillips, in Trevelyan #2, at paragraph 38, "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 [test 2] evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy ..." At paragraph 40, "... the evidence needed ... [test 3] to be clear and cogent and demonstrate that a mistake had been made in the original claim and recording." 'Cogent,' according to Collins Dictionary, means 'compelling belief', or 'forcefully convincing'.

26. Lord Phillips' requirement for "evidence of some substance" is a 'gatekeeper test', and it accords with the view of Lord Denning in Hood, and Collins J in Leicestershire, that, with the passage of time, it is a considerable evidential burden to 'disturb' the definitive map. Further, this "evidence of some substance" must also be "positive evidence" that a mistake was made.

27. The third-stage test is whether or not there exists 'clear and cogent evidence', taking account of all the evidence available, that a mistake was made when the right of way was originally recorded.

28. Lord Phillips sets out his test such that 'substance' in evidence is different from 'cogency' in evidence. 'Substance' goes to sufficiency as well as persuasiveness, while 'cogent' goes to persuasiveness more than to sufficiency. 'Sufficiency', in turn, cannot simply be a numerical count. Twenty people attesting to, for example, the existence of a stile, is more persuasive to the existence of that

stile than three people attesting, but no more persuasive as to the fact of that stile's existence being evidence of mistake as regards the existence of the public right in question. 'Substance' must go, firstly, to the 'positive' character of this discovered evidence to prove mistake, and, secondly, to their being quantitatively sufficient to displace the presumption against disturbing the definitive map.

29. So the test to be applied by order-making authorities, by the Secretary of State in a Schedule 14 appeal, and by Inspectors on behalf of the Secretary of State in an order determination, is this:

- Is there 'some information which was not known to the surveying authority when the earlier definitive map was prepared' (Mayhew, as approved in Kotarski)? If no, the issue cannot proceed. If yes,
- Is this 'information 'positive evidence of some substance', sufficient to displace the presumption that the definitive map and statement are correct? If no, the issue cannot proceed. If yes,
- Is this discovered positive evidence of some substance, taken with all the other available evidence, 'clear and cogent' evidence of mistake? This is a straightforward 'balance of probabilities' test, but the arm of the balance does not start level. The presumption that the definitive map is correct weighs the scale considerably in favour of the *status quo*, and to bring the balance level, and then tip it slightly in favour of mistake, requires 'clear and cogent evidence'. The balance of probabilities does not have to start with a level scale, and here that scale is quite heavily weighted against the proof of mistake. If no, the application, appeal, or order falls; if yes they succeed.

The weight to be given to the original recording in the definitive map.

30. In Trevelyan #1 (2000), Latham J., at Para 21: As Lord Denning said in R v. Secretary of State for the Environment ex parte Hood [1975] 1 QB 891 at page 899: "The definitive map in 1952 was based on evidence then available, including, no doubt, the evidence of the oldest inhabitants then living. Such evidence might well have been lost or forgotten by 1975. So it would be very unfair to reopen everything in 1975."

31. Lord Phillips, MR, in Trevelyan #2 at paragraph 38: "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 that such evidence existed ... Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake."

Evidence of reputation.

32. Where a right of way of a particular status was entered as such on the original definitive map, that entry is proof (per Trevelyan) that there must have been some evidence leading to the entry, thus giving the map entry itself some evidential weight. Where the original entry on the definitive map was at the instigation of local people, or people who might be expected to know of a route's history and status, then that is evidence of reputation, and should not lightly be discounted.

33. In AG v. Woolwich (1929) JP 173, in determining the status of a disputed road, Shearman J, "Apart from that there is what I may call local reputation and name

... But still it is important as showing the reputation." Here the judge is considering documentary evidence, rather than testimony, but is clearly giving weight to 'reputation', or 'belief', as to the route's status.

34. In Trafford v. St Faith's RDC (1910), Neville J, "Take anybody who has any knowledge of a countryside, if he is a person of any intelligence at all, he will be able to say with confidence of some roads that they are public roads, and of others that they are private roads." Again, in the absence of 'hard evidence' (ascertainable user, or documentary) the local knowledge and belief as to status – evidence of reputation – is given considerable weight by the judge.

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

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

Defective process is not of itself evidence of error.

37. The procedure set out in the 1949 Act is not on trial in a downgrading or deletion order case; the presumption '*omnia praesumuntur rite esse acta*' applies. It is not the job of an inquiry and Inspector to reopen, or even question, the 1949 Act administrative process. It is was faulty then it should have been challenged under the provisions applying at the time. Even if the administrative process were defective, that is not in itself evidence of error of status. There is a saying that the law is not about finding the truth, but is about

hearing the evidence – and hearing the evidence within the rules pertaining now. We may think the 1949 process was unfair by today's standards; we may even think the 1949 process was not properly carried out in a particular case. That has no bearing on a current application or order at all: Trevelyan #2, paras 32-36.

38. In Trevelyan #2, Lord Phillips says, "In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed ..." It is sometimes argued that this is an indication that a tribunal now is empowered to investigate the administrative process that made the original definitive map and statement, with the potential to find that process defective. That would be to take this sentence out of context. The 'proper procedures' Lord Phillips refers to are the evidence-gathering procedures prior to the making of the draft definitive map; not the publish-challenge-confirm processes following the publication of the draft definitive map.

39. It is inevitable in downgrading and deletion cases that, when the facts and processes of over fifty years ago are re-examined, we start to impose our assessments and value judgments on the evidence available then (such of it as we have, anyway), that we look at the fact of a way being shown and ask 'where is the evidence for that? It looks to me like it was the 'mere *ipse dixit* of the person who filled in the form' (Latham J at paragraph 23 in Trevelyan #1). Had the other parties had an opportunity to respond, no doubt they would have put in other evidence.' This is the wrong approach and is not the approach a tribunal must adopt. In Trevelyan #2, at para 42, the court looked at the words by which the inspector had indicated his approach to the matter. The court was concerned that, on the face of it, the inspector had asked himself 'does the evidence show, on the balance of probabilities, that a bridleway existed?' That was wrong. Had that been the only manifestation of the inspector's mindset, the appeal would probably have succeeded. Later, the inspector demonstrated a correct mindset by assessing the evidence as

showing error, 'beyond the bounds of credibility to accept that a right of way existed.' That is the proper test: "beyond the bounds of credibility'. That is 'clear and cogent' evidence. That is 'forcefully convincing'.

40. So, given that 'defective process' is not 'evidence of mistake', what types of 'evidence of mistake' are there? Assertion in 2007 that 'nobody ever used the route' is not evidence of mistake. It is certainly not positive evidence of mistake. It amounts only to a statement that the deposer never saw anyone using the route. Such an assertion would be valid – and quite possibly effective – to challenge the process of adding the route to the definitive map in the first place. It would then be a straightforward evidential battle between persons claiming a right by usage and persons denying that such had arisen. But some fifty-five years after the survey process, this 'negative user evidence' cannot be used (at least without more) to reopen the fundamental question of whether or not the right actually existed in and before 1952. It is impossible, at this distance in time, to replay the evidential battle, because the evidence that caused a parish council or other surveyor to record "uninterrupted user for fifty years' no longer exists to be tested against the 'negative user evidence'. Evidence saying 'nobody ever used this route' would have been good for the original process in 1952, when it could have been weighed against the evidence that people did use the route. This evidence cannot reopen the issue fifty-five years later, and even if it could, it would be impossible to test it against the evidence that the surveyors had in 1952.

41. Are there types of evidence that could, in 2010, be good to prove error? There are three types of evidence that can – and successfully have – gone to prove that the definitive map recording was in error:

- Evidence that the route was lawfully closed quite soon before 1952 and that it did not come back into public use in the intervening period. This might be, e.g., that in 1936 a public road was diverted only as a bridleway by Quarter Sessions, indicating that a BOAT, shown in the definitive map by virtue of reclassification of a RUPP, was shown there in error. This is 'positive

evidence' that a mistake was made. There is an example of this: the downgrading of part of a BOAT in County Durham (former RUPP) to bridleway, on discovery of a Quarter Sessions order predating the definitive map by (from memory) some twenty years, diverting part as a bridleway.

- Evidence that the route could not lawfully have been dedicated because of a legal impediment, e.g. a covenant. This is 'positive evidence' that a mistake was made. (This is part of the facts in Sawley 8: Trevelyan).

- Evidence that the route was physically barred to the relevant type of traffic during the period leading up to the survey in 1952, e.g. old established and documented stiles or walls across a bridleway where there is also documentary positive evidence to show that no bridleway existed before the obstructions went up. This is 'positive evidence.' Where there is such 'positive evidence' of 'physical impossibility', e.g. stiles on a bridleway, then 'negative user evidence' (i.e. 'nobody ever used it, before or since') can stand with the 'fact' of the barriers to show error (This is part of the facts in Sawley 8: Trevelyan).

42. There is a further situation that warrants consideration: where a route on the definitive map became obstructed soon after it went on to the definitive map, and nobody (so far as records show) ever complained. Can this be accepted as 'Positive evidence' that the original recording was defective? No. There is no positive element going to show that there was, historically, no bridleway. And further, if the Trevelyan position of 'there must have been evidence available to the surveyors' is the starting point, then a post-survey situation surely cannot be extended backwards in time to attack a process that had since been properly carried-through and administratively closed? Horse riding in particular was at its lowest ebb in the 1950s – both recreational and agricultural – and many definitive maps never got published until the late 1950s or early 1960s, so a lack of public use and knowledge of remote bridleway routes might be expected.

43. Take care in reading the judgments in the two Trevelyan cases. Mr Laurence, QC, postulates the various types of potential 'error' and includes in that list 'defective process'. The judges recite this list, but neither court accepts that the 'internal error' of defective process can be used to reopen the issue of true status. In Trevelyan the tests judicially considered and applied for error are external to the original process.

The presumption against cul de sac routes.

44. In Eyre v. New Forest Highway Board (1892) JP 517, the Court of Appeal under Lord Esher, MR, considered an appeal against a decision of Wills J, who had rejected an application by Mr Eyre that Tinker's Lane in the New Forest was not a publicly repairable highway and should not be made up by the Board. Lord Esher commended Wills J' s summing-up as "... copious and clear and a complete exposition of the law on the subject; it was a clear and correct direction to the jury on all the points raised."

Wills J: "It seems that there is a turnpike road, or a high road, on one side of Cadnam Common; on the other side, there is that road that leads to the disputed portion, and beyond that if you pass over that disputed portion, you come to Tinker's Lane which leads apparently to a number of places. It seems to connect itself with the high road to Salisbury, and with other more important centres, and I should gather from what I have heard that there are more important centres of population in the opposite direction. You have heard what Mr Bucknill says about there being that better and shorter road by which to go. All that appears to me on the evidence is that, for some reason or other, whether it was that they liked the picturesque (which is not very likely), or whether it is that it is really shorter; there were a certain portion of the people from first to last who wished to go that way. It is by the continual passage of people who wish to go along a particular spot that evidence of there being a high road is created; and taking the high roads in the country, a

great deal more than half of them have no better origin and rest upon no more definite foundation than that. It is perfectly true that it is a necessary element in the legal definition of a highway that it must lead from one definite place to some other definite place, and that you cannot have a public right to indefinitely stray over a common for instance... There is no such right as that known to the law. Therefore, there must be a definite terminus, and a more or less definite direction...

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

45. There are three often-cited cases on culs-de-sac and whether such can be (public) highways: Roberts v. Webster (1967) 66 LGR 298; A.G. v. Antrobus [1905] 2Ch 188; Bourke v. Davis, [1890] 44 ChD 110. In each of these the way in dispute was (apparently) a genuine dead-end with no 'lost' continuation. Fundamental argument in each was whether or not a cul-de-sac (especially in the countryside) could be a (public) highway. In each case the court took the point that the law presumes a highway is a through-route unless there are exceptional local circumstances: e.g. a place of public resort, or that the way was expressly laid out under the authority of statute, such as an inclosure award. In A.G. (At Relation of A H Hastie) v. Godstone RDC (1912) JP 188, Parker J was called upon to give a declaration that a cluster of minor roads were public and publicly repairable highways. "The roads in question certainly existed far back into the eighteenth century. They are shown in many old maps. They have for the most part well-defined hedges and ditches on either side, the width between the ditches, as is often the case with old country roads, varying considerably. There is nothing to distinguish any part of these roads respectively from any other part except the state of repair. They are continuous roads throughout and furnish convenient short cuts between main roads to the north and south respectively [note the similarity of logic here with Wills J in Eyre]. It is possible, of course, that a public way may end in a cul-de-sac, but it appears rather improbable that part of a continuous thoroughfare should be a public highway and part not. It was suggested that there might be a public carriageway ending in a public foot- path and that Cottage Lane and St Pier's Lane are public carriageways to the points to which they are admittedly highways, and public footpaths for the rest of their length. I cannot find any evidence which points to this solution of the difficulty, and so far, at any rate as evidence of the user of the road is concerned, there is no difference *qua* the nature of that user between those parts of the roads which are admittedly highways and those parts as to which the public right is in issue."

The evidential weight of routes mapped by the Ordnance Survey.

46. In Attorney General v. Antrobus [1905] 2 Ch 188, the issue arose of the evidential weight to be given, as regards public highway status, to the depiction of a track or road on an Ordnance Survey map. Farwell J at page 203 [my emphasis]: "Such maps are not evidence on questions of title, or questions whether a road is public or private, but they are prepared by officers appointed under the provisions of the Ordnance Survey Acts, and **set out every track visible on the face of the ground, and are in my opinion admissible on the question whether or not there was in fact a visible track at the time of the survey.**" It is not particularly material in this case, but Farwell J's view on the evidential weight of OS maps as regards public road status has been overtaken by s.32 of the Highways Act 1980.

Deletion/downgrading v. positional correction.

47. In some cases there is evidence that the route exists, but is on the wrong line for all or, more commonly for part, of its route. This is not corrected by a diversion order, but by a modification order under the provisions of the 1981 Act, incorporating 'twin elements' to delete the erroneous route, and to add the correct route:

S.53(2)(1) of the 1981 Act requires that, "As regards every definitive map and statement, the surveying authority shall (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3)."

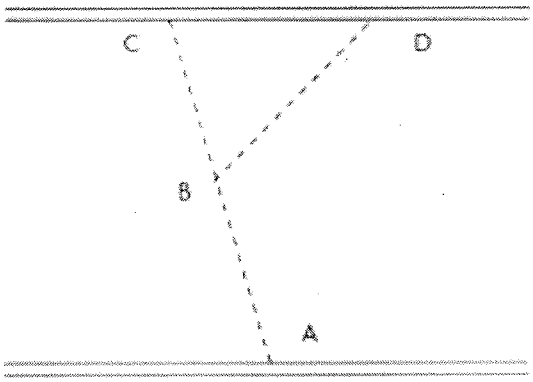
The deletion of the erroneous right of way would be by means of an order made under s.53(2) and s.53(3)(c)(iii), "that there is no public right of way over land shown in the map and statement as a highway of any description ..."

The addition of the correct right of way would be by means of an order made under s.53(2) and s.53(3)(c)(i), "that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist."

48. In the case of R v. SoS for Environment, ex p. Kent County Council [1994] CO/2605/93, where an order was made to delete the whole of a footpath (see also B&B 1995/1/3). It was later agreed that there was a footpath on part of the order line, but that, on another part, the order line was wrong, but nobody could say where the true line really was. From the Kent judgment, Turner J:

"28. Having regard to the provisions for conclusive evidence of Section 56(1)(a) of the 1981 Act, in law, a public footpath exists over the route shown on the definitive map and statement. Notwithstanding that the line of the path was incorrectly transcribed onto the definitive map, there is general agreement as to the existence of the footpath, although the line of the path is uncertain for parts of its length.

"It seems to me that the uncertainty of the line is a matter for the council, which may have to look to other powers if it wishes to expunge the route from the definitive map and statement, but in my view the matter cannot be resolved under Section 53 of the 1981 Act. Section 53(3)(c)(iii) is in terms of the circumstance where 'there is no public right of way over the land shown on the map and statement'. I am satisfied that a right of way existed. It follows, that in the case in question, it would be inappropriate to confirm the order seeking the deletion of the footpath from the definitive map and statement."



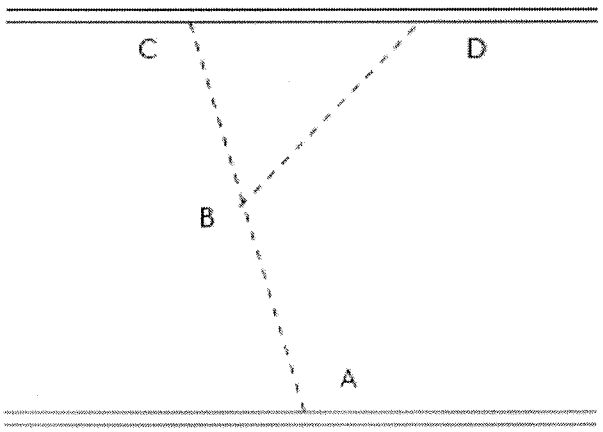
49. The facts of Kent are represented in the hypothetical-situation diagram above. There was a public footpath running between the two roads, and A-B is on the correct line, but the rest of the recorded line, B-C, was wrong on the evidence. There was no evidence as to the correct line from B towards the road. The council made an order to delete all of A-B-C. This was rejected by the inspector and upheld by the court. This decision had over the years been taken to be authority for the proposition that if you do not know where B-C should go, then no order to delete just B-C could be confirmed. This belief was challenged in R (Norfolk County Council) v. Secretary of State for Environment, Food and Rural Affairs [2005] EWHC 119 (Admin).

Pitchford J at paragraph 46, "Mr Laurence argues that Kent County Council was wrongly decided. It was common ground that no right of way existed between points B and C. At the least the inspector should have exercised his power under section 53(3)(c)(iii) to delete the path between those points, since paragraph (iii) enabled the removal of a right of way over land shown on the map and statement, or the modification of any other particulars shown on the map and statement. I do not understand Mr Morshead to dispute that section 53 did in fact give the inspector power to delete part of the footpath provided he was satisfied it was "requisite in consequence of the occurrence" of the paragraph (iii) event. He explains the decision by reference to the position taken by the county council on the application for review. It was still seeking

the removal of the whole footpath and, on any view, that would not have been appropriate. I agree."

50. The view of Pitchford J in the paragraph above on this point is crucial (my emphasis): " ... section 53 did in fact give the inspector power to delete part of the footpath provided he was satisfied it was **"requisite in consequence of the occurrence"** of the paragraph (iii) event." This is indicative that the confirmation of an order to delete B-C (in the Kent situation) does not inevitably follow a finding of fact that there is no right of way over land between B and C. 'Requisite' introduces a further test. 'Requisite' means 'required' , 'essential', or 'indispensable'. The last meaning is not appropriate to the statute, so applying both 'required' and 'essential' to the test in s.53(3)(c)(iii), the Secretary of State must be satisfied that not only is there "... no public right of way over land shown in the map ..." but that it is also 'required', or 'essential', that the order should be confirmed. This leads to clear guidance to order-making authorities, and to the Secretary of State, about applying the 'requisite' test in positional correction order cases.

51. In R oao Leicestershire County Council v. SoS for EFRA, 20 January 2003, [2003] EWHC 171 Admin, Mr Justice Collins was dealing with a situation represented by this diagram:



52. There was a public footpath shown in the definitive map and statement, running A-B-C. The was evidence that B-C should correctly be B-D, and one order was made both deleting B-C under s.53(3)(c)(iii) and adding B-D under s.53(3)(c)(i).

53. Collins J at paragraph 27: "As I have indicated, it is perhaps unusual for s.53 to come into play where there is no dispute that a right of way exists but there is a dispute as to precisely the route of that right of way. In those circumstances it is not possible to look at (i) and (iii) in isolation because there has to be a balance drawn between the existence of the definitive map and the route shown on it which would thus have to be removed, and the evidence to support the placing of the map of, in effect, a new right of way."

54. The words, "it is not possible to look at (i) and (iii) in isolation because there has to be a balance drawn ..." go directly to the application of the 'requisite' test in s.53(2). Whilst it may be requisite to confirm an order deleting B-C in the diagram above in the Kent situation, it cannot be requisite to confirm the deletion of B-C where there is any reasonable evidential indication that the correct line is B-D, even if the order as made only deals with B-C and is silent as to B-D or any other alternative line.

55. And further, the Secretary of State has been given the duty to apply the 'requisite' test, and this test is something beyond the bare test of is there a right of way here, or not?' Even if the answer to that is 'no', it is still open to the Secretary to decline to confirm the order, and thus making a cul-de-sac public right of way, because he thinks it not requisite so to do.

56. Where an order is made that is expressed to delete B-C (in the diagram above) but not to 'correct' the line on to B-D, but where there is some evidence that B-D is the correct line, then it is not only Leicestershire that indicates that a bare deletion of B-C should not be confirmed. If relevant evidence regarding B-D becomes available to the Inspector then he must consider it, per paragraph 3(9) of schedule 15. If his provisional conclusion is

that the way shown on the map should be deleted, but that the evidence establishes the existence of a way of that status along a different alignment, then the Inspector's duty is to propose a modification to the order to reflect that conclusion. Paragraph 8(1)(a) of schedule 15 covers just such a case (see also Trevelyan 2: Lord Phillip, MR, at paragraph 23, " ... if ... facts come to light which persuade the Inspector that the definitive map should depart from the proposed order, he should modify it accordingly ..." If the evidence points to there being a bridleway (and 'reasonably alleged' will do) then the 'facts' will 'persuade the Inspector' that the 'definitive map should depart from the order'. The Inspector must them 'modify it [the order] accordingly'.

57. When this 'line corrective order' is made (in this situation, modified from the original order and re-advertised), the Inspector must consider the two 'limbs' of the order together, but to somewhat different tests. Firstly comes the issue of the existing line. Here the test is the Trevelyan test. This is a balance of probability test, but the requirement for 'clear and cogent evidence of mistake' weights the starting position. This requirement is a heavy burden on one end of the evidential balance, in favour of the *status quo*. To discharge the evidential burden, the evidence of mistake must be heavy enough to tip the balance the other way, just beyond the horizontal. 'Clear and cogent evidence of mistake' is not just a gatekeeper test for making the order – it is the substantive determinative test for the Inspector too. As the judge says in Leicestershire, it is not in the public interest to delete ways from the definitive map without strong evidence.

58. Secondly, comes the issue of adding the 'replacement' line. Here the test for making the order – i.e. the Inspector modifying the original order – is ' subsists or is reasonably alleged to subsist' (s.53(3)(c)(i)), the test to confirm the 'replacement line' is 'subsists', or straightforward balance of probability: Todd v. SoS for EFRA, 22 June 2004, EWHC 1450 (Admin). But the order to add the true line of the 'replacement route' can only be confirmed if it is known where that route actually runs (per Leicestershire). If the order cannot be modified to

show the correct line of the 'true route' as a usable highway (i.e. linking to another highway) then the order should not disturb the current status. That is clear from the Leicestershire case.