

# Berrys Lane bridleway: statement of case

## PINS reference: ROW/3264111

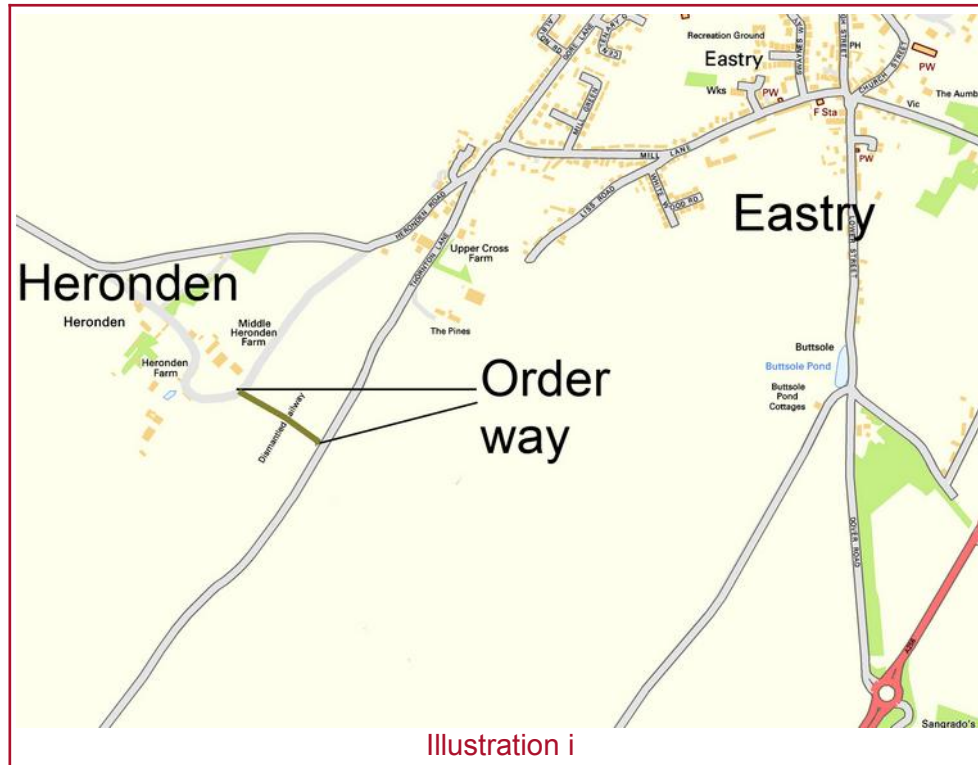
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## I. Overview

### A. Quick reference

#### A.1. Location plan:



A.2. Parish of: Eastry

A.3. Ancient parish of: Eastry

A.4. Hundred of: Eastry

A.5. Termination points: Monkey's Hill, Heronden, to Thornton Lane

A.6. Termination points Ordnance Survey grid references: TR29775410, TR29915397

A.7. Postcode: CT13 0ET

A.8. Ordnance Survey Explorer sheet: 150

A.9. Ordnance Survey County Series 25" sheet: Kent XLVIII/13

### B. Introduction

B.1. This statement of case is made by the British Horse Society in relation to the Kent County Council (Bridleway EE490 at Eastry) Definitive Map Modification Order 2020 ('the order'). It replaces all previous representations made by the society in relation to the order and the application for an order.

B.2. We refer to the order-making authority's statement of case as follows: KCCSOC, together with any appropriate further specification (e.g. to a paragraph of the statement of case, or to an annexe and paragraph — such as 'KCCSOC KCC2 para.10').

B.3. We refer to the ‘Objection by Simon Roscoe of Heronden Farm’, prepared by ET Landnet Ltd and dated 20 October 2020,<sup>1</sup> and references to ‘Objection’ and paragraph number following are to the numbered paragraphs in that objection.

B.4. To ensure ease of comparison, the alpha-numerical notation of documents in this statement of case adopts the same references where present in the society’s historical document analysis, version 1.3, in connection with its application for an order, to which reference is made in the surveying authority’s statement of case.<sup>2</sup> This statement of case includes five new evidential items not present in the previous version 1.3:

- Contracted map of principal roads in Eastry (item II.CA. below)
- Canterbury Chapter Estates map of Eastry, Tilmanstone and Worth (replacement item II.E below)
- Bartholomew's map (item II.N below)
- Ordnance Survey one-inch Popular edition (item II.O below)
- RAF aerial photography (1946) (item II.P below)
- Bridleway EE491 (item II.R below)

Other evidential items have been removed, as exclusively being relevant to bridleway EE491, as to which see item II.R below and KCC SOC, para.2.

B.5. Thus a reference in any document to a particular item in the society’s historical document analysis version 1.3 may be taken to refer to the item with the same reference in this statement of case.

## C. The applicant

C.1. The statement of case has been prepared by Hugh Craddock on behalf of the British Horse Society. The order to which this statement of case applies was made on the application of the British Horse Society which I represent for this purpose. I am appointed by the society as a volunteer historical researcher in relation to South and East Kent. I am employed as a casework officer for the Open Spaces Society, and was formerly a civil servant in the Department for the Environment, Food and Rural Affairs (and predecessor departments), whose responsibilities included Part I of the Countryside and Rights of Way Act 2000 and the Commons Act 2006.

## D. Locational details

D.1. The order relates to a way which lies in the parish of Eastry, in the district of Dover, Kent. The way is not currently recorded on the definitive map and statement. The order, if confirmed, would record the way as a public bridleway.

## E. Nomenclature

E.1. The way is believed correctly to be referred to as Berrys Lane, because the field through which it passes is identified by the same name on the Eastry tithe map prepared under the Tithe Act 1836 (item II.D below). In this statement of case, it will be referred to as the order way.

1 Included at KCCSOC KCC6.

2 Included at KCCSOC KCC1.

E.2. The road at the western end of the order way formally is known as Monkey's Hill, but also as a loop of the Heronden Road, servicing the hamlet of Heronden near Eastry. The road at the eastern end of the order way is Thornton Lane (note that Thornton Road is the road between Knowlton and Betteshanger at the southern end of Thornton Lane). Opposite the junction of the order way with Thornton Lane is bridleway EE491 to Betteshanger, which then joins with bridleway EE488 (Black Lane).

## F. Order way

F.1. The order relates to the way from point A (TR29775410) on Monkey's Hill (also known as Heronden Road) near Heronden, passing east south-east along the north side of a hedge to pass through the fence or hedge marking the west side of the course of the former East Kent Mineral Light Railway, crossing the site of the permanent way (TR29855405), continuing south-east to Thornton Lane at B (TR29915397) — a distance of 190 metres.

F.2. The points A and B are identified in the order map.

## G. Private road

G.1. The objector asserts (Objection, para.14) that:

The Order Route plainly provides access to different parcels of land (558 and 559 to the North and 554 and what has been annotated by the Applicant as 'Hearnden Bottom') so there is more than one possible interpretation of this material. The Applicant says that it is not tithable and is therefore a public highway. There is an equally plausible explanation that the route was used to privately access these different parcels and had no productive value and was not therefore subject to tithes.

G.2. Thus it is suggested by the objector that the order way is no more than a private road, presumably subject to easements.

G.3. A private road or path must be attributable to either:

- private ownership, such that the road is owned by a specific landowner who has exclusive control of the road, and who uses the road either for the private purposes of the landowner, or for the landowners' tenants, employees or others — an example is a carriage drive across a park, where both the drive and park are owned by the landowner, and the carriage drive provides a means of access to the principle house of the landowner; or
- a private right of way (or easement), such that the road is owned by A (A is the owner of the 'servient tenement', in this case the road and typically the neighbouring land), but B has a private right of way along the road to provide a means of access to B's own land (B is the owner of the 'dominant tenement') — an example is a track from a public road across a field to a cottage, where A owns the field and the track across it, but B has a right of way along the track as a necessary means of access to the cottage.

G.4. In relation to the order way, the objector's proposition presumably relies on the second possibility — that the way is a private way over which other private rights subsist. Although the land on either side of the order way is now held by the objector, each

formerly was held in separate hands (see Tithe Act 1836 at item II.D below, para.II.D.5) and continues to be held in separate titles (see HM Land Registry at item II.Q below), and therefore cannot simply be a private road not subject to other rights (the first possibility above). As the objector acknowledges, an ‘explanation [is] that the route was used to privately access these different parcels’ adjoining the order way, and as these parcels were, in the nineteenth century, held in separate hands, there must have been multiple rights over the order way.

G.5. Yet if the order way has always been a private road subject to multiple rights, it must have remained so for a long time. The order way appears to be identified on the Andrews Topographical Map of the County of Kent (item II.A below) dating from 1769, but there is no reason why it should not be ancient in origin — indeed, if it serves a purpose in providing access to adjoining land, it must have had an early origin. A landowner who grants private use of a way which could also serve a wider, public, purpose — as the order way does — must be assiduous in preventing that public use, or a public highway will be acquired by dedication at common law. Today, prevention typically requires the use of locked or electronic gates to which those with private rights are issued a key. Such measures are often cast aside over time unless the landowner remains assiduous, and they demand the co-operation of the private users too (who all too easily may cease to bother locking gates or challenge wider public use). But in relation to the order way, any such measures must have remained effective, not for years, but generations and centuries. Throughout, landowners must have continued to lock gates and private right holders must have continued to be issued with and use their keys, and warned off others who ventured that way, else inevitably, public rights would have become established and endured in perpetuity. Such assiduity in the defence of private status, even if that were once the position, is wholly unlikely.

G.6. There is also no evidence for it, because from the Tithe Act 1836 survey in 1841 (item II.D below) until the interwar period (see Ordnance Survey County Series 25" map at Illustration xi, revised in 1938), the mapping data suggest that the order way was entirely unenclosed, and left ungated, save for the level crossing over the East Kent Mineral Light Railway in the early twentieth century — the gates to which were erected and controlled by the railway operator and irrelevant in excluding public use.

G.7. It is not obvious how, if the order way were indeed private in origin, it remained so over a period of centuries without any means to secure that outcome, notwithstanding its public utility.

## H. Summary

H.1. The order way was the subject of the society’s application<sup>3</sup> to record the way on the definitive map and statement because historical evidence shows that the way was widely recognised as a public road or bridleway in the nineteenth century, and subsequent Ordnance Survey mapping continued to record the way as a physical feature in the landscape until the Ordnance Survey one-inch Popular edition (item II.O below) published in 1938.

H.2. Formerly, the order way may have been an enclosed road or track, and is represented on several maps of Kent dating from the late eighteenth century: Andrews Topographical Map of the County of Kent (item II.A below), the Boteler sketch map (item II.B

<sup>3</sup> Under s.53(5) of the Wildlife and Countryside Act 1981.

below), and the Barlow-Hasted map of Kent (item II.C below). It is also shown as an enclosed road or track, lacking gates at either end, on the map and apportionment prepared under Tithe Act 1836 (item II.D below), and the adjacent field is named 'Berrys Lane'. The Canterbury Chapter Estates map of Eastry, Tilmanstone and Worth (item II.E below) appears to show the order way coloured sienna, consistently with Thornton Lane, perhaps indicating a public road.

H.3. By the first edition of the Ordnance Survey County Series 25" map (item II.J below), the order way is no longer enclosed on its northern side, and is now regarded as a public path. It is marked as a footpath on the second edition of that map (Illustration ix), but the deposited plans and book of reference for the East Kent mineral light railway (item II.K below) identify it as a bridle road under the control of Eastry Rural District Council. The Bartholomew's map (item II.N below) continues to identify the order way up to and including its 1953 edition, and it is shown on the Ordnance Survey one-inch Popular edition (item II.O below).

H.4. The order way is not land to which any title has been registered in the register of title held by HM Land Registry (item II.Q below), consistent with the land being a highway in origin.

H.5. The order way terminates on Thornton Lane at B, but the route continues south-west as bridleway EE491 to cross Venson Bottom (also known as Pike Road) and join with bridleway EE488 (Black Lane) shortly before the latter bridleway crosses the Dover Road dual carriageway (A256) towards Betteshanger. This continuing route is more fully considered at item II.R below.

H.6. The order way also fulfilled a role in opening up a way south from Heronden along Thornton Lane to Thornton Road at Thorntonhill Cottages, and continuing south south-west along byway EE335 to Eythorne and Shepherdsweil, avoiding a time-consuming detour north-east out of Heronden along the Heronden Road towards Eastry before doubling back along Thornton Lane.

H.7. In summary, the order way performed a vital role of facilitating communication, on foot and on horseback (and perhaps in carts), south and east out of Heronden, avoiding an awkward and unnecessary detour almost to Eastry mills. It may be observed that the junction of the Heronden Road<sup>4</sup> with Thornton Lane is, even today, an acute turning.<sup>5</sup> Were the order way not in public use, one might expect the turning to have been eased, either through use or construction, in earlier times because of the extent to which traffic from Heronden would have had cause to double-back at the junction.

## I. Grounds for confirmation

I.1. The courts have given guidance on how evidence of highway status is to be considered. In *Fortune and Others v Wiltshire Council and Another*<sup>6</sup>, Lewison LJ said, at paragraph 22,

In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from circumstantial evid-

4 i.e. the continuation of Monkey's Hill north-east towards Eastry mill.

5 See [Google Streetview](#), August 2018.

6 [2012] EWCA Civ 334: [www.bailii.org/ew/cases/EWCA/Civ/2012/334.html](http://www.bailii.org/ew/cases/EWCA/Civ/2012/334.html).

ence. The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB famously directed the jury in *R v Exall* (1866) 4 F & F 922:

'It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.'

I.2. The correct test for confirmation of an order made under s.53(3)(c)(i) is whether the existence of the right of way is shown to exist on the balance of probabilities. While no single piece of evidence in this application is conclusive, the applicant believes that, taken as a whole, the evidence in this document analysis demonstrates bridleway reputation over many years, indicating that the route does indeed have bridleway status.

## J. Points awarded

J.1. Points have been awarded to each piece of evidence in relation to the order way, calculated according to or consistent with the guidance in *Rights of Way: Restoring the Record*<sup>7</sup>.

Item	Ref	Points
Andrews Topographical Map of the County of Kent	II.A	1
Boteler sketch map	II.B	1
Barlow-Hasted map of Kent	II.C	1
Contracted map of principal roads in Eastry	II.CA	0
Tithe Act 1836	II.D	3
Canterbury Chapter Estates map of Eastry, Tilmanstone and Worth	II.E	0
Ordnance Survey County Series 25" map	II.J	1
East Kent mineral light railway	II.K	5
Finance Act maps	II.L	0
Bartholomew's map	II.N	1
Ordnance Survey one-inch Popular edition	II.O	0
RAF aerial photography (1946)	II.P	0
HM Land Registry	II.Q	3
Bridleway EE491	II.R	2
<b>Total points</b>		<b>18</b>

<sup>7</sup> Sarah Bucks and Phil Wadey, 2<sup>nd</sup> ed. 2017.

## K. Width of application way

K.1. The width of the order way from A to B is unknown, and it is submitted that a width of three metres, as recorded in the order, is the minimum practicable width for two horse riders to pass, and therefore the minimum that might have been established through long use.



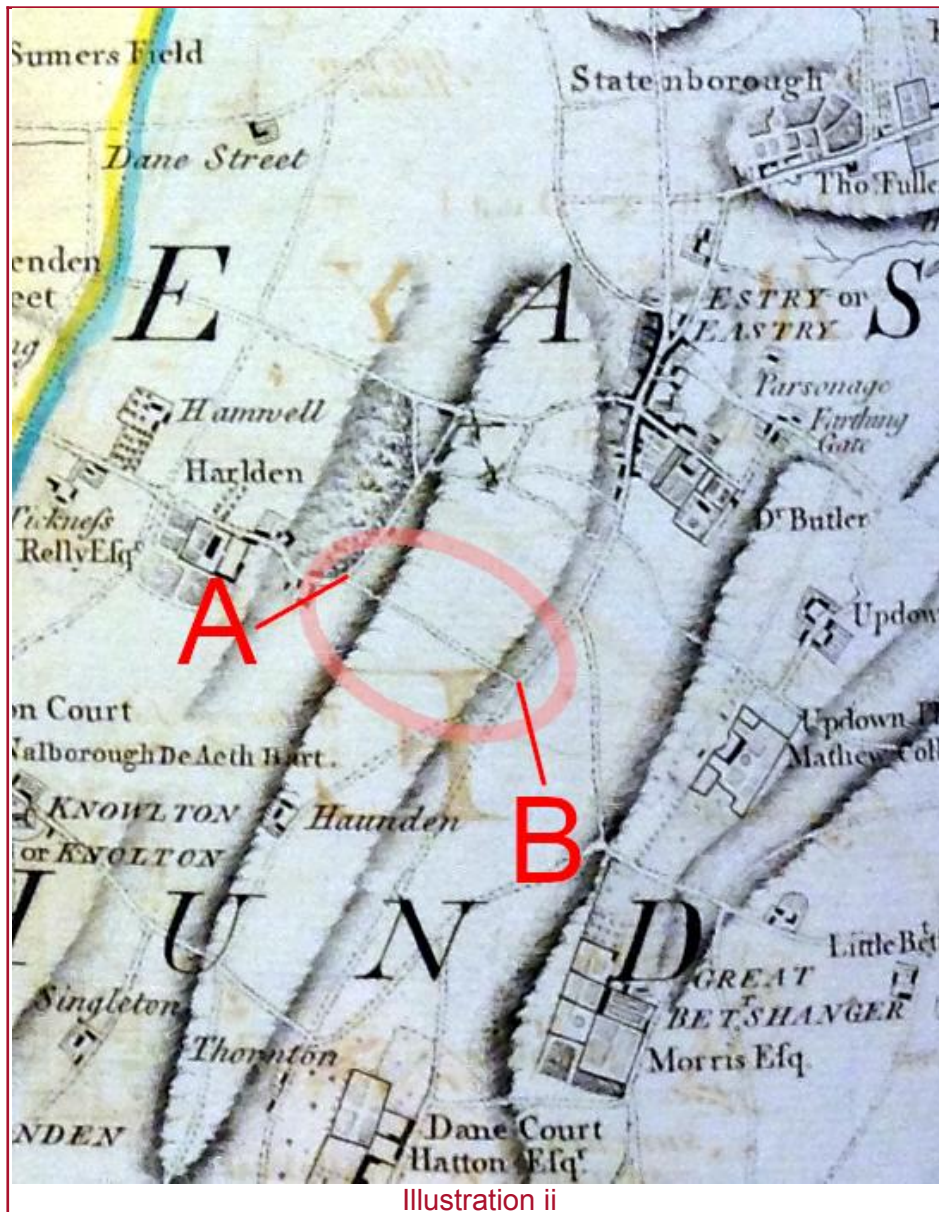
## II. Evidence

### A. Andrews Topographical Map of the County of Kent

A.1. **Date:** 1769

A.2. **Source:** British Library<sup>8</sup>

Andrews map



A.3. **Description:** Original scale: two inches to one mile; orientation: unchanged (top is north).

A.4. This remarkable map comprises 25 sheets covering the county of Kent, surveyed and published by Thomas Kitchin, John Andrews, Andrew Dury and William Herbert. The

8 k.1.tab.21.

maps are published at a scale of two inches to one mile, although the purpose of the individual sheets appears to owe more to the desire to flaunt potential clients' country estates than to give an accurate representation of the county at that scale.

A.5. A number of ways are shown on the map in the vicinity of Heronden, which is named on the map as Harlden. These include a way projecting east south-east from Heronden to join a way which heads roughly south from Eastry to Thornton, and another way, from the Eastry to Thornton way, slightly north north-east of that junction, which projects south towards Great Betshanger (now Betteshanger), joining a further way.

A.6. **Conclusion:** The way which heads roughly south from Eastry to Thornton is likely to be Thornton Lane.

A.7. The way projecting east south-east from Harlden is consistent with the application way from A, joining Thornton Lane at a point roughly corresponding to B. The second way, from Thornton Lane slightly north north-east of that junction, shown south towards Great Betshanger, joins a way which is believed to be bridleway EE488 (Black Lane) — this second way corresponds to bridleway EE491. However, the map portrays the two ways (the order way and bridleway EE491) as connecting with Thornton Lane via a modest stagger.

A.8. The Andrews map is the first credibly to document the order way.

A.9. **Points:** 1

## B. Boteler sketch map

B.1. **Date:** 1790–92

B.2. **Source:** Canterbury Cathedral Archives<sup>9</sup>

9 CCA-U11/6/6/3

## Boteler sketch map



Illustration iii

B.3. **Description:** Original scale: not known (sketch map marked 'This plan is not from actual admeasurement'); orientation: unchanged (the map is marked with legends which suggest that west is top, but some labels are arranged as if north were top). A fuller representation of the sketch map is at Annexe 1 (p.47).

B.4. A sketch map contained within Boteler's *Collections for the Hundreds of Bewsborough, Cornilo and Eastry and part of Ringslow*. The sketch map shows the application way between A and B, but does not show bridleway EE491 south-east from B.

B.5. **Background:** William Boteler (1745–1818) was the head of a prominent local gentry family and the last male descendant. He was born in Eastry and lived there for nearly all his married life. His family had lived in Eastry parish for many generations. He was a Fellow of the Society of Antiquaries (FSA). His brother-in-law, William Boys FSA partnered him as Edward Hasted's main support in completing the first edition of Hasted's *History and Topographical Survey of the County of Kent* and Boteler was himself the author of an outstanding history of Sandwich. Edward Hasted, the historian of the 12 volume County of Kent, acknowledged Boteler's major contribution in his preface to the 4th volume. Hasted also dedicated the 9th volume of the second edition to Boteler, observing how the public were indebted to him for the pleasure and information his work would give to them. The Revd. William Francis Shaw, Vicar of Eastry, also used the manuscript records of Boteler,

volumes, A, B and C, as a major source of information for his book *Memorials of the Royal Ville and Parish of Eastry*, published in 1870.<sup>10</sup>

B.6. **Conclusion:** The Boteler sketch map is good evidence for the existence of a highway between A and B. The sketch map recognisably shows only those ways around Eastry which today are metalled and tarred highways, with some annotated additions:

- bridleway EE488 (Black Lane), but only between Knowlton and Thornton Lane, which is annotated 'Bridleway to Knowlton';
- a track parallel to Thornton Lane from the junction with bridleway EE488 to Eastry, which is annotated 'Tenant's Way' and therefore expressly recognised by Boteler as not being a public highway;
- a footpath between Heronden and Eastry mills, which is marked by a pecked line, and which is shown on subsequent Ordnance Survey mapping as a footpath.

B.7. It may be concluded that the way between A and B is therefore likely to be a public highway, of at least bridleway status, in the absence of any annotation to the contrary.

B.8. **Objector:** It is stated (Objection, para.6) that the map contains many annotations of 'Lane' or 'Street', or as to destination, but as to the order way, there is none.

B.9. The objector's statement is correct. But the absence of any such annotation in relation to the order way is not significant. Some roads are marked with a name (e.g. 'Ham Lane'), and some of those which pass beyond the frame of the map are given a destination (e.g. 'High Road to Canterbury'). Others are not given a name, presumably either because there was none or, more likely, the name was not thought relevant. No name is given to the order way, and because it is entirely within the frame of the map, it does not need a destination. Various other roads are not named (e.g. Thornton Lane, and the roads through Heronden).

B.10. It is stated (Objection, para.7) that:

There is no eastward continuation shown on this Map..., and any such route would have crossed the "Tenants Way" that is marked.

But as noted at para.B.6 above, the map essentially records public roads with a few modest departures. Bridleway EE491 is not, and never has been, a public road, and there is no reason why it should be recorded on the map; but there is some evidence (including this map) that the order way is a public carriage road, and therefore is included on the map. Certainly, there is no annotation (as there is in relation to the 'Tenant's Way' and the 'Bridleway to Knowlton' (bridleway EE488)) to suggest it is anything other than a public road.

B.11. The only element for doubt arising from the map is whether the order way is represented as a public road, vice the bridleway status conferred by the order.

B.12. **Points:** 1

## C. Barlow-Hasted map of Kent

C.1. **Date:** 1797–1801

<sup>10</sup> From *East Kent History*, the website of the Addelam History Research Group. The source is at: [www.eastkenthistory.org.uk/people:william-boteler-f-s-a](http://www.eastkenthistory.org.uk/people:william-boteler-f-s-a), and contains footnoted references.

C.2. **Source:** [www.ancestry.com](http://www.ancestry.com)<sup>11</sup>

Barlow-Hasted map



Illustration iv

C.3. **Description:** Original scale: not known; orientation: unchanged (top is north).

C.4. William Barlow's maps of Kent were incorporated within the first edition of Edward Hasted's *History and Topographical Survey of the County of Kent*, published in 12 volumes. Each map represented one or more of the Kent hundreds: that shown here is an extract from the hundred of Eastry.

C.5. The Barlow-Hasted map shows the application way between A and B. The map is remarkably consistent with the Boteler sketch map at item II.B above. In common with the Boteler map, it shows a way similar to the Tenants' Way, and also shows some roads in the vicinity of 'Tickness' (Tickenhurst) which today would be considered to be private tracks.

C.6. **Conclusion:** The Barlow-Hasted map is evidence for the physical existence of the application way between A and B. The map was widely commercially published, and would tend to show through routes which were public highways, whereas minor routes of questionable public status (such as the track from Knowlton to Tickenhurst, partly visible in the extract, and the drive through Updown park, to the east of the extract) are shown with lines across the junction with public ways. Bridleway EE491 from B south-east to Bette-shanger is likely to have been omitted because it was only a cross-field bridleway.

C.7. **Objector:** It is stated (Objection, para.10) that:

11 Indexed at [freepages.genealogy.rootsweb.ancestry.com/~genmaps/genfiles/COU\\_Pages/ENG\\_pages/ken.htm](http://freepages.genealogy.rootsweb.ancestry.com/~genmaps/genfiles/COU_Pages/ENG_pages/ken.htm); map at [freepages.genealogy.rootsweb.ancestry.com/~genmaps/genfiles/COU\\_files/ENG/KEN/barlow-Hasted\\_eastry\\_1800.html](http://freepages.genealogy.rootsweb.ancestry.com/~genmaps/genfiles/COU_files/ENG/KEN/barlow-Hasted_eastry_1800.html).

Given that the Applicant's argument is that [the order way] was part of a through route of at least a bridleway, the lack of the continuation (eastward) route on this map is a significant omission and undermines the basis of the Applicant's case that the whole of the route must have served as a public bridleway.

C.8. As observed at para.II.B.10 above (in relation to the Boteler sketch map), bridleway EE491 is, and has always been, a cross-field bridleway, whereas the order way formerly was an enclosed public way, and quite possibly a public carriageway. As such, one would expect it to have been recorded on Barlow's map, while bridleway EE491 ought to be and was excluded. The Barlow map did not set out to record most cross-field public paths, which (then and now) had no permanent physical presence, but might be cultivated on an annual basis. It is therefore incorrect to depreciate the presence of the order way in the Barlow map merely on the basis that the continuation, on the other side of Thornton Lane, as a cross-field bridleway, is not present.

C.9. **Points:** 1

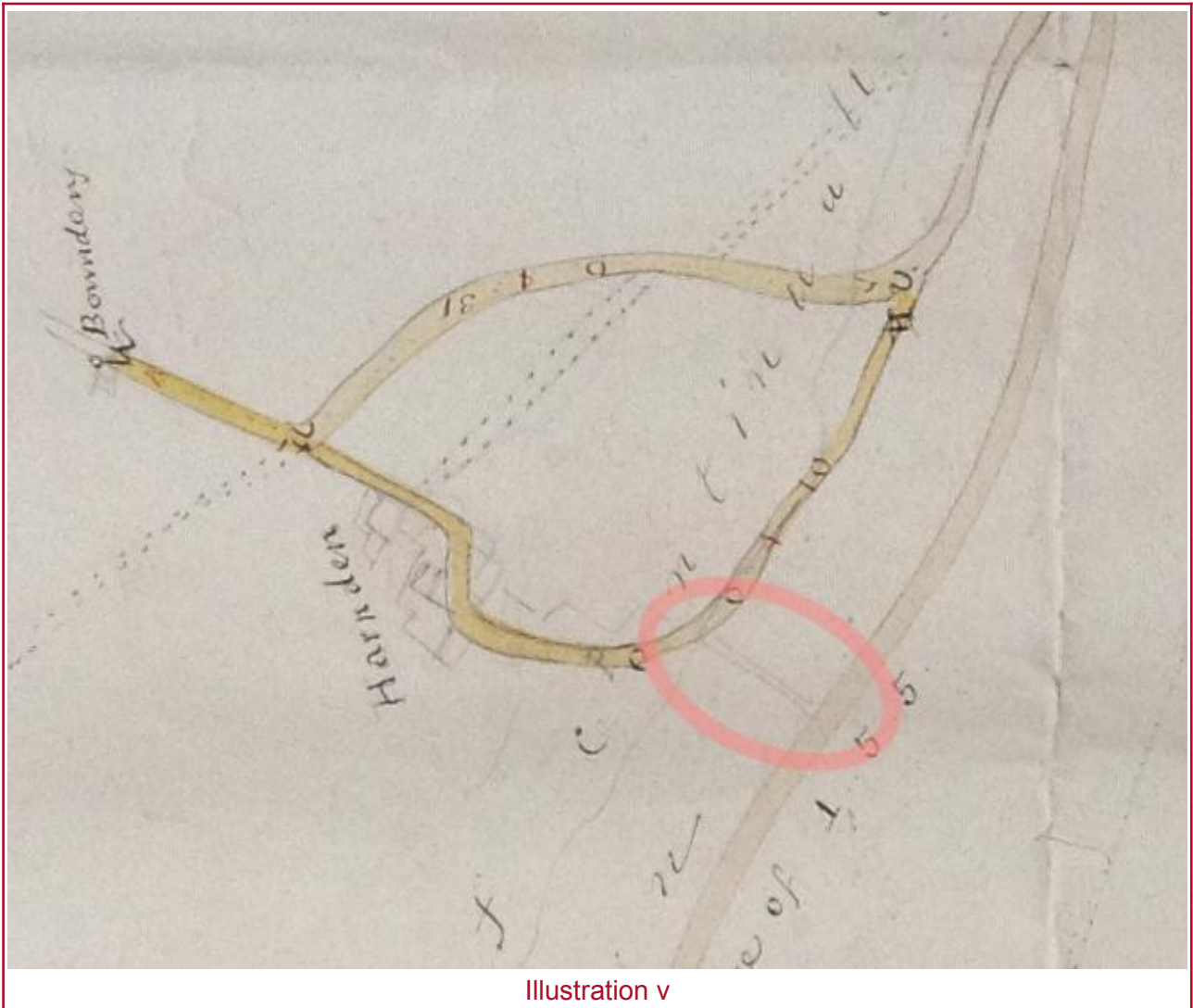
## CA. Contracted map of principal roads in Eastry

CA1. **Date:** 1836

CA2. **Source:** Canterbury Cathedral Archives<sup>12</sup>

<sup>12</sup> CCA-U3-275/22/2

## Contracted map of the principal roads in Eastry



CA3. **Description:** Original scale: none recorded; orientation: rotated 270°. A copy of the entire map is at Annexe 2 (p.49). The map is derived from the parish records of St Mary the Virgin, Eastry, and was drawn in 1836 by surveyor J Foord of Sandwich. It is entitled, 'The contracted map of the principal roads in the parish of Eastry County of Kent 1836'.

CA4. The map is most likely to be a record of those roads in the parish which at that time were recognised as maintained by the inhabitants of the parish of Eastry, and the responsibility of the lay surveyor appointed by the parish. Presumably, the surveyor wished to invite tenders for the maintenance of those roads by a contractor, and the map formed part of the specification.

CA5. The map records only those vehicular roads within the parish which today are recognised as publicly-maintainable, with the following discrepancies:

- Byway open to all traffic EE109 from Eastry to Hammill (omitted)
- Great Selson Farm Road (included, but not currently recorded as publicly maintainable)<sup>13</sup>

<sup>13</sup> Lies between Great Selson Farm and Drainless Road: the subject of application PROW/DO/C374 to record as a restricted byway.

- Lonely Lane, which is a public road but privately maintainable, is rightly omitted.<sup>14</sup>

CA6. In addition, several presumed footpaths or bridleways are identified on the map by uncoloured pecked lines (and therefore excluded from the contract) — most of these today are shown on the definitive map and statement.

CA7. The map shows the order way as paired continuous lines.

CA8. **Conclusion:** The map shows the application way within the parish of Eastry in its entirety as a track: the map is therefore good evidence of the existence of the order way at this date.

CA9. The order way is marked on the map in the same way as other tracks, but the map's purpose primarily is to record those principal roads which were maintainable by the local inhabitants. The order way is not one of these, but it is reasonable to suggest that it is nevertheless marked on the map because it is recognised as a highway within the parish which is not one of the maintainable roads. It may be included in this form for the avoidance of doubt: to show that the order way, although recognised as a highway within the parish, was not to be maintained under contract.

CA10. **Points:** 0

## D. Tithe Act 1836

D.1. **Date:** 1841

D.2. **Source:** map: Kent County Archives<sup>15</sup>; tithe apportionment: Kent Archaeological Society<sup>16</sup>

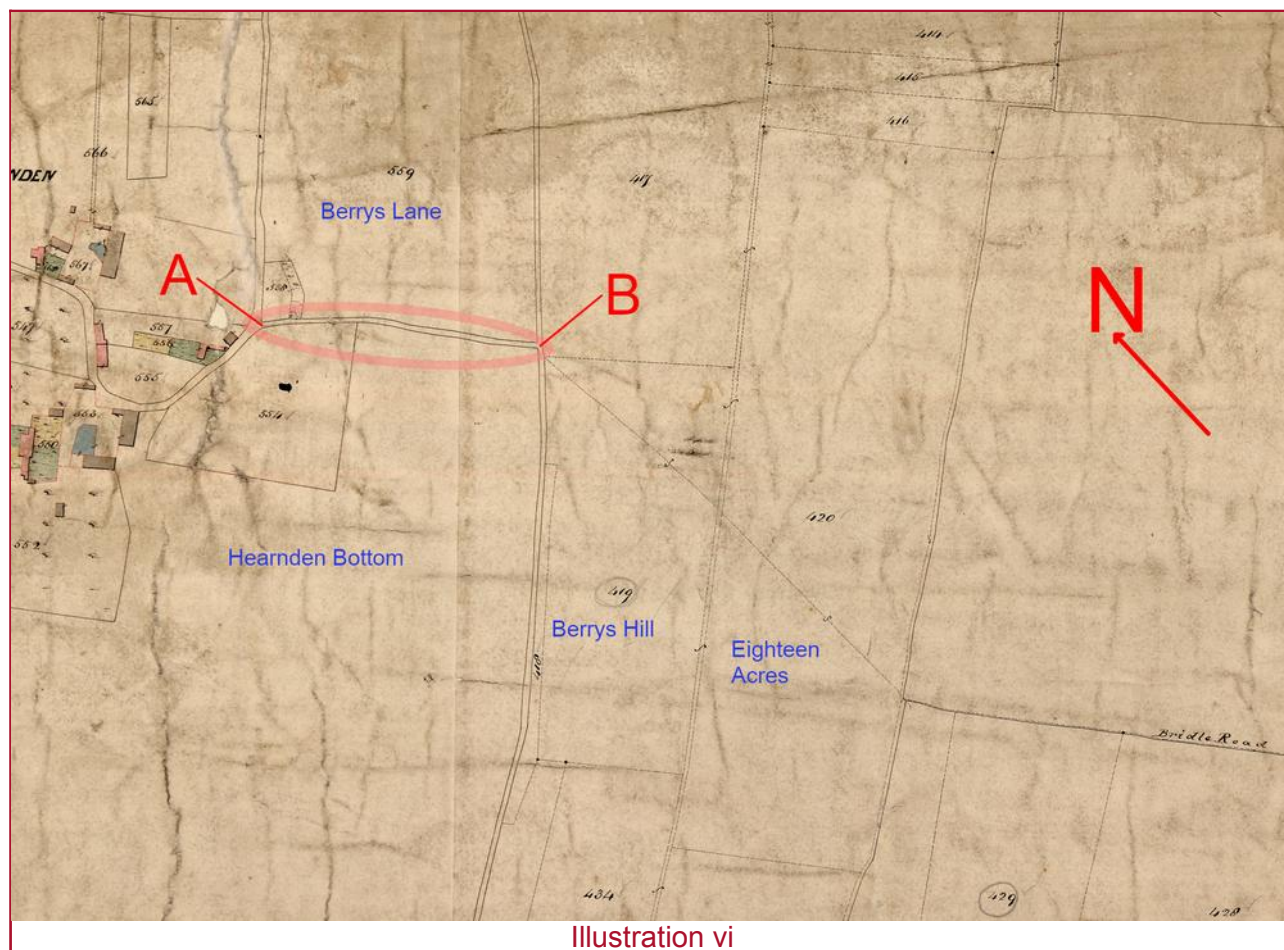
<sup>14</sup> Lies between Northbourne Road and Straight Mile: the subject of application PROW/DO/C415 to record as a restricted byway. An order to record this way was made in late August 2021.

<sup>15</sup> Kent tithe maps are available as images on CD.

<sup>16</sup> [www.kentarchaeology.org.uk/research/tithes/eastry](http://www.kentarchaeology.org.uk/research/tithes/eastry).



## Eastry tithe map



D.3. **Description:** Original scale: three chains to one inch (1:2,376); orientation: unchanged (top is north-east). The extract of the tithe map in Illustration vi has been annotated to show selected field names identified in the tithe apportionment. A full copy of the tithe map has separately been circulated.

D.4. The tithe map for Eastry shows the application way as an enclosed track or road east from A to B: the track or road is shown open to the junctions with the known public roads at both ends. No tithe apportionment parcel number is allocated.

D.5. To the north-east of the order way are:

- 559, Berrys Lane, owner John Frampton, occupier James Buddle
- 558, land, as above

To the south-west:

- 554, unspecified, owner and occupier Elizabeth Kelly
- 537, Hearnden Bottom, as above

D.6. **Analysis:** It is widely said that the tithe commutation survey was not required to identify or distinguish public from private roads.<sup>17</sup> The task of those involved in imple-

<sup>17</sup> See, generally, Planning Inspectorate, [Consistency Guidelines](#), para.8.2: '...tithe maps were not intended to establish or record rights of way. ... It is dangerous to assume the maps to be proof of something that it was not the business of the Commissioners to ascertain...'

menting the 1836 Act was to ensure that the existing tithes were established, if necessary, on a monetary basis; and to calculate the amount of rent charge due on tithable land.<sup>18</sup> Land was exempt from liability if it was barren and unproductive. Both private and public roads might be classified as unproductive. Equally, both private and public roads might nevertheless yield useful grazing, and give rise to a liability to rent charge.

D.7. But the assessment was not indifferent to status. An enclosed public road, which was maintained by the parish, and on which the grazing (if taken) did not belong to any particular person but might be grazed in common as waste, might be expected to be excluded from assessment, whereas an unenclosed public field road, on which the grazing might be taken by the landowner while grazing the field as a whole, might well be liable to assessment in the usual way (as part of the field). On the other hand, an enclosed private or drift road, with generous grazed shoulders or verges at the side of any metalled road, ought to be liable to assessment.

D.8. Thus identification of the status of a road, while not itself an express requirement of the survey documents, was relevant to determining the output of the survey. Notably, an enclosed way with significant grazing capacity ought to have been classified differently depending on whether the grazing was vested in an individual landowner, or waste under the control of the parish or grazed in common by farmers and others with rights of common. Even then, status would not necessarily be determinative of the position — a privately-maintainable public road would be subject to a public right of way, but the land was held privately and could be grazed only by the owner.

D.9. **Conclusion:** The tithe map excludes the order way from titheable rating. As a rural, enclosed (at that time), unmetalled lane,<sup>19</sup> it would be surprising, to say the least, if such a way, being wholly private, were excluded from titheable rating. The exclusion of the order way from any rateable parcel and the absence of any titheable rating therefore is good evidence of public status.

D.10. The order way is represented in Eastry parish comparably with other public roads of known status, which are also shown as unrated: Thornton Lane, Thornton Road, Venson Bottom, public bridleway EE266 (*i.e.* Venson Farm to Tilmanstone), Dover Road, Cater Road. Some of these roads specifically are annotated with parcel reference 571, which does not appear in the apportionment, but is presumed to be accounted for by a catch-all entry for 'Roads and Waste'. On the other hand, compare with driveways of presumed private status which expressly are braced with the parcels across which they lie, or which are assigned their own parcel number for assessment: the driveway to Shingleton Farm,<sup>20</sup> tracks parallel to but east of Thornton Lane,<sup>21</sup> the driveway to Updown House.<sup>22</sup>

D.11. The contemporary notoriety of the Tithe Act documents within the Eastry community ensured that a mistaken attribution of the application way is highly unlikely, and if identified

18 *Tithe map case studies*, J Andrews, 1994, *Rights of Way Law Review*, s.9.3.67

19 The way is uncoloured on the Ordnance Survey County Series 25" map (item II.J below: see Illustration viii) and thus recorded as not metalled.

20 Braced with parcel 523 ('Downs').

21 Assigned parcel 439 ('Waste') or braced with parcel 431 ('Long Slip').

22 Braced with parcel 465 ('Park').

at the time of publication, would have been corrected. In *Giffard v Williams*,<sup>23</sup> referring to a tithe award and map, Stuart VC said:

But the Act of Parliament requires these things to be done, not in a corner, but upon notice in all the most public places; so that it is impossible to treat this document otherwise than as a public one, and as public evidence that at that time the owner of the undivided moiety of this field was aware of the facts.

D.12. The field on the north side of the order way, labelled 559, is identified in the apportionment as 'Berrys Lane'. There is no suggestion that this name ever was applied either to Monkey's Hill or Thornton Lane (which bound the field on its west and east sides respectively), nor any reason why it would be named after roads which extend well beyond the limits of the field. But the order way extends only across the width of the southern bound of the field, and is highly likely to have lent its name to the field itself. Moreover, the field to the east of Thornton Lane and south of B was known as Berrys Hill, so that an enclosed (at that time) lane which led from the hamlet of Herendon to Berrys Hill might very well be known as Berrys Lane.

D.13. The continuation of the route beyond Thornton Lane as bridleway EE491 south-east towards Venson Bottom and Betteshanger is annotated on the tithe map as 'Bridle Road' (the annotation can be seen at the very eastern side of Illustration vi above). As we explain in relation to Bridleway EE491 (item II.R below), this bridleway could have served a useful purpose only in continuation of the order way from Heronden. It therefore is inconceivable that the order way is not of at least the same status as bridleway EE491.

D.14. **Objector:** It is stated (Objection, para.13) that bridleway EE491, in continuation, 'is of an entirely different nature and runs across open ground', and that the order way and bridleway cannot be considered to be of comparable or consistent status. We agree that the two ways are of different character — which is why bridleway EE491 is omitted from some late eighteenth and early nineteenth century maps, whereas the order way is included (*i.e.* the Boteler sketch map at item II.B above, the Barlow-Hasted map of Kent at item II.C above and the Canterbury Chapter Estates map of Eastry, Tilmanstone and Worth at item II.E below). But the objector does not explain why two ways of modestly different character cannot form a public, continuous through route, nor why the order way might not have that distinct character either because it was formerly enclosed, or because it is a public carriageway giving access for vehicles from Heronden south towards Thorntonhill and Eythorne, as well as on foot and on horseback south-east towards Betteshanger.

D.15. It is suggested (Objection, para.14) that the order way primarily confers access to parcels of land frontaging the way, and that an alternative explanation is that, 'the route was used to privately access these different parcels and had no productive value and was not therefore subject to tithes.' This is an unlikely explanation: all of the parcels frontaging the order way also are bounded by Monkey's Hill or Thornton Lane, and likely to have had access from one or the other, or both. While the order way now provides a means of access to that parcel recorded as 559 in the tithe survey, it is far from obvious that, at the time of the tithe survey, it provided access to any of them, the way (at this time) being entirely enclosed. It seems more likely that the way provided access between the public roads at A and B, and served little or no purpose in providing access to land frontaging its short length.

<sup>23</sup> (1869) 38 L.J. (Ch.) 597, 604.

D.16. **Points:** 3

E. **Canterbury Chapter Estates map of Eastry, Tilmanstone and Worth**

E.1. **Date:** 1853

E.2. **Source:** Church of England Record Centre<sup>24</sup>

Canterbury Chapter Estates map of Eastry, Tilmanstone and Worth

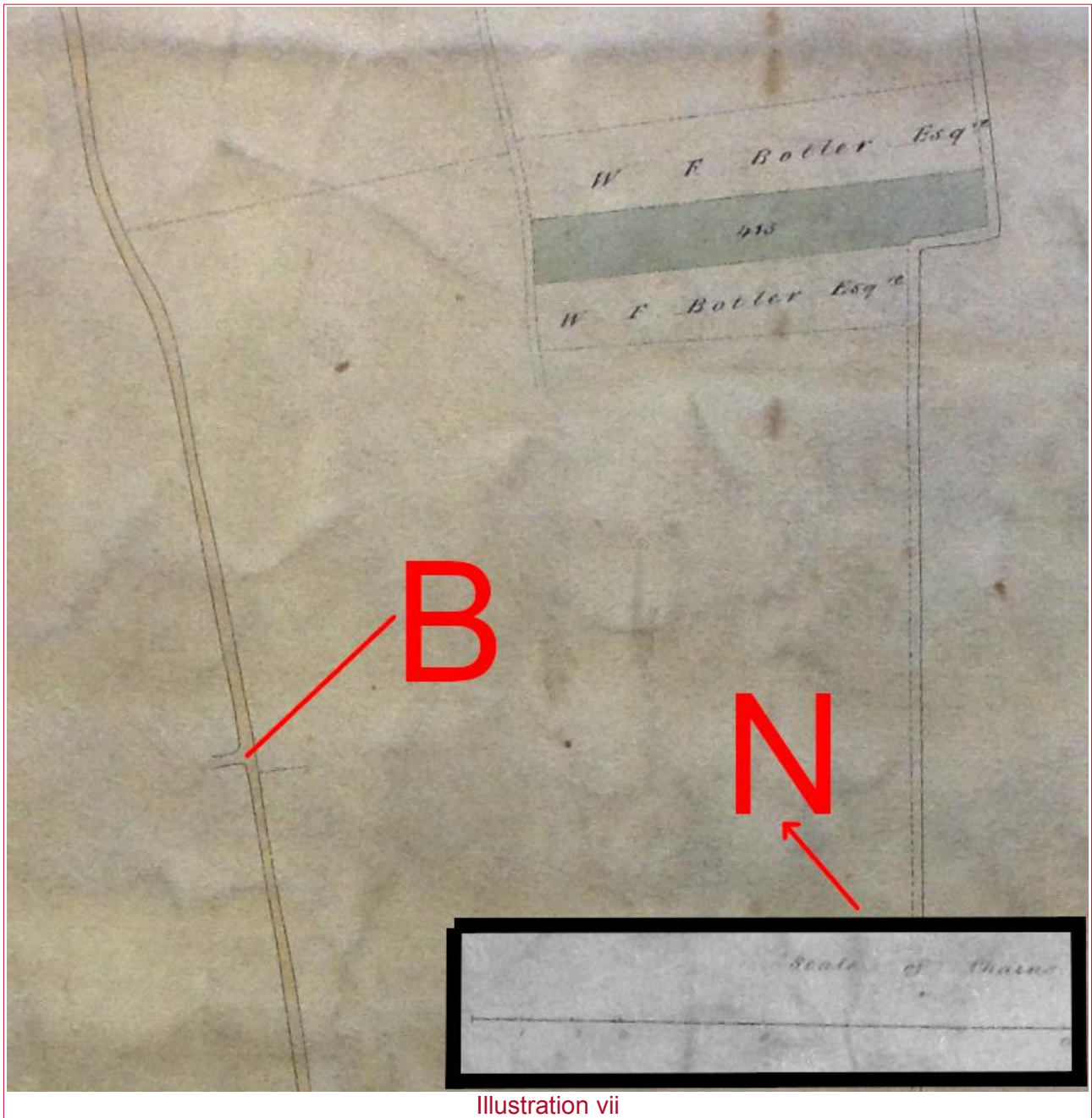


Illustration vii

E.3. **Description:** Original scale: scale bar marked in chains on map; orientation: unchanged (top is north-east). A copy of the entire map is at Annexe 3 (p.51).

24 ECE/11/1/64.

E.4. A map prepared in 1853 for the Ecclesiastical Commissioners, in relation to the land holding of the Canterbury Chapter estates.

E.5. A spur is shown leading north-west off Thornton Lane at B. The spur appears to be coloured sienna, consistently with Thornton Lane.

E.6. **Conclusion:** The map shows the order way at its junction with Thornton Lane at B. The use of sienna cannot here indicate ways which are metalled, as the way is not so indicated on the Ordnance Survey County Series 25" map (item II.J below) surveyed some 20 years later. Therefore it is submitted that the sienna colouring may be an indication that the order way was believed to be a public way, in common with Thornton Lane. This would be consistent with the absence of any colouring to the 'Tenants' Way', shown on the right-hand side of the extract, which is not claimed to be a public road — see the Boteler sketch map (item II.B above).

E.7. **Points:** 0

F. (Not used)

G. (Not used)

H. (Not used)

I. (Not used)

J. Ordnance Survey County Series 25" map

J.1. **Date:** 1872–1938

J.2. **Source:** British Library, National Library of Scotland<sup>25</sup>

25 2<sup>nd</sup> ed: [maps.nls.uk/view/103680710](https://maps.nls.uk/view/103680710); 3<sup>rd</sup> ed: [maps.nls.uk/view/103680707](https://maps.nls.uk/view/103680707); 4<sup>th</sup> ed: [maps.nls.uk/view/103680704](https://maps.nls.uk/view/103680704).

Ordnance Survey County Series first edition (surveyed 1872)

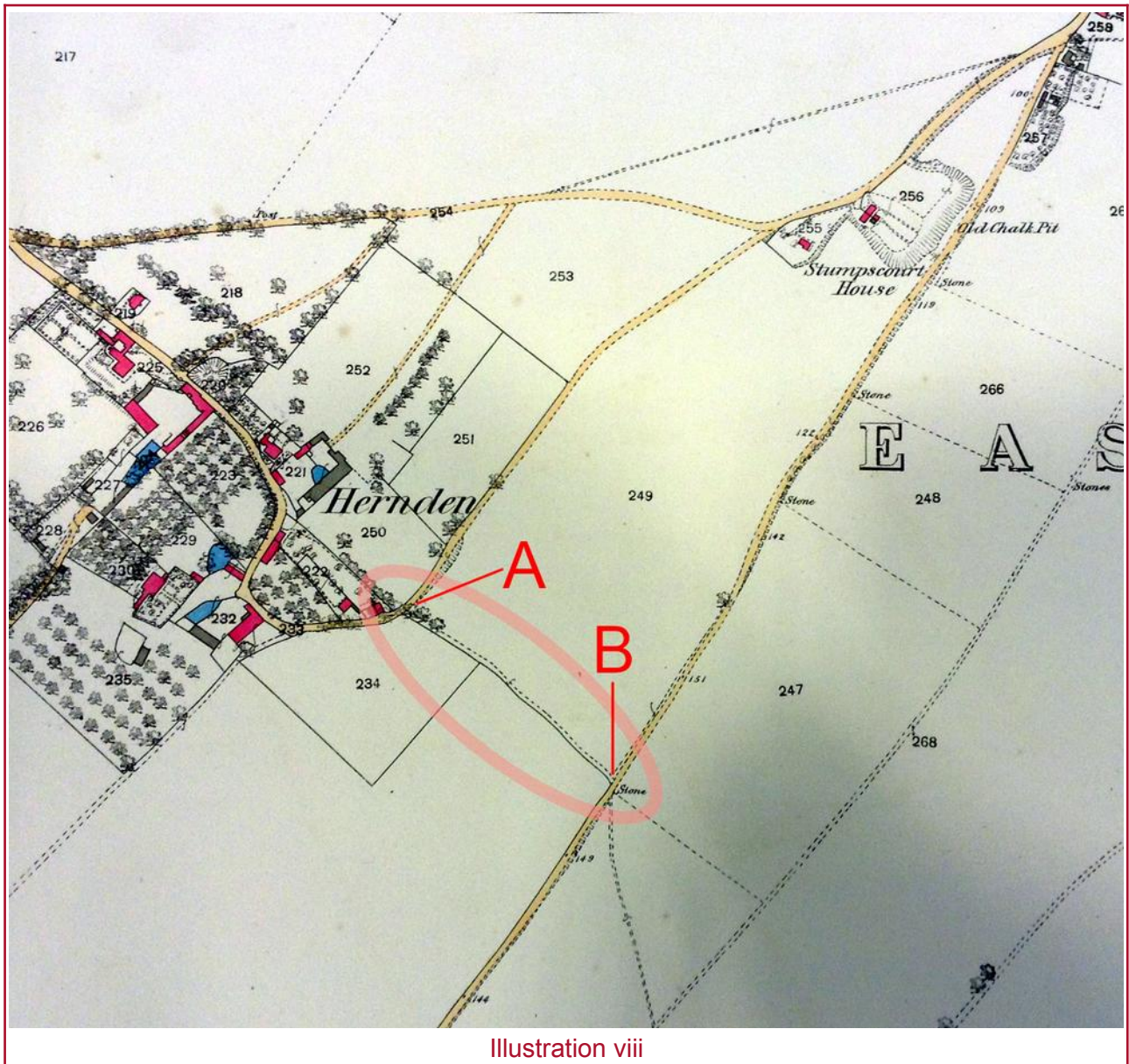


Illustration viii

Ordnance Survey County Series second edition (surveyed 1872, revised 1896)

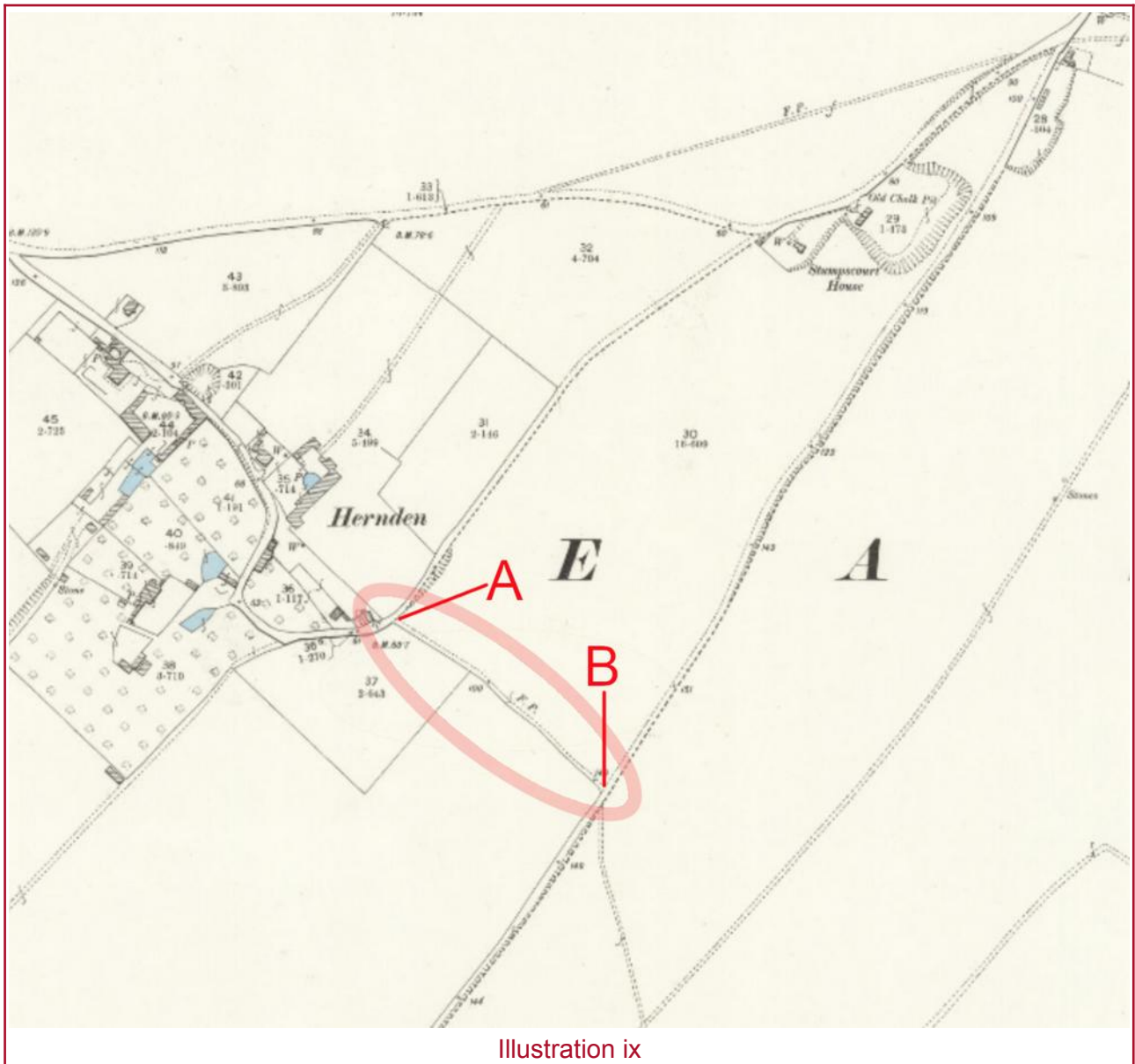


Illustration ix

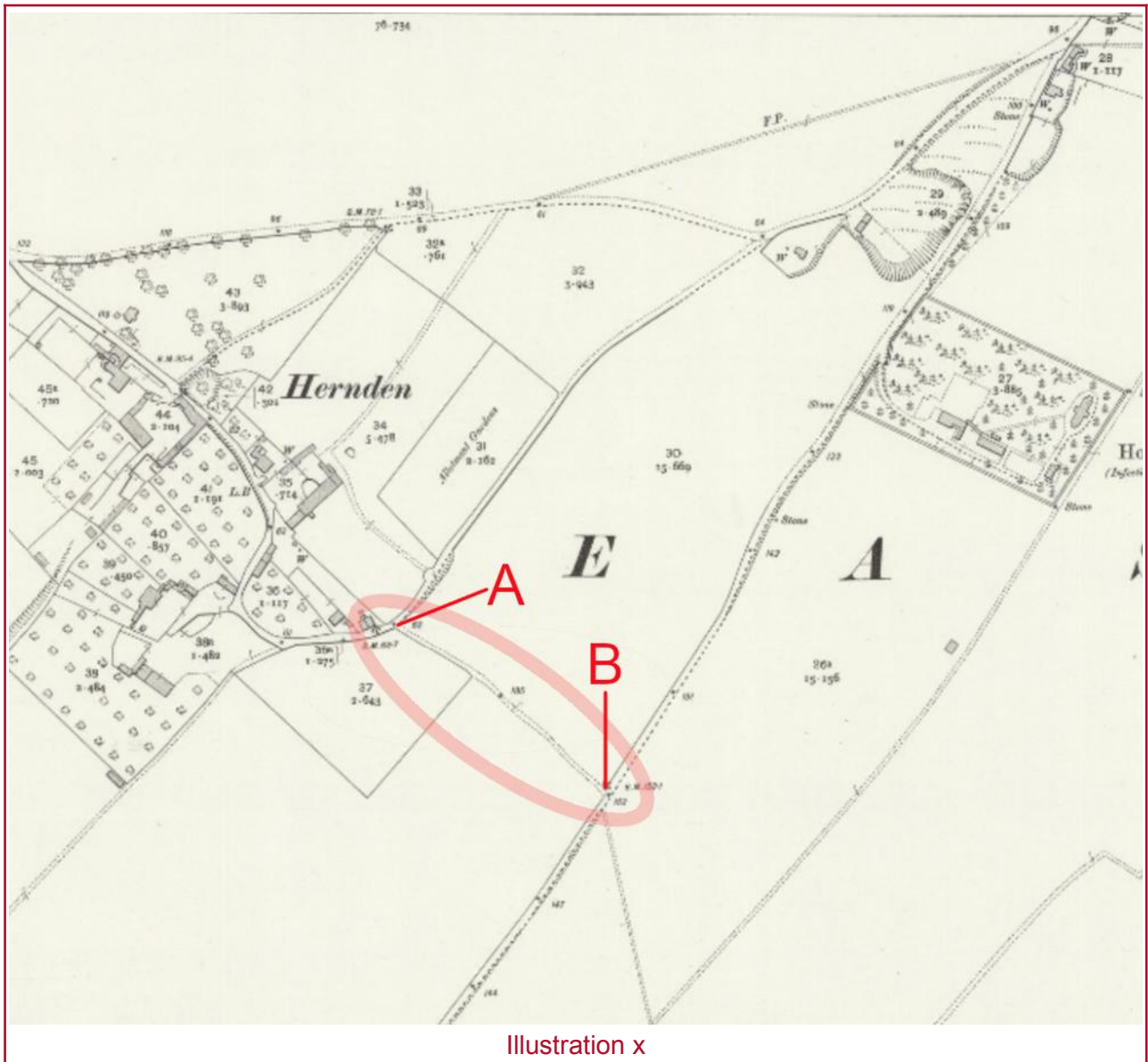


Illustration x



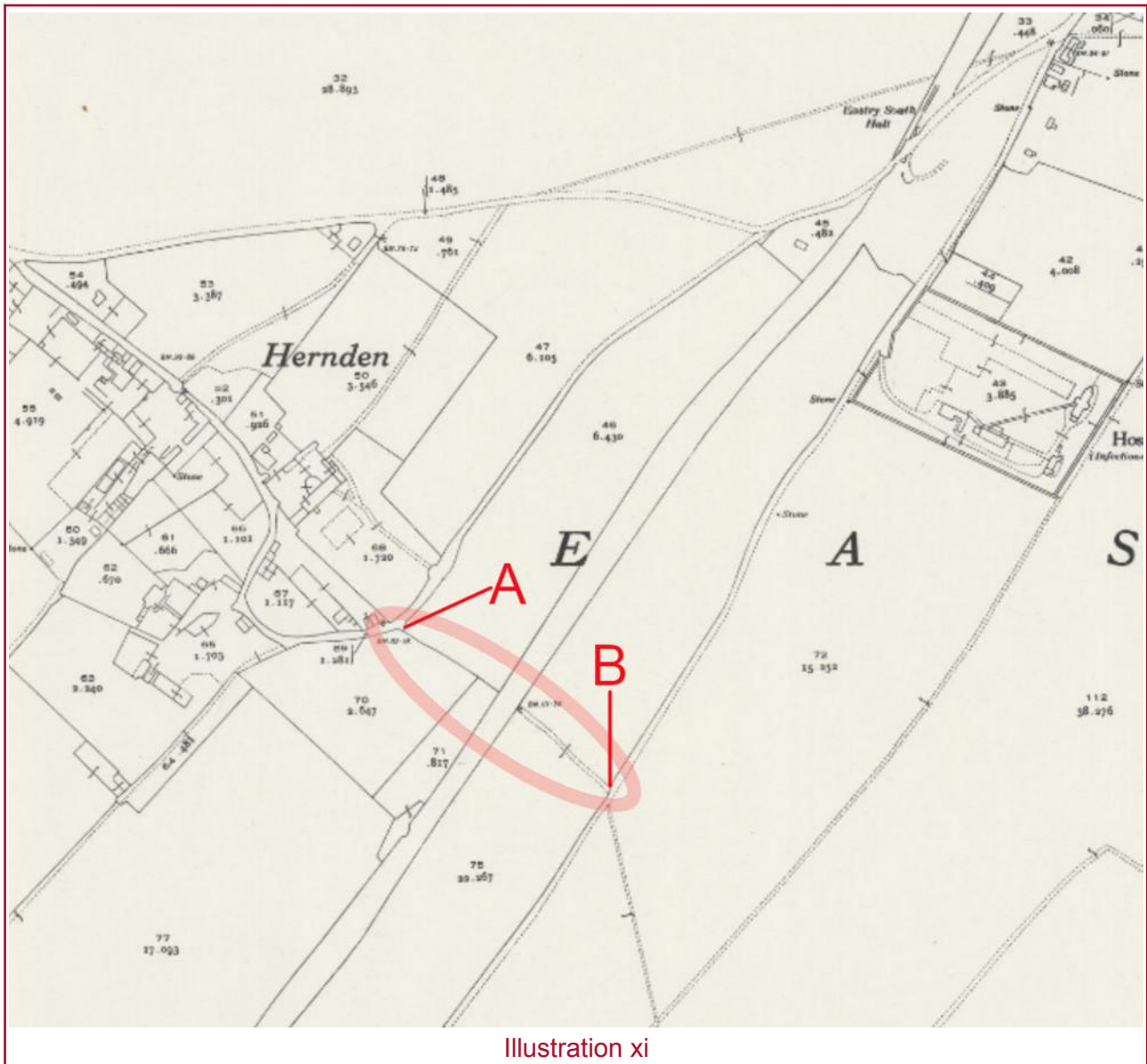


Illustration xi

J.3. **Description:** Original scale: approximately twenty-five inches to one mile (1:2,500); orientation: unchanged (top is north). Extracts are from the Ordnance Survey County Series editions of the twenty-five inch (1:2,500) plan, sheet Kent XLVIII/13.

J.4. On the first edition plan, the order way is shown as an unmetalled track or road between A and B,<sup>27</sup> bounded on the south side by a fence or hedge. The bounding on the northern side, shown on the tithe map (see Illustration vi at item II.D above), is no longer present.

<sup>26</sup> Re-levelled 1933.

<sup>27</sup> Colouring in sienna on the first edition map indicates that the road was metalled: '**Carriage drives** were tinted sienna on 1:2500 sheets produced before about 1880, and again from 1884 onwards... (SC, 25:6:1884) This instruction was presumably cancelled after 1889 or so.' *Ordnance Survey Maps—a concise guide for historians*, 3<sup>rd</sup> ed., Richard Oliver. However, in practice, it seems that colouring was not restricted only to 'carriage drives', but any road or path which was metalled.

J.5. On the second edition plan, the order way is shown similarly to the first edition, but two spot heights are marked part way along. The way also is annotated 'F.P.' (footpath).

J.6. On the third edition plan, much of the southern bounding to the way also has been lost (save at the western end, near A). There is now only one spot height along the way, although a bench mark has been made at the eastern end, at B.

J.7. The fourth edition plan is an outline edition owing to wartime measures. The course of the East Kent mineral light railway (item II.K below) now is shown, but the railway track and the detail of the level crossing is not marked. No path or track is shown between A and the railway, but the track is shown in continuation from the railway to B. No spot height is shown, but a bench mark has been made at the railway crossing.

J.8. **Conclusion:** All four editions of the County Series plan show the order way as an unmetalled track between A and B. So far as can be gleaned, none of the first three editions show any gate at A or B (this perhaps is unsurprising, as many arable fields on the East Kent downs were and remain unfenced alongside roads, and much of Thornton Lane was unfenced at this time). On the fourth edition, gates appear to be present at both ends, and at the railway crossing.

J.9. Spot heights are shown along the order way on the second, third and fourth editions, and bench marks appear at B on the third edition, and at the railway crossing on the fourth. These are consistent with the public status of the lane. On the second edition plan (i.e. sheet Kent XLVIII/13 taken as a whole<sup>28</sup>), leaving aside the order way, no spot height appears other than on ways recognised today as public roads or, in relation to Black Lane, a bridleway,<sup>29</sup> and no bench mark appears other than on such ways or buildings immediately adjacent to them.

J.10. We do not accept the statement in *Rights of Way Law: A guide to law and practice*<sup>30</sup> that:

The Ordnance Survey states that spot heights are positioned to meet the requirements of its surveyors when levelling an area and do not, and never have had, any bearing on rights of way along any road, track or path.

This statement is attributed to a 'Letter to Hereford and Worcester CC, 18 January 1996'. A letter sent at such a remove from the date of survey, over a century earlier, in circumstances where the majority of surveying guidance has been lost, cannot be reliable authority for the proposition.

J.11. A more contemporary explanation is to be found in *A resumé of the publications of the Ordnance Survey for England and Wales*<sup>31</sup>:

The Manuscript Plans<sup>32</sup>...Bench Mark (B.M.) and surface level altitudes are then inserted on the plans, the lines of levels running along the principal roads.

28 [maps.nls.uk/view/103680710](https://maps.nls.uk/view/103680710)

29 In one case, spot heights are marked along what is now bridleway EE376, which formerly was a public road before a diversion order took effect.

30 Riddall and Trevelyan, 4<sup>th</sup> ed., para.6.3.9.

31 Maj. F P Washington RE, 1890: reproduced in *Sheetlines* (the journal of the Charles Close Society), 67/21.

32 This section describes how the manuscript plans, having been structured from parish or tertiary triangulation, are filled out with detail from right line surveying entered in a field book.

...In country 1/2500 levelling the Bench Marks occur about every third of a mile. In towns, about 15 to the linear mile are cut.

Surface levels are shown at any defined change of level between these Bench Marks.

J.12. While the applicant does not suggest that every way which is marked with spot heights on early Ordnance Survey County Series large scale plans must inevitably be a 'principal road', the annotation of such features along the order way, and the adoption of consistent practice on the sheet which depicts the order way, does provide some modest support for its status as a bridleway rather than a private way.

J.13. The annotation of the way on the second edition plan as a 'footpath' confirms its physical existence between A and B, and that the surveyor, at the time of his survey, did not observe evidence of bridleway status (such as a bridleway guidepost, or evidence of use by ridden horses). The annotation is not a denial of bridleway status, but it is some evidence that the way was regarded as a public path vice an occupation road for front-agers' access (*c.f.* para.II.D.15 above).

J.14. **Objector:** It is stated (Objection, para.16) that the first edition Ordnance Survey County Series large scale plan has not been adduced. This omission has now been rectified.

J.15. It further is stated (Objection, para.17) that use was on foot — presumably a reference to the annotation 'F.P.' (*i.e.* footpath), which appears on the second edition plan, but not on the first, third or fourth editions. The distinction on large scale plans between footpath and bridle road ('B.R.') was abandoned in the late 1940s.<sup>33</sup> During this period (*i.e.* at the time of revision for the second edition in 1896), it is suggested that it was the practice of a surveyor to record a bridle road (*i.e.* 'B.R.') where such use was apparent, but the practice was somewhat haphazard, with many bridle roads not so recorded, or recorded as tracks or roads without annotation. We can conclude only that the surveyor did not, at the time, see cause to record the order way as a bridle road vice footpath. Perhaps the use predominantly was on foot? Clearly, such an annotation cannot be evidence that a way is not a bridleway, merely because the surveyor did not note equestrian use at the time of his survey, any more than the absence of carts demonstrates that a way is not a cart road. Moreover, first, the annotation was not repeated on the third or fourth edition plans, suggesting that use had become (or more likely, resumed being) more diverse, including carts; and secondly, it is not understood to be the objector's case that the way correctly should be recorded as a footpath vice a bridleway — yet the annotation is evidence that the way at the time of the revision of the plan for the second edition was in use as a footpath.

J.16. **Points:** 1

## K. East Kent mineral light railway

K.1. **Date:** 1910

K.2. **Source:** Kent County Archives<sup>34</sup>

<sup>33</sup> *i.e.* subsequently, paths were marked 'F.P.' even where in use as a bridleway: *Ordnance Survey Maps: a concise guide for historians*, Richard Oliver, 3<sup>rd</sup> ed., p.109.

<sup>34</sup> Q/RUm/1151.

East Kent Mineral Light Railway deposited plan:

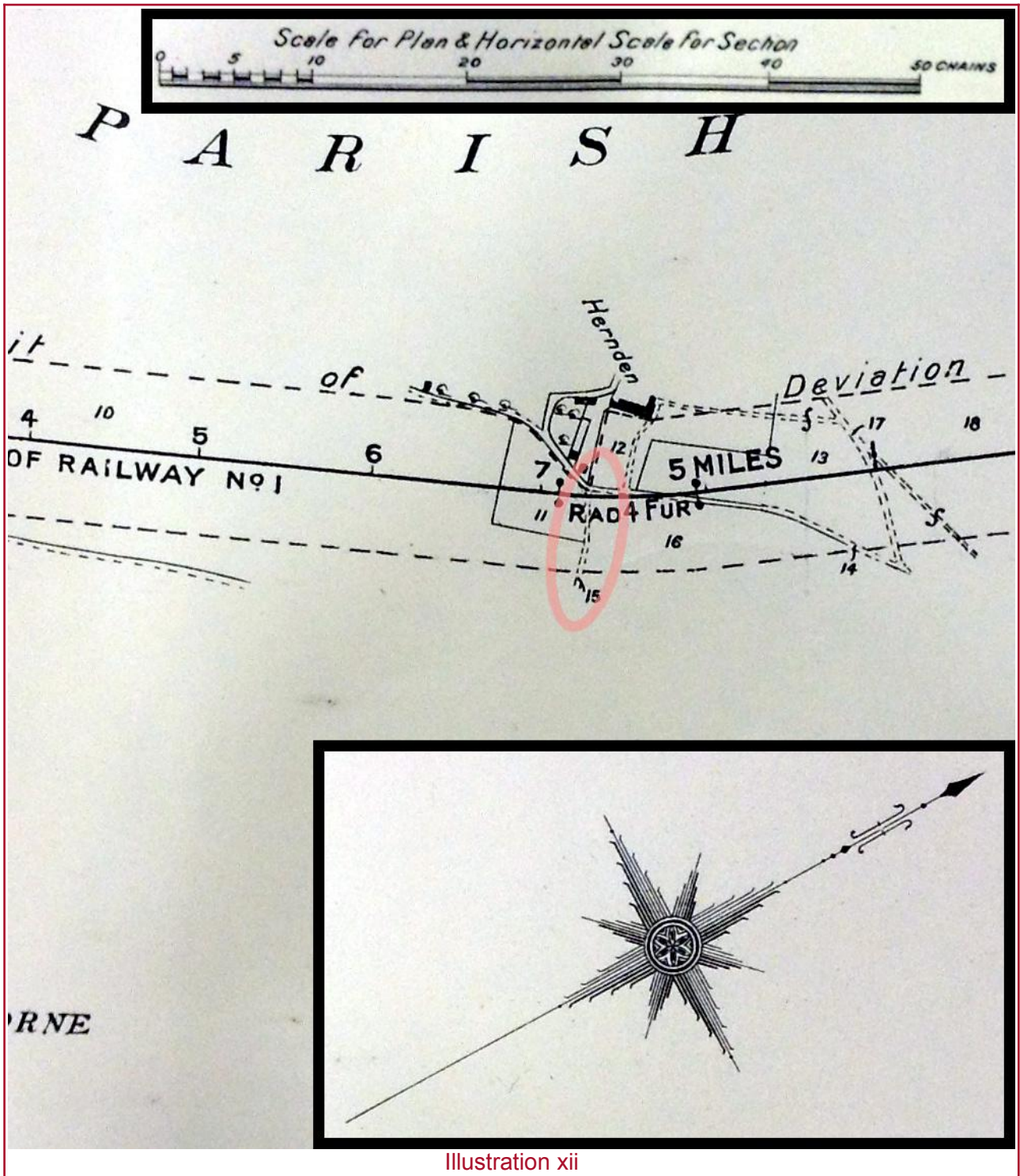


Illustration xii

East Kent Mineral Light Railway book of reference:

8

**EAST KENT MINERAL (LIGHT) RAILWAYS.**

Parish of EASTRY, in the County of KENT.

**RAILWAY No. 1—continued.**

No. on Plan.	Description of Property.	Owners or Reputed Owners.	Lessees or Reputed Lessees.	Occupiers.
15	Public bridle road	The Eastry Rural District Council	.. ..	The Eastry Rural District Council

Illustration xiii

K.3. **Description:** Original scale: as marked on the plan; orientation: unchanged (top is west north-west).

K.4. Originally called the East Kent Mineral (Light) Railway when first proposed in 1909, the undertaking later became generally known as the East Kent Light Railway. The promoters included Kent Coal Concessions Ltd, the original promoter of the Kent coalfield. The railway was authorised under the Light Railways Act 1896. The 1896 Act required the deposit of plans and books of reference in connection with a submission to the Board of Trade seeking authorisation under the Act. Railway no.1 was among the initial raft of proposals for a network of lines serving prospective East Kent collieries between Shepherdswell and Eastry and continuing north to Richborough, with line 2 branching from Eastry to Wingham. It duly was built, and opened for traffic in 1916.

K.5. Constructed cheaply, the promoters necessarily minimised costs. For example, the bridge over the River Stour at Richborough was built, after some delay, with a fixed span vice the swing bridge authorised<sup>35</sup>; only one bridge was built to cross a road<sup>36</sup> on the entire network of lines 1 and 2. None of the collieries which the railway sought to serve was successful, save the East Kent Colliery at Tilmanstone, and the railway settled down to trade with the East Kent Colliery and to provide a sparse freight and passenger service on the lines to the north of that colliery.

K.6. Illustration xii shows the application way as a track marked by double pecked lines which crosses the proposed line at a distance of just over 4 miles and 7 furlongs from the point of origination in Eythorne. The track is assigned plot number 15.

K.7. Illustration xiii records for Eastry parish that plot 15 was a 'Public bridle road' in the ownership and occupation of Eastry Rural District Council.

35 [en.wikipedia.org/wiki/East\\_Kent\\_Light\\_Railway](https://en.wikipedia.org/wiki/East_Kent_Light_Railway)

36 Selson Lane, Eastry: now demolished.

K.8. The newly-constructed railway was subject to approval by the Board of Trade before opening to passenger traffic. Col. J W Pringle attended for that purpose on 27 September 1916. His report notes that<sup>37</sup>:

There are six public road level crossings on Railway No.1, where cattle guards have been fitted in accordance with the Order. In addition there are 17 private or occupation crossings, fitted with gates which do not close across the railway, and 5 footpath and 3 bridle level crossings, the former fitted with stiles and the latter with gates.

K.9. In the book of reference for line 1, the following bridle crossings are identified (numbers refer to the parcel number identified in the book of reference):

- Eythorne 22 (now in part footpath EE338): not crossed by railway
- **Eythorne 24** (possibly Burgess Hill, now footpath EE337): level crossing
- Eastry 1 (BOAT EE335): not crossed by railway
- Eastry 2 (footpath EE264): not crossed by railway
- **Eastry 15** (order way): level crossing
- **Eastry 19** (BOAT EE109): level crossing

Three of the ways identified in the plans and book of reference for line 1 as bridleways required level crossings, including the order way — the other ways were not traversed by the railway. It is submitted that the level crossing to facilitate the passage of the order way is among the three identified by the inspector, and which would have been inspected by him during his visit. Other bridleways, notably Black Lane (bridleway EE488), were not identified as such in the book of reference,<sup>38</sup> and it is unlikely that such other ways were drawn to the inspector's attention as differing from the status (if any) shown in the book of reference.

K.10. **Conclusion:** Sections 46 to 48 and 59 of the Railways Clauses Consolidation Act 1845 were excluded from incorporation in the East Kent Mineral (Light) Railways Order 1911,<sup>39</sup> and the order itself provided for the bridging of certain public roads, and for all other public highways to be taken over the railway on the level (consistent with the minimal expectations of light railway construction and operation). In common with other crossings for ways which were not perceived as public roads, no specific provision is made in the plans nor the order<sup>40</sup> for a crossing of the application way, and a level crossing would have been provided (see RAF aerial photography (1946) at item II.P below). Note that the line was constructed along the eastern boundary of the limits of deviation.

K.11. The plan and book of reference provide good evidence for the status of the application way between A and B as a public bridleway. The Board of Trade inspector responsible for authorising the use of the line by passengers would have satisfied himself that appropriate crossing facilities had been installed for the use of the order way by the public on foot and on horseback, consistent with the status given in the book of reference.

37 Reproduced in *The East Kent Railway: The History of the Independent Railway*: vol.1, M Lawson Finch, S R Garrett.

38 Black Lane was identified as a footpath.

39 Art.3(1).

40 Arts.21–22.

K.12. **Objector:** It has been suggested by the objector (Objection, para.19) that the applicant has, in a different context, questioned the reliability of the survey undertaken for the East Kent Light Railway, and that in consequence, little or no reliability should be placed on this survey in relation to the order way.

K.13. The objector is correct that the applicant has, in relation to several applications for definitive map modification orders, concluded that the East Kent Light Railway surveys consistently overlooked or under-recorded rights of way. However, in common with a number of other evidential sources, railway surveys (and particularly that for the East Kent Light Railway) tend to false negatives, but not false positives — that is, the data are more likely to omit or under-record a right of way than to flag a non-existent one. This may be unfortunate from the perspective of an objector, but — in relation to railway surveys — it arises from the context of the evidence-gathering.

K.14. The surveyors and engineers employed to survey the proposed line might well overlook a minor right of way, and particularly a field path or field road, or take an enclosed way to have a lower status than public road (or merely to have the status of a private road). Such false negatives might arise from insufficient or poor data (e.g. an ill-informed or absent lay parish surveyor), negligence (failure to make due diligence inquiries), or deception (to lower the costs of construction<sup>41</sup>), but would have a common outcome — the projected costs of construction would be less.

K.15. False positive mistakes, showing non-existent highways, or public paths as of incorrectly higher status, cannot entirely be ruled out and again could arise from insufficient or poor data, but there was every incentive on the surveyors and engineers not to make mistakes which would inflate projected costs unnecessarily.

K.16. In relation to the East Kent Light Railway, the survey appears to have been done briskly and economically. The neighbouring crossing of Black Lane (bridleway EE488) was recorded as a public footpath. The nearby crossing of BOAT EE109<sup>42</sup> was recorded as a public bridleway.

K.17. It seems likely that the survey was done without sufficient diligence, for only three years later the railway undertaker was challenged by the Eastry Rural District Council's surveyor as to proper provision for a bridleway at Black Lane (bridleway EE488) and elsewhere. The Surveyor's report to the council of 22 July 1913 records as follows<sup>43</sup>:

East Kent Light Railways. I met Mr A S Wilks one of the Kent Coal Concessions representatives yesterday in reference to the erection of Bridle gates & stiles, where the railways have crossed over the Bridle roads & footpaths. Mr Wilks has received instructions to get these erected without delay....

K.18. Whereas acknowledged roads and bridleways (such as the order way) across the proposed line were recorded as in the occupation of the Eastry Rural District Council, footpaths were recorded as in the occupation of Eastry Parish Council. It may be that

41 Ss.46, 49 and 50 of the Railways Clauses Consolidation Act 1845, incorporated with almost every Act authorising construction of a railway after that date, required that public roads be taken over or under a railway by a bridge of specified dimensions, at considerable additional cost compared to a level crossing or lower specification bridge in relation to public paths and private roads. However, these provisions were excluded from application to the East Kent Mineral (Light) Railways Order 1911: see para.K.10.

42 Byway open to all traffic EE109 from Eastry Mills to Hammill.

43 Kent County Archives, RD/Ea/H6.

consultation on the entries for alleged public footpaths took place only at parish council level, and that the rural district council's surveyor was not given an opportunity to contribute. This may help explain why some public roads and bridleways were under-recorded as footpaths. But there is no corresponding explanation as to why the order way might have been wrongly recorded as a public bridleway in the occupation of the Eastry Rural District Council, if it was not a public right of way at all. Moreover, there is no suggestion, whether by the objector or according to the evidence, that the order way is only a public footpath.

K.19. Thus, either the surveyor, presumably in consultation with Eastry Rural District Council, made a serious and potentially costly mistake in identifying a private occupation road as a public bridle road, or the entry in the book of reference must be accepted as a correct, factual record. And the history of the East Kent Light Railway suggests that it always erred on the side of minimising costs, by under-recording public rights.

K.20. The objector questions (Objection, para.20) whether the railway was constructed within the authorised limits of deviation. The course of the railway, as built, is visible in the fourth edition Ordnance Survey County Series 25" map (item II.J above) at Illustration xi, from which, by comparison with the limits of deviation in the deposited plan at Illustration xii above, it may be seen that the railway was indeed plainly within the limits. The railway therefore was not, at this point, constructed on a 'different alignment', but on an authorised alignment within the permitted limits.

K.21. **Points:** 5

## L. Finance Act maps

L.1. **Date:** 1911

L.2. **Source:** National Archives<sup>44</sup>

<sup>44</sup> Ordnance Survey 1:2,500 sheet Kent LXVII/13: IR 124/5/75.



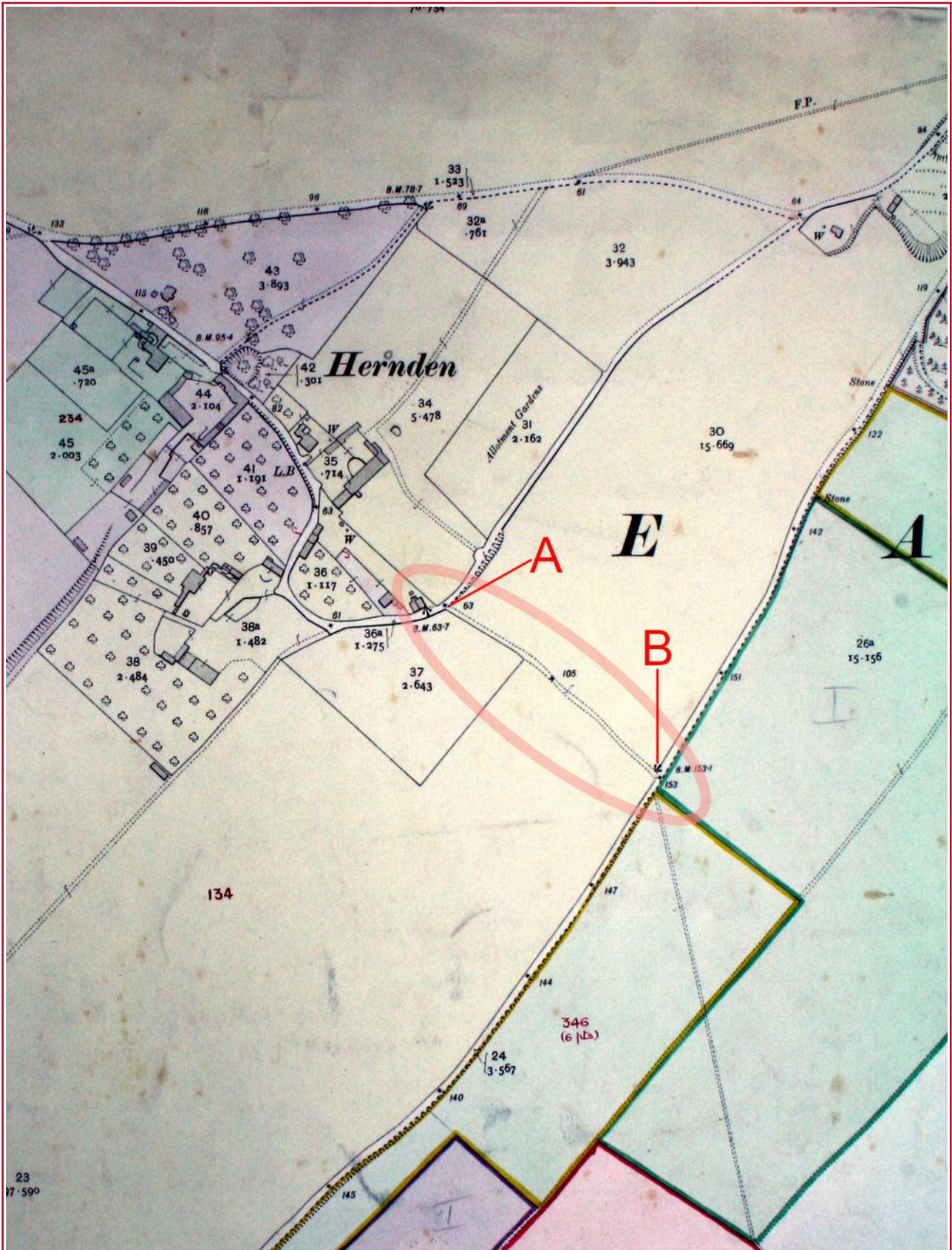


Illustration xiv

L.3. **Description:** original scale: 1:2,500; orientation: unchanged (top is north).

L.4. The Finance (1909–10) Act 1910 caused every property in England and Wales to be valued. The primary purpose was to charge a tax (increment levy) on any increase in value when the property was later sold or inherited. The valuation involved complicated calculations which are not relevant for highway purposes. However, two features do affect highways. First, public vehicular roads were usually excluded from adjoining landholdings and shown as 'white roads'. This is because s.35 of the 1910 Act provided,

No duty under this Part of this Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority.

A highway authority was a rating authority.

L.5. Secondly, discounts from the valuation could be requested for land crossed by footpaths or bridleways. Under s.25 of the Act, 'The total value of land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges and to any public rights of way or any public rights of user, and to any right of common and to any easements affecting the land...'<sup>45</sup>. Under s.26(1), the Commissioners of the Inland Revenue were required to cause a valuation to be made of, *inter alia*, the total value of land. Whether a discount was, in fact, given will depend on several factors:

- Whether the right of way was excluded from valuation (i.e. as a 'white road').
- Whether the landowner acknowledged the presence of a right of way on the land (e.g. if it were disputed).
- Whether the landowner wished to reduce the valuation of the land (if development were anticipated, it might be better to secure a higher valuation, so that the increase in value arising from development were minimised. However, as the 1910 Act also provided for other levies, and a valuation might be used for probate purposes, the calculations in a particular case might be for or against a discount from the value of the land).
- Whether the landowner declared the right of way on form 4 or form 7 (a failure to declare might be an oversight).
- Whether the valuer accepted the claim for a discount for a right of way.
- Even if the landowner did not declare the right of way, the valuer could give a discount for a right of way which was 'known to' the valuer.

L.6. All land had to be valued unless it was exempted by the Act. S.94 provided harsh penalties for making false declarations.

L.7. The order way lies on hereditament 134: Middle and Lower Heronden Farm. In the field book for this hereditament,<sup>46</sup> no deductions are recorded for rights of way (but nor is a deduction claimed in relation to holding 134 for the footpath shown to cut off the corner of Heronden Lane).

L.8. The order way between A and B appears to be coloured-washed as part of holding 134 (whereas Thornton Lane and Monkey's Lane appear to be retained uncoloured, and therefore excluded from valuation).

<sup>45</sup> Discounts for easements affecting the land were separately requested and recorded in the valuation book.

<sup>46</sup> IR 58/17470.

L.9. **Analysis:** The Act included provision for a duty on increment in land value (to capture some of the gain from community development, such as building new railways and public services) and a duty on the capital value of unimproved land on which building might be held back for speculative gain.<sup>47</sup> It was said by the Chancellor, subsequently, that the two duties expressly were designed to help ensure an honest valuation.<sup>48</sup> According to the landowner's disposition, the landowner might favour a higher valuation to minimise increment value duty, or a lower valuation to minimise the capital duty, but either way, there was a risk that favouring one might come at the expense of rendering the other more costly. As there was no obligation to declare rights of way to minimise the land valuation (though there was an obligation not to make false declarations), it is hardly surprising that some landowners chose to declare, and others did not. They may have made a decision after careful calculation, or they may have been ignorant that declaration of a right of way could bring possible financial benefits. They may not have wished to draw attention to a right of way, or they may have thought it would make barely any difference (and quite possibly the effect would have been adverse to their expected interests). They may have denied (rightly or wrongly) that a right of way existed, or at least not have wanted formally to acknowledge its existence. We cannot (usually) know.

L.10. Thus the absence of any indication of a right of way in a particular hereditament — even where the evidence of adjacent hereditaments (and otherwise) suggests it was crossed by a right of way — tells us nothing at all. One cannot conclude that the absence of any deductions under the Finance Act 1910 would appear to confirm that no such public route existed, without knowing the motivation why no deductions were claimed — and invariably there is no record of such motivation.

L.11. **Conclusion:** No conclusion can be drawn from the absence of any deduction for hereditament 134, as no landowner was obliged to claim deductions, and a landowner may have been incentivised not to claim a deduction.

L.12. **Objector:** The objector suggests (Objection, para.22) that:

Whilst it may be the case that a landowner was not obliged to claim a deduction from value for a public right of way, there is no apparent reason not to have claimed it, or that landowners affected by the whole of the east west route (the Order Route and the continuation to the east) would all have determined not to have claimed a deduction over their land.

This point is fully addressed above.

L.13. **Points:** 0

<sup>47</sup> For completeness, the 1910 Act also included provision for a reversion duty on the term of a lease, and a mineral rights duty. Neither is relevant here.

<sup>48</sup> *Land and Society in Edwardian Britain*, Brian Short, 1997, p.20. Rt Hon Lloyd George, speaking in the House of Commons on the repeal of s.4 of the 1910 Act in 1923, said: 'They [the taxes] were only valuable for the purpose of justifying a valuation, and for that purpose they were admirably conceived because if the valuation was too high the half-penny caught them, and if the valuation was too low the increment tax caught them; so that between one and the other we had a perfectly honest valuation.' *Hansard*, 3 July 1923, vol 166, [col.332](#).

M. (Not used)

N. Bartholomew's map

N.1. **Date:** 1904, 1922 and 1953

N.2. **Source:** National Library of Scotland<sup>49</sup> (1904 and 1922); personal copy (1953 map)

49 [maps.nls.uk/mapmakers/bartholomew.html](https://maps.nls.uk/mapmakers/bartholomew.html)

Bartholomew's maps: 1904, 1922 and 1953 editions

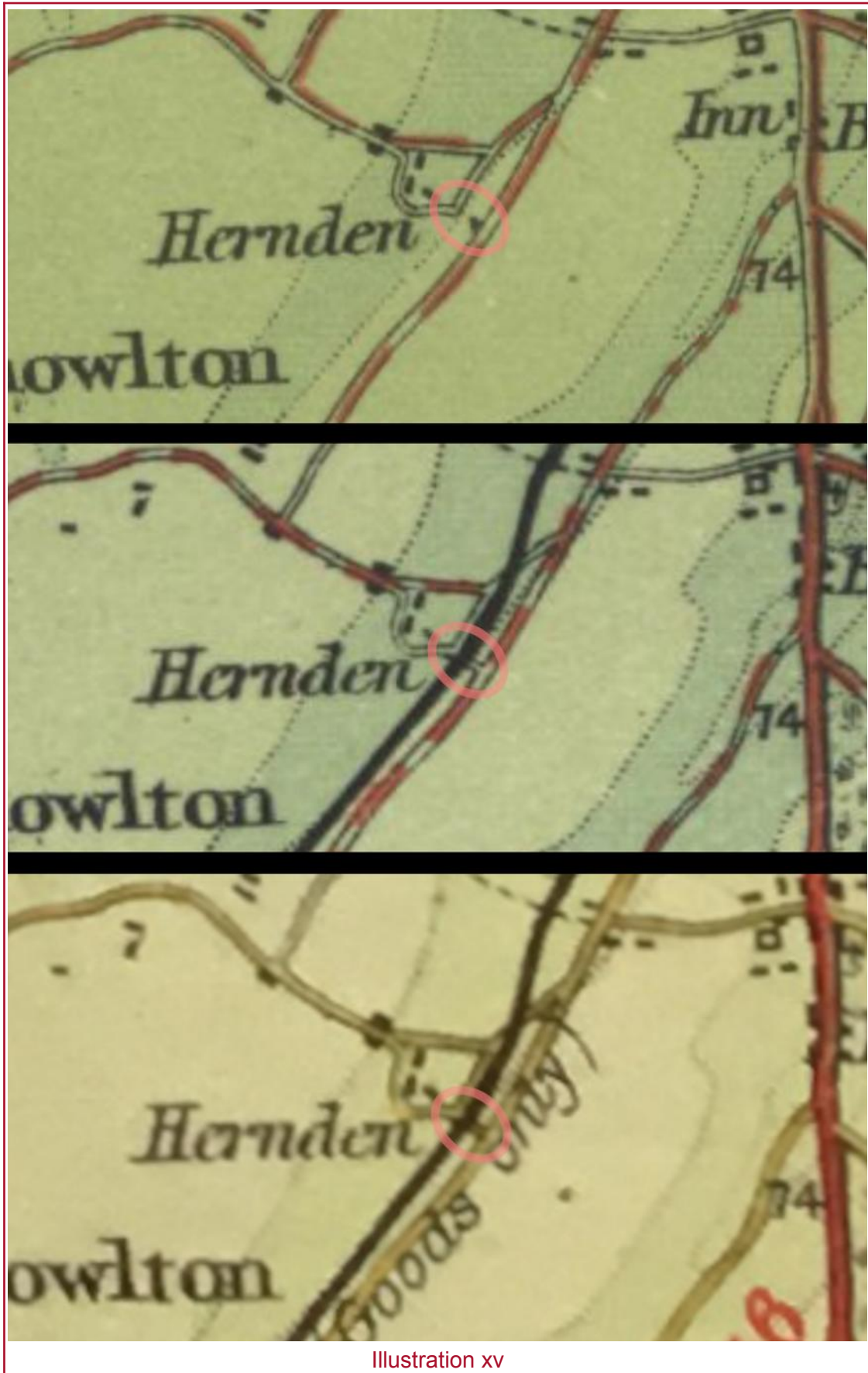
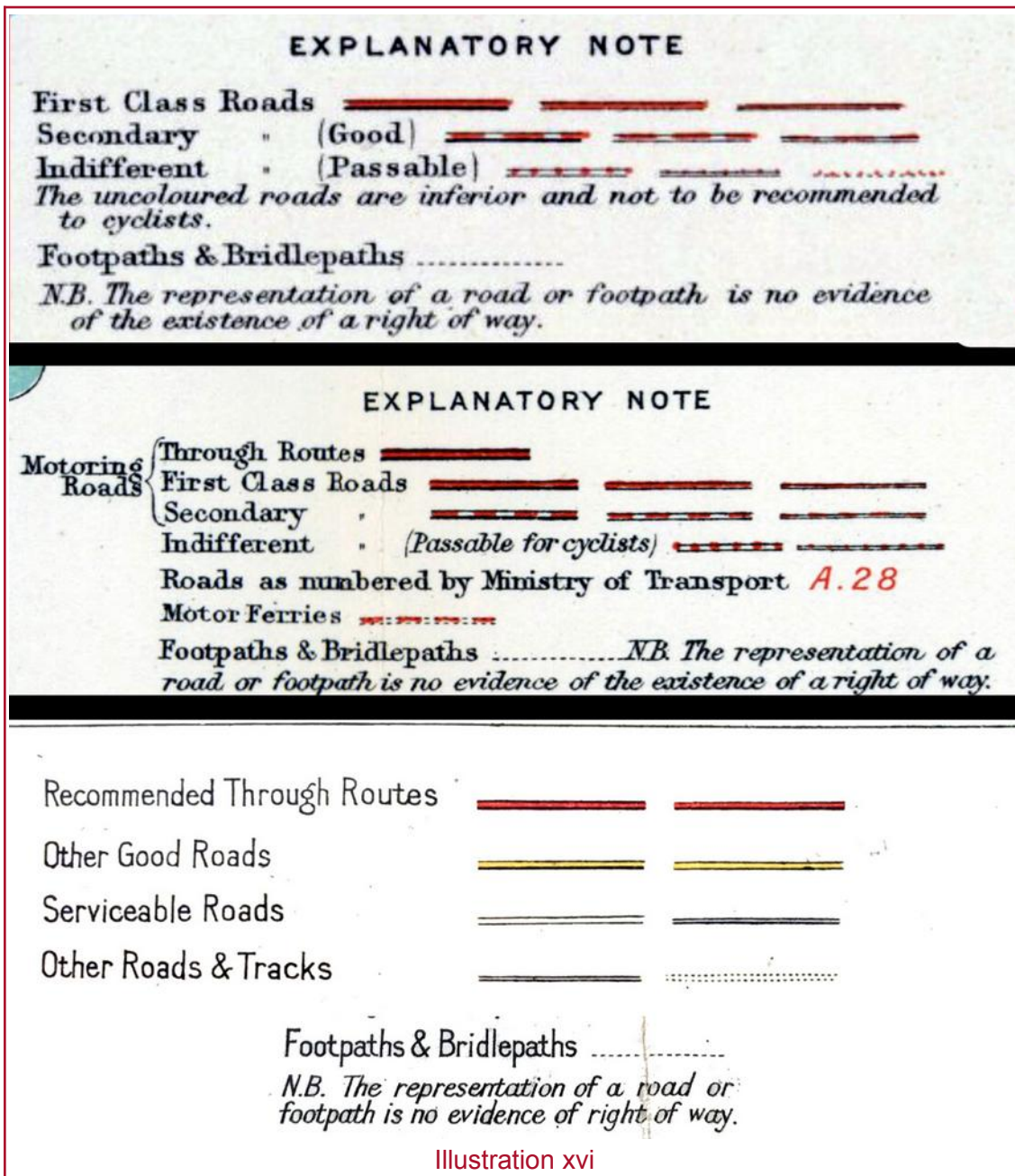


Illustration xv

Bartholomew's maps keys: 1904, 1922 and 1953 editions



N.3. **Description:** Original scale: half inch to one mile (1:126,720); orientation: unchanged (top is north).

N.4. Bartholomew's maps from the first half of the twentieth century show an evolving road network. On the 1904 edition, the order way is not shown, but a small black triangle on the map at point B suggests the omission is attributable to a cartographic mistake — no building or other feature has ever been recorded at that location. On the 1922 edition, the order way is depicted as an 'indifferent road', but now crossing the railway line (and impliedly unsatisfactory for cycling). On the 1953 edition, the way is shown coloured yellow as a 'good road'.

N.5. **Conclusion:** The Bartholomew's maps from the first half of the twentieth century show that the application way was regarded as a road apparently fit for motoring (although not necessarily for cycling).

N.6. Paragraph 12.41 of the consistency guidelines<sup>50</sup> notes that:

...current evidence indicates that, although Bartholomew were highly regarded as map producers, they did not employ independent surveyors to carry out any surveys on the ground nor to determine the nature and status of the roads on their maps. Moreover, they do not appear to have examined the legal status of the routes on their Cyclists' Maps before colouring them for use as suitable for cyclists.

N.7. However, this seems to be a too simplistic approach: we do not know what criteria Bartholomew used to assess the suitability of individual roads for cycling, but it is unlikely that it may have made a decision using no more than published Ordnance Survey data, if its maps were to meet with a favourable reception among its target market of cyclists. In the present case, the order way was omitted from the 1904 edition but the error was corrected in the 1922 edition to show an 'indifferent' road, and the order way remained included on the 1953 edition (though it may be a stretch then to describe it as a 'good road').

N.8. While the maps are not convincing evidence of public rights, it seems unlikely that an entirely private road, not subject to any public rights of passage, would have been depicted on successive editions, subject to widespread appraisal and feedback particularly from cycling users.

N.9. **Points:** 1

## O. Ordnance Survey one-inch Popular edition

O.1. **Date:** 1938

O.2. **Source:** [www.ponies.me.uk/maps/osmap.html](http://www.ponies.me.uk/maps/osmap.html)

<sup>50</sup> Planning Inspectorate: September 2015: [www.gov.uk/government/publications/definitive-map-orders-consistency-guidelines](http://www.gov.uk/government/publications/definitive-map-orders-consistency-guidelines).

Ordnance Survey one-inch Popular edition, sheet 117 (East Kent)



Illustration xvii

Key

**REFERENCE**

	Surface	Good & fit for fast traffic	Fit for ordinary traffic	Indifferent or winding road	Bad
Main Routes between Towns	over 14' of Metalling				
Other Roads					
Roads under 14' wide					
Minor Roads					
Bridle & Footpaths					
		Gradients steeper than $\frac{1}{4}$			

(The character of the surface is indicated by colours on the coloured edition)  
 (Private Roads are uncoloured, Unfenced Roads are shown by dotted lines)

Illustration xviii

O.3. **Description:** Original scale: one inch to one mile (1:63,360); orientation: unchanged (top is north).

O.4. This edition of the Ordnance Survey one-inch map is the last to include the order way as a continuous connection between A and B. The relevant sheet, 117, was published



in 1938 based on 1920 survey data. The key describes the order way as 'Bridle and Foot-paths'.

O.5. **Conclusion:** The Popular edition map describes the order way as a bridle or foot-path. This is to be distinguished from 'Private Roads', which 'are uncoloured'.

O.6. **Points:** 0

## P. RAF aerial photography (1946)

P.1. **Date:** 1946

P.2. **Source:** Kent County Council Heritage Maps website<sup>51</sup>

### Royal Air Force aerial photograph

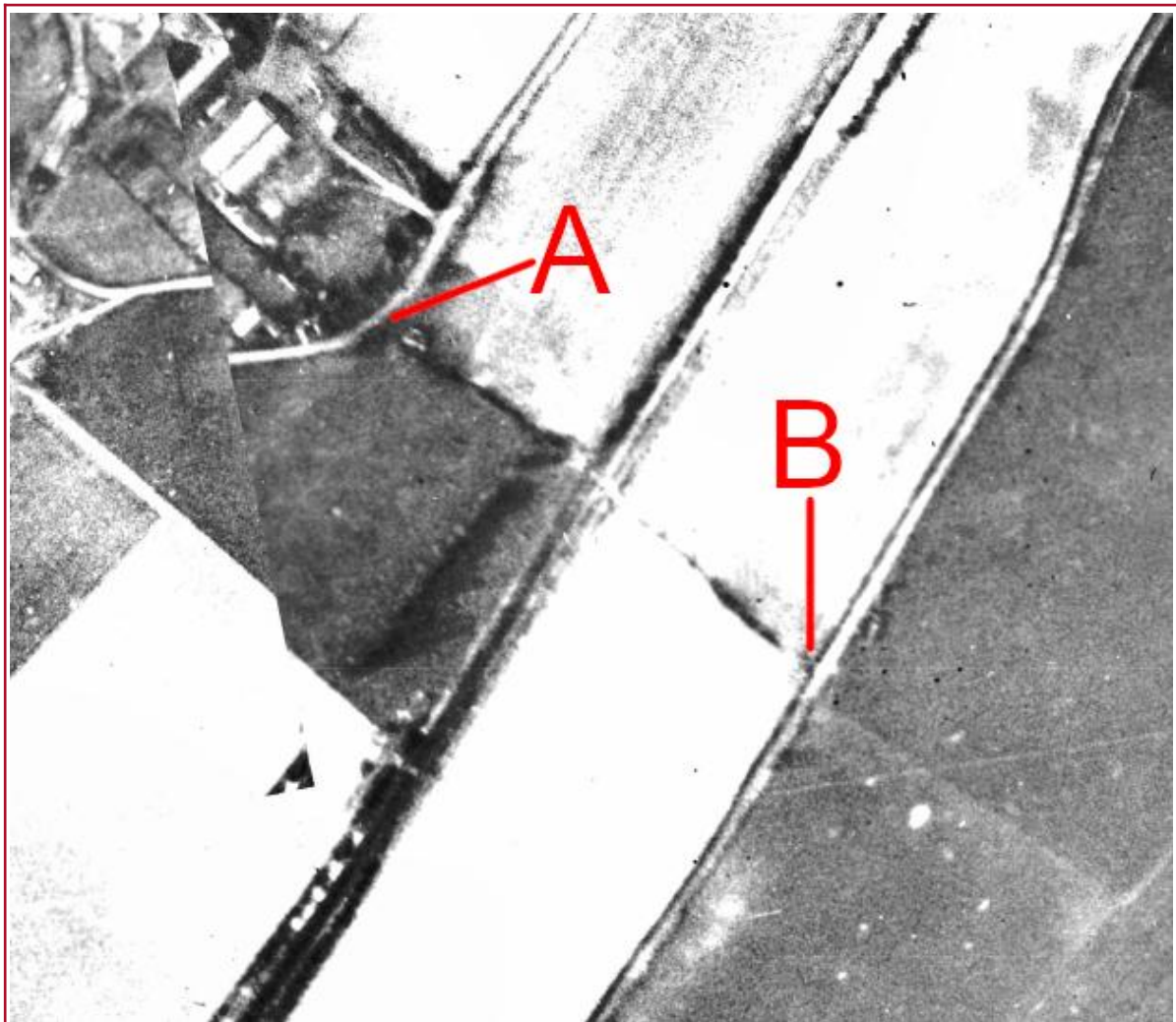


Illustration xix

P.3. **Description:** In the aftermath of the Second World War, the Royal Air Force undertook an aerial photographic survey (known as Operation Revue) to assist in assessing the damage sustained. This photograph shows the vicinity of the order way on either side of

<sup>51</sup> [webapps.kent.gov.uk/KCC.HeritageMaps.Web.Sites.Public/Default.aspx](http://webapps.kent.gov.uk/KCC.HeritageMaps.Web.Sites.Public/Default.aspx).

the East Kent Light Railway.<sup>52</sup> The fields either side of the railway are over-exposed, perhaps because they were cultivated with cereal crops.

P.4. **Conclusion:** A distinct but narrow crossing may be identified over the railway line,<sup>53</sup> showing that a level crossing was provided in accordance with the deposited plans and book of reference (item II.K above), and remained in use at this time.

P.5. **Points:** 0

## Q. HM Land Registry

Q.1. **Date:** 2021

Q.2. **Source:** HM Land Registry titles K152412 and K193747

### Overlap of titles K152412 and K193747

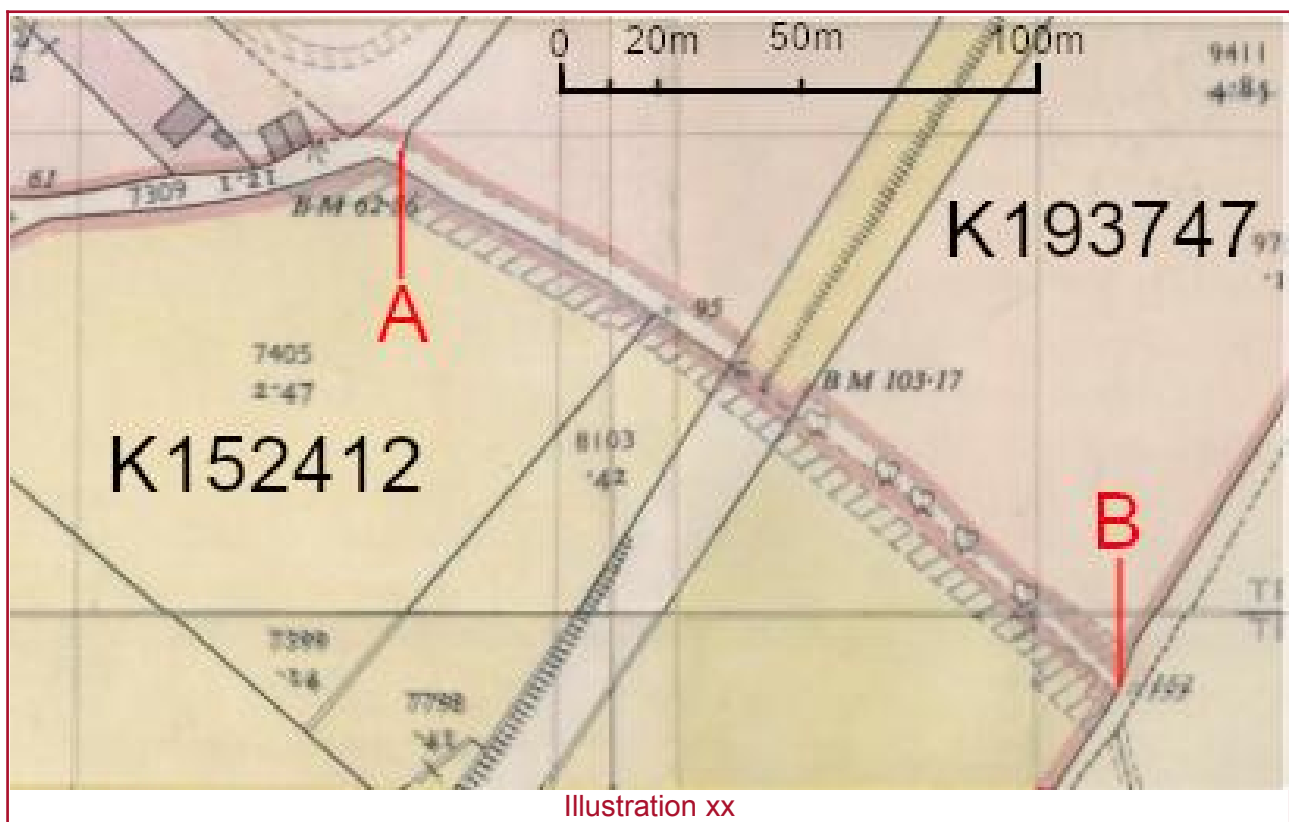


Illustration xx

Q.3. **Description:** Original scale: 1:2,500 (scale bar marked on plan); orientation: unchanged (top is north). Composite image showing the title plans, one overlaid the other.

Q.4. The plan shows the boundaries to two titles which abut the order way: K152412 and K193747. The plan shows the two title plans overlaid, with the upper plan rendered semi-transparent, so that the boundaries of both titles may be seen on the same plan. The

<sup>52</sup> The railway remained in operation at this time, and freight services over this part were not withdrawn until 1951.

<sup>53</sup> See also the report of the surveying authority on the determination of the application for a definitive map modification order, at KCCSOC, KCC2, Appendix B, para.82: 'it is possible to make out...a crossing point over the railway (which would appear to confirm that a level crossing was provided).'

boundaries are shown with a red edging. (The land hatched blue between A and B south-west of the order way is subject to rights in respect of a gas main.)

Q.5. Title K152412 relates, broadly, to land south of Monkey's Hill and north-west of Thornton Lane. The boundary follows the hedge south-east from A to the former railway line level crossing, and the former line of a hedge from the crossing to B. This hedge formed the south-eastern boundary of the order way.

Q.6. Title K193747 relates, broadly, to land from Heronden north to byway EE109. The southern boundary follows a line from A to B, but approximately 5–10 metres north of the boundary of title K152412. However, across the former railway line level crossing, the boundary steps south-west to form a common boundary with title K152412.

Q.7. **Analysis:** The order way is excluded from any registered title to the land, save that part comprised in the former course of the East Kent mineral light railway (item II.K above), which would have been conveyed back to the owner of the adjoining land following the closure of the railway in 1951 (it may be that the British Railways Board, which acquired the railway, conveyed back more than strictly it held title to).

Q.8. The absence of any title to the order way in the Land Registry titles to the land adjoining the order way must be consequential on the conveyances of that land prior to first registration of title — such conveyances likewise must have excluded the order way.

Q.9. Two possibilities arise to account for the exclusion — either that the title to the order way (save the site of the former railway line level crossing) is unregistered and contained in a separate title; or that ownership of the order way is held *ad medium filum* by the owners of the adjoining land.

Q.10. The first possibility is unlikely: there is no reason why title to a narrow strip of land, coincident with the order way, should be held in a separate title yet remain unregistered — first registration of title having become compulsory in this area in January 1961.<sup>54</sup> Thus, if such an unregistered title exists and endures, it must have remained vested in the same proprietor for the past 60 years. What would be the purpose of such a title, if the order way were not a highway?

Q.11. The second possibility arises only if the order way is indeed a highway to which the presumption of *ad medium filum* applies.

The 'ad medium filum' rule is a rebuttable presumption that an owner of land which abuts either:

- a public or private highway, or
- a non-tidal river or stream

also owns the soil of the adjoining highway, or the bed of the adjoining river or stream, up to its centre line. A transfer or lease of that land will therefore be presumed to include that part of the highway, river or stream without the necessity for any express mention of it.

In the case of a highway, the presumption is known as the 'ad medium filum viae' rule, and is based on a combination of convenience (so as to prevent

54 [www.gov.uk/government/publications/first-registrations/practice-guide-1-first-registrations](http://www.gov.uk/government/publications/first-registrations/practice-guide-1-first-registrations).

disputes as to precise boundaries) and also on the supposition that each owner contributed a portion of land when the highway was formed.<sup>55</sup>

Q.12. In relation to the order way, it will be noted that the exclusion of ownership continues west from A along Monkey's Hill, which undoubtedly is a public road. There is, however, no such exclusion in relation to the public road north-east from A along Monkey's Hill, both this road, and part of the Heronden Road, being included within the registered title (the Land Registry is willing to include within a title land where a legal presumption operates).<sup>56</sup>

Q.13. Thus, the only realistic explanation for the exclusion of the whole of the order way from the adjoining owners' title (save the former railway line) is that the order way is a highway.

Q.14. It may be said that there is authority for the proposition that ownership of a private occupation road also may pass *ad medium filum* (*Holmes v Bellingham*<sup>57</sup>). However, while the circumstances in *Holmes* of the urban lane serving a brewhouse pressed for such an inference, it is not obvious how the decision might be applied to the context of a rural way such as the order way. The presumption is founded on a supposition that the proprietor of the adjoining land at some former period gave up for passage all the land between the proprietor's inclosure and the middle of the road. But in relation to a private road, the dedication is likely to have occurred in relatively recent times (it being hardly possible to maintain such a way, of wider public utility, as exclusively private over a period of generations: see Private road at item I.G above), and far from obvious why, having dedicated such private rights, the extent of the landowner's ownership would be modified, in any subsequent conveyance, to exclude the private road. Whereas in relation to a public road, the dedication is presumed to have occurred so long ago — in time out of mind — that no plan identifying the land of adjoining owners has ever needed to address the question of ownership of the road.

Q.15. The presumption is also inherently unlikely where the adjoining land was, in origin, held in separate hands on either side of the road (as was the case in relation to the order way: see the position at the time of the Tithe Act 1836 at item II.D above, para.II.D.5). If at least two owners of such land jointly dedicate a private road, constructed along the margin of their land, intending (as the presumption implies) that the new private road be jointly owned by all the adjoining owners, none of them has control of the road as a whole, and each owner has control only of that half of the road adjoining the owner's land. As an intended mechanism to create a new private road, it is a recipe for a crisis in management. Each owner would have to grant and acquire the necessary private rights over each portion of the road. New rights could be conferred on third parties only by all the owners acting jointly. No owner would be incentivised to resist use by third parties lacking such a right. Maintenance responsibilities would fall on each owner, but only up to the centre line. No adviser would recommend such an arrangement in the context of the order way, yet the presumption insists on an orderly and intentional origin. It is submitted that the application of the presumption to private roads, far from being on a standing with highways, is isolated and unusual, and entirely unlikely to account for the context of the order way.

<sup>55</sup> The 'ad medium filum' rule, LexisNexis, [www.lexisnexis.co.uk/legal/guidance/the-ad-medium-filum-rule](http://www.lexisnexis.co.uk/legal/guidance/the-ad-medium-filum-rule).

<sup>56</sup> [www.gov.uk/government/publications/land-registry-plans-boundaries/land-registry-plans-boundaries-practice-guide-40-supplement-3#legal-presumptions](http://www.gov.uk/government/publications/land-registry-plans-boundaries/land-registry-plans-boundaries-practice-guide-40-supplement-3#legal-presumptions)

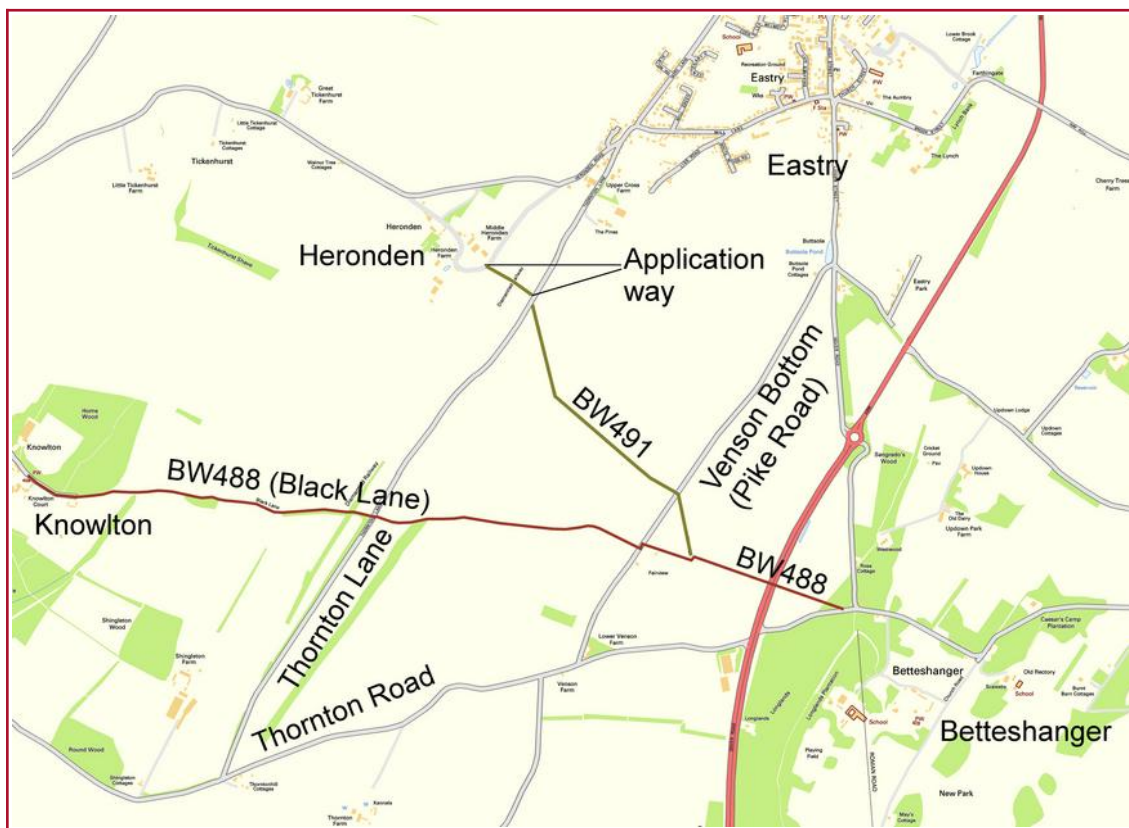
<sup>57</sup> (1859) 7 CB (NS) 329.

Q.16. **Conclusion:** The absence of any registered title to the order way (save at the site of the former level crossing) is good evidence that it is a highway in origin — indeed, it is submitted that it is the only plausible explanation.

Q.17. **Points:** 3

## R. Bridleway EE491

### Bridleway EE491 context map



R.1. **Background:** The order way is part of a longer east-west traverse of the downland south of Eastry: it begins with the order way in Heronden (a hamlet to the south-west of the present extent of Eastry village) leading east south-east to Thornton Lane, and then continues south-east as bridleway EE491 to cross Venson Bottom (also known as Pike Road) and join with bridleway EE488 (Black Lane) shortly before the latter bridleway crosses the Dover Road (now a dual carriageway, the A256).<sup>58</sup>

R.2. The order way and bridleway EE491 were together the subject of a single application for a definitive map modification order. Separate orders were made for the order way and bridleway EE491; the latter was confirmed without objection.

R.3. The order way, taken with its continuation along bridleway EE491, is one of several east-west links across the parish of Eastry south of the village itself (the others comprising Thornton Road<sup>59</sup> and bridleway EE488 (Black Lane)), but one which appears, at least east of Thornton Lane, always to have had the status of a bridleway. The continuation beyond

<sup>58</sup> The present dual carriageway follows approximately the alignment of the Dover, Waldershare and Sandwich turnpike.

the order way along bridleway EE491 is not marked on historical maps which focus on the depiction of roads, but it appears on large-scale nineteenth century mapping, and bridleway EE491 notably is annotated as a bridle road on the Eastry tithe map (see Illustration vi at item II.D above). It may be that the part of the route between A and B formerly was of a greater status than bridleway, being depicted as an enclosed road on some early maps, but the evidence is believed to be insufficient to confirm its status as such.

R.4. The course of the bridleway is a reasonably direct and continuous way between A and the junction with bridleway EE488, and so beyond, along the course of bridleway E488 (now interrupted by the dual carriageway Dover Road) to Betteshanger and Deal. The evidence for the status of the way between Heronden and Venson Bottom, taken collectively, is good, and it is submitted that the confirmed status of bridleway EE491 adds weight to the case for confirmation of the order. Thus given the status of EE491 as a bridleway, the order way also must be a bridleway, because bridleway EE491 serves a purpose only as a cross-country way from Tickenhurst and Heronden east to Betteshanger and Deal. There is little value to users from Eastry adopting cross-field bridleway EE491 striking off Thornton Lane 500m south-west of Eastry mills (formerly the nearest part of Eastry village) only to reach Betteshanger via a longer route than could be achieved by using the Dover Road out of Eastry. The *raison d'être* of bridleway EE491 is to provide access from the Heronden area east towards Betteshanger, and therefore the order way must be part of that route of at least the same status.

R.5. The order way also serves to provide access from Heronden south towards Eythorne and Shepherdswell: see para.I.H.6 above.

R.6. **Points:** 2

59 Thornton Road is to be distinguished from Thornton Lane: the latter terminates on Thornton Road at its southern end.

## **Annexes**

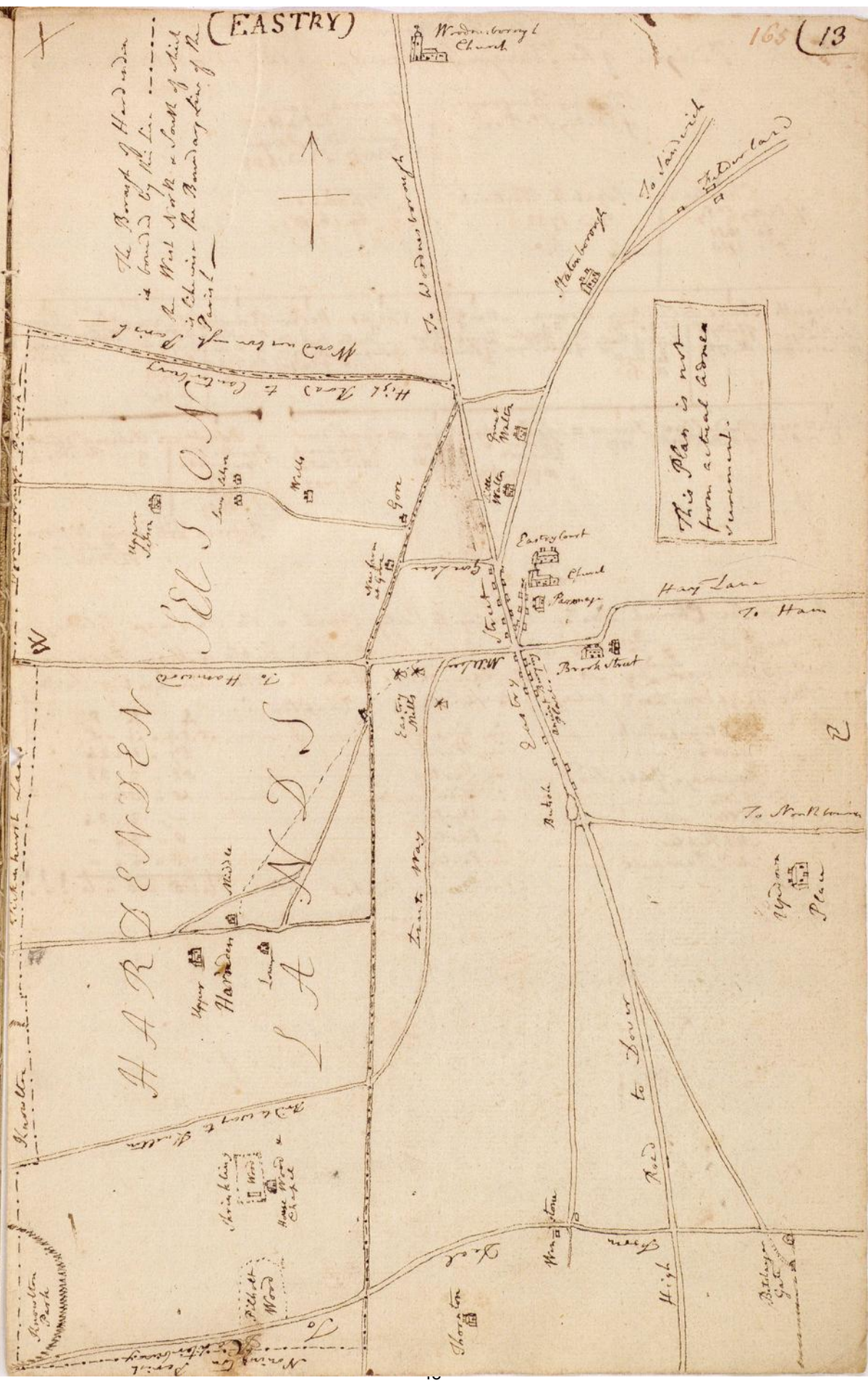
### **Annexe 1: Boteler sketch map**

(See statement of case item II.B)

(EASTRY)

X

The Borough of Hardwiden  
is bounded by this line  
the West North a South of which  
is shown the Boundary line of the  
Parish



This Plan is not  
from actual admea  
monument.

HARDWIDEN

EASTRY MILLS

Upper  
Hardwiden  
Lower

Eastry  
Church

Stout  
Garden

Eastry  
Mills

Brook  
Street

Road to Lower

To Sparkburn

Hay Lane  
To Ham

To Widenborough

To Sandwich  
To Dunlaw

Knollton

Knollton  
Park

Drinking  
House  
Chapel

Ward

Thorton

Winstone

Billing  
Gate

Z

W



**Annexe 2: Contracted map of principal roads in Eastry**

(See statement of case item II.CA.)

THE CONTRACTED MAP of the Principal Roads  
 in the Parish of EASTERY County of Kent.  
 1836



## Annexe 3: Canterbury Chapter Estates map of Eastry, Tilmanstone and Worth

(See statement of case item II.E)

