



Order Decision

Site visit on 3 August 2013

by Sue M Arnott FIPROW

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

Decision date: 16 September 2013

Order Ref: FPS/M1900/7/75

- This Order is made under Section 53(2)(b) of the Wildlife and Countryside Act 1981. It is known as the Hertfordshire County Council (Pirton 29 and 30) Modification Order 2012.
- The Order is dated 31 August 2012. It proposes to add to the definitive map and statement for the area a footpath and a bridleway at Burge End, Pirton, as shown on the Order map and described in the Order schedule.
- There were three objections¹ outstanding and three representations in support when Hertfordshire County Council submitted the Order for confirmation to the Secretary of State for Environment, Food & Rural Affairs.

Summary of Decision: The Order is not confirmed.

Procedural Matters

1. The Order was made by Hertfordshire County Council (HCC) on the direction of the Secretary of State following a successful appeal² by Mr M Westley. Having previously concluded that the evidence was not sufficient to justify the Order, HCC took a neutral stance as regards its confirmation.
2. Following advertisement of the Order, three letters of objection were submitted within the statutory timescale, including one from the applicant, Mr Westley, and one of which³ made representations on behalf of the five landowners affected by the two Order routes. In addition there were three letters of support. A further letter was submitted on behalf of the British Horse Society (BHS) after the close of the period for objection, the contents of which I have addressed nonetheless. I have also taken note of evidence sent in by the Chairman of the Pirton Local History Group.
3. The Order proposes to record two routes: the first is a claimed bridleway leading to a point on the parish and county boundary where the definitive map and statement for neighbouring Shillington Parish in Bedfordshire County record a public bridleway (No. 9). This is shown on the Order map as A-B-C-D-E. The second route is a public footpath (shown as A-F). The original application for the Order sought the recording of a much longer footpath connecting with Shillington Footpath 24 at the same county boundary. The applicant and others now object to the omission of the section beyond point F. For convenience I shall refer to this point on the boundary as X (although this was noted as H on an earlier plan). I shall also make reference to a point Y (previously shown as B), approximately 90 metres or so north west of point A,

¹ See paragraph 2 below.

² Reference FPS/M1900/14A/3R issued on 25 May 2012.

³ For convenience I shall refer to these parties as 'the landowners' to distinguish them from other objectors.

this being the end of what was once a defined way known as Millers Lane which joined Washbrook Lane at A.

4. The claimed bridleway was not accessible when the Order was made and my visit to the site confirmed that is still largely the case today. Although I was able to see sections of the Order routes from nearby public footpaths and from Washbrook Lane at the end of Burge End Lane, what is visible now is not necessarily a reliable indicator of circumstances long ago. Whilst it was useful to view the sites of the routes in question, the weight I attribute to present physical features (or lack of them) is minimal given the antiquity of the main evidence in this case.

The Main Issues

5. The main issue here is whether the evidence shows that in the past the Order routes were regarded as a public bridleway and a public footpath such that they can be presumed to have been established along the two distinct but connected routes between the Burge End area of Pirton and the county boundary. A secondary matter concerns changes to the details recorded in the definitive statement for a connecting public footpath (Pirton 2) that would be necessary as a consequence but this is essentially an administrative formality.
6. The Order was therefore made under the Wildlife and Countryside Act (the 1981 Act) with reference to two of the events specified in Section 53(3)(c).
7. To satisfy the terms of Section 53(3)(c)(i), at this stage, requires evidence which shows, on a balance of probability, that public rights of way carrying the status of bridleway and footpath subsist over the routes in question, that is A-B-C-D-E and A-F respectively.
8. The second issue concerns the relevant part of Section 53(3)(c)(iii) of the 1981 Act. This requires evidence which shows that "*any other particulars contained in the map and statement require modification.*" If the Order is confirmed, thereby recording Bridleway 29, this would cross the definitive line of Footpath 2 at point B. Consequently the way in which Footpath 2 is described in the definitive statement would need to be revised accordingly.
9. In essence the Order is based on historical evidence to support the existence of the claimed public rights along the Order routes, relying on the legal maxim '*once a highway, always a highway*'. In examining the evidence in this case I note that Section 32 of the Highways Act 1980 provides for "*any map, plan or history of the locality or other relevant document*" to be taken into consideration when deciding whether or not a way has been dedicated as a highway. Thus, evidence of the status attributed to a route at some time in the past may be taken into account in determining its present status.
10. One of the objectors (the BHS) submits that the proposed status of A-F as a footpath is incorrect and argues that it should instead be shown as a restricted byway⁴. Here, I will need to consider firstly whether the evidence shows that a public right of way for vehicles was once established along the Order route and secondly whether any such rights still exist for motor vehicles that should be recorded on the definitive map and statement. This requires me to take into account the effect of Section 67 of the Natural Environment and Rural

⁴ A restricted byway is a way over which the public may pass on foot, on or leading a horse, and in or on a vehicle other than one that is mechanically propelled.

Communities Act 2006. Sub-section 67(1) of this Act provides that an existing, but unrecorded, public right of way for mechanically propelled vehicles (MPVs) is extinguished unless any one of several exemptions apply. However it was not argued that any public MPV rights would have been saved and thus restricted byway (RB) would be the resulting class of highway.

Reasons

11. It is the applicant's submission that dedication of the Order routes as highways can be inferred from the documentary evidence available. I propose to consider the evidence broadly in date order, noting my main observations before drawing conclusions in relation to the claimed bridleway and footpath.

Historical mapping from the eighteenth century

12. There are two county plans from this period submitted: **a map by Warburton dated 1749** and one by **Dury and Andrews in 1766**. Whilst the former does not show any ways in the vicinity of the Order routes, the later map shows a route from the village of Pirton to the county boundary which the applicant submits is similar to the claimed bridleway A-E.
13. As regards the 1749 map, I agree with the applicant's comment that Warburton would have been "*selective as to what highways he depicted and that his map shows only the major roads of his time*". Indeed the same may be said for many of the commercial map makers of the period. But whilst the absence of the Order routes is no proof that they did not exist, it clearly offers no support for them either.
14. The quality of the copy supplied to me of the map produced by Dury and Andrews is not good and I therefore exercise some caution in reaching a firm conclusion on its implications. I note that when it considered the application, HCC accepted that the route shown on this map to the boundary (denoted as 'road enclosed by hedges') was probably depicting a way between points A and E. However, whilst I bear in mind a comment from the applicant that "*the direction of (north) varies within the map*", I tend towards agreement with the landowners that this is not A-E. In my view it is closer to the line A-F, continuing in that same direction until it reaches the county boundary. (For reference I will identify this point as Z.) There is also a possibility the map is showing the line advocated by the applicant as the missing footpath link, A-F-X, although I consider the line shown is too straight for that to be likely.
15. I recognise that Dury and Andrews' map is, as HCC describes it, "schematic" to a degree and I therefore refrain from placing any great weight on the precise alignment shown. The significance of the fact that a route **is** shown is difficult to establish when it is not clear whether or not it continued in Bedfordshire and if so, where it led to. No contemporary map for the adjoining county has been produced. If the road continued, I would be inclined to attach significant weight to the possibility it was a public road. Alternatively, if it simply stopped at the boundary without explanation (as seems likely from later evidence) then the likelihood of it being a highway diminishes, as the case of *Eyre v New Forest Highway Board [1892] 56 JP 517* demonstrates.
16. I have considered the Dury and Andrews map very carefully since this is the only evidence showing a route in this vicinity that wholly pre-dates the inclosure process which began around the turn of the nineteenth century.

17. My conclusion from this map is that at the start of that process there was a defined road leading to the county boundary, possibly in the direction A-Z, which may have been a public highway but equally may not.

Nineteenth century plans and maps

18. **A plan of a farm at Burge End dated 1801** shows what is today known as Burge End Lane leading into Washbrook Lane at point A, the start of A-B heading north westwards, and the whole of A-F, the latter continuing north eastwards in the direction of F-Z. I concur with the applicant's observation that these are parts of longer roads communicating with land beyond the farm itself; they may be occupation roads or they may be through-routes leading to public places. There is nothing on this plan to confirm their status but neither is there anything to differentiate between those that are now recognised as carrying public rights and those that are now claimed. I note there is no indication of the footpath claimed by the applicant between points F and X but I find nothing on this map that would be inconsistent with either the claimed footpath or bridleway (or the BHS' claim for a restricted byway along A-F).
19. **In 1807** Dury and Andrews published a map with the title '**Sixty Five Miles Round London**' including the area between Pirton and Shillington (then known as Shitlington). This showed the same road from Pirton village to the county boundary as their previous map but to a distorted scale; however in 1807 it appeared as a double dashed line continuing to Shitlington. HCC accepted the applicant's submission that this equated to A-E, the claimed bridleway. As with their 1766 map, I am not convinced. Yet whilst I concur with the landowners that it probably does not show A-E, I cannot agree with their submission that it shows no part of the Order route A-F; it surely shows one or the other. I hesitate to place undue weight on this map, either in terms of status or alignment, but I tend towards my earlier view that it was probably A-F and a continuation thereof that was shown and which therefore may have had some significance towards the end of the eighteenth and early nineteenth centuries.
20. Before examining the documents relating directly to the inclosure process which began in Shitlington in 1802 and Pirton in 1811, I note with particular interest a document submitted by the local history group. This purports to be a **pre-enclosure working plan of Pirton** made by the surveyors recording the field systems prior to inclosure with new roads and drains sketched in. The information provided suggests that the original map may have been lost; yet whilst its provenance may be in question to an extent, the detail on this copy is such that I am in no doubt of its authenticity.
21. It is clear from this map that there was an enclosed track shown approximately between A and Y but this continued in a more westerly direction, not along the line of Y-B-C-D-E. There is also a similar track between A, F and about half way to Z; from there it is not clear whether the line shown to Z is an existing track and/or the proposed public drain (No 9). Although this plan is by nature very sketchy, I cannot discern any sign of a path or track along the line F-X.
22. However there is a track entering the parish close to but to the west of point X which heads south towards point A although it stops just short of A where it meets the enclosure known as 'Miller's Close'. Whilst there is no indication of the origin of this path on the map, at point E an annotation "*The Public Bridleway from Shitlington*" is clearly visible. Yet no continuation of this bridleway is shown through the Pirton field system – either existing or

- proposed. The only feature that might be interpreted as its onward path would be south westwards via narrow enclosures to the Pirton-Shillington Road through which the proposed public drain (No. 10) was later shown.
23. Although the landowners submit that this map provides no indication of the status of the route, I disagree. I find it hard to reconcile the very detailed survey work that led to the production of this map - and on which the statutory inclosure process subsequently relied for planning the resulting re-design of the local landscape - with the complete absence of any clear indication of a bridleway on the Pirton side of the boundary at the date of survey. Only one possible route may be speculated and this is not the Order route Y-B-C-D-E. If this were recognised as a highway, there would surely be some hint of it.
24. By the time this map was produced (which seems to be estimated at 1811) the **Inclosure of Shitlington and Holwell (1802-1817)** was underway but not yet finalised. Whilst there is no explanation for an annotation on the 1811 survey plan for the public bridleway from Shitlington but not the footpath at point X, it is not disputed that the resulting award established the two public rights of way which led to the county boundary on the Bedfordshire side.
25. Both HCC and the landowners referred to the Inclosure Commissioners' powers to set out highways extending no further than the boundary of the inclosure land. Thus the Shitlington Award would have no legal effect in Pirton, yet if the awarded bridleway and footpath were used by the public, the obvious question would arise: where did they go once they entered Pirton Parish?
26. The applicant contends the answer to that question must be E-D-C-B-(Y)-A and X-F-A and his view is also supported by other parties. Those who oppose the Order say there is no evidence to support either route ever being used by the public between the parish boundary and point A.
27. The wording of the Shitlington Award offers a clue insofar as the footway is described as running from "*an allotment to Trinity College in Town Field nearly in a straight line to the Parish of Pirton where it meets an ancient way near Fly Pightle in the Parish of Pirton*". However no-one has been able to identify the location of 'Fly Pightle'. The description of the bridleway is also helpful insofar as it runs from New Bridge (marked on the Award Map) "*thence nearly in the ancient track of the road over the Town Common into the parish of Pirton which it enters at the south end of New Ditch Balk*".
28. The documents relating to the **Pirton Inclosure** date from **1811 to 1818**. There appears to be no evidence of any parts of the Order routes being set out as highways but there is reference to "*an ancient Field Way called Millers Lane*" (this being A-Y on the Order map) and to "*an ancient Lane called Washbrook Lane*" (referring to a section between A and F).
29. The applicant acknowledges that the Pirton Inclosure documents do not show the claimed bridleway through open fields and that "*the Commissioners seem to have ignored its existence*". HCC concluded that the process had no legal effect on the existence of the application routes (as guided by the case of *R v SSE ex parte Andrews (1996) 71 P & C 1*) primarily for the reason that public ways of less than 30 feet in width could not be set out under the terms of the General Inclosure Act of 1801, nor could they be stopped up. In response, the landowners point out there is no evidence to support the pre-existence of any public right of way in Pirton Parish over either of the routes claimed.

30. From a reference in a local history book entitled "**A Foot on Three Daisies – Pirton's Story**", the applicant asserts that a common balk noted in a field called "North End Corner by North" may have been the route of the bridleway, this being the usual way of setting out an unfenced minor highway through open fields cultivated in strips. Although I have been able to identify two fields named 'North End Corner', the references to a common balk cannot assist unless its location can be reliably established.
31. Before reaching any conclusions on the implications of the inclosure documents I have looked at what was recorded after this period of significant change.
32. The map maker **Bryant** produced **maps of Hertfordshire in 1822 and Bedfordshire in 1826**. He recorded only a short section of the claimed bridleway (approximately A-Y) but the full length of the way between A, F and Z to the county boundary and into Bedfordshire (though stopping almost immediately). Both were shown in the category 'Lanes and Bridle Ways'.
33. The landowners submit that these maps are more likely to show private routes for the purpose of accessing fields, yet HCC considered it reasonable to deduce that both routes would be highways open to the public, otherwise there would be little point in them being shown on commercial maps of this nature designed for the travelling public. The BHS goes further, arguing that Bryant's map of Hertfordshire weighs in favour of the route A-F-Z being at least a bridleway and possibly a public vehicular right of way through to the county boundary.
34. The applicant submits the fact Bryant did not show the continuation of either way does not mean it did not exist and argues that the 1826 map shows the start of Shillington Bridleway 9. As the Shillington Inclosure Award confirms the bridleway continued over the county boundary, he submits this reinforces the evidence for the existence of the through-route shown by Dury and Andrews.
35. As a general principle, I agree with the applicant's statement that "*absence of evidence is not evidence of absence*". However I do not accept that the rather limited evidence links together to support his theory in the way he suggests. I find it interesting to note that in 1826 the 'lane or bridleway' in Shillington was not shown on its awarded route but leading to unnamed buildings in the vicinity of the present Rosehill Farm. In my view this adds no weight at all in support of this being a historical continuation of the claimed bridleway in Pirton Parish.
36. As regards the route shown by Bryant from A to the boundary at Z, I may have been prepared to give weight to this as a public way, and possibly vehicular, had his corresponding map for Bedfordshire shown this to be a through-route but it does not. Since there is no clear indication of any feature of a public nature which might explain a cul-de-sac highway of whatever status, I attribute very little weight to the depiction of these two routes by Bryant as evidence of public rights of way. Nevertheless, what is shown would not be inconsistent with highways in both directions if other evidence proved their existence.
37. Maps of the proposed **Hitchin Extension to the East and West Junction Railway in 1865** do not acknowledge the presence of public rights of way in the vicinity of the Order routes or the claimed continuations. The awarded (and now definitive) Shillington Bridleway 9 and Footpath 24 are not noted and therefore no significance can be attached to the absence of acknowledgement of the claimed rights in Pirton Parish. However I do note that Washbrook Lane was recorded in the accompanying book of reference as an occupation road.

38. I observe that the base map used to illustrate the general line of this proposed railway in 1865 is one that has not been submitted separately as an item in this case but which I suspect may be the Ordnance Survey's first edition 1": 1 mile map. Although there is no indication of the claimed bridleway beyond A-Y, the beginning of the awarded line of Bridleway 9 in Shillington is apparent. Further, a link from Washbrook Lane appears to continue to the county boundary and beyond as a track past features named "Spinny" and "Crophills". These do not appear on any other map that is before me and their significance (pre-1865) remains a mystery.
39. The plan relating to a **farm sale in 1867** provides confirmation of the physical existence of an enclosed lane between A and a point roughly half way between F and Z, coloured in the same way as Burge End Lane. No such way is shown over the claimed bridleway. From the end of the coloured section of Washbrook Lane, this continues to point Z and beyond as two broadly parallel lines although there is no clear explanation for this. However a plan attached to an **indenture in 1867** shows Washbrook Lane continuing to the county boundary (A-F-Z) and to land owned by Trinity College Cambridge; the Millers Close track (A-Y) led only to Windmill Field Allotment. A **farm sale in 1879** included the field north east of A-Y and in **1894 a plan** attached to an indenture named Washbrook Lane but left it uncoloured (in contrast to the road south east of A); it also indicated A-Y with double dashes, similar to (and probably based upon) the OS 25": 1 mile map of 1882.
40. I accept that the colouring on these maps is not indicative of the legal status of the ways shown but more probably its physical construction. The landowners submit that this collection of documents show that A-Y and A-F were private accesses, the first to Windmill Field Allotments and the second to the fields owned by Trinity College. The applicant asserts the absence of express provision of private rights of access over sections of the claimed routes indicates a reliance on a public right.
41. I exercise caution in placing any weight on what were essentially private documents as evidence of an implied public right, yet I am not convinced Washbrook Lane would have been necessary to provide access to the Trinity College land when adequate provision would have been made within Shillington Parish at inclosure. However none of these documents suggest any alternative destination or purpose for this lane. As regards A-Y through Millers Close, I find nothing to support any kind of recognised way beyond Y, public or private.
42. The **1882 OS map** (mentioned above) names both the road south east from A and A-F as Washbrook Lane. This route continues through the next field beyond F as a track fenced on one side only and although no track is shown through the last field before the boundary at Z a line of trees suggests the route of the way followed the way illustrated on earlier maps.
43. The BHS argues that because the **OS Object Name Book** associated with this edition recorded that the name "Washbrook Lane" was confirmed by the Assistant Overseer of Highways for Pirton, this indicates the public interest in the Order route. I consider the argument might have a degree of merit although the extent of the lane is not entirely clear; indeed a part is today acknowledged to be maintainable at the public expense. However the OS did not seek to establish the status of the ways shown on its maps and confirming a name does not necessarily indicate any particular interest in the subject matter. Indeed the Assistant Overseer, Mr Carter, also confirmed the spelling

of St Mary's Church and the Methodist Chapel, neither of which would have fallen directly within his jurisdiction.

44. The BHS further submits that since another road within Pirton known as 'Little Lane' was also similarly noted as confirmed by the Assistant Overseer and is now recorded as a publicly maintainable highway on HCC's 'List of Streets',⁵ the Order route A-F should likewise be recorded as an unclassified road.
45. In the absence of any evidence that the Assistant Overseer of Highways had a direct interest in all of Washbrook Lane, or clear evidence of the extent of that lane, I give this only a modicum of weight in favour of a public right of way.
46. I note that on neither the 1882 OS 25" map nor **the 1898 edition** was Bridleway 9 or Footpath 24 shown in Shillington Parish⁶. Whilst tracks were shown between A and Y and from A to beyond F in the direction of (but not to) Z on the 1882 map, these did not appear on the 1898 edition although the footpath (now Pirton No 1)⁷ appeared on both. As regards these maps, I adopt the applicant's phrase: "*absence of evidence is not evidence of absence*" but there is little to be drawn in support of the Order routes' existence as public rights of way in use at the end of the nineteenth century.

Twentieth century evidence

47. Plans prepared in **1902** for the proposed **Leighton Buzzard and Hitchin Light Railway** showed A-F (listed as an occupation road) and a very short continuation in the direction of Z to the limit of deviation. Whilst the Order route A-Y (Millers Lane) lay outside this proposed corridor, there was no indication at all of the remainder of the claimed bridleway.
48. The records associated with the **1910 Finance Act** show the section of Washbrook Lane A-F excluded from adjacent hereditaments for the purposes of tax assessment but no deductions for any public right of way within the land parcels through which pass the claimed bridleway or any continuations of the claimed public right of way beyond F.
49. Where land is excluded from assessment, there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular. I therefore accord due weight on the basis of the exclusion of A-F, yet temper this since the apparent cul-de-sac nature of Washbrook Lane without an obvious public terminus at F challenges that general principle.
50. When **the definitive map** was compiled in the **1950s** the awarded routes Bridleway 9 and Footpath 24 were recorded in Shillington Parish, but there was no evidence to support a connection in Pirton. However, the definitive record is conclusive of what it does show but without prejudice to any way that has been omitted being subsequently shown to exist.
51. Lastly I note the statements made by and on behalf of the landowners to the effect that no culverts have been discovered along the lines of the claimed paths, and also that the applicant recalls there having been one such culvert to his certain knowledge in recent years on the line of his claimed footpath and depicted on the 1979 OS map. On this point I agree with the applicant that the

⁵ Held under Section 36(6) of the Highways Act 1980

⁶ It is not clear exactly when Shitlington changed to Shillington.

⁷ Part of Definitive Footpath 1 (Pirton) together with part of Footpath 2 (Pirton) follows the route shown on the Pirton Inclosure Map as Public Footway No. 1.

absence of culverts in the later part of the twentieth century does not preclude the possibility of crossings being in existence a century or more before.

52. I have dealt with the records from the twentieth century very briefly since it seems to me that any substantive evidence of the claimed route had faded by the end of the nineteenth century.

Conclusions from the evidence

53. Reflecting on the inclosure process, I consider it important to recognise that highways were sometimes set out along pre-existing routes and some were completely new, designed to accommodate the public's need to move around the locality within the new system of allotted lands. Some highways, as seems to be the case here, were a little of both, being near to but not exactly on their original lines.
54. The applicant places great weight on the unequivocal existence of Bridleway 9 and Footpath 24 leading to points E and X respectively as endorsed by the Shitlington Inclosure; yet the evidence for the pre-existence of both is scant. The description of the footpath in the Award refers to part being "*nearly in its ancient course*" but this is in the context of a more northerly section and may not have applied also to the part leading to the Pirton boundary. The description continues with a reference to the path meeting "*an ancient way near Fly Pightle in the Parish of Pirton*", which would imply that the ancient way in question carried at least a public right of way on foot. Yet it is not entirely certain whether this ancient way was the ancient fieldway (A-Y) or the ancient lane (A-F). The "*Public Bridleway from Shitlington*" is indeed noted on the Pirton pre-enclosure map (c1811) but the Shitlington Inclosure (which was not complete until 1817) confirmed it was near to but not on its ancient alignment.
55. Dury and Andrews showed a way between Pirton and Shitlington in the mid-1700s but I do not regard this map as sufficiently reliable in terms of alignment to offer any significant support for the line of Bridleway 9. It is unlikely that the map was depicting a footpath (via the line of Footpath 24 or any other variation) although I do not rule out the possibility that the connecting route was Washbrook Lane (A-F-Z) given this was shown later by Bryant in 1822. The Pirton pre-inclosure map offers some support for a path entering the parish at a point⁸ a short distance west of point X but its alignment does not support that claimed by the applicant as an extension to A-F.
56. In summary, I find insufficient evidence that either Bridleway 9 or Footpath 24 in Shillington Parish existed on their awarded lines before the inclosure process began in the early nineteenth century. Consequently I consider there to be no basis from which to presume that continuations existed in Pirton before inclosure from those same points on the boundary, referred to here as points E and X respectively, or that they inevitably headed for point A.
57. Since it seems clear that the Pirton Inclosure Award did not set out either route as a highway of any description, the next question is whether the evidence is sufficient to imply that the Order routes were nonetheless regarded as public rights of way at that time.

⁸ It seems to me possible that this could have been the path described in the Shitlington inclosure as meeting the "*ancient way near Fly Pightle*", if the "*ancient Field Way called Millers Lane*" (as described in the Pirton Inclosure Award) were the *ancient way* and *Fly Pightle* somewhere in the vicinity of Millers Close. However that is largely speculation and I do not rely on it.

58. Dealing firstly with the claimed bridleway, the only section which appears to be acknowledged is A-Y, referred to in the award as the "*ancient Field Way called Millers Lane*" (and later shown by Bryant in 1822). However far from leading towards the county boundary in the direction of point E, I agree with the landowners that the pre-inclosure plan suggests this led from the end of Millers Lane in a more westerly direction; post-inclosure it appears to have served only fields west of Y. No definition has been found to explain the term 'field way' but here, this seems to me to be more in the nature of a customary right enjoyed by those holding land accessed from the way, rather than a public bridleway. I therefore hesitate to accord use of the term 'field way' to describe A-Y any significant weight (although it may just possibly have been the 'ancient way' referred to in the Shitlington Award describing Footpath 24).
59. As regards the Order route between A and F, the Inclosure Commissioners referred to this as an '*ancient lane*'. Again, there is no clear indication of whether this term was intended to recognise a pre-existing highway or some other customary way in communal use. The lane is visible on the 1801 plan leading in the direction of point Z and on the 1811 pre-inclosure survey plan to the boundary at Z, yet there is no destination stated for it beyond Z⁹ that might suggest it was a public through-route. The relationship between public rights of way and public drains (if there was any) has not been explored.
60. I consider the setting out of the Pirton 'Public Footway No. 1' (now parts of definitive Footpaths 1 and 2) weighs against the existence of both the claimed bridleway and footpath in the early nineteenth century. The Commissioners were clearly mindful of public rights of passage and the need to define a footpath, yet no rights of way were set out between A and E or between A and X (or Z). Even if, as the applicant submits, any pre-existing public rights would have been preserved, the fact that these were not indicated on the inclosure map and clearly not taken into account in the decision to set out Footway No. 1, weighs against the existence of any such pre-inclosure ways. In this instance I consider that absence of evidence is in fact evidence of absence.
61. Of the evidence that post-dates the inclosure period, I find nothing to support a way of any description between Y and E or between F and X but will return to the applicant's further submissions on this below.
62. The evidence in support of the Order route between points A and Y post-inclosure is equivocal. The way continues to appear as a track on some, but not all, maps and plans into the twentieth century but any evidence to suggest a public right of way over it is inconsequential.
63. However the evidence in support of Washbrook Lane between A and F is stronger. It was shown by Bryant in 1822 and 1826 as a lane to the county boundary; there is a hint that in the mid-nineteenth century it linked with another track to the north yet it was noted as an occupation road in railway documents of that period. OS maps support its physical existence as a lane although by the turn of the twentieth century it ceased to be shown beyond point F. The farm sale documents and indentures from the second half of the nineteenth century are equivocal but support the continued existence of a track beyond F in the direction of Z, whatever its status.

⁹ On this plan it appears to turn eastwards along the boundary.

64. Whilst none of this evidence is inconsistent with a public footpath (or a vehicular highway as claimed by the BHS) it provides little of any substance in support of such rights. The 1910 Finance Act records add the greatest weight in support of a highway as an extension of Burge End Lane, and the absence of express provision of private rights of access over this part of Washbrook Lane does suggest a reliance on the existence of a public right for all traffic. Yet the public destination of any such vehicular highway remains unclear and I find no direct evidence to support the existence of a footpath linking Washbrook Lane at F to Footpath 24 at point X on the county boundary.
65. Whilst I find the evidence sufficient to reasonably allege the existence of a public right of way between A and F (and Z), that is not enough to satisfy the statutory test at this stage. Following the principle established in the case of *Todd and Bradley v SSEFRA [2004] EWHC 1450* if I am to confirm the Order, or propose modifications to it, the standard of proof required is higher than that.
66. On a balance of probability I find the evidence is not sufficient to show it is more likely than not that a public footpath exists between points A and F, or that the highway continued from point A via F to point Z or X as claimed. Neither do I find it sufficient to support the existence of a public bridleway along the Order route A-B-C-D-E.

Consideration of other submissions

67. The applicant accepts there is no direct evidence to support the existence of public rights of way over the Order route between Y and E and over his claimed extension to A-F between F and X. Nevertheless he submits that the claimed bridleway between A and D should be recorded as a virtually straight line in accordance with the principle (as set out in Halsbury's Laws of England) that where a public right of passage exists but there is no defined track to identify it, then the right is presumed to be "*confined to a strip of reasonable width ... running straight from terminus to terminus*".
68. In short, the applicant argues that in the Inclosure Award Bridleway 9 and Footpath 24 in Shillington Parish were both identified as continuing into Pirton Parish and, although the line taken by each cannot be identified, the right must nonetheless exist and therefore should be taken to follow the most direct line between known points.
69. In response the landowners say there must first be sufficient proof of the existence of a right before such a presumption can apply. Whilst I concur with this general principle, in the case of both the claimed bridleway and footpath I would only be prepared to consider the applicant's proposition if there were **no** evidence to the contrary. Here, in both cases, I find there is: on the pre-inclosure map there are possible alternative routes which I have already considered (although rejected for lack of supporting evidence). I have also reached the conclusion that it is not certain that either Bridleway 9 or Footpath 24 existed on their present lines before inclosure. For all these reasons I reject the applicant's claim that the presumption to which he refers should apply here.
70. In support of his submission that "*something rather than nothing should be recorded on the definitive map*", the applicant cites examples where a right is known to exist but its precise route is uncertain. However I do not consider his analogy with the right of way across Morecambe Bay capable of adding any

weight to the argument, given my conclusion in the previous paragraph. Further, I hesitate to consider his Lake District example has much to offer, given the mapping available for upland areas such as this at the time the definitive map was drawn would not have enabled public paths to be recorded with any greater precision despite subsequent and more accurate maps now showing certain definitive routes to be wholly impracticable.

71. In summary I reject the applicant's submission that there is *sufficient* evidence that the definitive bridleway and footpath in Shillington Parish continued in Pirton Parish, or that the bridleway continued between points A and E, or that A-Y ever formed part of that continuation. I also reject his submission that there is *sufficient* evidence of a footpath leading from point X to Pirton via point F although I accept there is some evidence of a public interest in A-F and, to a lesser extent, A-Y.
72. Whilst examination of all the evidence in this case and consideration of all the submissions leads me to conclude that the evidence is not sufficient to show the Order routes should be recorded as public rights of way, I have considered whether the evidence for highways along other variations of the lines claimed is sufficient to satisfy the statutory test such that I should propose to modify the Order so as to record them. However, on balance, I find the information that is before me does not justify that course of action.
73. To summarise, I repeat my previous conclusions, I find the evidence submitted is not sufficient to show that, on a balance of probability, a public bridleway subsists over the Order route between points A and E or that a public footpath subsists between A and F.

Other matters

74. Whilst I note the three letters of support for the proposed bridleway welcomed the addition of such a route to the local network of safe highways available to horse riders, the merits of the routes at issue cannot be taken into consideration in determining the historical status of the way in question.

Conclusion

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

Formal Decision

76. I do not confirm the Order.

Sue Arnott

Inspector