

**Appendix 12**

**Commission for New Towns v. J J Gallagher [2003] 2 P & CR 3**

## COMMISSION FOR NEW TOWNS v JJ GALLAGHER LTD

CHANCERY DIVISION  
(Neuberger J.): December 16, 2002

[2002] EWHC 2668 (Ch); [2003] 2 P. & C.R. 3

- H1 *Real property—Ownership of land adjacent to lane—Lane provided the only vehicular access to land—Potential development—Conveyance of land did not indicate that lane included—Whether presumption that a conveyance of land next to a highway carried with it that part of the highway which adjoined the land was rebutted—Whether right of way over lane—Whether lane was a public highway—Application of s.62 Law of Property Act 1925*
- H2 The Commission for New Towns owned the freehold of land which it had purchased from Warwickshire County Council. Adjacent to one side of the land was a lane which provided the only practicable vehicular access to the land which the Commission wished, in due course, to develop. Warwickshire County Council had itself acquired the land in 1971 from A. who owned both the land and the whole of the adjoining lane. The 1971 conveyance did not expressly include the lane and the attached plan did not identify the lane as included in the conveyance. The defendant contended that it owned the lane and that the Commission had no rights over it other than as a bridleway. The Commission contended that it owned the freehold of the lane. That contention was based on s.62 of the Law of Property Act 1925 and/or the presumption that a conveyance of land next to a highway carried with it that part of the highway which adjoined the land; alternatively, that if the defendant owned the lane, the Commission had a right of way for all purposes over it and/or that the lane was a public highway for all purposes.
- H3 **Held**, in favour of the claimant, that the presumption that a conveyance of land included the adjoining highway *usque ad medium filum* had not been rebutted in the present case. If the adjoining owner happened, as in this case, to own more than half the width of the adjoining road, it would seem logical that the presumption should lead to his being deemed to convey away the whole of his interest in the adjoining road. If, however, the presumption had been rebutted, the road would not have been included in the 1971 conveyance by virtue of s.62 of the Law of Property Act 1925 and would have been in the ownership of the defendant. Had this been the position, the Commission's contention that when the land was conveyed to the Council by A., the Council was granted, by implication, a right of way for all purposes over the lane must be rejected. The Commission had established, however, that, on the balance of probabilities, the lane was a public carriageway.

---

Paragraph numbers in this judgment are as assigned by the court.

**H4 Cases referred to:**

- (1) *Attorney General and Newton-Abbot R.D.C. v. Dyer* [1947] Ch. 67.
- (2) *Berridge v Ward* 10 C.B. (N.S.) 400; 142 E.R. 507.
- (3) *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council* (1995) 70 P. & C.R. 307.
- (4) *Gregg v Richards* [1926] Ch. 521.
- (5) *Lister v Pickford* (1865) 34 Beav. 576; 55 E.R. 757.
- (6) *Marquis of Salisbury v Great Northern Railway Co.* (1858) 5 C.B. (N.S.) 174; 141 E.R. 69.
- (7) *Methuen-Campbell v Walters* [1979] Q.B. 525; [1979] 2 W.L.R. 113; [1979] 1 All E.R. 606; (1979) 38 P. & C.R. 693.
- (8) *Micklethwait v Newlay Bridge Co.* (1886) L.R. 33 Ch. D. 133; [1886–1899] All E.R. Rep. 885.
- (9) *Pardoe v Pennington* (1998) 75 P. & C.R. 264.
- (10) *Pryor v Petre* [1894] 2 Ch. 11.
- (11) *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] A.C. 144; 1977] 2 W.L.R. 951; [1977] 2 All E.R. 385; (1978) 35 P. & C.R. 350.
- (12) *Suffolk County Council v Mason* [1979] A.C. 705; 1979] 2 W.L.R. 571; [1979] 2 All E.R. 369; (1980) 39 P. & C.R. 20.
- (13) *Wheeldon v Burrows* (1879) L.R. 12 Ch. D. 31; [1874–90] All E.R. Rep. 669.
- (14) *White’s Charities, Re* [1898] 1 Ch. 659.
- (15) *Wright v Macadam* [1949] 2 K.B. 744.

**H5 Legislation referred to:**

Countryside Act 1968, s.30; Finance (1909–10) Act 1910; Highways Act 1959, s.214; Highways Act 1980, s.32; Law of Property Act 1925, s.62; Local Government Act 1933, s.157; Studley Inclosure Act 1817.

**H6 Action** by the claimant, The Commission for New Towns, to determine whether it owned the freehold of a lane adjacent to a strip of land already in its ownership; alternatively, if the ownership of the lane was in the defendant, JJ Gallagher Ltd, whether the Commission had a right of way for all purposes over the lane or whether the lane was a public highway for all purposes. The facts are stated in the judgment.

**H7** *Kim Lewison Q.C.* and *Jonathan Karas (DLA)* for the appellant.  
*John Randall Q.C.* and *Conrad Rumney (Wood Glaister)* for the respondent.

**JUDGMENT****NEUBERGER J.:****Outline**

- 1 The Commission for New Towns (“the Commission”) owns freehold land in Worcestershire and Warwickshire known as the Wynyates Triangle (“the

triangle”). As its name suggests, it is an area of land roughly triangular in shape, with its base in the north, and its (flattened) apex in the south. The triangle is bounded by the Coventry Highway to the north, the Birmingham Road to the west, and an overgrown and muddy lane known as Beoley Lane to the west. With the exception of a very small section in the northwest (which is in Worcestershire) the triangle is in Warwickshire. The Commission and its statutory successor, English Partnerships, wish, in due course, to develop the triangle for housing.

- 2 The defendant, JJ Gallagher Ltd, contends that it is the freehold owner of Beoley Lane, and that the Commission, as owner of the triangle, has no rights over Beoley Lane, other than as a bridleway. If that is right then, although it has little, if any, apparent significant intrinsic value, Beoley Lane would be potentially worth a lot to the defendant as ransom land. That is because it is not practicable to obtain vehicular access to (or egress from) the triangle from (or onto) the Coventry Highway or the Birmingham Road, and it is not practicable to obtain access to (or egress from) the triangle across the short southern boundary.
- 3 The Commission contends that Beoley Lane is not ransom land as the defendant contends, for one or more of the following three reasons:
  - i) It is in fact the Commission, and not the defendant, which owns the freehold of Beoley Lane,
  - ii) If the defendant owns the freehold of Beoley Lane:
    - (a) The Commission, as owner of the freehold of the triangle, has a right of way for all purposes over Beoley Lane; and/or
    - (b) Beoley Lane is a public highway for all purposes— *i.e.* a public carriageway.
- 4 Worcestershire County Council is the second claimant in these proceedings; it is only interested in the third of the three issues, in respect of which it supports the Commission’s case. It should be emphasised that the defendant accepts that the public has the right to use Beoley Lane as a bridleway, but contends that there is no public right to use it as a carriageway. In other words, the third issue is not whether Beoley Lane is a highway, but whether the public have the right to drive vehicles along it.
- 5 The first issue turns mainly on the effect of a conveyance pursuant to which the Commission’s predecessor in title, Warwickshire County Council (“the Council”), acquired the triangle in 1971. The second issue can be dealt with comparatively shortly. The third issue requires consideration of the effect of various maps, awards and other documents prepared over the period between 1722 and 1942, with the assistance of expert evidence. Before turning to the three issues, I propose to summarise the position on the ground.

### **The Position on the Ground**

- 6 Until about 1973, when the Coventry Highway was constructed across Beoley Lane, about one-third of the way along its route from the south, Beoley Lane was a lane of over 9 metres or 30 feet in width and about one and a half miles long. It runs, in the main, in a north-south direction. At its northern end, it meets the southern side of a public carriageway running east-west in a village called Holt End, which

is the parish of Beoley, in Warwickshire. Towards its southern end, after it has passed the triangle to its east, Beoley Lane turns east and joins the western side of the Birmingham Road. To the immediate east of this end of Beoley Lane, on the eastern side of the Birmingham Road, is a village called Mappleborough Green, in the parish of Studley, Worcestershire. Until around 1960, the only buildings adjoining Beoley Lane were a farmhouse and associated farm buildings, being Lower House Farm, on the western side of Beoley Lane, very near its southern end.

7 Around the point that Beoley Lane turns east towards the Birmingham Road, and just to the south of Lower House Farm, Beoley Lane passes through what used to be a common (“the Common”) which abuts the Birmingham Road. The Common was enclosed pursuant to the Studley Inclosure Act 1817 (“the 1817 Act”) which led to an Inclosure Map and an Inclosure Award in 1824. The triangle itself formed part of a substantial estate to the east of Beoley Lane, known as the Gorcott Hall Estate, which existed under that, or a similar, name for a substantial time. It seems clear that the owners and occupiers of the Gorcott Hall Estate were not commoners so far as the common was concerned.

8 Beoley Lane has become more impassable and less used over the past six decades (and possibly over a longer period). The oral evidence establishes that, since 1940, there has been little use of that part of Beoley Lane, which is now to the south of the Coventry Highway, with the exception of the southern most 300 metres or so. I heard oral evidence from three witnesses of fact, who were cross-examined, and I have read evidence in the form of five statements from witnesses of fact who were not cross-examined. The evidence of three of these witnesses was not challenged; the other two witnesses did not attend for cross-examination. Between them, these various witnesses gave evidence from their own knowledge as to the state and use of Beoley Lane from 1930 to the present day. It seems clear that, at least up to the end of the Second World War, the southern part of Beoley Lane (*i.e.* that part which is now to the south of the Coventry Highway) was used by members of the public on foot and on horses, moderately regularly, but not intensively. There is also evidence to suggest that it was used “on a regular basis” by cyclists, at least during the 1940s and 1950s, but I am reluctant to place much weight on that evidence, because it was given only by the two witnesses whom the defendant wished to cross examine, but was unable to do so. However, there was evidence from another witness, whom the defendant chose not to cross examine, that, during the 1940s, the southern end of Beoley Lane was used by “an occasional cyclist” and by farmers “occasionally driv[ing] their tractors”.

9 By the time one gets to the second half of the 1950s, the evidence of Mr Alan Turney, the Farm Manager of the Gorcott Hall Estate between 1954 and 1960, appears to me to paint an accurate picture. While he “did not have cause to pay [Beoley] Lane much attention” he described it as “always overgrown, usually waterlogged, and in many places impassable”. During his six or seven years working on the Gorcott Hall Estate, he “never saw anybody using Beoley Lane”.

10 It also appears that, during the 1930s, Beoley Lane was occasionally used for motor cycle rallying, although the evidence clearly established only that it was the northern section that was used for that purpose; it may be that the motorcyclists

turned off before they reached the southern section. More recently, in the early 1970s, it appears that Beoley Lane was used by recreational motor cyclists, in groups of three or four around four times a year. The then Principal Estates and Valuation Officer of Redditch, Mr Derek Owen, walked the whole length of the route of Beoley Lane around 1989. He described it as “very overgrown in places” but he said that he could walk along it. He produced some photographs which show that, at least in a significant part, Beoley Lane was muddy and waterlogged.

- 11 It is also clear from the evidence that, over the past 60 years or so, a substantial part of the route of Beoley Lane has been under water, particularly, I suspect, in winter. For some of its length, the whole width of Beoley Lane has been under water, although that does not appear to have prevented passage, because the water has not been very deep. However, it does appear that, particularly in the north, the water was viewed as a sufficient problem for a diversion off Beoley Lane to have been used, at least before 1940. Elsewhere along its length, especially in the south, part of the width of Beoley Lane appears not merely to have been underwater, but to have been a significant stream.
- 12 In early December 2002, I visited the site and saw Beoley Lane in its present state. From the north, Beoley Lane starts as a wide path going south from Holt End village to the east of Beoley, although it is not easy to tell now where one village starts and the other village stops, both villages being just to the northeast of Redditch. As one progresses southwards, after about 50 metres, Beoley Lane becomes (on its eastern side) a relatively narrow and somewhat muddy bridleway, and (on its western side), a fairly full running stream. Approached from its southern end, Beoley Lane initially goes westwards off the Birmingham Road and, after about a hundred metres, it turns northwards. For the first 300 metres or so, Beoley Lane is covered with concrete and then tarmacadam. To its immediate west are Lower House Farm and other houses which have been constructed, to judge from their appearance, in the past thirty years.
- 13 The tarmacadam then continues northwards, but this is on a footpath to the east of Beoley Lane, which has to its west, a public road representing effectively the eastern boundary of Redditch at that point. Beoley Lane itself runs to the east of the tarmacadam footpath, i.e. between that footpath, to its west, and the western boundary of the triangle to its east. If one continues northwards along Beoley Lane, parallel to this footpath, Beoley Lane effectively stops about a third of the way along its length to Holt End, because it is cut across by the dual carriageway of the Coventry Highway. The section of Beoley Lane, north of the first 300 metres or so, up to the southern side of the Coventry Highway, is virtually impassable throughout. For much of its length, part of the width of Beoley Lane is a stream, and for virtually all of its length, all parts of Beoley Lane are very muddy. Further, the whole of this section of Beoley Lane is heavily overgrown with shrubs, weeds, and overhanging trees.
- 14 So far as any means of access from the triangle onto Beoley Lane is concerned, there is a five-barred gate, of a traditional construction, about three-fifths of the way from the south along the western boundary of the triangle. The position of this gate appears to be identical to a gate shown on a 1758 plan of the Gorcott Hall Estate (to which I refer in more detail below).

**THE FIRST ISSUE:****The Ownership of Beoley Lane***The relevant facts*

- 15 It is common ground that, by a conveyance of April 26, 1946, Mr W D Adams acquired land, which expressly included the triangle, and which also included the whole of that part of Beoley Lane adjoining the triangle, although it was not expressly referred to in that conveyance. By July 1971, Mr Adams still owned the freehold of the triangle, and other land to the north of the triangle. He also owned the freehold of the whole of Beoley Lane adjoining the west of the triangle.
- 16 By a conveyance made on July 27, 1971 (“the 1971 Conveyance”), Mr Adams conveyed the triangle to the Council. In the preamble to the 1971 conveyance, reference was made to the fact that the Council had made a compulsory purchase order in 1969 (“the CPO”) to enable it to acquire land on the east of the triangle. That land is coloured red on the plan annexed to the 1971 conveyance, and it amounted to about 15 per cent of the triangle. The preamble also stated that the CPO was made for the purpose of constructing a road, which has now been constructed, and is the realignment of the Birmingham Road consequential on the then-proposed construction of the new Coventry I-Highway.
- 17 The preamble went on to mention that, additionally, Mr Adams had agreed to sell, and the Council to buy, the remainder of the triangle, coloured blue on the plan. This accounted for the balance of 85 per cent of the triangle. The preamble further stated that the land coloured blue was being acquired by the Council pursuant to its powers under s.214 of the Highways Act 1959 and s.157 of the Local Government Act 1933. It further referred to the fact that the land to be conveyed had been valued by the District Valuer at £24,700 (the sale price in the 1971 conveyance), which included a claim for injurious affection.
- 18 It is clear from the contemporary correspondence and other documentation that the CPO had the purpose described in the 1971 conveyance, namely to construct a realigned Birmingham Road as a result of the projected construction of the Coventry Highway. It is also apparent that Mr Adams wanted the Council to acquire the whole of the triangle. It is similarly clear that this was commercially acceptable to the Council, not least because the northern part of the triangle was needed by Redditch New Town Development Corporation (“Redditch”) for the construction of the Coventry Highway itself. It was also attractive to Redditch and the Council because an underpass would otherwise have had to be constructed under the projected Coventry Highway, to enable Mr Adams to obtain access to the land coloured blue from the land retained by Mr Adams to the north. It further appears clear from the negotiations that Mr Adams knew that the new Coventry Highway would be constructed across the northern part of the triangle and across Beoley Lane.
- 19 On October 15, 1970, the District Valuer carried out an initial valuation of the land to be conveyed, at £18,300. In that valuation, he identified the land to be conveyed, by reference to plot numbers shown on the 1905 Ordnance Survey (“O.S.”) sheets, which did not include the plot number for Beoley Lane. In the

valuation, he identified precisely the same acreage of land as that identified in the conveyance. He also distinguished between the blue land “acquired for Redditch ... for [the Coventry Highway]” and the red land “acquired for [the] Council for [Birmingham Road] improvements”. Mr Charles Phillips FSA, negotiated on Mr Adams’s behalf with the District Valuer, and it appears that Mr Phillips and the District Valuer eventually agreed the £24,700 valuation.

20 The plan attached to the 1971 conveyance (“the plan”) is not conspicuously clear, although the extent of the areas coloured blue and red are quite apparent. The location of the proposed realignment of the Birmingham Road was shown by a series of pecked lines going roughly north/south in the land coloured red within the triangle. Also shown on the plan was a proposed substantial intersection between the realigned proposed Birmingham Road and the Coventry Highway; this intersection, which included a gyratory system, was partly to the east of the triangle, and partly on the land coloured red and partly on the land coloured blue, within the triangle. The proposed route of the Coventry Highway was also shown on the plan marked with a pecked line going west from this intersection along the north part of the triangle and along the northern section of that part of Beoley Lane, which ran along the western boundary of the land coloured blue.

21 The land conveyed by Mr Adams to the Council was described in the 1971 conveyance as:

“ALL THOSE several pieces or parcels of land containing in the whole [45.197] acres or thereabouts situated at Gorcott Hill in the Parish of Studley in the County of Warwick and being enclosures Nos. 19, 23, 36 and 37 and parts of enclosures Nos. 8, 9, 20, 21, 22, 24, and 27 on Sheets Nos. XXXI-2, 5 and 6 of the Second Edition of 1905 of the O.S. Map for Warwickshire and which said pieces or parcels of land are for the purpose of identification only delineated on the plan annexed hereto and coloured as to part red [and] as to further part blue ...”

22 It is clear that a very small part of enclosure No. 15 was accidentally omitted from that description, but it was included, both in the District Valuer’s Valuation, and on the plan. The colouring on the plan appears to have obliterated much of the marking underneath. However, it seems clear from the numbering of various areas shown on the plan, but not coloured red or blue, that the numbering referred to in cl.1 of the 1971 conveyance was reflected in the numbering on the plan. In particular, Beoley Lane, which is not included in the coloured land, is marked 35. The 1905 O.S. Map similarly shows Beoley Lane marked 35.

23 Thereafter, the Council constructed the realigned Birmingham Road on the red land, *i.e.* on the west of the triangle, and it appears to have conveyed the remainder of the triangle to Redditch. During the first half of the 1970s, Redditch constructed the Coventry Highway along the north of the triangle. As projected, it cuts across Beoley Lane, which is now a cul-de-sac. Redditch’s statutory successor is the Commission, which now intends to redevelop the remainder of the triangle for housing purposes. Vehicular access to the triangle cannot be obtained (or, possibly could only be obtained with difficulty and expense) from the Birmingham Road or



the Coventry Highway. For that reason, vehicular access from Beoley Lane is of considerable potential value.

- 24 In these circumstances, the defendant's case, at least at first sight, is simple. It is clear that the land conveyed by the 1971 conveyance, when one looks at the description in the 1971 conveyance, which does not include enclosure 35, and at the plan, on which Beoley Lane is not coloured, did not include Beoley Lane. However, Mr Kim Lewison Q.C, who appears with Mr Jonathan Karas, for the Commission, contends that Beoley Lane was nonetheless included in the 1971 conveyance. This contention is based on the provisions of s.62 of the Law of Property Act 1925 ("s.62") and/or the presumption that a conveyance of land next to a highway carries with it that part of the highway which adjoins the land, and is owned by the vendor. I propose first to consider the second argument, which is based on what I will call the "highway presumption", and then I will turn to s.62.

### **The highway presumption**

- 25 The highway presumption has been defined in the following terms:

"Where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is, that the soil of the highway usque ad medium filum passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it."

This quote is taken from the headnote in *Berridge v Ward* 10 C.B. (NS) 400, cited with approval by Waite L.J. in *Pardoe v Pennington* (1996) 75 P. & C.R. 264 at 269.

- 26 There are two issues to be considered. The first is the effect of Mr Adams's owning the whole of the width of Beoley Lane adjoining the west of the triangle. The second is whether the presumption is rebutted in the present case.
- 27 As I have mentioned, it is common ground that Beoley Lane is a highway (although the extent of the permitted public use is in dispute). Normally, when a highway (or part of a highway) divides properties in different ownership, the owner of the property each side can be shown, or is deemed, to have included in his ownership, the soil of the highway adjoining his property up to the middle of the road. Hence the reference in the headnote in *Berridge* to "usque ad medium filum". However, a somewhat novel point arises in the present case, because, although Mr Adams owned the triangle to the west of Beoley Lane and did not own the land on the other side of that part of Beoley Lane, he owned the whole of that part of Beoley Lane adjoining the triangle. In those circumstances, it is the Commission's case that, unless the presumption is rebutted in the present case, the whole of that part of Beoley Lane adjoining the triangle must have been included in the 1971 conveyance by virtue of the highway presumption. Despite argument to the contrary by Mr John Randall Q.C., who appears for the defendant with Mr Conrad Rumney, I consider that that submission is well founded in principle and on authority.
- 28 So far as principle is concerned, the highway presumption is that, in the absence of a good reason to the contrary, where a vendor conveys land adjoining the

highway and (as is usual) he therefore owns the land of the adjoining highway ad medium filum, he should be presumed to have conveyed away that land, which he owns under the highway, together with the land the subject of the express conveyance. The rule is essentially one of convenience, both in public terms and bearing in mind the interests of the parties. It is undesirable, in terms of public interest, to have odd pieces of land, whose ownership is largely academic in practice (unless, for instance, the highway is diverted), vested in persons who have no interest in any adjoining land, and who may well not even be aware that they own part of the highway. It is in the interest of the parties to a conveyance that the purchaser takes the adjoining highway land, essentially for the same reason. On that basis, if the adjoining owner happens to own more than half the width of the adjoining road, even all the adjoining road, it would seem logical that the presumption should lead to his being deemed to convey away the whole of his interest in the adjoining road. To put the point more simply, if the rule is that, in the absence of good reason, a person should not retain the half of a highway adjoining land which he sells, it seems almost a fortiori that he should not retain the other half of the adjoining highway, if he happens to own that half as well. Further, there is no inherent reason why the soil of the whole of the highway should not be deemed to be conveyed away: consider a case where the vendor owns, and is conveying land on each side of the highway.

- 29 Although there is no case in which this issue has been considered in circumstances where the vendor owns the whole of the adjoining road, it seems to me that significant support for my conclusion can be found in an observation of Romer J in *In re White's Charities, Charity Commissioners v Mayor of London* [1898] 1 Ch. 659 at 666:

“In the ordinary case where it is said that the presumption is that the soil of the highway ad medium filum is intended to pass, that is because, as between owners of land abutting the highway between them, the presumption is, in the absence of knowledge of the precise facts, that each owner does own the soil of the highway ad medium filum. If it turned out that the presumption was not accurate in fact, and that, as between the owners of the properties on the opposite sides of the highway, the highway was unequally divided between the two, then the sole effect of that would be, not that it would negative the presumption that the soil of the highway passed by a conveyance by the owner of the property on one side of the highway, but the presumption would then be that the conveyance passed the soil of the highway so far as it was vested in the conveying party.”

- 30 Accordingly, I turn to consider the second question relating to the highway presumption, namely whether, on the facts of this case, that presumption is rebutted. Before turning to consider that question by reference to the facts of this case, it is helpful to mention the authorities on the subject to which I have been referred.

- 31 In *Marquis of Salisbury v Great Northern Railway Company* (1858) 5 C.B. (NS) 174, the conveyance listed those parcels of land which were included in the conveyance, including two parcels, with their respective numbers as shown on a

plan, which were either side of the road, which itself had a number on the plan, and which was not identified as included in the conveyance (see at p.176). Further, both vendor and purchaser believed that the vendor did not have title to the road. The court concluded that the road was not included in the conveyance, *i.e.* that the highway presumption was rebutted.

32 Williams J., at p.210, thought that the point was clear, and based his reasoning on the understanding of the parties and the terms of the conveyance. Crowder J., at pp.214 to 215, “entertained some doubt” on the point, and, while it seems plain that he relied on the terms of the conveyance, it is not entirely apparent, at least to me, how much weight he placed on the understanding of the parties: at the very least, he thought it was worth mentioning. Byles J., at p.217, agreed with both judgments.

33 In *Berridge*, it was held that the road was included, *i.e.* the highway presumption was not rebutted. In that case, the name of each piece of land to be conveyed, together with its respective area, was set out in the conveyance, and the land to be conveyed was shown coloured on a plan, which also contained the numbers. Again, there was no reference to the road in the conveyance and the road was not included in the coloured area on the plan. Two grounds for distinguishing *Salisbury* appear to be that the plan did not disclose a specific enclosure number for the road in question, and that the parcels clause conveyed the land “together with all roadways belonging or appertaining” (see at p.402). I am not impressed with the latter ground, as it was not referred to in the judgments and, a similar provision was expressly not relied on in *Micklethwait v Newlay Bridge Company* (1886) 33 Ch. D. 133 at p.145 (see below).

34 In *Berridge* at p.415, Erle L.J. effectively contented himself with identifying the highway presumption and saying that it was not rebutted Williams J., who had been party to the decision the other way in *Salisbury*, said this at p.416:

“In the case of ... *Salisbury* ..., there was enough on the face of the conveyance which was set out in the special case to shew that moiety of the adjoining highway was not intended to pass. That case, therefore, is out of the general rule. There is nothing in the present case to take it out of that general rule.”

Willes and Keating JJ. agreed in the result.

35 In *Micklethwait* itself, the Court of Appeal held that the highway presumption applied equally to a water way as it did to a road. At p.145, Cotton L.J. held that the presumption was not rebutted in a case where the land conveyed was “described by quantity of yards and ... as being bounded to the north by the river”. Thirty years after the conveyance, it was proposed to build a bridge over the river, a proposal which meant that ownership of each half of the river became potentially valuable. While Cotton L.J. accepted that “the surrounding circumstances” could be relied on to rebut the presumption, he emphasised that one could not take into account circumstances which were not and could not have been in the minds of the parties at the time of the conveyance, and only arose afterwards. He also made it clear that he rested his decision on the highway presumption rather than the fact that the conveyance included all “water courses” appertaining to the land conveyed.

36 In *Pryor v Petre* [1894] 2 Ch. 11, the highway presumption was held to be

rebutted by Romer J., whose decision was upheld by the Court of Appeal. The conveyance described the land conveyed as “comprising 52.645 acres” and as shown delineated on a plan. The conveyance contained a schedule which described the property to be conveyed by reference to numbers appearing on the O.S. plan. The road in question was shown on the plan with a plot number, but it was not shown on the plan as included in the sale, nor was it referred to in the schedule. There was also evidence that the timber on the land conveyed had been valued, and that the valuation did not extend to trees on the road.

37 At 18, Lindley L.J. described the case as being “very near the line”. At p.19 he said:

“When you find the parcels described with reference to the ordnance map, the numbers on that map appear to me to be too important to be left out of account.”

At pp.19 to 20, he concluded that the evidence of the timber valuation, and the fact that it did not extend to the trees on the road, was admissible, not least because reference was made to the valuation in the recital to the conveyance.

38 At p.20, having referred to the contents of the conveyance, including the precise acreage, and the designation on the plan, including the apparent exclusion of the road, Lindley L.J. said this:

“That, of course, after the decision in *Berridge v Ward*, is not conclusive by any means; neither is the acreage coupled with it sufficient to rebut the general presumption. But when we come to look at the recital with respect to the trees, it appears to me that the learned Judge has decided this case rightly upon that recital and upon the fact that the trees which were valued were trees on the property defined in the parcels, but excluding the [road] in question”

He concluded:

“One of the several facts which I have mentioned would not be conclusive; but when we join them altogether it is difficult to say that this piece of land passed by the presumption of law, and that there is not sufficient to rebut the presumption.”

39 At p.21, Kay L.J. said this:

“First of all, on the face of the deed, the acreage does not include any part of this road; secondly, it is described by reference to the ordnance map, and the numbers on the ordnance map are copied on the map which is part of this conveyance. This moiety of the road is included in a piece numbered 5, and No. 5 is not referred to in the deed. That is another point. Then you find upon that map on the deed that the freehold land, which includes this wood, is edged with a pink line, and this pink line is so drawn as not to include one moiety of the road.”

40 He went on to say this:

“However, I agree that those facts alone, after the decision in *Berridge v Ward*, although they are very strong and significant, might not be enough to rebut the presumption; but then we have another fact [sc. a valuation of the timber excluding the trees on the road] which, added to those facts, to my mind does turn the scale. The presumption is, I think, rebutted by an accumulation of facts, a few of which alone, or it maybe any of which alone, might not be enough to rebut it; but when you get the force of the whole accumulation, that . . . seems to me . . . sufficient to rebut the presumption.”

The judgment of AL Smith L.J. was to much the same effect (see at pp.24 and 25).

41 Finally, I should refer to *Pardoe*. In that case, the Court of Appeal held that the highway presumption was rebutted, for reasons which were set out at pp.270 to 271. I do not propose to go into those reasons, because they are special to the facts of the case. However, it seems to me that none of them were based on the terms of the conveyance itself; rather, they arose from practical and common sense factors which would have been known to both parties to the conveyance at the time of its execution.

42 Confining oneself to the description of the property conveyed by, and the contents of the plan appended to, the 1971 conveyance, it appears to me that, at least on the basis of the authorities, each party has a fairly powerful case. As Mr Randall points out on behalf of the defendant, the facts of the present case are virtually indistinguishable from those in *Salisbury*, where the presumption was rebutted. First, the land to be conveyed is shown coloured on a plan attached to the conveyance, and it is clear that the colouring has been done carefully, and does not extend to the highway in question. Secondly, the parcels to be conveyed are identified in terms in the conveyance by reference to their numbering on a plan, and the highway has a specific number on the plan, and that number is not included in the conveyance. Indeed, it may be said that the present facts are slightly stronger against the presumption, than those in *Salisbury*, because the presumption in *Salisbury* applied to only half the road, whereas here it applies to the whole road: it is perhaps a little more significant that the colouring does not extend to the whole road, than it would be if the colouring should only have extended to half the road.

43 However, there was clear and positive evidence in *Salisbury* that the parties believed that title to the road in question was vested in a third party, not the vendor. That fact, certainly appears to have been treated by Williams J., and, I think, Crowder J., as providing support for the contention that the parties could not have intended that the road be included in a conveyance from the vendor. In the present case, there is no suggestion of such a belief on the part of the parties to the 1971 conveyance. *Salisbury* is therefore of some, but limited, help to the defendant, at least if one limits oneself to the terms of the 1971 conveyance.

44 On the other hand, still confining myself to the specific identification of the land to be conveyed in the conveyance and the plan, the distinction between the present case and *Berridge* is pretty slight. The only difference which appears to me to carry any weight is that the conveyance plan in the present case shows the road with a number, whereas the road had no number in *Berridge*. It does not seem to me that the decision in *Pryor* takes matters much further in this connection, given the

somewhat equivocal observations as to the correct answer if there had been no timber valuation. However, Lindley L.J.'s indication that that case was "very near the line", even with the timber valuation evidence, is somewhat helpful to the Commission's case.

- 45 If the issue had to be determined on the narrow basis so far considered, I would have found it difficult to resolve. However, each party relies on other points to support their respective positions with regard to the highway presumption. Those arguments depend on commercial common sense, and accordingly they may be seen by some to be rather more forceful in the modern context than nice points of drafting (particularly in light of the approach of the Court of Appeal in the most recent case on the highway presumption, namely, *Pardoe*. While these points may be more attractive, their combined effect does not make the determination of the issue any easier.
- 46 Four further factors are relied on by the defendant to rebut the highway presumption, namely, the District Valuer's valuation, the possibility of the vendor wanting to use Beoley Lane for the benefit of his retained land, his desire to keep Beoley Lane as a ransom strip and the poor drafting of the 1971 conveyance. Two factors are advanced by the Commission to support the application of the presumption, namely the parties' appreciation of Redditch's requirement for part of Beoley Lane, and the likelihood that the vendor thought he did not own or need Beoley Lane. I shall take these points in turn.
- 47 The defendant's first contention, namely that the District Valuer's valuation clearly excluded any part of Beoley Lane, appears, at any rate at first sight, a strong point for rebutting the highway presumption, in light of the decision and reasoning in *Pryor*. In each case, there was a valuation, which was referred to in the preamble to the conveyance, and which can be shown to have excluded the highway concerned. However, unlike in *Pryor* there is no evidence in the present case that, at the time of the conveyance, the highway had any value. In *Pryor* it was agreed that the trees on the road had a specific value, which was plainly not included in the timber valuation referred to in the conveyance. Here, there is reason to believe that Beoley Lane was of no practical utility (being overgrown over most of its route, and waterlogged in many places), indeed, there is no evidence that it had any value. Mr Randall suggests that that part of Beoley Lane adjoining the triangle must have had some value, given that it was over one acre, about half a hectare in area. I am not persuaded by that. It is one thing to say that an unencumbered one acre of field of regular shape must have a value; it is quite another to say that an overgrown, waterlogged, etiolated strip of land, subject to public highway rights throughout, must have a value. In this case, therefore, I think that the valuation evidence takes matters only a little further than the terms of the conveyance itself.
- 48 The defendant's next argument, that Mr Adams, the vendor under the 1971 conveyance, might well have had an interest in retaining the relevant part of Beoley Lane as a means of access, has apparent attraction if one considers the position on a plan as at 1971. Mr Adams retained land which was to the north of the triangle which abutted Beoley Lane. He might well, therefore, at least on the face of it, have wanted to retain that part of Beoley Lane adjoining the triangle, in order to obtain access from the south to his retained land. There are, however, two

serious objections to that argument. First, there is nothing to suggest that, in 1971, Beoley Lane was used as a means of access (whether from the south or at all) to any land owned by Mr Adams (whether the triangle or the retained land). Indeed, there was oral evidence which fairly strongly indicates that Beoley Lane was hardly used at all by 1971; further, such evidence as there is as to its use at that time does not suggest that there was any use for access to, or egress from, any land abutting Beoley Lane. Secondly, Mr Adams cannot have been interested in using Beoley Lane as a means of access to his retained land from the south. The Coventry Highway, which he knew, as at the date of the 1971 conveyance, was to be constructed in the near future, would cut across the northern sector of that part of Beoley Lane adjoining the triangle. It would have been clear that this would cut off any vehicular access to Mr Adams's retained land, from the south along Beoley Lane. Indeed, it seems from the evidence that, by the date of the 1971 conveyance, preparatory work in connection with the relevant part of the Coventry Highway had already started. Correspondence suggests that Redditch had already entered onto the triangle, and started such preparatory work by the end of April 1971, some three months before the 1971 conveyance.

49 I turn to the contention that Mr Adams could have wanted to retain Beoley Lane for the very purpose that it is now being used by the defendant, namely with a view to sharing in any development value of the triangle. I do not consider that that is a good point. It seems to me to run into the same difficulties as the argument that was rejected in *Micklethwait*. Just as it could be said in that case that it was foreseeable that someone in the future might want to construct a bridge across the river, so it might be said in this case that it would have been foreseeable in 1971 that the triangle might be developed at some point. The essential point is that the prospect in question was not in the minds of the parties at the date of the conveyance: it only came into contemplation some 30 years later (both in *Micklethwait* and in the present case).

50 I am also unimpressed with the defendant's fourth contention, namely that the 1971 conveyance was poorly drafted. It is true that there was an accidental omission of a small part of plot 15 from the list of properties in the parcels clause in the conveyance (although the small part is clearly included in the plan, if one compares it with the 1905 O.S. plan, of which it is a coloured-up copy). Further, if anything, it could be said that this oversight means that the failure to mention Beoley Lane by plot number in the 1971 conveyance is of less, rather than more, significance, but, in my view, the point is irrelevant. The second defect alleged to exist in the 1971 conveyance is the omission of a small piece of land on the northwest of the triangle. That omission is convincingly explained by Mr Lewison: the piece of land in question was omitted because it was in Worcestershire (unlike the rest of the triangle which was in Warwickshire) and the Council could therefore not acquire it.

51 The Commission's main point is that it is clear from the position on the ground, the pecked lines on the plan attached to the 1971 conveyance, and the documentation leading up to the execution of the conveyance, that all the parties knew that one of the two purposes of the Council (effectively on behalf of Redditch) in acquiring the triangle was to enable Coventry Highway to be

constructed across its northern part, and across the northern section of that part of Beoley Lane adjoining the triangle. Accordingly, if the highway presumption does not apply, and Mr Adams retained that part of Beoley Lane, he would have been able to hold up the construction of the Coventry Highway, or a very narrow section of that highway, unless and until a section of Beoley Lane had been compulsorily or voluntarily acquired from him by the Council on behalf of Redditch, or by Redditch directly. Particularly as Redditch owned the land immediately to the west of that section of Beoley Lane, and Mr Adams owned no other land which was required for the construction of the Coventry Highway, it seems to me that this represents a significant point in favour of, or bolstering, the application of the highway presumption.

52 The Commission's second point is effectively a composite contention. It is that Beoley Lane had no apparent value, that Mr Adams, whether as owner of the retained land to the north, or in any other capacity, did not appear to have used, or have benefited from, Beoley Lane, and, indeed, that the parties to the 1971 conveyance will not have appreciated that Mr Adams owned that part of Beoley Lane. These points appear to me to be correct. On their own, however, they do not take the issue of the highway presumption much further either way. Nonetheless, in my view, they tend rather to reinforce the application of the highway presumption, in that they emphasise that there is no apparent extraneous reason, which outweighs the Commission's first argument to support the application of the highway presumption in the present case. In particular, it should perhaps be emphasised that this is not a case, like *Salisbury*, where the parties positively believed that the roadway was owned by a third party, it is a case like *Micklethwait*, where the parties "probably never thought about the point"—see *per* Cotton L.J. at 33 Ch D 147, and *per* Lindley L.J. to much the same effect at 153.

53 Like Lindley L.J. in *Pryor*, this case appears to me to be "very near the line". Nonetheless, the Commission's arguments persuade me that, in light of the approach of the courts in the various authorities cited above, the defendant's arguments, even when taken together, are insufficient to rebut the highway presumption applying in the present case. Although the facts of the present case, as to the identification of the property to be conveyed in the conveyance and plan, are very similar to those in *Salisbury*, and although there is a close apparent similarity with *Pryor*, so far as the valuation aspect is concerned, I am not persuaded the presumption is rebutted. In *Salisbury*, there was the additional fact that the parties clearly believed that the road was owned by a third party. (In this connection, although Williams J. seems to have suggested in *Berridge* that *Salisbury* was decided simply by reference to the terms of the conveyance alone, I am not convinced that that observation is correct) In any event, the decision in *Berridge* itself, and the observations of the Court of Appeal as to the effect of the description of the property in the conveyance in *Pryor*, render the description of the property in the 1971 conveyance (and plan), a somewhat uncertain basis for holding that the highway presumption has been rebutted in the present case. In any event, there are the extraneous factors in the present case which did not exist in *Salisbury*. As to *Pryor*, although there was a valuation in the present case which excluded the road, there is no evidence as to the value, if any, of the road, and there is a real possibility



that it had no value. Furthermore, in *Pryor* there was no other extrinsic evidence as there is in the present case.

54 In the end, of course, I am concerned with construing a particular document, the 1971 conveyance, in the context of its own factual matrix. To ignore earlier cases would be wrong. They contain valuable guidance as to the approach to be adopted to the highway presumption. Further, it could lead to inconsistency, and therefore to undesirable uncertainty, if I did not consider those earlier cases in the context of the present issue. However, it is notoriously dangerous to construe a document by comparing its terms with the terms of different documents entered into in different circumstances.

55 In the end, it seems to me that the essential factors in the present case, so far as the application of the highway presumption is concerned, are as follows:

- i) Beoley Lane is a highway, part of which adjoins the triangle which was conveyed by Mr Adams to the Council;
- ii) The soil of the whole of that part of Beoley Lane which adjoined the triangle was owned by Mr Adams;
- iii) The highway presumption therefore applies to the whole of that part of Beoley Lane which adjoins the triangle;
- iv) It is for the defendant, standing effectively in the vendor's shoes, to establish that the highway presumption is rebutted;
- v) The effect of the cases, and of normal principles of construing contracts, is that the presumption will be rebutted if it is sufficiently clear, from the terms of the conveyance and/or from the surrounding circumstances, that the vendor was intending, and/or the vendor had good reason at the time, to retain the soil of the adjoining highway;
- vi) One must therefore look at the terms of the conveyance and the surrounding circumstances and ask oneself whether, taken as a whole, they rebut the highway presumption;
- vii) The fact that Beoley Lane was not mentioned or included in the 1971 conveyance, or marked on the plan as included within the land to be conveyed, is plainly not enough to rebut the presumption: otherwise the presumption would be virtually always redundant;
- viii) The fact that Beoley Lane had a plot number and the 1971 conveyance identified the properties to be conveyed by reference to plot numbers which did not include Beoley Lane, is a factor which should be taken into account and militates against the presumption;
- ix) The fact that the property to be conveyed was the subject of a valuation (referred to in the 1971 conveyance) which clearly did not extend to any part of Beoley Lane, provides some basis for rebutting the presumption, but it is of limited value given that there is no evidence that any part of Beoley Lane had any value, and there is real reason for thinking that it had no value;
- x) In view of the imminent construction of the Coventry Highway (obliquely referred to in the 1971 conveyance by virtue of the mention of s.214 of the Highways Act 1959, and identified more plainly by pecked lines on the plan attached to the conveyance), the evidence as to the virtual absence of

any local use of Beoley Lane, and the complete absence of any evidence as to the use of Beoley Lane for access to Mr Adams's retained land, there is no real force in the point that Mr Adams might have wanted to retain that part of Beoley Lane adjoining the triangle, in order to obtain access to his retained land;

- xi) The notion that the vendor might have wanted to retain that part of Beoley Lane in order to be able to participate in any eventual development value of the triangle is irrelevant, as it was not in the minds of the parties at the time;
- xii) The requirement of Redditch (via the Council as purchaser under the 1971 conveyance) to obtain a significant section of the relevant part of Beoley Lane for the construction of the Coventry Highway (evident from the plan attached to the 1971 conveyance) is a substantial factor in favour of the highway presumption applying, especially as Mr Adams retained no other land needed for the construction of the highway, and Redditch already owned the land needed for that purpose, on the other side of Beoley Lane.

56 Bearing in mind the potential importance of surrounding circumstances (as emphasised in *Micklethwait* and in *Pardoe*), especially when they can be identified by reference to the terms of the conveyance and the plan attached thereto, I am of the view that the highway presumption is not rebutted in the present case. The fact that Beoley Lane had a number on the plan which is not mentioned in the conveyance, and the fact that Beoley Lane was not included in the valuation, as well as the very weak point that the vendor may have wanted to keep the relevant part of Beoley Lane for access to his retained land, are at the very least balanced, and in my view are outweighed, by the facts that it was clear that a section of the relevant part of Beoley Lane was needed by Redditch (via the Council) for the construction of the Coventry Highway, and Beoley Lane had no real apparent value to Mr Adams.

57 Given this conclusion, it is strictly unnecessary for me to consider the alternative basis upon which the Commission contends that the relevant part of Beoley Lane was conveyed away in the 1971 conveyance, namely pursuant to s.62, or indeed the other two main arguments. However, because they have been fully argued, and because this case may go further and the remaining points (especially the third issue) involve making findings of fact, I shall deal with those remaining arguments.

### *Section 62*

58 I turn to the Commission's contention that, if the relevant part of Beoley Lane was not conveyed to the Council in 1971 by virtue of the highway presumption, it was so conveyed by virtue of s.62 of the Law of Property Act 1925. The provisions of ss.62(1) and (4) are as follows:

“(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or, at the time of

conveyance, demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

...

(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained”

59 If that part of Beoley Lane adjoining the triangle is a “way . . . enjoyed with . . . or appurtenant to [the triangle]”, then I think it would follow, from my reasoning as to why the highway presumption is not rebutted, that s.62(4) is not engaged, and that therefore the Commission’s alternative argument based on s.62 would succeed. In this connection, Mr Randall accepts, in my view rightly, that the s.62 presumption is at least as strong as the highway presumption. In my judgment, it is stronger, and therefore harder to rebut. My view is not so much based on the fact that s.62 involves a statutory presumption, it is based more on the way in which s.62(4) is worded. The authorities already discussed indicate that the highway presumption can be rebutted by implication. It seems to me, however, that s.62(4) requires an express rebuttal of the s.62 presumption, although there is no reason to think that the express words need refer to s.62. After all, s.62(4) refers to “a contrary intention” being “expressed” in the relevant conveyance.

60 This view appears to be supported by authority. In a case concerned with the statutory predecessor of s.62, namely s.6 of the Conveyancing Act 1881, *Gregg v. Richards* [1926] Ch. 521, Pollock M.R. said this at pp.526 to 527 and 529:

“It is not suggested in any of the cases that that must be an expression in absolute terms, but it is worth noting that the word used in the sub-section is ‘expressed’ and not, as in some other cases . . . ‘unless the contrary intention appears’”.

“Under those circumstances I do not think the . . . canon of construction, ‘expressio unius exclusio alterius,’ is appropriate here.”

The observations of Sargant L.J. at pp.534 and 535 are to much the same effect.

61 The question, therefore, is whether Beoley Lane was “appurtenant to” or “enjoyed with” the triangle, within the terms of s.62(1). The large category of items included in s.62(1) is a mixture of physical things and incorporeal hereditaments, and a mixture of the obvious ( e.g. “buildings” or “fixtures”) and items which lead to somewhat unexpected results (thus s.62 can effectively convert a precarious licence into an easement: see *Wright v Macadam* [1949] 2 K.B. 744). Further, it appears to me clear that it was not intended that all the verbs at the end of s.62(1) could apply to all the items listed therein. Thus “occupied” cannot govern “easements”. There is therefore no inherent reason why, for instance, “enjoyed with” should govern “buildings” or other physical items.

62 The essential questions in the present case for the purpose of determining the s.62 issue, are (a) whether a way not otherwise included in the conveyance can be said to be “appurtenant to” or “enjoyed with” the conveyed land under s.62, and, if so, (b) whether, on the facts of this case, that part of Beoley Lane adjoining the triangle was “appurtenant to” or “enjoyed with” the triangle.

- 63 The first question is potentially wide-ranging: is s.62 apt to include other physical land, not referred to in the conveyance, with the land expressly to be conveyed? In my view, while, in very exceptional circumstances, it might be possible (a point which I leave open), it would not be a permissible result in a normal case. For instance, if a vendor sells a house to an occupying purchaser, who is currently permitted by the vendor to store materials (to the exclusion of others) in a nearby garage owned by the vendor, it cannot possibly be right that the garage, not otherwise included, but not referred to, in the conveyance, is deemed by s.62 to be so included because it is “enjoyed with” the house. (I accept, that the effect of s.62 might well be to convert the licence to use the garage into an easement, in light of the decision in *Wright*).
- 64 In my view, “enjoyed with” refers to incorporeal hereditaments, such as easements, and not to physical property. So, too, with the word, “appurtenant”. Authority suggests that, at least so far as its normal meaning is concerned, land cannot be “appurtenant” to other land: see the authoritative observation of Sir John Romilly MR in *Lister v Pickford* (1865) 34 Beav. 576 at 580, and the discussion in *Methuen-Campbell v Walters* [1979] Q.B. 525, 534–535 per Goff L.J., and at 542–543 per Buckley L.J.
- 65 Section 62 is “designed to make it unnecessary to set out the full effect of every conveyance by ‘general words’ extending it to all kinds of particulars”—see Megarry & Wade, “The Law of Real Property”, sixth edition, at para.18–108. In those circumstances, I do not think that the court should be anxious to give “appurtenant to” or “enjoyed with” a very wide meaning, particularly if it is inconsistent with their normally accepted legal meaning, albeit that I accept that any such expression must be interpreted according to its context. Although the statutory insertion of words in order to shorten deeds may sometimes have a fairly far ranging effect, as in *Wright*, I do not think that the court should be anxious to give it the wide—almost revolutionary—meaning which the Commission’s case involves. Indeed, I think there is force in Mr Randall’s contention that all three members of the Court of Appeal in *Gregg* considered that s.62 should not be construed in such a way as to result in “[the] habendum ... enlarging the description of the parcels” (per Warrington L.J. at [1926] Ch. 533, see also at p.527 per Pollock M.R., and at p.535 per Sargent L.J., to the same effect).
- 66 Even if this is wrong, I do not consider that it has been established in the present case that that part of Beoley Lane adjoining the triangle was “appurtenant to” or “enjoyed with” the triangle, at the time of the 1971 conveyance. There was, I accept, one means of access (through a gate), so far as I can see it on the evidence, from the triangle directly onto Beoley Lane. However, the evidence suggests that Beoley Lane was not in fact used as a means of access to the triangle, whether directly from the lane or indirectly (e.g. through other land owned by Mr Adams). It is clear that there were other means of access to the triangle, usable by Mr Adams (namely from the north) and available to Redditch (namely from the east) as at the time of the conveyance. In my view, the furthest one can go is to say that that part of Beoley Lane adjoining the triangle is “appurtenant to” or “enjoyed with” the triangle because it was a highway, the soil of which was owned together with the triangle, and that really brings one back to the highway presumption.

67 Further, if it could be said that that part of Beoley Lane adjoining the triangle was appurtenant to, or enjoyed with, the triangle, I do not see why the rule in *Wheeld v Burrow* (1879) 12 Ch. D. 31 (referred to in the next section of this judgment) should not be sufficient to provide a purchaser of the triangle with appropriate protection. After all, on this hypothesis, it is hard to see why Beoley Lane would not also have been “appurtenant to” or “enjoyed with” Mr Adams’s retained land to the north of the triangle. It is far more likely and sensible, on this hypothesis, to conclude that he conveyed rights over the relevant part of Beoley Lane in the 1971 conveyance, rather than conveying the land itself, thereby depriving himself of any rights over it.

68 Accordingly, I conclude that that part of Beoley Lane which adjoins the triangle was included in the 1971 conveyance by virtue of the highway presumption, but, if that is wrong, it would not have been included by virtue of s.62. I turn then to the second issue which proceeds on the assumption that that part of Beoley Lane was not included in the 1971 conveyance, and was therefore retained by Mr Adams, and is now owned by the defendant.

## THE SECOND ISSUE:

### A Private Right of Way

69 The Commission contends that, when the triangle was conveyed to the Council by Mr Adams, the Council was granted, by implication, a right of way for all purposes over Beoley Lane for the benefit of the triangle, by virtue of the rule in *Wheeldon v Burrows*. This rule was quoted by Lord Wilberforce in *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] A.C. 144 at 168E–F in terms which I repeat (together with his emphasis):

“On the grant by the owner of a tenement of part of that tenement *as it is then used and enjoyed*, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and *which have been and are at the time of the grant used* by the owners of the entirety for the benefit of the part granted”

70 In my view, this contention of the Commission must be rejected. There is, as I have mentioned, no evidence that, as at 1971, Beoley Lane was used as a means of access to, or egress from, the triangle, at all, let alone with vehicles, whether directly from the land itself, or indirectly (such as through other land owned by Mr Adams). I am of that view even though the evidence establishes that there was a gate at one point from the lane to the triangle. The evidence establishes to my mind that as at 1971, Beoley Lane was occasionally used for motor cycling three or four times a year, by four or five people who liked travelling on challenging routes, and that one or two people in the vicinity may very occasionally have taken a stroll down parts of Beoley Lane. However, there is nothing to suggest that it was ever used, let alone with vehicles, in 1970 or 1971 by Mr Adams, his tenant, or anyone else, to obtain access to or egress from any part of his land adjoining or near Beoley Lane, and in particular the triangle.

- 71 I do not consider that the Commission's argument on this aspect is assisted by the fact that Beoley Lane may have been used in the past as a means of access to, or egress from, the triangle. As Lord Wilberforce emphasised, for the purpose of the rule in *Wheeldon -v- Burrows*, one is concerned with use which is contemporaneous with the date of the conveyance, and not with use in the past. Nor do I consider that the Commission's case is helped by the fact that Beoley Lane was a public highway. If anything, the fact that Beoley Lane was a highway suggests that there was no need for an implied private grant of a right to use the lane, given that there was a public right to do so (albeit that there is a dispute as to whether the public right extends to a carriageway use).
- 72 In these circumstances, I reject the Commission's argument, that, if the defendant owned Beoley Lane, the Commission has a private right of way over it. I turn to the third issue, which does not depend on the identity of the owner of Beoley Lane.

### THE THIRD ISSUE:

#### Public Carriageway

#### The relevant legal and factual background

- 73 There is no dispute as to the basic highway law applicable in this case. First the definition of a highway. It is a way over which a public right of passage exists, for all Her Majesty's subjects at all seasons of the year to pass and re-pass, freely and at their will, without let or hindrance (Halsbury's Laws, 4th edition, re-issue, Vol.21, para.1).
- 74 Secondly, there are three types of highway: (i) A carriageway (also known as a cartway), over which there is a public right of way (a) on foot, (b) riding on, or accompanied by, a beast of burden, and (c) with vehicles or cattle. (ii) A bridleway, which is more limited, in that there is no right of passage with vehicles; often, there is no right to drive cattle over a bridleway either, but where there is such a right, the bridleway is often known as a driftway. (iii) A footpath, where the public's rights are limited to passage on foot (See Halsbury, *op. cit.* para.8 and *per* Lord Diplock in *Suffolk County Council Mason* [1979] A.C 705 at p.710).
- 75 Thirdly, until 1968, bicycles could only be ridden on carriageways, but, since 1968, the use of bridleways has been statutorily extended to bicycles by s.30 of the Countryside Act 1968.
- 76 Fourthly, a highway may be created by the common law doctrine of dedication and acceptance, or by statute. Dedication and acceptance can be express. However, it can also be inferred if the way in question has been used by the public, provided that the use has been for such a period and in such circumstances that the proper inference is that the owner of the soil has, by words or conduct, granted the right of passage to the public. (See Halsbury, *op. cit.*, at paras 65 and 78–80, s.31 of the Highways Act 1980, and *Attorney General and Newton Abbott -v- Dyer* [1947] Ch. 67 at 86–90).

77 Fifthly, if it is in issue whether or not a way is a highway, then the onus plainly lies on the person seeking to establish that the way has highway status. In this connection, it is clear that maps, plans and the history of the locality are admissible in evidence (see Section 32 of the Highways Act 1980 and Halsbury, *op. cit.*, at para.86). Sixthly, as can be gathered from Halsbury (*op. cit.*, at paras 83 and 90–93), it is clear that neither the existence of gates across a way nor the fact that cattle graze land over which the way runs, should be seen as being, of themselves, inconsistent with the existence of a highway. Seventhly, there is the well-established common law rule of “once a highway, always a highway”. Obviously, that principle is subject to qualification, in the sense that statutory powers exist to extinguish or divert highways. However, that is not germane for present purposes, because there is no question of any such statutory powers having been exercised in relation to Beoley Lane.

78 With that background, I turn to the question of whether the Commission has established, on the balance of probabilities, that Beoley Lane is a carriageway. Before embarking on that inquiry, it is important to identify what is agreed, and what is in issue, between the parties as to the status of Beoley Lane. First, as I have mentioned, it is not in dispute that it is, and has been for over 275 years, a highway. The issue is whether it is a public carriageway (as the Commission contends) or (as the defendant argues) only a bridleway. Secondly, the defendant accepts that, although it asserts that Beoley Lane is not a public carriageway, it had been used, at least until the past few decades, as a private carriageway. In other words, the defendant accepts that Beoley Lane was (and presumably still is) subject to private rights of way with vehicles.

79 The parties rely on various strands of evidence as assisting on the issue whether, on the balance of probabilities, the court should presume that Beoley Lane was at some point in the past dedicated as a public carriageway. In this connection, it should be repeated that it is common ground between the parties that the evidence establishes that Beoley Lane is a bridleway, *i.e.* that the evidence establishes, on the balance of probabilities, that one can infer dedication of Beoley Lane sometime in the past as a bridleway. The relatively limited, but hotly contested, issue is whether the evidence establishes inferred dedication as a public carriageway, over and above, as it were, a bridleway.

80 There are a number of different factors which fall to be taken into account when considering this issue. Some of them required evidence of a very detailed nature relating to old maps, an enclosure award, tithe records, private maps, and Finance Act records. In this connection, in addition to the excellent submissions of counsel, I had the benefit of full and careful evidence from Dr Yolande Hodson, an expert map historian with impressive credentials, and Professor Roger Kain, who has an even more impressive curriculum vitae as an academic and writer in the field.

81 The first category of evidence consists of a number of maps published between 1728 and 1831 (and to which I shall refer as “the historical maps”). They are Beighton’s Map of Warwickshire (1728), Jeffrey’s Map of Warwickshire (1752), Kitchin’s Map of Warwickshire (1770), Taylor’s Map of Worcestershire (1772), Yates’s Map of Warwickshire (1793), Greenwood’s Maps of Worcestershire and Warwickshire (both 1822), Cary’s Half Inch Map of England and Wales (1825)

and the first O.S. One-Inch Map of England (1831). I also include in this category the O.S. Drawing of 1814 prepared by Robert Dawson, Royal Military Surveyor and Draftsman, which resulted in the first O.S. Map, of 1831.

- 82 The second category of evidence consists of a map prepared in 1758 of the Gorcott Hall Estate; this map (“the 1758 Estate Map”) was apparently prepared for the purposes of the owners or managers of the Estate at that time, and has never been published. Thirdly, there is the Inclosure Award and Inclosure Map of 1824. Fourthly, there are the Tithe Records for the parish of Beoley (1842 to 1844) and for the parish of Studley (1845 to 1847). Fifthly, there are particulars, which include a map, prepared in 1886 for a sale of the Beoley Estate, which adjoined both sides of Beoley Lane. Sixthly, there are records prepared in 1912 for the purpose of the Finance (1909–10) Act 1910. Seventhly, there are more modern maps, namely the O.S. 1:2,500 First Edition (1883–4) and Second Edition (1903–5) and Bartholomew’s Map of England (1901 and 1911). Eighthly, there are various conveyances and conveyancing documentation. Ninthly, there is oral evidence of reputation and of use. Tenthly, there is the position on the ground. Finally, there are the expert opinions.
- 83 While each of these aspects of the evidence has to be initially considered on its own, it must, of course, also be assessed in light of the other aspects. In the end, after considering all of these aspects together, 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 Beoley Lane was such as to justify the inference that it was dedicated as a public carriageway.

### Discussion

- 84 So far as the historical maps are concerned, they satisfy me that Beoley Lane has existed as an identified way consistently from 1722 or 1723 (when Beighton actually drew up his plans). With one exception, namely Yates, all the historical maps show a road substantially in the location of Beoley Lane, although it is right to say that a number of the maps identified a different route, sometimes a radically different route, at its southern end. So far as Yates is concerned, Professor Kain realistically did not suggest that it cast doubt on the existence of Beoley Lane in the 18th century, but, not unfairly, he suggested that its absence tended to suggest that Beoley Lane was not a particularly important or highly used road. I consider that the fact that the recorded route of Beoley Lane varied, particularly at its southern end, in various maps is explicable by the inevitable inaccuracies in old maps.
- 85 Particularly, given that it is common ground that Beoley Lane was a highway, at least to the extent of being a bridleway, and that it was in fact used by vehicles (albeit that the Professor’s case is that it was because it was subject to private rights of way for vehicles) it is impossible to draw confident conclusions from any of the historical maps as to whether or not Beoley Lane was indicated thereon as a public carriageway. However, it appears to me that there is one factor which provides a little support for the Commission’s case. One of the historical maps, namely Cary, does tend to suggest that Beoley Lane was a public carriageway. This is because it was denoted as a “parochial road”. Whether one judges that expression by



reference to terms which seem to have been used in the early 19th century, or by reference to other expressions used by Cary, it is by no means clear what it means. However, as Professor Kain fairly accepted in cross-examination, Dr Hodson's view that it meant a public carriageway was a little more likely than his explanation, which was to the effect that it meant a non-vehicular highway.

86 The interrelationship of two of the published maps, namely Dawson (1814) and Greenwood (1822), and the 1758 Estate map raises a point of some interest to interpreters of historical maps. The two published maps appear to show the southern end of Beoley Lane ending at the point that it joins the Common, rather than going across the common and joining the Birmingham Road. As Professor Kain said, that might have been a factor militating against Beoley Lane being a public carriageway, on the basis that it would have been primarily used as a means of access to, and egress from, the Common, rather than to and from the Birmingham Road as well. Initially, Dr Hodson thought that this could be explicable on the basis of a mistake on the part of Dawson and Greenwood. However, for the first time when in the witness box, she suggested that there might be a cartographic convention, adopted by at least some map makers in the 18th and early 19th centuries, which involved not marking a non-metalled highway (or, presumably, private road) when it crossed a common or a heath. (In this connection, it should be explained that a road is not metalled when its surface is no more than beaten earth. It is metalled if it is covered with anything from thick asphalt over a foundation, at one extreme, to loose chippings, at the other extreme).

87 Although initially inclined to dismiss this suggestion as heretical, Professor Kain, although still sceptical, was prepared to accept, on further examination, that the suggestion had more force than he had at first supposed. Given that the suggestion was, as it were, sprung on him at the hearing for the first time, it is not to the discredit of Professor Kain that he modified his attitude; on the contrary. Dr Hodson's hypothesis is supported by two factors. First, the 1758 Estate Map makes it clear, as Professor Kain fairly accepted, that Beoley Lane did track a defined route over the common to the Birmingham Road. Secondly, it would seem that the convention may well have been adopted by Dawson and Greenwood in relation to a significant number of other heaths and commons on the same page of their respective maps as contained Beoley Lane. That is only a matter of inference, but, on a fair number of occasions, one can see a road coming onto a common or heath precisely opposite another road on the other side of the common or heath, and a fair inference would be that those using either road to cross the common or heath would naturally walk or ride along the shortest distance joining the two points.

88 However, it is fair to say that Dr Hodson's hypothesis is called into question to some extent by the fact that another highway, Common Lane, is shown, unlike Beoley Lane, going over the common, by Dawson and Greenwood, and that Common Lane was not metalled in the 1880s. However, as Mr Lewison says, this may well be explicable on the basis that Common Lane was, as it were, loosely metalled, e.g. with loose stones, in the early part of the 19th century, and that all the loose stones had been washed away and not replaced by the latter part of the 19th century.

89 On the basis of the documentary evidence, particularly the 1758 Estate Map, and

on the basis of Professor Kain's acceptance that Beoley Lane had a visible vehicular route across the common, and, indeed, that members of the public would not have had a right to stray on the common, I have reached the conclusion that Dr Hodson's notion of a cartographic convention is in fact correct. In case this decision is of interest to cartographic historians, it should be emphasised that I have reached this view on the balance of probabilities, and on the basis of the documentary, oral and expert evidence, as well as the arguments, advanced before me.

90 Apart from the aspect just considered, I am of the view that the 1758 Estate plan is independently supportive of the contention that Beoley Lane was a public carriageway. It is described on the plan as "the lane leading from Mappleborough Green to Holt end". This description, coupled with the fact that the lane is shown joining the Birmingham Road, appears to me to be an indication, albeit not a decisive indication on its own, of public carriageway status. It was agreed between both experts that the designation "from X" or "to X" on a road was indicative of highway status. A specific description of a lane as leading from one village to another, particularly when one bears in mind that it was a carriageway (albeit that its status as a public carriageway is in issue) does provide some support for the notion that it was a public carriageway.

91 The Inclosure Award of 1824 is concerned with a relatively small part of Beoley Lane, namely the very south-eastern end. However, given that the issue between the parties concerns whether or not Beoley Lane is a carriageway, it seems clear that the highway status of this part of Beoley Lane cannot be any different from the rest of Beoley Lane. Further, the Inclosure Award does refer to the whole of Beoley Lane at least in one place.

92 Two passages in the Inclosure Award are particularly relevant. First, the south-eastern end of Beoley Lane was awarded as "a private carriage road and driftway"; secondly, the whole of Beoley Lane was described in the Award as "a private carriage road from Beoley to Mappleborough Green". It is common ground that, in light of the provisions of the Inclosure Act 1801, that, if Beoley Lane was a public carriageway at that time, the Inclosure Award cannot have deprived it of that status.

93 In *Dunlop v Secretary of State for the Environment* (1995) 70 P & CR 307, Sedley J. considered, and rejected, a suggestion (which had been advanced in an article), that the description in an Inclosure Award of a route as a "private carriage road" might mean a road which was open to any member of the public using a private carriage. He held that the natural meaning of the expression "private carriage road", whether at the present time or at the time that Inclosure Awards were made, was a private road (as opposed to a public highway) for carriages. Realistically, Mr Lewison does not seek to depart from that interpretation in relation to the instant Inclosure Award. There is no doubt, therefore, that the description of Beoley Lane, as a "private carriage road" in the Inclosure Award, is a substantial factor against its being a public carriageway, at least as at the date of the Award. First, if it had been a public carriage road, then, almost by definition, it could not also have been a private carriageway, because it would have been meaningless to grant anyone a private right of way for a certain purpose if he

already had that right as a member of the public. Secondly, unlike those who prepared the historical maps, the Commissioner who prepared the Inclosure Award and the Inclosure Map was performing a statutory duty, and was concentrating on a relatively small area, for which he had to provide a detailed Award. Thirdly, the Commissioner did award or confirm certain other roads as “public carriage roads”. Furthermore, it is clear that he “walked” the area the subject of the Award (and, indeed, it is clear from his ambulatory report that Beoley Lane was not of particular significance, because he did not even refer to it in a fairly full report).

94 On the other hand, in any field of human endeavour, mistakes can be made, even if the greatest care has been, or should have been, taken. In that connection, Mr Lewison raises a number of reasons for doubting the accuracy of the Inclosure Award. While they have some force, I do not consider that, at any rate by themselves, they would justify the conclusion that the Inclosure Award is not strong evidence that, at least as at 1824, Beoley Lane was not a public carriageway. First, he says that the description of Beoley Lane was incomplete, imprecise, and possibly inaccurate. The description of Beoley Lane as a “private carriage road and driftway” is incomplete, in the sense that there is no reference to Beoley Lane being a highway, which, on any view, it was, as the defendant accepts that it was a bridleway. However, it is clear that nothing done or awarded by the Commissioner could impinge on the highway status of Beoley Lane, so it does not appear to me overwhelmingly significant that its highway status was not described.

95 Further, the description as a “driftway” is said to be ambiguous or inaccurate, in the sense that, either, “private” governs the word “driftway”, as well as the words “carriage road”, in which case it is inaccurate, or the Commissioner intended “driftway” to imply public use, in which case the drafting is ambiguous. There is undoubtedly force in that point, as far as it goes, but it cannot fairly be said seriously to undermine, the point that the description as a “private carriage road” is not sensibly possible to reconcile with the notion that it was a “public carriage road”. The same point may be made about Mr Lewison’s next criticism, namely that, although Beoley Lane was described as a “private carriage road”, there was no indication in the Award of the class of persons entitled to use it. Again, there is force in that point, but it does not follow from it that one should presume that the Commissioner was unaware of the difference between a public carriage road and a private carriage road. (I note that, in *Dunlop*, the Award also referred to a “public carriage road” without identifying the dominant tenements—see at 70 P. & C.R. 311—and that the description of a road as a driftway, in the context of “private carriage roads and driftways” appears to have been accepted as being a reference to a private driftway—see at 313).

96 It is also relevant to mention that the Inclosure Map effectively forming part of the Inclosure Award has the words “from Beoley” annotated at the northern end of the section of Beoley Lane included in the Inclosure Award. It is common ground between Professor Kain and Dr Hodson that such an annotation was some evidence that Beoley Lane was a public highway, even a public carriageway, notwithstanding the designation of the route as a private carriage road in the Award.

97 Further, the fact that Beoley Lane was not even described as being a bridleway

tends to support the view that the Commissioner did not direct his mind to the nature and extent of any public rights of way over Beoley Lane. There is also something in Mr Lewison's point that, at least on the evidence available, it seems likely that the Commissioner did not go beyond the parish boundaries of Studley, and in particular did not investigate the northern part of Beoley Lane, in the parish of Beoley. That is of itself not surprising, bearing in mind the Commissioner's function, but, had he appreciated that Beoley Lane joined a highway at its northern end, he may have reconsidered his apparent view that it was not a public carriageway. If Beoley Lane was a public carriageway as at 1824, it is conceivable that this was overlooked by the Commissioner, because, for instance, the point was not raised with him by anybody with whom he discussed the matter, or because he never considered the possibility. However, the fact remains that his Award, which appears otherwise to have been a carefully considered document, does describe Beoley Lane in such a way as to make it clear, albeit by implication, that he did not consider that it was a public carriageway, and that is a strong factor in support of the proposition that it was not a public carriageway as at 1824.

98 I turn to the Tithe Maps. There is a marked difference between the Studley Tithe Map and the Beoley Tithe Map. The Beoley Tithe Map shows the northern section of Beoley Lane as an enclosed route on which no Tithe rent-charge was apportioned. Accordingly, it follows that Beoley Lane was treated as having highway status in this Tithe Map. However, I do not consider that the Tithe Map takes matters further, at least on its own, because the evidence is consistent with Beoley Lane being a bridleway just as much as a carriageway.

99 The Studley Tithe Map, on the other hand, indicates that the southern end of Beoley Lane was owned by two individuals, that it was farmed as pastureland, and that Tithe rent-charge was apportioned to it. Although Professor Kain suggested that this evidence supported, possibly strongly, the contention that Beoley Lane was not a public carriageway, I do not believe that any such conclusion is justified. In the first place, such a treatment of Beoley Lane is not, as Professor Kain admitted, inconsistent with Beoley Lane being a public carriageway. Secondly, there are features of the Studley Tithe Map, particularly the annotation at the northern end of the southern section of Beoley Lane in Studley parish, "from Beoley", suggesting that Beoley Lane had public status. Thirdly, it would be plainly unsafe to rely upon the Studley Tithe Map as having this effect, as it is inconsistent with the Beoley Tithe Map.

100 In my view, other than serving to confirm what is, in any event, agreed between the parties, namely that Beoley Lane was a highway, the Tithe Maps, at least taken on their own, do not assist on the point at issue between the parties, namely whether Beoley Lane is or was a public carriageway.

101 I turn now to the Sales Particulars, prepared in respect of the Beoley Hall Estate by estate agents, Chesshire Gibson Son & Fowler of Birmingham for a sale on August 17, 1886. These particulars run to over ten pages which describe a total of 12 plots. Lot 4 is described, in part, in these terms:

"This Property has considerable frontages to a Road leading from Beoley to the Birmingham and Alcester Road, and to a Road leading from Beoley to Mappleborough Green . . ."

- 102 There is no doubt that the “Road” leading from Beoley to the Birmingham and Alcester Road is a public carriageway. Accordingly, I accept that the description of Beoley Lane in the same sentence as “a Road leading from Beoley to Mappleborough Green”, is some indication that Beoley Lane was similarly regarded as a public carriageway. Further, the expression “a Road” in today’s parlance would tend to suggest a public carriageway, although I quite accept that that is not necessarily so, and, in any event, that I am concerned with construing a document prepared in 1886.
- 103 Additionally, it is to be noted that none of the 12 plots was described as including any part of Beoley Lane, or as having any private rights of way over Beoley Lane. It seems to me that that is another indication that Beoley Lane was a public carriageway. If, as the Commission contends, Beoley Lane was a public carriageway, then it was natural to describe it as a road, and there was no need to mention any possibility of rights of way over it. However, if, as the defendant contends, Beoley Lane was not a public carriageway, but a public bridleway, subject to private rights of way with vehicles, then one would have expected that to have been referred to in the particulars, because it would have been a beneficial feature of those plots which abutted Beoley Lane. In this connection, Professor Kain realistically accepted that it was inconceivable that, for instance, lot 4 would not have enjoyed a vehicular right of way, whether private or public, over Beoley Lane.
- 104 On the other hand, the plan attached to the 1886 particulars does have one road marked as “public road”, which the defendant says is an indication that roads not so marked are not public roads. However, there are other roads on the plan which, like Beoley Lane, are given no description, and yet were clearly public roads. I believe that the explanation for a single road being specifically described as “public road” is because it runs through one of the lots, lot 12, which was described in the particulars as “being entirely within a Ring Fence”, and the estate agents were anxious to draw the attention of prospective purchasers to the fact that the Ring Fence was not, as it were, complete, in that a public road went through the lot.
- 105 The next category of evidence I propose to consider are the maps prepared pursuant to the provisions of the Finance (1909–10) Act 1910, which provided for the levy of a charge on the increment value of land, which was based on the value of the land after April 30, 1909. The 1910 Act allowed certain deductions, including reduction in the value of the land as a result of any “public rights of way or any public rights of user”. Maps and other records were prepared pursuant to the 1910 Act. Except for two small sections, it is clear from the map prepared around 1912 that Beoley Lane was treated as public land for the purposes of the Act. Professor Kain suggested that the fact that two parts of Beoley Lane were not shown as public land was impossible to explain, unless it demonstrated in some way that Beoley Lane may not have been subject to a public right of way I find that impossible to accept. The defendant, and indeed Professor Kain, agree that Beoley Lane was subject to public rights of way, and, therefore, the fact that it is not shown as public land in two places is only sensibly explicable on the basis of oversight. The existence of oversight is reinforced by the fact that there is no record of the two landowners concerned having claimed any reduction in liability for tax owing to

the existence of public, or even private, rights of way over that part of Beoley Lane they owned. On any view, they must simply have overlooked their rights, and there was clearly a mistake.

106 Dr Hodson provided a detailed analysis of the practice of surveyors, and indeed the instructions given to surveyors, when preparing such Finance Act plans, and concluded that the maps tended, if anything, to support the conclusion that Beoley Lane was a public carriageway and not merely a bridleway. This was on the basis that, at least to a large extent, Beoley Lane was shown uncoloured, excluded from adjacent hereditaments, and plainly wide enough to carry vehicles. I accept that these factors tend to suggest that Beoley Lane was treated as a public carriageway in the Finance Act maps, but I do not regard it as a strong point. The maps are not unambiguous in this regard, and they appear to have been prepared in something of a hurry. Further, as both experts rightly accepted, there are inconsistencies in the way different parts of Beoley Lane are treated. Accordingly, at least if taken on their own, the Finance Act maps are of only slight value in tending to support the Commission's case.

107 I turn to consider the more modern published maps. The O.S. 1:250,000 Map of England was originally published in sheets in 1883–4, and a second edition was published in 1903–5. Professor Kain and Dr Hodson agreed that, in each of the two editions, the representation of Beoley Lane, while consistent with a carriageway, was also consistent with the status of a public bridleway over a private road. They also agree that Beoley Lane is depicted as a vehicular route. Dr Hodson suggested, or, perhaps more accurately, speculated that the marking of “spot heights” on a couple of places in Beoley Lane might tend to support the contention that it was a public carriageway rather than a bridleway. Although it would be wrong to dismiss the point as hopeless, I think it is too speculative on which to found any conclusion as to the status of Beoley Lane.

108 Bartholomew's Map of England, 1901 and 1911 editions, has three categories of coloured roads. They are “first class roads”, “secondary roads (good)”, and “indifferent roads (passable)”. There are two other categories, namely uncoloured roads and “footpaths & bridlepaths”. Beoley Lane is marked in each of the two editions as uncoloured road. The legend to each of the Bartholomew maps states that “the uncoloured roads are inferior and not to be recommended to cyclists”. The implication of the demarcation of Beoley Lane on these maps appears to me to be that they are public carriageways. First, each of the other four categories is a public highway. Secondly, in a somewhat paradoxical way, the indication in the description of the uncoloured road is that they can lawfully be used by cyclists, which, as at 1901 and 1911, would have meant that they were public carriageways. However, it is important to mention that there is a note to the effect that “the representation of a road or footpath is not evidence of the existence of a right of way”. I do not consider that that means that one can cast aside what one could otherwise glean from Bartholomew as being of assistance, but the disclaimer underlines the fact that one cannot place much weight on Bartholomew's Maps, or indeed on any map which does not have the positive function of identifying public carriageways.

109 I do not think that it is helpful to consider published maps later than the 1905

O.S. Map and the 1911 Bartholomew's Map. That view appears to be supported by the expert views of Professor Kain and Dr Hodson

110 I turn to the conveyancing documentation. In this connection, there is a conveyance of the Gorcott Hall Estate dated September 29, 1898, which refers to that part of Beoley Lane, which adjoins that Estate as being included in the conveyance. There is nothing in the 1898 conveyance to suggest that Beoley Lane was subject to private rights of way in favour of third parties, and there is nothing in the 1898 conveyance to indicate that the Gorcott Hall Estate had rights of way over those parts of Beoley Lane not included in the sale. In my view, that is significant. If, as the Commission contends, Beoley Lane was throughout a public carriageway, then conveyancing practice would not have required a vendor expressly to convey any part of Beoley Lane subject to public rights, and it would certainly not have been necessary for the Estate to have been conveyed with the benefit of public rights of way over the remainder of Beoley Lane. On the other hand, if Beoley Lane was subject to private rights of way, the vendor under the 1898 conveyance would have been at risk of being in breach of his covenants of title if he had conveyed that part of Beoley Lane forming part of the Estate without stating that it was subject to private rights of way. Further, on that basis one would have expected the conveyance to have included such private rights of way over the remainder of Beoley Lane as the Estate enjoyed.

111 Indeed, this argument can, as it were, be related back from 1898 to 1823. That is because the property conveyed by the 1898 conveyance is described therein by reference to an "Indenture of Settlement and Bond" of 6th September 1823. The point that can be made in relation to the 1898 conveyance can also be made in relation to conveyances dated December 16, 1912, April 25, 1946, December 14, 1948 and January 10, 1966. Each conveyance involved land abutting Beoley Lane being conveyed, and none of them referred to the land having the benefit of rights of way over any part of Beoley Lane not included in the conveyance, or, in so far as any part of Beoley Lane was included in the land being conveyed, as that part of Beoley Lane being subject to private rights of way.

112 The witnesses of fact tend to support the contention that Beoley Lane is a public carriageway, in two respects. First, there is evidence of use by members of the public of Beoley Lane as a carriageway during the period between the 1930s and the early 1970s. It is fair to say that the evidence of such use is fairly exiguous, and the Commission does not suggest that, on its own, it could possibly support the contention that Beoley Lane is a public carriageway. Nonetheless, I am satisfied that during the period from about 1930 to about 1974, Beoley Lane was used from time to time by members of the public riding bicycles, motorbikes, and tractors. The extent of this use may not, however, have been such as to render it particularly remarkable that there was no objection if Beoley Lane was not a public carriageway. However, the fact remains that there is evidence to support the notion that, for more than 40 years before the construction of the Coventry Highway, Beoley Lane was consistently (if not intensively) used as a public carriageway.

113 The other aspect of the oral evidence concerned the past use or reputation of Beoley Lane. One of the witnesses, who was cross-examined, was a Miss Angela Aldington, who lived at Lower House Farm with her parents from 1930 to 1942,

when they were evicted in rather sad circumstances connected with the Second World War. Around the time that her family was evicted, she drew an impressively detailed plan of Lower House Farm, which she has kept. Although she could not give much first hand evidence as to the use of Beoley Lane, she remembers it being known as “Old Lane” (as indeed it is marked on her plan). She clearly believed that Beoley Lane constituted a public road, and she had been told this by her grandmother. Indeed, the Aldington family believed Beoley Lane to have been a Roman road. It appears likely that what was passed on to Miss Aldington was based on information which could have gone back to at least 1847, when members of the Aldington family are shown as occupiers of part of Beoley Lane and land adjoining Beoley Lane in the Studley Tithe Records. It is fair to record that she could not specifically remember any vehicles using Beoley Lane, but she thought that they probably would have done. The evidence of the other witnesses of fact was either consistent with Miss Aldington’s evidence on this point, or was not inconsistent therewith.

114 The position on the ground is a factor which was emphasised on behalf of the Commission, both in the evidence of Dr Hodson and in the submissions of Mr Lewison. In this connection, the following features are in point. Until the construction of the Coventry Highway in the early to mid 1970s, Beoley Lane connected two long-standing villages, namely Holt End (and Beoley) and Mappleborough Green, which were not merely in different parishes, but in different counties. Secondly, with the exception of Lower House Farm, there were no buildings along its route. Thirdly, at least for the past 300 years or so, Beoley Lane has been of sufficient width to accommodate vehicular traffic, and, indeed, it is common ground that it did accommodate vehicular traffic. There is evidence of vehicular use as long ago as the early 18th century, and (particularly bearing in mind that bicycles were treated as vehicles for this purpose until 1968) of not insignificant vehicular use during at least the early part of the last half-century. Fourthly, Beoley Lane was level, and it appears to have been hedged on either side almost throughout the whole of its route. (There seems to have been one field abutting Beoley Lane which did not have a hedge separating it from the lane). Fifthly, Beoley Lane is shown on a number of historic maps as a road. Sixthly, there was no obvious mechanism, so far as the evidence goes, whereby members of the public could have been prevented from using Beoley Lane for vehicular purposes.

115 In my judgment, what I have called the position on the ground provides some further support for the Commission’s case that Beoley Lane is a public carriageway. The various features identified, when taken together, render it inherently more likely that Beoley Lane was a public carriageway, especially bearing in mind that the position on the ground, as I have described it, appears to have obtained continuously since before 1722 until the middle of the last century. Beoley Lane was a means of access between two villages in different counties, each of which was on a public carriageway, and it had the capability of being, and indeed was used as, a carriageway. There appears to have been nothing to prevent members of the public wishing to use Beoley Lane as a vehicular means of getting to or from the carriageway or village at either end. Apart from visiting, or leaving,



Lower House Farm, Beoley Lane was not a means of access to, or egress from, buildings, a point emphasised by the hedges on either side of Beoley Lane.

116 The use of Beoley Lane has progressively diminished since 1930, and probably earlier. The fact that its use appears to have lessened progressively does not bear on the argument. Since the construction of the Coventry Highway, it is scarcely surprising that, with the exception of the first 300 metres or so, that part of Beoley Lane south of the Coventry Highway has not been used at all, and has become overgrown and almost impassable I should add that the fact that Beoley Lane became progressively less used over the past 50 or 60 years seems to be supported by the fact that an assessment has been carried out on the trees in Beoley Lane, and it appears to me that a significant number of those trees are of an age of 40 years or less.

117 The final aspect I must turn to is the expert opinion Professor Kain was of the view, that the net effect of the evidence that he considered showed that Beoley Lane was not a public carriageway, and Dr Hodson came to the opposite conclusion. Each of these experienced and knowledgeable witnesses was undoubtedly giving his or her honest opinion based on a great deal of evidence spread over the last 280 years, much of which evidence was notable more for its academic interest and detail than for the help it provided in relation to the case (through no fault of either expert). Some justified criticisms of each expert were made both in the course of his or her cross-examination, and in the course of counsel's respective closing speeches. I do not find it entirely easy to decide which of the two views I prefer (ignoring for the moment, in so far as it is possible to do so, the weight to be given to the other ten points I have been discussing. In a way, this is a somewhat unreal exercise, because I have inevitably formed certain views as to the conclusions to be drawn from the other aspects of the evidence. There is obviously a risk of those conclusions influencing my assessment of the two experts).

118 While, as I think Dr Hodson would acknowledge, Professor Kain has greater authority and expertise on many aspects of historic cartography, I have come to the conclusion that Dr Hodson's evidence and conclusion has stood up better than those of Professor Kain. First, it appears to me that she came to her conclusion on the basis of a wider body of evidence than Professor Kain. Thus, in reaching her conclusion, she took into account the 1758 Estate Map, the 1886 Sale Documents, and the conveyancing documentation, as well as the oral evidence, all of which were largely ignored by Professor Kain. Mr Randall says, with some force, that Professor Kain's approach was correct, because, like Dr Hodson, he was an expert on old cartography, not on conveyancing documentation, private estate maps, or oral evidence. However, I think that that takes too limited a view of a cartographical historian's function. It seems to me that Dr Hodson was right to say that, when interpreting old maps, one does seek to take into account all the evidence which is available. It may well be that cartographical historians are, in terms of their expertise and experience, on firmer ground when looking at published old maps, than, say, conveyancing documents, but that does not mean that they should not, indeed would not, look at conveyancing documents for assistance in interpreting old maps.

- 119 Secondly, I cannot overlook the fact that Professor Kain misinterpreted a Tithe Map, which led him to believe that there might have been another route between Holt End and Mappleborough Green, in addition to Beoley Lane. Mr. Lewison rightly points out that this is of particular significance, in the sense that Professor Kain is a particular expert on the interpretation of Tithe Maps. Having said that, it is scarcely surprising if an expert, even one as eminent as Professor Kain, makes a mistake. Furthermore, it is entirely to his credit that Professor Kain made no bones about the fact that he had made a mistake in this regard, when it was pointed out by Dr Hodson.
- 120 Thirdly, at the end of his main report, Professor Kain helpfully set out factors which, on the one hand, suggested that Beoley Lane was not a public carriageway, and, on the other hand, which suggested that it was a public carriageway. Of the eight factors which he said suggested that Beoley Lane was not a public carriageway, I believe that only one has real force, and that is the Inclosure Award and Map, the other seven factors have, to my mind, been established as being either quite inconclusive, or (in the case of Bartholomew's Maps) actually of assistance to the argument that it was a public carriageway. Professor Kain identified four factors, which tended to point in favour of Beoley Lane being a public carriageway (although it is fair to say that at least some of them are equally consistent with Beoley Lane being a bridleway). However, in addition to not referring to the 1758 Estate Map, the Beoley Estate Sales Particulars, and the witness evidence (all of which tended to support the Commission's case), Professor Kain did not refer to Cary's Map (which also provides a little support for the contention that Beoley Lane was a public carriageway), or conveyances.
- 121 This is not to say that Dr Hodson's evidence escaped unscathed from cross-examination. I think that the general criticism that can be made of her evidence is that she was too academic, in the sense that she was trying to squeeze out, to an unrealistic extent, every conceivable point from each of the historical maps that might possibly suggest that Beoley Lane was or was not being treated as a public carriageway. As an exercise in thoroughness, even at times in ingeniousness, it was admirable. However, at least in my view, a great number of the points she made were of no real assistance, as Mr Randall's cross-examination demonstrated.
- 122 Nonetheless, the fact remains that, if one strips away the more tentative and contemplative points raised by Dr Hodson, it seems to me that she did cast her net more widely and put forward all points that could have been put forward (albeit that there were many more besides) from the various maps and other documents. Furthermore, it is fair to her to record that her ingeniousness did result in one new thought, namely the way in which non-metalled roads may have been shown on some maps in the early 19th century when crossing heaths and commons. All in all, therefore, I think that her conclusion stood up better than that of Professor Kain, and, equally, viewing it, as far as possible, as detached from the conclusions I have reached on the other aspects of the evidence, her opinion seemed more convincing.
- 123 Drawing together the various disparate, but often connected, strands of evidence relating to the issue of whether or not Beoley Lane is a public carriageway, I have reached the conclusion that the Commission has discharged the onus of proof upon

it, i.e. that it has established that, on the balance of probabilities, Beoley Lane was a public carriageway. Of all the various pieces of evidence, only one points the other way to my mind, and that is the Inclosure Award and Map of 1824. The mere fact that there are a fair number of other pieces of evidence all of which tend to point the other way does not of itself mean that the Inclosure documentation is outweighed. Obviously, it is not a case of seeing which of the parties has identified more separate pieces of evidence. One piece of high quality, or convincing, evidence will frequently outweigh a large number of pieces of low, or weak, quality evidence. However, on this occasion, bearing in mind the quality of the various items of evidence pointing in favour of Beoley Lane being a public carriageway, I consider that they do outweigh the effect of the Inclosure documentation. While the Inclosure documentation does represent powerful evidence, it is not unequivocal, not least because the Commissioner would not have been ultimately concerned with whether Beoley Lane was a public carriageway or not: as I have mentioned he would not have had the power on his own to discharge it from such status. In my view, the weight of the evidence the other way leads to the conclusion either that an error was made in the Inclosure Award and Map, or that Beoley Lane became a public carriageway subsequent to 1824. If it needs to be decided, I incline to the view that the former alternative is correct.

### **Conclusion**

124 In these circumstances, I conclude that:

- i) The highway presumption, but not s.62, has resulted in Beoley Lane being vested in the Commission, through the medium of the 1971 conveyance, and it has therefore not been acquired by the defendant;
- ii) If that is wrong, and Beoley Lane is owned by the defendant, the Commission cannot claim any private vehicular right of way over Beoley Lane;
- iii) In any event, the evidence establishes that, on the balance of probabilities, Beoley Lane is a public carriageway.

*Order accordingly.*

Reporter—David Stott.