

The Hampshire (Hart District No. 27) (Parish of Bramshill) and the Wokingham Borough Council, Parish of Swallowfield (Swallowfield Byway Open To All Traffic 38 and Swallowfield Restricted Byway 39) Definitive Map Modification Order 2019

ROW/3271783

Proof of evidence prepared by Hugh Craddock on behalf of the British Horse Society as applicant for the order

A. Introduction

A.1. My name is Hugh Craddock. I am appointed by the British Horse Society as an access and bridleways officer for south and east Kent, with responsibility for historical research in relation to rights of way. I have a class 2/1 degree in economics and agricultural economics from the University of Exeter. I have been employed as a casework officer for the Open Spaces Society since 2016, in which role I advise local correspondents, members and others in relation to common land, town or village greens, rights of way and open spaces. Until 2016, I was a civil servant in the Department for Environment, Food and Rural Affairs (and predecessor departments), and my responsibilities included advising on the preparation, enactment and implementation of Part I of the Countryside and Rights of Way Act 2000 (which conferred a statutory right of access to open country and registered common land) and the Commons Act 2006 (which updated the registration, management and regulation of common land).

A.2. I am a director and member of the Institute of Public Rights of Way and Access Management. I am co-editor of the third edition of *Gadsden and Cousins on Commons and Greens*, a legal text book published in 2020 by Sweet & Maxwell. I have written two papers for the former *Rights of Way Law Review*, one of which was on Access and Management under the Commons Act 1899. I have written several articles for *Waymark*, the journal of the Institute, including on directions in definitive map modification order cases, limitations in Town and Country Planning Act public path orders, and the revocation and variation of public path orders. I maintain a blog, pannageman.craddocks.co.uk, which has published 59 posts over nearly ten years, on subjects related to commons, greens and rights of way.

A.3. In my voluntary role for the British Horse Society, which I shall refer to as the society, I research and make, on behalf of the society, applications to record or upgrade rights of way on the definitive map and statement for Kent. I have applied in respect of 43 discrete routes, of which the applications for six routes have been determined and all but

one have been confirmed, with one pending. Prior to focusing on Kent, I previously applied for the order way and another way in nearby Riseley.

B. Knowledge of the order way

B.1. I first recall visiting the order way aged about 10 with my father (in the early 1970s). We visited in an ordinary saloon car. I encouraged him to drive through the ford from A to D, but he was advised against doing so by a man standing on the bank who suggested it was unsuitable. I have made several visits on foot and on horseback around 2014, riding through the ford on one occasion: the photograph at p.47 of the society's SOC¹ was taken by me, having crossed first.

C. Research into the order way

C.1. I am reasonably familiar with the order way in practical terms, and have conducted extensive research into its history which is reflected in the society's SOC.

C.2. I have made two visits to the Hampshire Record Office in Winchester to consult records local to the Hampshire part of the order way, such as the Eversley tithe award. I have also visited the Berkshire Record Office in Reading, the National Archives and the British Library. Berkshire inclosure awards are published online.

C.3. I was also fortunate to find an extensive archive of county maps of Hampshire online, primarily through the Old Hampshire Mapped² website arranged by Jean and the late Martin Norgate. Mr Norgate was registrar with the former Hampshire County Council Museums Service from 1989 to 2002, and most of the maps appear to have been copied from those held by the Museums Service.

C.4. The evidence collected from initial research enabled me to make on 8 May 2013, on behalf of the society, the applications to record the order way (two applications were made, one to Hampshire County Council and one to Wokingham Borough Council).

C.5. Subsequent to the order being made, I gathered further evidence to support the society's SOC, from a more intensive review of material available on the web, and from a visit to the Berkshire Record Office.

C.6. The society's SOC includes the further evidence, as well as a commentary on the evidence supplied by the objectors and their interpretation of that evidence. The society's SOC includes a number of photographs of the order way taken by me in 2014, as well as aerial or published satellite photographs dating from between 1972 and the present day. And the society's SOC refers also to the user evidence relating to the order way, to which Nicola Greenwood will speak.

C.7. Hampshire County Council, as order-making authority, generally has relied on my evidence in determining the application and in preparing its SOC, although it has obtained some new material. I have included all the evidence available to me in preparing the society's SOC, even where the same evidence has been presented in the council's SOC, in order to show the whole picture and include all the evidence in one place.

1 Subsequent references to page numbers are to those in the society's SOC.

2 oldhampshireremapped.org.uk/hantsmap/hantsmap.htm

D. History of the order way

D.1. I suggest that the order way is ancient in origin. By ancient, I mean dating from the mediæval period or earlier. There is no evidence that the land on either side of the order way south of the Blackwater river was inclosed as part of any formal, statutory process. It seems likely that the land comprises ancient inclosures — land which was inclosed sufficiently long ago that no records endure (if they ever existed). If one looks at the pattern of the inclosures south of the Blackwater River on the Ordnance Survey County Series first edition twenty-five inch plan in appendix 2 to this proof, one sees that they are not rectilinear — as might be the outcome of an inclosure commissioner's plan — but haphazard in layout: the product of manual labour long ago, when fields would have been carved out of the waste, ditches dug along the boundary, and hedge banks thrown up behind them. This is particularly the case along the boundary between the inclosures south of the Blackwater River and Bramshill Common (as it then was): this boundary was intended to last, to keep livestock on the new holding and to keep out commoning livestock (as would have been the customary obligation).

D.2. My suggestion as to origin is not conjecture. The former boundary between the parish of Eversley or Bramshill³ and the detached part of Odiham followed the centre line of the order way between C and near to D. This is shown in the Ordnance Survey boundary documents (p.112). That boundary, in turn, is likely to reflect the manorial boundary between Great Bramshill and the manor within Odiham of which Smith's Farm, to the west of the order way, formed a part. As such, it is likely that the order way is very old, for the order way very probably predated the concept of a manor comprising enclosed land with fixed boundaries.

D.3. Consider the alternative proposition, in which the order way might have been carved out of existing enclosed lands. First, its creation would have required the co-operation and agreement of three lords of the manor, those for Great Bramshill, the relevant manor within Odiham, and Beaumes (a manor within Swallowfield). They would have had to agree that the way should be created precisely along the line dividing the manor of Great Bramshill and that of Odiham, which one might have expected at that time to be denoted by some physical boundary feature such as a hedge or ditch. And by extraordinary coincidence, it turns out that the way, projected north along this boundary, emerges at the Blackwater River in precisely a place suitable for crossing by a ford and opposite an existing road leading north to Farley Hill. Even if all of these improbabilities were overcome, there is one further aspect which puts the proposition beyond credibility. The width of the ford at its greatest extent, as shown on the Ordnance Survey County Series maps, is over 100 metres. No landowners, deciding to create a new way across their lands, would surrender such a vast extent of their already-enclosed lands for the purposes of the new way: at most, they might agree to allow slightly more width at the river crossing to enable driven cattle to cross (if indeed it was their intention to enable the way to be used by livestock). The only credible explanation is that this wide crossing was already here when the lands first came to be enclosed.

D.4. Accordingly, I would suggest that the order way has been here since time immemorial. Perhaps it already was a way south at the time of the Roman road to Silchester? It is not possible now to say, at least without archaeological research. But it certainly is very

3 It appears that Bramshill formerly was a tything of Eversley (which is why it appears in the tithe apportionment for Eversley), but was created a civil parish in its own right, possibly under the Local Government Act 1894.

old indeed. It may have been a way which existed south from the Roman road through the ford and across the waste of Bramshill.⁴ Long before inclosure, livestock being driven across the river would have strayed wide to find a line of crossing, and the wide splays either side of the river were preserved by subsequent inclosures of farmland, at least until recently.

D.5. And if the order way is very old, It must be a public way. It is inconceivable that an ancient way across the countryside, serving a useful function in linking different communities, could remain private over many centuries. Indeed, I would suggest that the concept of being private in the mediæval era was unknown in the context of a purposeful through way of this kind.

E. The historical evidence

E.1. I now propose to turn to the historical evidence which supports the society's assertion that the order way is in reputation a public carriage way, and that it was dedicated as such in the distant past.

E.2. I do not propose to dwell on each item of evidence set out in the society's SOC. I do, however, propose to alight on the more significant elements or those which might benefit from elucidation. I prepared the evidence contained in the society's SOC, and I am content to be cross-examined on any matter of fact or opinion contained in it, even if such matters are not within this proof.

Finchampstead bailiwick

E.3. Before summarising the evidence in the society's SOC, I wish to mention the bailiwick of Finchampstead. The bailiwick was one of the four administrative areas of the Forest of Windsor. The boundary of the forest followed the Blackwater River, as does today the county boundary, and was described in a perambulation of 1631 reported in the Berkshire Archaeological Journal thus (the relevant pages are reproduced in appendix 1):⁵

At Yatley Mille the line followed the branch called *the Sheire Stream* and so to *Blackwater Bridge* (Eversley Bridge), *Oulde Ford* (Joulding's Ford), and *Thatcher's Ford*.

E.4. The author of the article does not explain the connection between 'Oulde' Ford and 'Joulding's' Ford, but it seems reasonable to infer that the author's placement of the ford is correct. The date of the perambulation is quite close to the date of Norden's map, to which we come next.

County and other historical maps

E.5. I turn first to the John Norden map of the Forests around Windsor (p.58) which dates from 1607. This map is remarkable in itself, containing far more detail of the road network than is characteristic of its contemporaries.

E.6. I draw attention to the way marked to the left of the word Westwood and below the word Fareleyhill, which shows a road leading to the Blackwater River in a location which

⁴ Bramshill is derived from Old English *Brōmeshyll* meaning broom hill — *i.e.* a hill of heathland (*Place Names of Hampshire*, Richard Coates).

⁵ [*An Elizabethan Swainmote Court Roll of Finchampstead Bailiwick*](#), G A Kempthorne, Berkshire Archaeological Journal (1932), vol.36, pp.106–121 at p.119.

fits well with the order way. The SOC refers to a further label, apparently 'wiuoldes', to the left of the intersection of that way with the river. I now believe that this name is Wivold, there being a wood called Wyvols Copse just to the north of BOAT 33, and Wyvols Court is to the west of Swallowfield village.

E.7. I suggest that some pink colouring is visible on the south side of the river which shows a continuation into Hampshire. But as the map is of the forests around Windsor, and not of Hampshire at all, it hardly is surprising if the map maker took no further interest in its route. It is in any case apparent that this map, despite showing an extensive road network, shows only what were perceived to be the most important or useful roads. The map maker would have no interest in showing an inevitably minor no through road. We see that there are two roads crossing the Blackwater river, visible on the extract, to the west of Swallowfield and to the west of Arborfield, which have barely any continuation beyond the bridge in each case.

E.8. I do not propose to go individually through each of the county and similar maps, which date from 1759 (Taylor's Map) to 1846 (Snare's Map), unless the inspector wishes me to focus on any particular item. I would draw the inspector's attention to the list of these maps at pp.21–22, recording in each case the name applied to the ford, and whether each map shows the way north or south of the Blackwater River, or both sides. What I find remarkable about these 12 maps is that they all appear to show the order way. It is unusual to find what today we perceive to be a minor track shown with such regularity on county maps of this era, which tend to ignore the more minor routes. I conclude that, consistent with the map of the Forests around Windsor, the order way was not at this time a minor track at all, and probably had at least parity with the neighbouring roads through Thatcher's Ford and New Mill Ford.

E.9. It also is plain that these maps show the order way so far as is relevant to their function: a map of Berkshire need not show much if anything of the order way in Hampshire, and *vice versa*. But this does not mean that they suggest no continuation across the county boundary, and there are in any case several maps, identified in the table, which do depict such a continuation.

E.10. I would suggest that, where a way of this kind is recorded on 12 maps over a period spanning more than two centuries, and with nearly a century elapsed between the publication of Taylor's Map and Snare's Map, it is highly unlikely that the way was considered to be private, for two reasons. The first is that map makers would not have considered it prudent to mark such a way, appearing to be a through route, on their maps if it were not in fact a public way available for the use of those who purchased the maps. One or two might have made such an error, but if it were done repeatedly, word would surely have got around. Plainly, it did not, because no-one took objection to what was shown.

E.11. The second reason is that some of the map makers expressly describe the way in terms which suggest a public road: *Rocque* (p.65) refers to 'The Main and Crofs Roads, Bridle Ways'; The *Topographical Map, of the Town of Reading & the Country* (p.69) refers to 'the Main and Cross Roads'; *Cary's half-inch map* (p.80) refers to 'parochial roads'; *Greenwoods* (p.88) refers to 'cross roads' — a term which is addressed in more detail in the society's SOC.

Swallowfield inclosure award, 1814–17

E.12. I turn to the first Swallowfield inclosure award of 1814–17 (p.77). This does not show the order way, but it does include land on the north side of the Blackwater River slightly west of Jouldings Lane. It includes a road — now BOAT 33 — which leads into Jouldings Lane, annotated ‘To Bramshill Common’, and it is only sensibly possible for horses, carriages and carts using that road to reach the common via the order way. There is also a footpath along the river, which is marked ‘To Jouldings Ford and Bramshill’. Thus the ford is noted as a destination and as a means of onward transit to Bramshill, presumably via the footbridge next the ford which disappeared late in the nineteenth century.

E.13. There is some consensus that such directional labels on maps of this period are associated with public ways, and usually public roads.

Eversley tithe award

E.14. The Eversley tithe documentation (p.91) rewards careful study. This relates to the commutation of tithes in Eversley and Bramshill. The order way is on the map numbered 665, and this is described in the apportionment as, in effect, ‘Road through Swallowfield Ford’. It appears in the apportionment under the heading ‘Roads and Waste in the Parish of Bramshill’. There are eight such entries: three comprise waste, being common land and the village pound. The others appear all to be public roads. It may be helpful here to refer to the locations map in the society’s SOC at p.8. We have, starting from the bottom at entry 667a, Plough Lane (a road striking south-west from the southern end of Sandy Lane to Hazeley); the minor road west from Thatcher’s Ford to what formerly was Great Ford; the northerly, enclosed part of Ford Lane; the order way; and the road through Well House Farm Yard. Three of those roads, then and now, indubitably were public roads. A further one is the order way. The last is the continuation of Well House Lane across the Blackwater River, to become Forges Lane in Berkshire.

E.15. Part I.K of our SOC explains why we believe that way, to Forges Lane, which also lies through a ford across the river, to be public, notwithstanding that a small part is not now recorded as such. Note that no entry is contained in this section of the apportionment for unenclosed roads across the common, for they are part of the entries for Lower and Upper Common.

E.16. This section of the apportionment does not contain any entries for what might be private roads: for example, it does not contain the road leading from Well House Lane to what was then Smith’s Farm, which is numbered 509, and which, in common with the order way, is lightly shaded in sienna, but which is not public. None of the roads identified in this section is made subject to a rent-charge, notwithstanding that, if the order way were privately-held land, its substantial dimensions, including up to 100 metre length of grazing next the river, surely would give rise to the owner attracting a significant liability.

E.17. I therefore suggest that this section of the apportionment is confined to public roads, and is further evidence of the order way status.

E.18. I should add that the Swallowfield tithe award (p.98) presents a consistent impression, for the order way between A and B, of a public road.

Bristol and Dover Direct Junction Railway

E.19. The plans and book of reference for the Bristol and Dover Direct Junction Railway (p.100) are on the face of it quite straightforward: they record the order way as a parish road in the charge of the Surveyor of Highways, leading to Swallowfield Ford. That is good evidence of status.

E.20. The plans date from 1845, described as a period of 'railway mania' when shareholders sought immediate profits from speculative schemes. I accept that there are errors in the plans which suggest a survey and preparation under time pressure in order to meet Parliamentary deadlines.

E.21. However, it is one thing to make errors in the documents prepared from the survey, such as to mislabel a parcel or to make drawing errors. These might arise from mere clerical errors in copying the plans. It is less obvious how the status of the order way might be misattributed. It is fairly inevitable that the surveyor must have made local inquiries to establish the status of the order way, and such inquiries most likely were directed towards the parish surveyor, or the agent of the Bramshill estate. Either would doubtless have given his true opinion. The railway surveyor would have wished to minimise costs, and to misattribute public road status to a private road would have served substantially to increase the costs of any bridge to be built: under ss.49 and 50 of the Railways Clauses Consolidation Act 1845, habitually incorporated with any railway Act passed after 1845, a bridge to accommodate a public road was of substantially more generous dimensions than a private road bridge. It is unlikely that the surveyor would have got this wrong so as potentially to impose unnecessary additional costs. It is immaterial that the order way lay outside the limits of deviation; the surveyor would have adopted a uniform approach to such matters.

E.22. In recording the existence and status of the order way, I suggest that the surveyor wanted to acknowledge the existence of this public road feeding into the common at C. In our SOC (p.101), we show how the various tracks across the common were attributed in the book of reference. Most of them were described as 'Road', with one an 'Occupation Road' which feeds east into two 'Road's. No express provision is made for bridges on the common, save apparently for a crossing of Ford Lane⁶. This is not unusual: commons at this time were criss-crossed by many tracks and roads. The parish did not want to maintain them. The owner did not care greatly to discourage use. And the railway company did not want to build multiple bridges across every single track which might or might not be a public cart road. The railway company might well have thought that the provision of a bridge across Ford Lane would provide adequate access, and perhaps intended to put in a private occupation level crossing south of Well House Farm (though none is shown in the section). Perhaps further level crossings might have been provided. But no railway company was likely to put in costly bridges where it could employ its powers to divert any roads across the common to convenient crossing points. S.16 of the Railways Clauses Consolidation Act 1845 conferred express powers to 'divert or alter, as well temporarily as permanently, the course of any...roads, streets, or ways, ...in order the more conveniently to carry the same over or under or by the side of the railway, as they may think proper'.

⁶ Shown at 20m, 6f on the section at TW/1, SO, App.12, p.6: 'Road edge of common, level unaltered'.

Ordnance Survey original boundary mapping

E.23. The Ordnance Survey boundary documents (p.111) date from around 1871, and map Jouldings Ford in detail, and record the order way between C and D as a 'road'. The boundary sketch map for Bramshill and Eversley parishes identifies the boundary between Bramshill and a detached part of Odiham parish as following the centre line of the order way. This record underpins my view that the order way is ancient in origin, because the boundary would be unlikely to follow the centre of the way if the way was of later origin than the boundary.

Ordnance Survey County Series twenty-five inch second and third edition plans

E.24. The boundary records paved the way for recording boundaries on the Ordnance Survey County Series maps published subsequently. I have now been able to obtain a first-hand copy of the first edition of the Ordnance Survey County Series twenty-five inch plans, which is included in appendix 2.⁷ The second and third editions, dating from revision in 1898 and 1909, are included in our SOC (pp.119 and 130). These plans show a fairly consistent record of a broad crossing of the Blackwater River at A to C, a generously-proportioned enclosed way leading south-southwest towards Well House Lane, and a final stretch of about 40 metres ending at D which is unenclosed across the common. Oddly, the first edition plan shows a yellow colour-wash (indicating a metalled surface) only on that part of the order way on sheet Hampshire VI/9, which suggests a mistake — although one cannot quite be sure which part is mistaken.

E.25. The first edition plan is unclear in what is shown in terms of gates across the order way. The exit of the order way out of the ford on the south side of the Blackwater River, at X, appears to be gated, but this may be no more than the casing in which the river is enclosed. At Y, having regard to the better quality plan copy in the appendix, I now suggest that there appears to be a hedge across the order way but with a gap in the centre. In effect, perhaps there used to be a gate here, but the gate had been removed at the time of the survey, leaving a gap.

E.26. The second edition map (p.119) is more convincing in showing a gate at X. At Y, a fine pecked line closes off the enclosed part of the order way where it crosses the boundary of Bramshill Common, to signify the extent of the separate parcels comprising the order way between X and Y and the common itself. There is a line drawn across the second edition map about midway between C and D, but this is used to label a tiny part of parcel 23 which appears on the easterly of the two sheets.

E.27. It is only when one turns to the third edition plan (p.130) that one sees that any gate at X definitively has been removed, and a gate now is present at Y.

E.28. I therefore suggest that, taking account of this late nineteenth and early twentieth century mapping evidence, no gate consistently has been present across the order way during that period. The society therefore has asked that the order be modified to remove any reference to limitations. I will revert briefly to this point later.

⁷ This plan is not new evidence: it is a better quality reproduction of the plan which appears in the council's evidence at page 10.

Finance (1909–1910) Act 1910

E.29. It is the third edition Ordnance Survey County Series plan which is the basis of the assessment under the Finance (1909–1910) Act 1910 (p.123). Here, I have, in the society's SOC, made a short-sighted assessment of the available evidence. I am grateful to the objectors' SOC for drawing attention to the omission, which I will explain.

E.30. The Act provided for the imposition of four duties on land. The Inland Revenue was required to make an assessment of values for all privately-owned land. The Ordnance Survey County Series third edition plans were used to identify the extent of individual hereditaments, using numbering and discrete colours to distinguish larger holdings. Public roads generally were excluded from assessment, because they were treated as occupied by the highway authority.

E.31. However, on the relevant plan (p.123), we find that hereditament 34, comprising broadly speaking Bramshill Common, is identified only by a perimetral line, with an implication that everything within the perimeter is subject to valuation. I have illustrated in the SOC how similar practices were adopted elsewhere, apparently in relation to large areas of low-value land where it was not thought worthwhile to identify ineligible parcels.

E.32. There is an oversight on my part. This relates to the entry in the field book for the hereditament, of which only an extract was included in our SOC (p.125). A copy of this field-book entry is at TW/1, SO, App.5.

E.33. It can be seen that, on the third page of the entry, is a list of the parcel numbers included in the hereditament. Now, if we look at the base map at p.130, the order way is assigned parcel number 7 (0.306a) (not including a short piece of the way which is unenclosed south of Y) on sheet Berkshire XLV.12, and parcel number 26 (0.655a) on sheet Berkshire XLVI.9. (Generally, parcels split between sheets are assigned the same parcel number on each sheet *except* in relation to roads.) In the field book, no entry appears for parcel 7 against 'V-12', whereas parcel 23, which is the copse abutting the west side of the order way, is recorded. Nor is there an entry for parcel 26. Indeed, there is no entry at all for sheet Berkshire XLVI.9 (which contains a small part of Bramshill Common included within the overall area), because the common mainly is comprised in parcel 21, with the total area recorded against 'V-16'.

E.34. We can see that Ford Lane, which is assigned parcel number 12 on sheet Berkshire XLV.12, also is omitted from the list, whereas Well House Lane is braced with the rest of the common, and so effectively counted as part of the larger common comprised in parcel 21.

E.35. From this, I suggest that the valuer expressly excluded the order way from the valuation, contrary to the explanation of the evidence reported in the society's SOC, and that the valuer did the same in relation to other separately-identified public roads within the hereditament. In my opinion, this is significant evidence that the order way was considered to be a public road.

E.36. The objectors observe, in their SOC (paras.25–28) that Sandy Lane, a way across Bramshill Forest which partly is visible on the location map at p.8 of our SOC, and which was the subject of the challenge in *Todd*, also does not appear in the list on p.3 of the field book entry. (Sandy Lane is parcel number 52 on sheet Berkshire XLVI.13, and in the field book, no entry appears for parcel 52 against 'VI.13'.) However, in *Todd*, no-one disputed

that Sandy Lane was dedicated as a bridleway,⁸ but the dispute instead turned on whether it was dedicated as a public road — and that question has not resolved, the surveying authority having failed to make a new order to replace that quashed by the court. It is entirely plausible that an enclosed and made-up bridle or carriage road, dedicated to the public, should be excluded from assessment, in the same way as the order way.

Ordnance Survey object name book

E.37. The Ordnance Survey object name books (p.131) date from around the turn of the previous century, being updated to 1930. The book for Finchampstead and Swallowfield Parishes refers to Jouldings Lane as a parish road leading to Jouldings Ford. That entry was amended, having previously referred to a parish road leading to Jouldings Farm (the farm on the north-east side of the ford). It is not clear when the amendment was made, but as the amendment is in blue ink, and the page is endorsed 'No change on this page' in 1930, I infer it may be a correction contemporary with the original entry.

E.38. The entry provides support for the objectors' contention that the name does not apply to the order way from B to D: it does not tell us anything about the status of that part of the order way. It is not surprising that the road name ceases at the ford on the county boundary: we find that Forges Lane becomes, beyond the ford, Well House Lane, and New Mill Road becomes New Mill Lane.

Ordnance Survey one-inch New Popular Edition

E.39. In the Ordnance Survey one-inch New Popular edition map (p.135), we see the order way, in the immediate post-War period, described throughout as a road 'under 14ft of metalling', but in 'bad' condition. Whereas Thatcher's Ford is described as an 'unmetalled road'. The casual map user might well conclude that the better route between Farley Hill and Bramshill was though Jouldings Ford rather than Thatcher's Ford.

Swallowfield parish council

E.40. We find in 1931 that Swallowfield parish council (p.136) decided to write to the landowners asking them to remove 'an elm tree lying across the road at Jouldings Ford'. There was no reason for the council to concern itself with a blocked private road.

E.41. In 1948, it was minuted that: 'A letter from the Surveyor pointed out that the ford was entirely in the Hampshire boundary and any improvement would have to come from that source.' The minute suggests that the council had asked for improvements to what it must have perceived to be a public road — it hardly would press for improvements to a private road.

Bramshill Estate Sale

E.42. Finally, I turn to the Bramshill estate sale in 1952 (p.138), when Lord Brocket sold off the estate in lots. The particulars of sale are indicative of the beliefs of those who managed the sale.

E.43. The estate generally comprised the land south of the Blackwater River. Land to the west of the order way was parcelled into lot 10 (coloured pink) and that to the east into lot

⁸ Judgment, paras.1, and 45 last bullet.

7 (blue). Bramshill Common was lot 11 (green) The order way is uncoloured (although there is some bleeding of pink), as is Well House Lane and other public roads.

E.44. I suggest that the particulars show that the estate believed these uncoloured ways to be highways, for three reasons.

E.45. First, there is a presumption that highways belong to the frontagers *ad medium filum*, and therefore do not need to be identified in any conveyance of the frontager's land. That plainly is what was intended here: the purchasers of lots 7 and 10 obtained title to the order way *ad medium filum*, without any express provision. There was no need to colour the order way blue and pink in two finely-drawn halves because it was regarded as a highway to which the presumption applied. That was and remains conveyancing practice.

E.46. Secondly, lot 10 includes no part of the widened splay at Jouldings Ford to the west of the order way, which the society contends is highway waste. This is a substantial piece of land which could only have belonged to the Bramshill estate, yet it was not expressly included, as one might expect, within lot 10. I suggest that it *was* included in lot 10 *ad medium filum* — but it did not need to be coloured pink, and the convention is that it should not be, again because it was regarded as highway waste.

E.47. Thirdly, the stipulations as to easements (p.143) made detailed provision for any necessary rights which might need to be reserved by the estate to purchasers. None was reserved in relation to the order way in favour of any purchaser — even though it might be thought that the purchasers of lots 7, 10 and 11 would be most in need of private rights over the order way if it were not public. If, as the objectors contend, the order way is private, then no purchaser of any part of the estate would have acquired a right to use the way, for none of them could claim a right of way of necessity, none of them needing to rely on the order way to reach any of the allotted parcels of land.

E.48. If the objectors are correct, it seems that the estate retained the title to the order way. Why would it do that? This was a disposal of the entire estate. Lord Brocket had no conceivable use for the order way: he no longer would own any of the land which it particularly advantaged. And Lord Brocket had long since lost interest in the estate — he had bought a house in Ireland in 1949. No-one else would have been able to use the way save with his permission — but he was disengaged from the estate. No-one acquiring land from the estate could claim to have acquired an easement over the way, because prior to the sale, the land was in unified ownership. Title to the way to this day remains unregistered, characteristic of a highway, save for the possessory titles registered (see p.42).

E.49. If the order way had no utility at the time of the sale in 1952, and was considered to be private, and of no advantage to the purchasers of lots as a means of access, why was it not parcelled up with the adjacent lots, or sold as a separate lot?

E.50. And yet, 70 years on from the Bramshill estate sale, we find that the order way remains open and unobstructed to public use, save for the encroachments made by certain frontagers, and notwithstanding that the frontagers themselves have no rights to use the order way, and no incentive to keep it open. That is an unlikely outcome for a way which, if the objectors are right, is an entirely useless strip of land intentionally held back from sale in 1952 by an estate owner who had no purpose in doing so.

Settlement

E.51. I have commented at length on the historical origin of the order way, not only because that is directly relevant to our case, but because it is relevant to the objectors' submissions on the Bramshill estate being in settlement between 1779 and the early twentieth century (Objectors' SOC, paras.12–22).

E.52. I have suggested that the order way is ancient in origin, and the society's SOC refers to evidence which demonstrates that the order way certainly predates 1779 in origin — Norden's Map of Forests around Windsor (1607, p.58), Taylor's map (1759, p.62) and Rocque's map of Berkshire (1762–64, p.65), as well as the perambulation of the Finchampstead bailiwick, dating from 1631.

E.53. There then chronologically follow a series of county maps and other evidence which show that the order way subsisted throughout the period of settlement. Moreover, in my view, the evidence taken together demonstrates that the order way throughout this documented period of some 400 years (and therefore from a date long before the settlement) was a well-established road which had the reputation of use by the public, and indeed, during the earlier part of this period, was a pre-eminent crossing of the Blackwater River.

E.54. In short, I suggest that, if the evidence shows such reputation was current in the nineteenth century, the documented history demonstrates that the reputation was not innovated in that century but long before, and established by the early seventeenth century at the latest. That would be consistent with an ancient origin of the order way.

E.55. If the Secretary of State is not satisfied that dedication can be shown to have occurred prior to 1779, I suggest that, in the alternative, it occurred early in the twentieth century, as soon as dedication became lawfully permissible. During the period of settlement, the tenants for the time being of the Bramshill estate acted as if dedication might otherwise have been inferred. An inference of intention to dedicate was, in effect, latent. I suggest that, as soon as the legal restrictions on dedication were abrogated by Act of Parliament, enabling dedication, common law dedication did indeed occur. The Bramshill estate sale in 1952 is (among other documents) evidence of such dedication (if dedication did not occur long before the period of settlement).

User evidence

E.56. This brings me to the close of the historical evidence on which the society relies.

E.57. There is also the evidence in the society's SOC about the endurance events which have passed along the order way (p.33). These took place in 2005, 2006, 2008, 2009, and 2011, involving several tens of riders on each occasion. Endurance rides in Britain are organised by Endurance GB, which states that it 'cater[s] for all levels of ability, whether you simply want to compete occasionally at local events or aim eventually for top class and international competition. We provide and manage well over 100 events a year for members of the Association riding registered horses and ponies as well as many social and pleasure rides, to encourage non-members.' Thus riders in these events would have included a range of riders, not all of them experienced. In one year, September 2008, over 60 riders passed through the ford.

F. Requested modification of order

F.1. I wish to add some remarks about the society's wish that the order be modified before it is confirmed.

F.2. The society's SOC explains that a modification is sought to show the full width of the ford, and to remove reference to historical limitations in the form of gates. It may be helpful if I explain the evidence on which that request for a modification is founded.

F.3. As I said in my opening words, my view is that the ford is very old. It also was very wide — over a 100m length of the river. The width of the ford is shown on several accurate maps of the nineteenth century, including the Eversley tithe map and the Ordnance Survey County Series twenty-five inch plans. But it is also corroborated today by the registered titles of land abutting the ford. There are only two titles which substantially encroach on the highway waste identified in those nineteenth-century maps, and they are identified on p.42 of the SOC: HP476207 and HP830941. Both of those titles are possessory titles, confirming — as we already know from the Bramshill estate sale documents of 1952 — that the titles were obtained through claimed adverse possession. However, if the society is correct that the land comprised in those titles is highway waste, then it is not possible to obtain a possessory title⁹ and the titles were incorrectly granted by HM Land Registry.¹⁰ Thus, leaving aside those possessory titles, the substance of the full extent of the waste at the ford would remain unregistered today. I suggest that this is a classical illustration of what might be expected if it were highway waste.

F.4. As to the gates, the council in its own statement of case (para.53) acknowledges that the user evidence shows the order way to have been free from limitations since 1965. I would add that, since the evidence shows that no gate has been consistently present in any location since the first large scale plans were published in the late nineteenth century, it must be that the way has become rededicated without limitations, even if such limitations can be shown to be coeval with the origin of the order way (which I do not accept).

G. Concluding remarks

G.1. Taking the historical evidence as a whole, my view is that it plainly demonstrates that the order way is ancient in origin, and has long been regarded as a public cart road. None of the evidence expressly refers to bridleway or footpath status; the county maps collectively are strongly suggestive of a road for vehicles, the railway evidence refers to a public road, and other documentary sources describe a road with an implication that it is a vehicular road.

⁹ [*R \(on the application of Smith\) v The Land Registry \(Peterborough Office\)*](#) [2010] EWCA Civ 200.

¹⁰ However, in that case, it may be that title could be granted *ad medium filum*.

G.2. Even if no individual piece of evidence is conclusive in itself, taken as a whole, the evidence show reputation as a public road over a period of roughly two centuries, and an origin going back to at least the sixteenth century. I therefore commend that the order should be confirmed, subject to the modifications which the society seeks.

I believe that the facts stated in this proof of evidence are true, and I confirm that the opinion expressed are my true and professional opinions.

A handwritten signature in black ink, appearing to be 'H Craddock', with a stylized, cursive script.

Hugh Craddock
22 June 2022

An Elizabethan Swainmote Court Roll of Finchampstead Bailiwick.

By LT.-COL. G. A. KEMPTHORNE, D.S.O.

THE bailiwick of Finchampstead was one of the four administrative areas of Windsor Forest. The first mention of a bailiff in the Calendars of Patent Rolls is in the reign of Richard II., when Walter Wimmbushe held that appointment at a salary of 6d. a day, and, with three of the local gentry, was ordered to apprehend Matthew Bail, butcher, of Wokingham, who had resisted arrest for trespass of vert and venison in Windsor Forest.¹ From this date down to the time of the Forest Inclosure of 1813 the appointments of his successors, latterly termed rangers, are found in the State Papers.

The Public Record Office contains a number of proceedings of the "Swainmote Courts" held in the bailiwick during the 16th and 17th centuries which often provide details of personal or topographical interest. The fir plantations which in the nineteenth century covered the country were then absent, and the eastern three quarters of the bailiwick, which included the chapelry of Sandhurst, the parish of Easthampstead, and parts of Finchampstead and Wokingham, were open heath. In 1615 Easthampstead had 55 houses, Sandhurst 23, Finchampstead 59, Barkham 15.

The courts in which forest law was administered were the Attachment Court, supposed to be held in each bailiwick at forty-day intervals, and the Eyre. At the former, cases of trespass on the vert, as distinct from venison trespass, were presented, and the offenders either amerced in small fines, or bound over to appear at the next Eyre. As poachers, if caught, were committed forthwith to the "Cole Hole" at Windsor Castle to be dealt with under the order of the Chief Justice of the Forest, venison pleas are not found in the Attachment Court Rolls. The term Swainmote, properly the periodic meeting of the forest officers to discuss business, was, in the sixteenth and following

¹ *Cal. Pat. Rolls* 1383, 1438.

AN ELIZABETHAN SWAINMOTE COURT ROLL OF
FINCHAMPSTEAD BAILIWICK.

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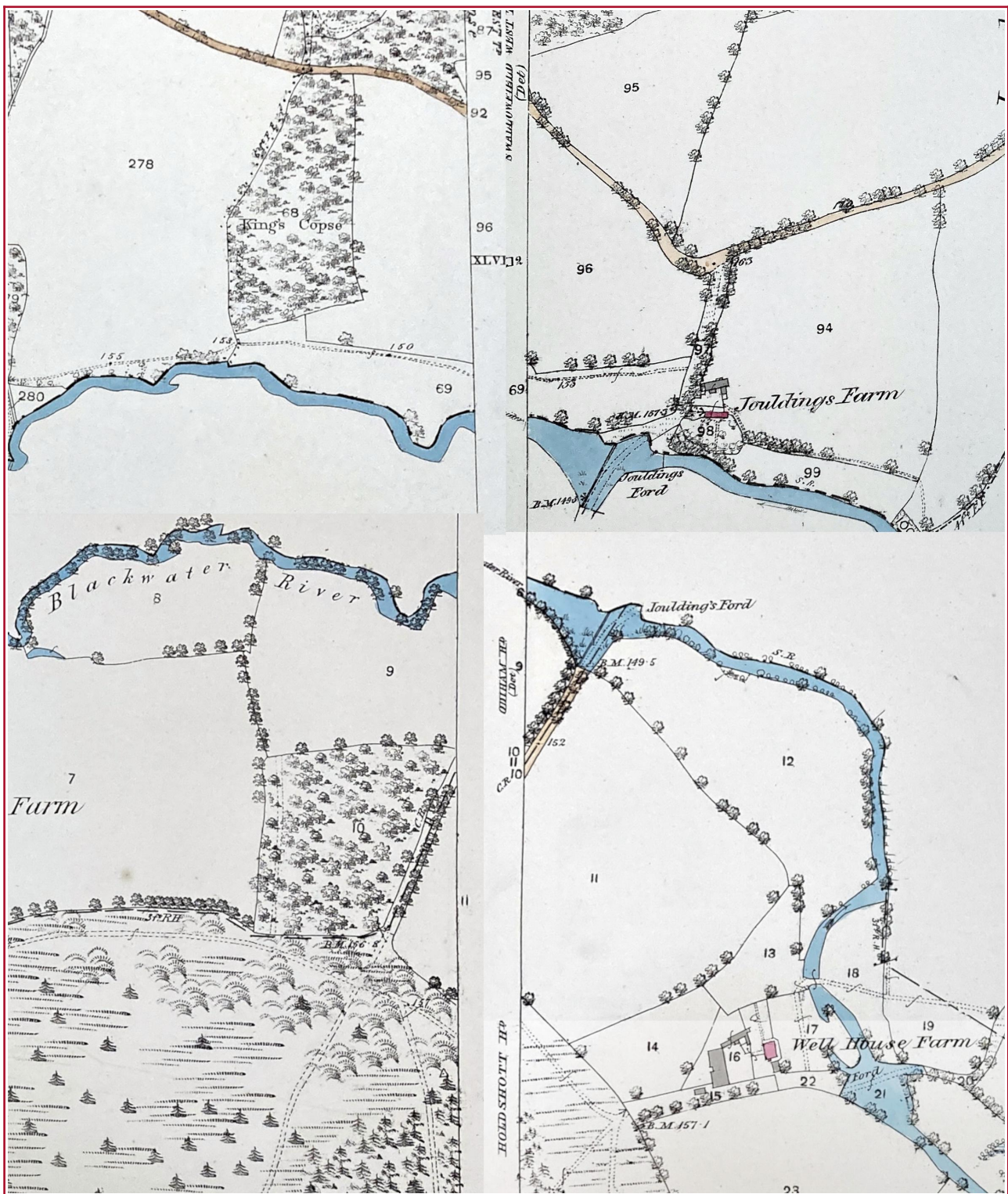
room for any other creature in the Forest. He also took the field against the poachers, and caused forest law to be expounded from the pulpits of all the forest churches. His efforts caused some amusement, but had little success. When however, in order to balance his budget, he began to exact substantial and even ruinous fines from the gentry and respectable inhabitants for alleged encroachments made by their fathers and grandfathers, it raised a storm which precipitated the Civil War. From that date to the time of the Great Inclosure of 1813 there was very little discipline maintained in the Forest.

THE BOUNDS OF FINCHAMPSTEAD BAILIWICK.

(From a Perambulation c. 1631).

The Perambulation commenced at the south east corner, a little to the west of *Blackwater alias Twichen Bridge*, and proceeded along the right bank of the river, "the auntiant River called *Dudbrooke*, the true and auntiant bound of the Forest." Between this point and *East Mille*, which was in Darby Green Lane, *Halle Grove*, *Perry Moore*, and *Dawney Mede*, three fields belonging to John Geale of Sandhurst, are mentioned. Formerly on the Sandhurst side of the river, they then, owing to the diversion of the stream, were on the left bank. The next place mentioned is *Greene Mille*. There was a cart bridge at East Mille in 1586, and a horse bridge at Greene Mille, both out of repair. Neither appears in John Norden's Survey of 1607. At *Yatley Mille* the line followed the branch called *the Sheire Stream* and so to *Blackwater Bridge* (Eversley Bridge), *Oulde Ford* (Joulding's Ford), and *Thatcher's Ford*. "From thence to *Swallowfield Bridge* including the house of Sir John Backhouse Kt., and soe alonge the river to *Arborfield Bridge* including the house of William Standen esq., from thence alonge the river [Loddon] to *Sindlesham Mille*, thence to *Lodone Bridge*, and soe alonge the *Lodone meade* to *Sandforde Mille* excluding the mille, and thence, leavinge the Lodone and comeing up a little river called *Embrooke*, to a bridge called *Merryhill Bridge*, from thence alonge the same river to a bridge and hyghewaye that leads from Oakingham towards Reading, from thence to *Okingham markett*

Appendix 2: Ordnance Survey County Series first edition twenty-five inch plans¶



¶ composite presentation from sheets Berkshire XLVI/9, XLV/12, Hampshire V/12, VI/9 — scale may not be consistent (source: British Library, date of survey 1871)