*307 Dunlop v Secretary of State for the Environment and Cambridgeshire County Council

No Substantial Judicial Treatment

Court
Queen's Bench Division

Judgment Date
29 March 1995

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Queen's Bench Division

(Sedley J.):

March 29, 1995

Footpaths— Wildlife and Countryside Act 1981 —Classification of byway—Inclosure Award of 1820 pursuant to Inclosure Act 1801 construed—Meaning of "private carriage road"—Whether private carriage road available for use by the public

The Cambridgeshire County Council (Roads Used as Public Paths Glatton Nos. 5 and 7) Reclassification Order 1992 ("the 1992 order") designated as a byway open to all traffic under section 54(3) of the Wildlife and Countryside Act 1981 , a track running between the villages of Denton and Glatton in Cambridgeshire. That track was known for part of its length as Mill Road and for the rest of its length as Denton Road. Mill Road and Denton Road were respectively identified as "Glatton Nos. 5 and 7" in the Glatton with Holme Inclosure Award of 1820 made pursuant to the Inclosure Act 1801 , and the entire length of the track was described in that Award as a "private Carriage Road". Objections to the 1992 Order were made and a public inquiry was held. The applicant was one of the objectors at that inquiry. On April 22, 1993 the inquiry Inspector concluded that Mill Road and Denton Road were private roads for the use of the landowner's wheeled vehicles. At a second inquiry, held to hear objections to the proposed modification of the relevant map consequent upon the Inspector's conclusion in the first inquiry, the second respondent, without notice, renewed the contention made unsuccessfully in the first inquiry that the track was a public highway. That contention was supported by fresh evidence and the Inspector was persuaded at the second inquiry that the track historically had been a public road open to wheeled vehicles, and that public vehicular rights over it should be reflected in the reclassification made by the second respondent. The applicant applied to quash the 1992 Order as confirmed by the Inspector on the ground, *inter alia* , that a private carriage road differed from a public carriage road and was not available for use by the public. Upon the hearing of that application,

Held, granting the application and quashing the 1992 Order, that whether a public right of way for vehicular traffic had been shown to exist over Mill Road and Denton Road depended upon the construction of the 1820 Award. Nothing in the material before the court or in the Inclosure Act 1801 suggested that enclosure awards or highway law generally differentiated between carriage roads according to whether private or public vehicles were permitted to go on them, and so the true construction exercise was to determine the meaning of "private carriage road" in the context of the 1820 award. The legal history of enclosure furnished compelling evidence that in both the 1801 Act and the 1820 Award public and private carriage roads were deliberately distinguished and that the latter term embraced not all the monarch's subjects but a limited, if unspecified class. Furthermore, whilst section VIII of the 1801 Act required that public carriage roads be wide enough to carry the intended traffic and laid out on routes convenient to the public, no such requirements were imposed by section X of the Act in relation to private roads, suggesting precisely that these latter are roads which, although larger than bridleways and footways, are not intended for the use of the public at large. All the indications were, therefore, that "private carriage road" is deliberately used in the 1820 Award as a term of art distinguishing the particular road according to the extent of the particular rights over

it from the public carriage roads on which all subjects enjoyed an equal right of vehicular passage. The subsequent history of many such roads does not destroy that deliberately made distinction. The existence of a public right of way for vehicular traffic over Mill Road and Denton Road, therefore, had not been demonstrated, and ***308** a designation under section 54(3)(a) of the Wildlife and Countryside Act 1981 , of that track as a byway open to all traffic could not be made. Accordingly, the application succeeded and the track should be shown in the definitive map and statement not as a byway open to all traffic, but, pursuant to section 54(3)(b) of the Wildlife and Countryside Act 1981 , as a bridleway.

Cases referred to:

(1) *River Wear Commissioners v. Adamson (1877) 2 App.Cas. 743* .
(2) *R. v. Hammond (1717) 10 Mod. 382* .
(3) *Katherine Austin's case (1683) 1 Ventris. 189* .
(4) *R. v. Thrower (1684) 3 Keble 28* .
(5) *R. v. Saintiff (1704) 6 Mod. 255* .

Legislation construed:

Wildlife and Countryside Act 1981, s.54(3) . The material parts of this provision are set out at p. 308.

Application by Andrew Dunlop, under paragraph 12 of Schedule 15 to the Wildlife and Countryside Act 1981 to quash the Cambridgeshire County Council (Roads Used as Public Paths Glatton Nos. 5 and 7) Reclassification Order 1992 as confirmed by the Secretary of State's Inspector on March 30, 1994 by which the track known as Mill Road and Denton Road between Glatton and Denton in Cambridgeshire was reclassified as a byway open to all traffic under section 54(3) of the 1981 Act.

The application sought to quash the order on the basis that no public right of way had been shown to exist for vehicular traffic over the track as required by the 1981 Act before a designation as a byway open to all traffic can be made. The main grounds for the application, in summary, were (i) that the Inclosure Act of 1801 clearly differentiates between “private carriage roads” and “public carriage roads”; (ii) that “private carriage roads” according to the common law are not open to the public as a whole; and (iii) that the Glatton with Holme Inclosure Award of 1820 designated the track a “private carriage road”.

The facts are stated in the judgment of Sedley J.

Representation

Mark Cunningham for the applicant.
Nicholas Burton for the first respondent.
The second respondent did not appear and was not represented.

Sedley J.

Section 54 of the Wildlife and Countryside Act 1981 calls for the review of definitive maps so as to show every road used as a public path as a byway open to all traffic, a bridleway or a footpath, in all cases abandoning the protean expression “road used as a public path”. The choice of permitted designations is dictated by subsection (3) as follows:

> A road used as a public path shall be shown in the definitive map and statement as follows—
>
> (a) if a public right of way for vehicular traffic has been shown to exist, as a byway open to all traffic;
>
> (b) if paragraph (a) does not apply and public bridleway rights have not been shown not to exist, as a bridleway; and

(c) if neither (a) nor (b) applies, as a footpath.

This is an application under paragraph 12 of Schedule 15 to the Act to quash an order made by Cambridgeshire County Council in 1992 and eventually confirmed by an Inspector on March 30, 1994, the material effect of which ***309*** was to classify as a byway open to all traffic a track (I use as neutral a word as I can find) known in one section as Denton Road and in another as Mill Road, running roughly north and south between the villages of Denton and Glatton in what is now Cambridgeshire. When the proposal to reclassify the track, previously designated as a road used as a public path, was published in 1992 many objections were received and a public inquiry was accordingly held on March 9, 1993. The present applicant, Mr Dunlop, was among those whose objections were co-ordinated and presented by Glatton Parish Council, and their objections were upheld by the Inspector in his decision issued on April 22, 1993.

The Inspector concluded that “each road was a private road for use by the landowner's wheeled vehicles”, and that its public use, which should be reflected in a reclassification, was limited to use as a bridleway. The consequent modification of the map required a further opportunity to be given for objections to be made. Objections were received from a variety of potential users of the track, but Cambridgeshire County Council, which had argued at the first inquiry that the track was historically a public highway and so should be classified as a byway open to all traffic, gave no notice to the Inspector of any continuing or fresh objection along the same lines. Although Mrs Hodges, the county council's assistant public rights of way officer, has no memory of it, there is cogent affidavit evidence from Mr Dunlop that in response to his specific enquiry she had confirmed to him that the county council would not be objecting at the second inquiry.

Nevertheless, at the second inquiry the county council took the supporters of the Inspector's first report by surprise by renewing its contention, supported now by new material, that the track was a public highway. Mr Hackman, the chairman of the parish council, had no knowledge of procedure and did not ask for an adjournment; nor is there evidence even at this stage that an adjournment, had he asked for and obtained it, would have made any material difference to the conduct and outcome of the second inquiry. Since this aspect of the conduct of the second inquiry is a ground of challenge on the present application, let me deal with it straight away. Although I have not called upon Mr Cunningham to develop the Secretary of State's arguments on the point, if the applicant's account of his dealings with the county council is correct, to take advantage of a statutory second inquiry, held to consider the consequences of the decision arrived at the end of the first inquiry, in order without notice to anybody affected to re-run an argument which had been advanced without success at the first inquiry, although not unlawful or strictly an abuse of process, will not have been an attractive way of discharging the responsibilities of local government. Cambridgeshire County Council have elected not to appear on this application, so that I have not been able to hear their views or explanations, but what saves the Inspector's decision from quashing on this ground is the bare fact that no adjournment was sought and no tangible damage done by the late and unannounced advancing of a new case by the county council. If, as is accepted, they were entitled to do it, the element of gamesmanship in their timing is not shown to have had any perceptible impact on the fairness of the proceedings so far as affected the interests represented by the parish council.

The consequence of the fresh intervention of the county council was that the Inspector was persuaded that his original decision was wrong and that because the track had historically been a public road open to wheeled ***310*** vehicles, public vehicular rights now existed over it with the consequence that it should be reclassified as a byway open to all traffic under section 54(3)(a) .

It was and is common ground that whether a public right of way for vehicular traffic had been shown to exist over Mill Road and Denton Road depended upon the proper construction of the Glatton with Holme Inclosure Award of 1820. Construction being a matter for the court, it is accepted that I am not limited to supervisory review on *Wednesbury* grounds of the Inspector's decision. But, like the Inspector, I am not confined to the words of the Award. As Lord Blackburn said in *River Wear Commissioners v. Adamson* [1] :

> In all cases the object is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention was without enquiring further, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view, for the meaning of words varies according to the circumstances with respect to which they were used.

More problematical is the question what margin of appreciation is due, in such a construction exercise, to the Inspector whose experience and knowledge the court lacks. No single formula can in my view provide for this: it will depend in every case on the exact nature of the construction issue and the materials upon which it has to be resolved. Thus on questions of topography a court would, I think, be much less ready to differ from an Inspector than it would be on purely linguistic issues of construction.

Although Mr Burton, for the applicant, has segregated two topographical issues, the steepness of one part of the track and the measured area of Glatton with and without private roads, as instances of a failure of the Inspector to address relevant matters in evidence, the arguments on these topics can properly be deployed as part of the construction exercise, so that there is no need to treat them separately. It follows that, with the procedural issue out of the way, the single issue to be decided is the proper meaning of the Inclosure Award of 1820.

The award was one of many carried out under the first general enclosure Act, the Inclosure Act 1801 , passed

> for consolidating in one Act certain provisions usually inserted in Acts of Inclosure, and for facilitating the mode of proving the several facts usually required on the passing of such Acts.

The Commissioners for Glatton with Holme (then in Huntingdonshire) were appointed in 1809 and took 11 years to make their award. The preamble concludes:

> […] we have set out and appointed and by these presents do award and confirm the following public and private carriage drift and footways or roads that is to say […]

There follows a tabulated list of roads, the material one of which is sidenoted “Denton Road” and reads: ***311**

> One other public Bridle and Drift road and footpath and private Carriage Road of the breadth of 40 feet in Glatton called the Denton Road commencing at the north end of a lane near a homestead belonging to Philip Castel Sherard to the Lordship of Denton thence Eastward to a Lane leading to the Town of Denton.

It is accepted on all sides that whether the Commissioners were creating or confirming this road, it is their award that is definitive of the rights now to be reflected in the reclassification of the way. No map is found with the Award.

The construction reached by the Inspector is set out at the beginning of the section of his decision letter headed "Conclusions".

> From the new evidence of the objectors to the proposed modification I am persuaded that roads described in the Glatton with Holme Inclosure Award as "public Carriage Roads and highways" and "private Carriage Roads and Drift Ways" both refer to roads for use by the public. I consider that in present day terms, the second description does not apply in the sense of being a privately owned road for use by vehicles of the landowner but not the public. Instead it applied to a public road of lower status than a "public Carriage Road and highway". I accept that the Award does not state any difference in the maintenance liability of these two types of road described and does not refer to "private Carriage Roads and Drift Ways" as being for the use only of certain landowners. I also accept, from map evidence, that routes conforming to Glatton Nos 5 and 7 existed prior to the Inclosure Award and would therefore need to be specifically awarded in 1820.

(The routes referred to as Glatton Nos. 5 and 7 are respectively Mill Road and Denton Road.)

Mr Burton submits that this construction of the material part of the Award is wrong. His arguments in summary are these:

> (i) The Act of 1801, within the framework of which the Commissioners were required to operate, differentiates clearly between public and private roads. By section VIII Commissioners are required, before making divisions and allotments,
>
> > "to set out and appoint the public Carriage Roads and Highways, through and over the Lands and Grounds intended to be divided, allotted, and inclosed, and to divert, turn, and stop up, any of the Roads and Tracts, upon and over, all, or any Part of the said Lands and Grounds, as he or they shall judge necessary, so as such Roads and Highways shall be, and remain Thirty Feet wide at the least, and so as the same shall be set out in such Directions as shall, upon the Whole, appear to him or them most commodious to the Public […]"
>
> Separately section X required Commissioners:
>
> > "to set out and appoint such Private Roads, bridleways, footways […] as he or they shall think requisite […]"
>
> While, therefore, "private carriage road" (the phrase used in the Award) is not a statutory term of art, it appears that "public carriage road" and "private road" are.

(ii) The distinction between carriageways open to the whole of the public and carriageways for the use of a limited section of the public, for example the inhabitants of a town or parish, has long been known to the ***312** law. Coke, following Fleta and Bracton, classifies ways as being a footway, or a footway and horseway (also known as a packway or driftway and so permitting the driving of cattle along it), or

> " *via aditus* , which contains the other two, and also a cartway […]; and this is twofold, *viz* , *Regia via* the King's highway for all men, *et communis strata* , belonging to a city or towne, or between neighbours and neighbours."

The first, the King's highway, corresponds with a public carriage road; the second with a local road which is private in the sense that not everybody has the right to use it for all purposes.

(iii) The note appended to this passage, taken from Coke on Littleton, 56a, in Pratt and Mackenzie *The Law of Highways* , [2] citing *R. v. Hammond* [3] for the proposition that *Regia via* and *communis strata* , "are synonymous expressions and signify the same thing," is wrong: see *Katherine Austin's case* [4] ; *R. v. Thrower* [5] ; and *R. v. Saintiff* [6] the last of which cases distinguishes "common" ways from public ways, because

> "there is common for two, three or more; and it will be hard to understand the word 'common' to be universal […]"

(iv) By the end of the eighteenth century it appears from Hawkins' *Pleas of the Crown* [7] that "common way" and "highway" have become elided in a single meaning and are now to be distinguished from a "private way". Thus:

> "[…] there seems to be no reason why any way leading from village to village, which does not terminate there, but is also a thoroughfare to other towns, may not properly be called a common or highway […]"

whereas:

> "[…] a way to a parish church, or to the common fields of a town, or to a private house, or perhaps to a village, which terminates there, and is for the benefit of the particular inhabitants of such parish, house, or village only, may be called a private way, but not a highway, because it belongeth not to all the King's subjects but only to some particular persons […]"

This differential usage is spelled out in Tomlins' *Law Dictionary* [8] :

> "Ways are also either public or private; […] it seems that any of the said ways which is common to all the King's subjects, whether it lead directly to a market town, or only from town to town, may properly be called a highway; that any such cart-way may be called the King's highway […]. But it seems—"

and there follows Hawkins' description of a private way.

(v) It follows that the usage of the word "private" in relation to a road had by the first quarter of the nineteenth century acquired a precise meaning distinct from and narrower than that of "highway" or "public way". How much narrower will have varied from case to case, and Mr Burton accepts that if not sufficiently narrowed the class might be ***313** indistinguishable from the general public; but in the absence of any evidence that the class was this broad, the onus under section 54(3)(a) of showing that a right of way for vehicular traffic exists cannot have been discharged, with the result that paragraph (b) of the sub-section operates to define the track as a bridleway. The nearest one can come to the class of private user is the likelihood that the road went from Denton to the mill, in which case it will have been *communis via* only in the earlier parlance and a private way in later parlance.

(vi) The statute requires all public roads created by awards to be at least 30 feet in width. The present award goes on to create

> "One other private road and driftway in Glatton of the breadth of 20 feet […]"

Unless the Commissioners were acting unlawfully, this is good evidence that a private carriage road was, at least in this award and probably generally, distinct in law from a public carriage road.

(vii) The way is at one point so steep, as the Inspector will have seen for himself, that it is not thinkable that a public carriageway can have been intended to traverse it.

(viii) The total area of roads, town streets, drains, banks and water courses included in the award is shown as amounting to 19 acres, 3 roods and 34 perches—a total which can only be arrived at, at least on the late nineteenth-century survey, by omitting Mill Road and Denton Road from the calculation. This suggests that in the Commissioners' own view the private carriageways in the Award were something separate.

On behalf of the Secretary of State, Mr Cunningham makes the following contrary submissions:

(i) The object of the exercise is to deduce the purpose of the award from the words used and the circumstances in which they were used. The purpose of the Award, as of all Inclosure Awards, was the public purpose of dividing up common land amongst the local population and fixing and clarifying the local topography and infrastructure.

(ii) Hausted's map of 1613 and Jeffry's map of 1766 (both of which were before the Inspector and the former of which is before the court) show the two sections of the road running through open fields which will have been part of the communal farming system and not privately owned. Their purpose is shown by their names: they gave access to and from Denton and the mill near Glatton. Thus between them they joined two agricultural communities and served a local amenity. Such roads would be open to all who wished to use them, even if in practice this meant mainly local inhabitants.

(iii) The Award gives no indication that the land over which the road ran was in single or in limited ownership and so used only for private vehicular access.

(iv) The use of "confirm" in the Award indicates prior similar use. The fact that the roads had names indicates that the use was public.

(v) The absence of any evidence whatsoever of the class to whom the supposed "private" right to use the road belonged casts real doubt on whether the word "private" was being used in this exclusive sense at all.

(vi) The Award appears to recognise a public right of use for pedestrians, horses and driven cattle: how then can the same road become private in relation to vehicles alone?

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(vii) The only acceptable solution to these problems is that the word "private" either signifies a local or inferior road, or qualifies the noun "carriage".

(viii) The usage of "private" to denote the physical and geographical quality of the road corresponds with its use in the expressions "private soldier" "private citizen" and "private member [of Parliament]", denoting an absence of official status. One can readily substitute "local" for "private" in the Award, but no synonym exists to reflect the applicant's construction.

(ix) Alternatively, it is far from fanciful to take "private" as qualifying "carriage" rather than "road". The case for this reading is cogently put by Christine Willmore in her article *Inclosure Awards: Public Rights of Way* . [9] I will come back to this article—which also argues in the alternative for the respondent's meaning of "private" in relation to roads—below.

To the last two points Mr Burton responds:

(i) A meaning of "private" corresponding with "local" or "low" in the description of Denton Road in the Award is contra-indicated by the way in which the Award goes on to describe Lambs Lane Road and the road to Holme Doles. Each of these is a road to a private allotment, and each is described as:

"One other private carriage road and driftway […]", omitting any reference to rights of passage on foot or with horses or cattle. If the commissioners considered it necessary to spell out the latter classes of right in relation to Denton Road, it can only have been because a private carriage road was, precisely, not the same as a public carriage road, on which rights of passage for all were automatically implied in the single designation.

> (ii) As to the secondary submission on behalf of the Secretary of State that the adjective "private" in "private carriage road" qualifies "carriage" and not "road", it is accepted that a distinction existed between private and public carriages; but there is nothing to support a distinction made in this case or generally between the right to use a highway for the one or the other. Given the plain statutory use of the epithets in "public carriage road" and "private road", and the absence of any evidence of usage, whether legal or colloquial, in the sense contended for, to use "private" to qualify "carriage" is fanciful, notwithstanding that the Department of the Environment's Guidance Notes for Inspectors advise that it is a possible meaning of the phrase.

In seeking to approach the construction of the Award in its historical and geographical context, I have reminded myself of what is known about local statutory enclosures, as described for example in W. E. Tate *The English Village Community and the Enclosure Movements* [10] :

> […] for a "typical" eighteenth-century Midland enclosure, the story should begin with the gradually growing discontent of the leading proprietors in the place with the rigid and inelastic open-field system, which prevented them from modernising their methods of husbandry as ***315** they wished. […] Farmers would benefit by the enormous increase of productivity which was confidently predicted. The lord of the manor would receive a sufficient compensation for his not-very-valuable interest in the soil of the common. The incumbent could have his tithe commuted at a handsome valuation. The highways might well be improved while the enthusiasm for progress lasted. The deserving poor would find small plots in severalty, or small pasture closes, more useful than scattered scraps in the open fields, and vague grazing rights […].
>
> Then the story should deal with the methods used to induce the smaller freeholders at length to give a reluctant consent. Then it might cover the gradual buying out of those who proved recalcitrant to the last, until finally the promoters had the necessary *quantum* of consent in support of their proposal. Of all this, however, the greater part of the records—if there ever were any—have perished, and the tale can but be pieced together from casual and fragmentary references. It is clear, however, that this, or something very like it, must have happened before ever the enclosure petition was drafted by the local attorney to be presented to the House by one of the county members.
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> The missing middle of the story would tell how, when, and where the Commissioners met, how they regulated their proceedings, dealt with the infinity of claims, just, unjust, and dubious, submitted to them and tried to harmonise conflicting interests. It would be most useful to know exactly how they reduced what they regarded as the unbusinesslike chaos of the open-field area to something more in accordance with their conception of what a reasonably well-ordered parish should be. All this, however, can hardly be discovered without the aid of the Commissioners' working papers. It is very doubtful whether many of the Commissions kept any records at all (there was no statutory rule that they should do so); and when Commissions were businesslike enough to keep proper working papers, only a proportion even of the minute-books are known to survive.

I have no indication in the present case or generally of the kind of men who were appointed commissioners. There is no reason to think that they were necessarily attorneys; many may have been land agents or surveyors; but there is no reason, either, to think that they acted idiosyncratically or made their awards in eccentric or coded language. It is known that a number of individuals were appointed commissioners over and over again, and I note that one of the commissioners who made the present award, John Burcham, of Coningsby, Lincolnshire (the county which underwent more enclosures than any other), is recorded by Tate [11] as having acted in at least 69 enclosures between 1801 and 1840, "dozens of them carried on simultaneously". Burcham died in 1841 worth £600,000. His participation, and possibly that of others, may explain the

11 years which it took to make the present Award; but it also affords some assurance that the work was being done by experienced hands.

The only real attraction of the proposition that by "private carriage road" the commissioners meant a road for private carriages is that it would provide a way round the impasse created by the competing arguments on the principal construction advanced; but this would not be an intellectually ***316** respectable reason for inclining to it, and intrinsically, in spite of Ms Willmore's argument in its favour, the submission has little to commend it. In the article referred to above [12] she writes:

> One interpretation problem arising under both 1801 Act and 1845 Act Awards is the meaning of "public carriage road" and "private carriage road". The use of language seems remarkably vague, even for nineteenth century legislation. […] A modern eye may assume a "private carriage road" is private, but private carriages were also a type of vehicle to be distinguished from public carriages *viz.* the stagecoach, mailcoach and public carriers. Private can therefore be read conjunctively with carriage rather than road, as a road for "private carriages", rather than a "private road" for carriages.
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> What was meant cannot be defined with certainty. By 1862 public carriage road meant a public road with vehicular rights whereas private carriage road meant a private right of way (Highways Act 1986, s.36). Yet those with experience of handling enclosure awards seem drawn to the conclusion that "private carriage road", prior to the middle of the century, meant a road for private carriages, *i.e.* open to everyone with a carriage (a word for cart way effectively), but that "public carriage road" meant a road for public carriages like stage, post coaches and carriers' vehicles. Department of the Environment Guidance Notes support this view. "A private carriage road may mean a public road for use only by private carriages. It should be remembered that terms in everyday use now may have had different meanings two hundred years ago, and may have been used in different ways in different parts of the country."
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> However, because the evidence falls tantalisingly short of conclusive proof of the meaning of these words, one may need to look to other factors, such as the destinations of roads, or their names indicating a destination to ascertain their status. A route indicated as going to the next or a further off town or village is almost certainly public. It is not in the nature of private roads to be thoroughfares from one village to another; private roads existed and exist, to give access to the land they lead to and abut.
>
> One way to determine what a particular commissioner meant by the words is to look at the particular power under which the road was set out. Many seem to have set out routes for use by private carriages under section 8, a provision which only relates to public rights of way. These routes must be considered public.

While this meaning might be a feasible one in the absence of any more obvious construction, it represents in my view an elliptical and uncharacteristic use of language for the period in which this Award was made. It is not a form of construction or usage for which any evidence or any analogue has been put before me, and it is not the natural or comfortable meaning which a reader would attribute to the phrase. The natural grammatical reading of it is that "private" qualifies "carriage road", and although this throws one upon the meaning of "private" in relation to "road", to evade the consequent conundrum by resort to an otherwise inappropriate meaning is not in my view a legitimate mode of construction. ***317** Nothing in the Act of 1801 or in any other material put before me suggests that enclosure awards or highway law generally differentiated between carriage roads according to whether private or public vehicles were permitted to go upon them, and a reading of the Denton with Holme award so as to erect such a distinction would in my view be a hazardous and probably a false step.

The true construction exercise is therefore to determine the meaning of “private carriage road” in its present context. Here Ms Willmore's reasoning, adopted by Mr Cunningham, points first and foremost to the fact that the two roads in question, forming a single way, ran not between two private estates or allotments but between a village and a mill. If the road was a “local” or “low” road it may have carried significant short-term advantages for the locality as against a “high” road used by the public at large. According to Ms Willmore:

> The latter imposed significant (and often deeply unpopular) repair obligations. How much better to claim the local roads were not available to public carriages, and therefore fell outside such intervention. Many hamlets were owned by one or two landowners. As such they could well have seen the road to the hamlet in much the same way as we may today see a way to an isolated cottage as private.

But the law, as I understand it, required the parish or the local inhabitants to repair all public roads, high or low, local or turnpike; so that the best that a “local” road could achieve was reduced wear and tear and less frequent repair to, quite possibly, a lower standard. All of this, however, will have been a question of practical usage if “private” meant public. The mere designation would not have made it possible to exclude anybody who wanted to use it with or without a vehicle. For this reason I do not consider Ms Willmore's reasoning on this point persuasive of the legal signification of “private”. On her view, the word will have created a nominal distinction without a legal difference.

I accept Mr Cunningham's submission that the steepness of the way at one point, quite possibly making it impassable in bad weather, cannot be taken as evidence that it would not have been designated by the Commissioners as a public way for vehicles: if it was impassable, it was impassable for all vehicles, however limited the right of access. The reality would have been that a vehicle setting out on this road, as on most roads at the time, had to take its chance on the state of the road and might find itself forced to turn back. As to the measured area, I accept Mr Cunningham's submission that it is not possible safely to make mathematical comparisons between the area spelt out in the Award and areas measured on a map made, with much greater precision, the better part of a century later. But by parity of reasoning, it is equally unsafe to deduce from either Hausted's map of 1613 or Jeffrys' map of 1766 what the state of land tenure was in the region of the road in the second decade of the nineteenth century. One of the impulses towards inclosure had been the decay of strip-farming, with lots allocated year by year to villagers, and the fragmentation and disappearance of smaller rights of cultivation in favour of the accumulation of such rights by larger freeholders. In my view it is not possible to say with any certainty what the state of land tenure was along Mill Road and Denton Road by the early part of the nineteenth century. It may have been fragmented or it may have been in the hands of one or two individuals who alone had the use of the ***318** roads as a cart track. While the fact that the two ways had names and between them ran between a village and mill is certainly of relevance, it cannot be decisive in determining the state of affairs to which the Inclosure Award was to give effect, must less in determining what changes—if any—the commissioners were now introducing.

Even if it were otherwise, the principal question would still be the proper meaning of the words used. There is little or no lexicographical support for Mr Cunningham's meaning of “local” or “low” as the intended signification of the word “private” in its present context. The entries in the Oxford English Dictionary are prefaced with the words: “In general, the opposite of the word *public* .”

The meanings which signify want of public office or official position all relate to persons, not things. Those meanings which relate to things are defined in general as:

> Not open to the public; restricted or intended only for the use or enjoyment of particular and privileged persons.

The first illustration, from 1398, reads (transliterated): “The private way [be]longeth to no town […]” This is the group of usages in which private is the antonym of public, not of prominent or official.

The Act of 1801 in sections VIII and X respectively uses the words public and private in the same relationship. There is nothing in the statute which suggests a recondite or colloquial meaning for the word private when applied to a road.

Turning to legal usage, which will be relevant though not necessarily determinative, one begins with Coke's sub-division of cartways into the King's highway and the common street. The decision in *R. v. Hammond* , [13] was that on an indictment for nuisance the location of the offence “ *in communi strata sive alta Regia via* ” did not make it bad for duplicity because the two forms of road are “synonymous expressions and signify the same thing”. It appears from the footnote that the nuisance complained of was obstruction of the road by depositing straw and dung in it. The court did not have to decide a general point of highway law but only whether it mattered in an indictment for nuisance whether the Act had been committed on a common street or on the King's highway, since to obstruct either would be an offence without regard to the proportion of the public entitled to use the road. The earlier cases cited by Mr Burton, which may well have been among the “several authorities both ancient and modern” cited in argument in *R. v. Hammond* , [14] speak clearly of a distinction between a highway and a private way. In *Katherine Austin's case* , [15] Hale C.J. is reported as saying:

> If a way lead to a market, and were a way for all travellers and did communicate with a great road, *etc.* it is an highway; but if it lead only to a church, to a private house or village, or to fields, there it is a private way. But't is a matter of fact, and much depends on common reputation. If it be a publick way of common right, the parish is to repair it, unless a particular person be obliged by prescription or custom. Private ways are to be repaired by the village or hamlet or sometimes by a particular person.

***319** In *R. v. Thrower* [16] Hale C.J. said:

> If it be only a way for the parish to church, each inhabitant may have an action upon the case, but no indictment will lie.

It may well be upon this distinction that the decision in *R. v. Hammond* [17] turned. If so, it is not inconsistent with a true distinction in law between a private and public road. So too in *R. v. Saintiff* , [18] where Holt C.J., on argument upon an indictment laid for non-repair of “a common bridge situated in a certain common footpath” but not stating that it was in the Queen's highway, said:

> So all that sticks with me is the manner of laying it; for the word *commune* does not *Ex v. Termini* import that it is common to all the Queen's subjects, as it ought to do to maintain an indictment. And one of the precedents produced has the word " *publicus* ", which is of wider extent than " *communis* ", for there is common for two, three or more; and it will be hard to understand the word "common" to be universal to charge a man's freehold. […] And here it is not said to whom it is common.

In my judgment there was a true distinction, certainly into the eighteenth century, between private or common roads and public roads or highways. The distinction between them was apparently held not to matter where nuisance by obstruction was laid since in either case the offence was the same. But so far as rights of access were concerned, these differed by definition, being limited in the case of a private or common way to a class which might be defined by any of a number of factors or criteria.

By the beginning of the nineteenth century, however, it appears that legal usage had changed so as to conflate common ways with highways and to distinguish these from private ways: see Hawkins *Pleas of the Crown* , [19] and Tomlins' *Law Dictionary* . [20] This history furnishes compelling evidence for the construction advanced on the applicant's behalf, namely that both in the Act of 1801 and in the Glatton with Holme Inclosure Award of 1820 public and private carriage roads were deliberately distinguished, and that the distinction signified differential rights of user, embracing all the monarch's subjects in the former case and a limited if unspecified class in the latter. The Award accordingly sets out "the following public and private carriage drift and footways or roads" and proceeds to designate some roads as one and some as the other. Thus Holme Road is designated "One other public carriage road and highway" and Lambs Lane Road "One other private carriage road and driftway". There is no reason on the face of it to deduce any different usage in relation to Denton Road, use of which as a bridleway, driftroad and footpath is designated public and as a carriage road, private. There is no impracticality in a distinction between those who may use the road on foot and with horses and cattle and those who may use it with vehicles.

To these considerations it is relevant to add that a public carriage road less than 30 feet wide would have been contrary to the express provision of ***320** section VIII of the Act of 1801: "so as such Roads and Highways shall be, and remain, Thirty feet wide at the least"—yet this Award includes more than one private carriage road "of the breadth of twenty feet". In itself this might not point towards the applicant's rather than the respondent's meaning of "private", since there would be a logic in setting a 30-feet minimum width for major roads but not for minor roads; but it has also to be noted that the words which follow in section VIII are:

> and so as the same shall be set out in such Directions as shall, upon the Whole appear […] most commodious to the Public […]

The import of the passage is that public carriage roads are to be wide enough to carry the intended traffic and laid out on routes convenient to the public; but the fact that no such requirements are imposed by section X in relation to private roads suggests precisely that these are roads which, although larger than bridleways and footways, are not intended for the use of the public at large.

No internal evidence suggests that the choice of words in the Award is casual or accidental. Exactly the same, admittedly complex, formulation is used for Mill Road as for Denton Road, which is appropriate since they are continuous with one another; and different language is used, as I have indicated, for other roads in the Award. But throughout the words "public"

and “private” are used differentially and with evident care in a context suggestive of the defining of rights to use the road rather than of the characterisation of the road's quality or status. All the indications are that “private carriage road” is deliberately used in the Award as a term of art distinguishing the particular road according to the extent of the particular rights over it from the public carriage roads on which all subjects enjoyed an equal right of vehicular passage. The subsequent history of many such roads, to which Ms Willmore draws attention in her article and which has resulted in such roads becoming public routes maintained at public expense, does not destroy the distinction deliberately made in Awards such as the Glatton with Holme Award, which concerns a track for which no case of lost modern grant has been able to be erected.

The remaining problem is that there is no indication from any source of the class to whom the “private” vehicular use of Denton Road and Mill Road is to be confined. Since it is conceded by Mr Burton that if the class is large or vague enough it may be indistinguishable from the public at large, this is capable of mattering. But if it is to matter, section 54(3)(a) permits the designation of a road as a byway open to all traffic only “if a public right of way for vehicular traffic has been shown to exist”. In the absence of any evidence that the permitted class of vehicular users of this private carriage road was so large as to make their right of way a public right of way, the test posed by section 54(3)(a) is not met. This being so, the road is to be shown in the definitive map and statement, pursuant to paragraph (b) of the subsection, as a bridleway.

Accordingly this application succeeds. I quash the Cambridgeshire County Council (Roads Used as Public Paths Glatton Nos. 5 and 7) Reclassification Order 1992 as modified by the Inspector on April 22, 1993, confirmed by the Inspector on March 30, 1994 and published by notice by Cambridgeshire County Council on April 21, 1994. The effect will be that the procedure reverts to the point at which the order was first made and is to be recommenced forthwith in the light of this judgment.

***321**

Representation

Solicitors— Greenwoods , Peterborough; Treasury Solicitor .

Order

Reporter —Christopher Murgatroyd.

Application granted with costs (quashing the order, with the road to be shown in the definitive map and statement as a bridleway); liberty to apply. ***322**

Footnotes

1 *(1877) 2 App.Cas. 743* .
2 (21st ed., 1967), p. 11.
3 *(1717) 10 Mod. 382* .
4 *(1683) 1 Vent. 189* .
5 *(1684) 3 Keble 28* .
6 *(1704) 6 Mod. 255* .
7 1824 edition repeating the 1787 edition.
8 (4th ed., 1835).
9 Rights of Way Law Review, July 1990, section 9.3 at 1.
10 *(1967) pp. 22–24* .
11 *ibid.* at 112.
12 See n.9.
13 *(1717) 10 Mod. 382* .
14 *ibid.*
15 *(1683) 1 Ventris. 189* .

16 *(1684) 3 Keble 28* .
17 *(1717) 10 Mod. 382* .
18 *(1704) 6 Mod. 255* .
19 1787 and 1824 editions.
20 (4th ed., 1835).