

Inclosure Awarded Private Carriage Roads

1. The term ‘private carriage road’ in an Inclosure Act and Award (“award” will hereafter infer act and award where the context requires) was interpreted in the *Dunlop*¹ and *Buckland*² cases as a road exclusive in use to specified persons or sets of persons, that is, not a public road. Both those judgments were made on evidence relating to single awards but have subsequently been applied to evidence from other awards. This paper aims to demonstrate that the judge’s interpretation may not be the same as that of the Commissioners in all awards and it is wrong to apply the *Dunlop* or *Buckland* decisions in all cases where the setting out as private carriage road at inclosure is offered as evidence of a public bridleway or byway.
2. Many awards of the inclosure period created both public carriage roads and private carriage roads. It is doubtful that private meant not public in all cases. Some awards provided private carriage roads only yet covered areas too large to not have had public access and those roads are public today³; other awards set out private carriage roads to be “*commodious or convenient to the public*” and “*for the use benefit and convenience of all and every person and persons who may have occasion to use the said roads*”⁴ therefore were obviously intended for public use; or they were to be “*maintained in like manner as public carriage roads*”⁵.
3. The last appears to mean that the mechanism for repair was via the Highway Surveyor, which it may be argued meant that they were also public, as to maintain a private access road in like manner would surely have been an unnecessary standard for an occupation road, or was unlawful use of statute labour, although it is recorded that labour was not always “*employed upon those ways that lead from market to market, but each Surveyor amendeth such byplots and lanes as seem best for his own commodity more easy access unto his fields and pastures*”⁶, this ‘interpretation’ perhaps being seen as a reward for having taken on the role of Surveyor.
4. Studying a variety of inclosure awards provides at least four reasons for awarding a private carriage road and none are consistently applicable to all awards. They are:
 - i. A local or minor road rather than a main through route, generally used by inhabitants but still a public road available to anyone. The liability to repair would rest with one or more people or a body rather than the parish because the land was owned by those liable, not owned by the state—the King’s highways.
 - ii. The road existed prior to the award and was to be retained but it was not as wide as the Act laid down for public carriage roads and the Commissioners were not

¹ *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council* [1995] 94 LGR 427

² *Buckland & Ors v Secretary Of State For Environment Transport & Regions* [2000] EWHC Admin 279 (11 January 2000)

³ Martock, Somerset 1810

⁴ Example: North Petherton, Somerset 1798 “*all which said several private carriage roads ... for the use benefit and convenience of all and every person and persons who may have occasion to use the said roads same or travel*”

⁵ Mepal Inclosure Award, Cambridgeshire 1854

⁶ *Description of England*, William Harrison, 1577 quoted in *English Local Government: the story of the King’s Highway* Sidney and Beatrice Webb, 1913

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authorised to increase its width, therefore awarded as private carriage road to satisfy the lesser width, however, it was a public road.⁷ There are private carriage roads awarded across inclosure areas contiguous with ancient lanes at each end beyond the area, indicating retention of an existing way.⁸ There is considerable doubt, especially in pre-1801 awards, that existing ways were automatically extinguished by the award.

- iii. A road for which the liability to repair was imposed on a person or group of people other than the parish, usually the owners or occupiers of the adjacent parcels, or the inhabitants of a hamlet or village, because the Commissioners did not have the authority to impose a liability to repair upon the parish. This is more true in early acts as the power of the commissioners evolved considerably over time, particularly after 1801. The right of passage was for anyone, not only those for whom there was a liability to repair.
 - iv. An access road for owners or occupiers only (private in the modern, exclusive sense of the word).
5. Until the Definitive Map and Statement of Public Rights of Way⁹, which aimed to record the *status* of public rights of way, records of highways were about *repair*. In the history of highways, repair is the most common and much repeated topic and is upheld by every iteration of the highways acts, e.g. those acts attempted to limit the width of cart wheels so as to cause less damage and reduce repair. The means of transport arises only relative to the damage it caused and therefore the level of repair required to allow passage. It is argued that historically, 'private' was related to liability to repair not to user.

Historical Origin

6. **Roman Law** differentiated roads as public or private dependent on ownership of the soil of the way.
- The soil of **Public Roads (*via publica*)** was public, belonging to the state; commonly the great roads to ports and cities, or military roads;
 - The soil of **Private Roads (*via vicinales*)** did not belong to the state, although the public had right of passage over the ways.
7. **Ulpian**¹⁰ (Roman law) explained that the ownership of the soil determined whether a road was classed as public or private, and that term related to its repair, not its use:

22: Some roads are public, some are private, and others are local, belonging to the neighbourhood. We call roads public which the Greeks designated as royal, and we name praetorian or consular roads. Private roads are such as some persons style agrarian.

⁷ Witcham Inclosure Award, Cambridgeshire 1840

⁸ Mitfurlong Road, Pitney Inclosure Award, Somerset 1807 "*for the use benefit and enjoyment of all*"

⁹ 1949 National Parks and Access to the Countryside Act Part IV

¹⁰ Ulpian, Digest of Justinian: Liber XI 68 ad ed ([Domitius Ulpianus \(d. AD 228\), Roman jurist](#))

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Local or neighbourhood roads are those which are situated in villages, or lead to towns; certain authorities also call these public roads. This, however, is only true where they have not been established by the contribution of land by private persons; but it is otherwise if they are repaired at the expense of individuals, for a road is not private on this account.

The repairs of the same are common, because such a road is for the common use and benefit.

8. **Mediaeval English Law** carried forward the same principle that ownership of the soil, not use, differentiated between public and private roads:
 - **Public Roads** belonged to the monarch, (royal and military roads) connecting cities, borough towns and ports, with free passage for the monarch and all their subjects.
 - **Private Roads** (or community roads) were the local roads, some of which became more important as trade increased the number of market towns. These were still regarded as private roads because—even if *usque ad medium filum*¹¹—the soil belonged to a person (e.g. Lord of the Manor) or body corporate or politic (e.g. monastery) not to the state, although the monarch and all their subjects had a right of passage.
9. **1555 Highways Act** enacted that maintenance of the public roads should be via statute duty or the customary (historical) duty of the inhabitants of a parish under common law.

Liability to Maintain

10. The distinction between ownership of the soil and the liability for repair created different means of bringing an action by a user when a road was out of repair:
 - **Public Roads** came under the Statute Duty and the parish's Surveyor of Highways was liable for an indictment for out of repair, the whole parish (the public) being liable.
 - **Private Roads** were the responsibility of the village, person or body and any inhabitant could bring an action of common law nuisance against them.

Although there are instances of presentment for a public road out of repair, we know of no instances of indictment for a private road out of repair.

11. This principle was handed down through the statutes as laid out in the following extract from *The Compleat Parish Officer*¹² (later editions were little changed in this section) which starts by defining the difference between highways and private ways and continues with a number of other useful references as follows. It appears that, prior to widespread inclosure, there was a clear contextual meaning of private roads in ancient highway law as pertaining to ownership of the soil, not user, which became common law.

¹¹ Adjacent owners assumed to own to the centre line of the road in the absence of evidence to the contrary.

¹² *The Compleat Parish Officer* 1734 Section 4: Surveyors of the Highways and Scavengers, their particular Business, etc. page 81 (7th ed)

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Before I come to the Office of Surveyors of the Highways, I shall let you know what are Highways, and what are private Ways in the Eye of the Law.

And first, Any Cart, Horse, or Foot-way, common to all People, is the King's Highway; (whether it directly lead to any Market-Town or not) and a Nuisance [sic] in any of the said Ways, is punishable by Indictment. 6 Mod.255.

12. The principle that a user may deviate to avoid a foundrous length is included and could be the basis of the current right to deviate around an obstruction; 'obstruction' in the past having a wider context than today's distinction from 'out of repair'.

And if there be an Highway in an open Field, when the Fields are bad in the Winter, Travellers may go on the Outlets of the Lands adjoining, being warranted by Custom: For the King's Subjects are to have good Passage, and such Outlets are Parcel of the Way. 1 Roll. Abr.390; Dalt.98

13. It establishes that the freehold and use of the land of the highway remain with the owner, although the public have right of passage over it.

In a Highway the King hath but the free Passage for him and his People; but the Freehold, and all the Profit are to the Lord of the Manor, and he may have an Action for eating the Grass, or for Trees taken away, etc. Dalt.76

14. The distinction between public and private is about who is liable to repair and what action can be taken when there is a problem.

A private way is that which leads from a Village, etc. to the Parish Church, or Fields, without any Communication with a Great Road; which is to be repaired by the Village or Hamlet, and sometimes by a private Person; (contra of Highways, the whole Parish shall be charged). If such Way be out of Repair, every Inhabitant may bring an Action; and for stopping the Way to the Church, they may have an Action upon the Case. 1 Vent.208

15. Private appears to have meant a lesser or minor or local road which was no less a public way, only of lower status, just as now, where travellers through a parish will tend to use the main roads and minor roads are more likely to be used most by the inhabitants, but are no less available by right to the passing traveller should they wish to use the minor ways. A traveller today from Exeter to Plymouth is most likely to use the A38 as the 'great road', providing the most convenient, easiest and fastest route; but the traveller is equally free to use the narrow, winding local roads for the same journey.

16. Physically enclosing a way by fences *prima facie* did not stop it being public; it transferred the burden of repair onto the owner or occupier because limiting the width available for use potentially increased the need to repair for the way to remain usable by the public.

All Highways of Common Right are to be repaired by the Inhabitants of the Parish in which the Way lies; unless there be some special Matter to fix the Repairs upon others; as where a Person by an Enclosure straightens a Highway on both Sides, though the Parish repaired it before, yet now he is obliged to maintain it at his own

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Charge; but if he lays open the Enclosure, so that the Way remains as it did before, then the Parish is to repair it again. Cro.Car.366

17. The Compleat Parish Officer continues with case law and statutes supporting the maintenance by the country, a particular person or a group by prescription.

Term.Pasb. 7 Jac.1. It was resolv'd, That all the Country ought to repair a Highway, where no particular Persons are bound to repair, because the whole Country have their Ease and Passage by it. Co. Rep.13

A Person may be obliged to repair a Way by Tenure of Lands; and Lands have been often given for the Maintenance of Highways. See Statute 22 Car.2. A particular Person may be bound to repair a Highway by Prescription; and so may a Corporation. Latch. Rep.206

The King by the Common Law might award his Commission for amending the Highways and Bridges throughout the Realm. Dalt.77. And no Highway can be changed etc. Without the King's Writ of Ad quod damnum, and Licence thereupon, on Enquiry whether it will be prejudicial to the Publick, etc. 3 Cro.267

18. There follows detail on how Surveyors are to perform their duties and who must provide what labour or expense for repair of the roads. It is shown that the greater the extent of landholding, the more horses and vehicles the holder will have and therefore the greater the requirement from them to contribute to maintenance. Greater liability to repair was attached to greater use of wheeled vehicles—

A Person keeping a Coach and Pair of Horses, is bound to send out a Wain towards the Repairs of Highways, a Coach and Horses doing equal Damage to the Ways, as a Cart and Horses. 1 Lev.130

19. The description throughout is of repair of highways, with no mention as to who could use the way or how. This is borne out by the Quarter Sessions which include innumerable cases of roads being out of repair, but rarely¹³ record challenge as to mode of travel or right of use.

20. It clarifies that the statute to repair was simply to support common law and could be added to by raising rates or prescriptions where the statute provision was inadequate.

It is no Excuse for the Inhabitants of a Parish indicted at Common Law, for not Repairing the Highways, that they have done the Work required by Statute; for the Statutes are in Aid of the Common Law: And when the Statute Work is not sufficient, Rates and Assessments are to be made. Dalt. c.26

21. The same provision as in modern highway law to repair and not improve is stated.

But the Defendants are not bound to put the Highways in better Repair than it has been Time out of Mind 1 Salk.358

¹³ The authors have not seen such challenge to date

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22. **1835 Highways Act** Liability for maintenance of “highways” previously undertaken by a body or person could be transferred to the Surveyor of Highways¹⁴.
23. **Private Carriage Roads** Some Inclosure Awards subdivided private carriage roads into different classes and awarded as:
- For all to use; these were predominantly thoroughfares.
 - For a section of the public (which is not recognised under modern law) some of which terminated at a place of public resort such as the church, local mill or watering place.
 - Access to the adjacent land for owners and occupiers, commonly culs de sac.
 - Both private carriage road and public bridgeroad.
24. The last may appear to justify the private carriage road as being exclusive to user, as why else would there be a public bridleway coincident with the private use by vehicles. However, it is equally consistent with the liability for repair being split: if the way was out of repair to pass on foot or horseback (as a bridgeroad), then the remedy lay by indictment to the Surveyor of Highways (the whole parish); if the road was out of repair for vehicles, then an action could be taken against those responsible for repair—the village, a person or body.
25. In some Inclosure Awards, the commissioners directed the private roads to be maintained in like manner to the public carriage roads, therefore under the jurisdiction of the Surveyor of Highways, e.g. Mepal, Cambridgeshire 1854.

Horse Transport during the Inclosure Period

26. Rights of way is a legal subject but it is also about the practical matter of people historically going about their business on foot or horseback and using horses, mules and donkeys for transport of goods. It is therefore important to treat historical documents with social history in mind and not to view things through the perspective of the twenty first century.
27. In the days of under-nourishment, weary people driving tired laden horses would have taken the easiest gradient, or the most direct route even if that was not the ‘main road’. Many of these lesser roads were awarded as private carriage roads; free passage for all but maintained by the village, a person or body.
28. Practical examples from the period indicate that private carriage roads were indeed used by the public, since they were the parish or township roads of diarists and the minor or cross roads¹⁵ of the small scale maps of the period.
29. **1754 Diary of Alexander Fothergill**¹⁶ (Surveyor of the Richmond to Lancaster Turnpike)

¹⁴ Highways Act 1835 Section 62

¹⁵ Secondary or minor roads *What is a Cross Road?* Susan Taylor, South Pennines Packhorse Trails Trust

¹⁶ North Yorkshire County Council Publications No. 37

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Then measured the new road....I then put a value upon 665 square yards taken into the new road from Mr Carter which in consideration of the private way across it before, I thought worth....

30. **1794 Joseph Granger** in 'The Review and Abstract of the County Report of the Board of Agriculture. Public Works – Roads'

The Public Roads are in good condition but the private or township roads are in a very indifferent state...

31. **1823 William Cobbett's 'Rural Rides'**¹⁷

These are cross roads, mere parish roads; but they are very good.

32. **1785 White's Map of the Ainsty of York** shows turnpike and 'private or occupation' roads only so the only public communication across the whole area was via the private roads, therefore they must have been public. Some are marked with a destination, e.g. "From Wetherby" indicating public roads.¹⁸

33. These extracts from the period show that cross roads, parish roads, township roads and private roads are all terms for the same type of road, which were public as to user but private as to repair and ownership of the soil.

Summary

- Roman Law divided roads into public and private by ownership of the soil; the soil of the former being owned by the state and the soil of the latter being owned by an individual or body.
- English Law continued this principle in the mediaeval period by the King's Highway where the soil and right of passage was owned by the King for his subjects. The soil of a private carriage road was not owned by the state, but the King and his subjects had right of passage over it.
- This then evolved into the two categories of road having different means of maintenance. Public carriage roads could be indicted since they were the duty of the Surveyor of Highways to keep under repair. The private carriage roads were the responsibility of the village, a body, or an individual so anybody could bring an action against those responsible when out of repair.
- Finally, the later Inclosure Acts often separately distinguished between the awarded private carriage roads into those used by the public and those that were restricted as to user.

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¹⁷ William Cobbett was an eighteenth century journalist and political reformer; the book is his observations from travels on horseback in England, published 1830

¹⁸ *Commission for New Towns & Anor v JJ Gallagher Ltd* [2002] EWHC 2668 (Ch)