THE PROPOSED NETWORK RAIL (SUFFOLK LEVEL CROSSING REDUCTION) ORDER

NETWORK RAIL POSITION STATEMENT ON S22 WEATHERBY

Status of the crossing

1. Network Rail's position is that there are no public rights of way over S22 Weatherby.

2. There are no public rights of way recorded on the Definitive Map and Statement.

3. There is no historical evidence of public rights of way existing across the railway alignment prior to the railway being constructed. The documentary evidence is to the effect that the level crossing point was provided to accommodate a private occupation road in existence when the railway was built.[1]

4. Network Rail understands that whilst allegations have been made to Suffolk County Council that a public right of way exists over the crossing[2] – it is assumed, by reason of long user – it has discovered no evidence to support this, and there has been no formal application to alter the DMS to record a public right of way over the crossing.

5. Network Rail maintains that any application to modify the DMS to record public rights of way over S22 Weatherby by reason of 20 years' use under s.31 of the Highways Act 1980, would be bound to fail.

6. Section 31 provides, so far as is material, as follows:

> "(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence during that period to dedicate it.
> …
> (8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes."

7. In order for a claim to succeed that a public right of way has arisen by long use, whether at common law or under s.31, there must be a landowner with capacity to dedicate the land for use as a right of way by the public.

[1] See the Note attached to this Position Statement, which sits behind the account provided by Andrew Kenning in his rebuttal proof of evidence for S22 [NR30-4-7]
[2] See para 2 of the 'Submissions on behalf of Suffolk County Council on the Rights of Way Status of S22 Weatherby' (OP-INQ-20)

8. Network Rail maintains that dedication of a public right of way over the operational railway would be incompatible with its statutory objectives with regard to the safe and efficient operation of the railway and its duty to ensure the safety of the public and its passengers. It does not, therefore, have capacity to dedicate a public right of way across the operational railway. It will rely, to the extent necessary, on *Ramblers Association v Secretary of State for Environment, Food and Rural Affairs* [2017] EWHC 716 (Admin) as authority for that position.

9. A claim that a public right of way had arisen by long use under s.31 of the 1980 Act could not, therefore, succeed.

10. It is Network Rail's position that the Secretary of State may therefore properly proceed to determine this application on the basis that there are no public rights of way under the Order.

The effect of the Order

11. The effect of the Order, if confirmed would be to extinguish any private rights of way which might exist over S22 Weatherby. It would also confirm, beyond doubt, that no public rights of way could be claimed over the crossing point itself. The request for deemed planning permission connected with the application would, if granted, authorise Network Rail to carry out any works connected with the closure of the level crossing.

12. Network Rail maintains, therefore, that S22 Weatherby is properly included within the Order, even though there are no public rights of way over the crossing.

The right forum?

13. It is common ground between Network Rail and Suffolk County Council[3] that this Transport and Works Act Order Inquiry is not the appropriate forum for determining whether an alleged public right of way may exist over S22 Weatherby.

14. A specific statutory regime for examining claims as to public right of way not recorded on the DMS is provided for in Part III of the Wildlife and Countryside Act 1981. By s.53 of the 1981 Act, the highway authority is under a duty to keep the DMS under review. This duty includes, in s.53(2):

> "As regards every definitive map and statement, the surveying authority shall –
>
> (a) As soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequences of the occurrence, before that date, of any of the events in subsection (3)
>
> (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of

[3] See para 6 of OP-INQ-20

those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event."

15. The 'events' in s.53(3) include:

> "(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows –
>
> (i) That a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path, a restricted byway or, subject to section 54A, a byway open to all traffic…"

16. It is clear from Suffolk County Council's submissions that allegations to the effect that a public right of way exists over S22 Weatherby have been made to them. It is also clear, however, that the County Council have not considered that the evidence they have been provided with, to date, when viewed with other relevant evidence held by them would justify a modification of the DMS to reflect the existence of a public right of way over this crossing.

17. Thus, there is a procedure which exists for asserting the existence of a public right of way where none is recorded on the map. That procedure has not, to date, resulted in it being established that a public right of way does so exist, in spite of the fact that closure of the level crossing has been mooted in the public domain since 2012.

18. In those circumstances, Network Rail does not consider that any issues arise with seeking to close this level crossing through the current procedure in circumstances where that alternative procedure exists and where allegations have been made in the past that such rights exist but sufficient evidence has not been put forward to justify further action being taken under Part III of the 1981 Act.

<u>The test to be applied</u>

19. Network Rail maintains that given the matters set out in paragraphs 1 – 10 above, the Secretary of State may properly proceed on the basis that there are no public rights of way over S22 Weatherby. Section 5(6) of the <u>Transport and Works Act 1992</u> is thus simply not engaged, and the guidance in Annex 2 to the DfT 'A Guide to TWA Procedures' does not apply.[4]

20. The 'test' for the Secretary of State in considering whether to confirm the provisions within the Order relating to S22 Weatherby (specifically, its inclusion within Part 2 of Schedule 2 to the draft Order) is simply whether Network Rail has made out its strategic case for the Order. Network Rail acknowledges that as part of that consideration, the Secretary of State will wish to consider whether an alternative crossing point of the railway exists for persons currently using the S22 level crossing: as Network Rail has made clear in its evidence, in

[4] That is, the guidance that "If an alternative is to be provided, the Secretary of State would wish to be satisfied that it will be a convenient and suitable replacement for existing users" only applies to the situation where an alternative right of way has been or will be provided under s.5(6)(a) TWA 1992.

Phase 1 of its Strategy[5] it was looking for opportunities to rationalise its level crossing estate where it could divert users to alternative crossings points of the railway.

21. However, there is no requirement either under the Act, or in policy guidance (specifically, the DfT Guide to TWA Procedures) that that alternative be 'suitable and convenient'. Nor does the Act (or guidance) specify any other 'test' that should be applied in considering the proposed alternative route. It must also be borne in mind, in this respect, that members of the public currently have no established rights to use the crossing: the use is, at best, 'permitted' by Network Rail, which permission it has the right to revoke at any point.

22. Strictly without prejudice to that legal position, Network Rail remains of the view, for the reasons set out in the evidence of Sue Tilbrook, that the diversionary route it has identified for persons currently using the level crossing, is a suitable and convenient route.

JACQUELINE LEAN

7th March 2018

Landmark Chambers
180 Fleet Street
London, EC4A 2HG

[5] See NR18

THE PROPOSED NETWORK RAIL
(SUFFOLK LEVEL CROSSING REDUCTION) ORDER

Creation, History and Status of the Crossing S22 Weatherby

NOTE

Introduction

1. In Andrew Kenning's Rebuttal Proof of Evidence for S22 Weatherby [NR30-4-7], he sets out at paragraph 2 why Network Rail does not believe there to be any public rights of way over S22 Weatherby. As he makes clear in his Proof, his evidence on that issue is based on advice he has received from the Liability Negotiations Manager for Anglia Route. I am the Liability Negotiations Manager for Anglia Route and I set out below the relevant matters relating to this crossing which underlie the advice I provided to Mr Kenning, attaching relevant documents: specifically, those referred to by Mr Kenning in his rebuttal proof.

2. The information I provided to Mr Kenning for the purposes of his rebuttal proof, and as set out below, is based on Liability records held by Network Rail.

The creation and history of the crossing

3. The first railway at Newmarket, and the one on which the level crossing now stands, was authorised by the Newmarket and Chesterford Railway Act 1846, which incorporated the provisions of the Railways Clauses Consolidation Act 1845 ('the 1845 Act'). A copy of the 1846 Act can be found at Appendix 1.

4. Before a railway is built, a survey of the land through which is it proposed to build the railway is made. Ordnance Survey maps did not cover the whole country at this time so surveys were made by the railway company's surveyors to record all interests in land and public rights of way. The **Deposited Plans** set out a nominal centre line of the proposed railway, and the railway company were authorized by the Act to acquire land within the limits of deviation, being the dotted lines either side of the centre line. The **Book of Reference** details the interests relevant to each plot.

5. On the Deposited Plans, the centre line of the railway is shown to cross Plot 29 in the Parish of Wood Ditton. This is described in the Book of Reference as Public Highway in the ownership of The Parish Surveyors of Highways.

6. However, the **Conveyance** by which the railway company purchased the land shows that the referencing of Plots 29 (and 26, which had the same description) was in error. The site forming Weatherby level crossing was purchased by the Railway Company under Deed S35/61 dated 26/11/1849, which conveys land from John Henry, Duke of Rutland to the Newmarket Railway Company. There is no mention of the level crossing in the text of the document but the First Schedule describes the site of the level crossing as follows:

   No. 26. Private Road (By mistake described as Public Highway).
   No. 29. Ditto.

7. For ease of reference, the area of the Conveyance around the level crossing is indicated on the Deposited Plan with a superimposed red line. The small blue circle indicates the location of the current single line.

8. S. 68 of the Railways Clauses Consolidation Act 1845 entitles landowners affected by the coming of the railway to 'accommodation works'. These works include fencing, drainage, bridges, and, relevant to this case, level crossings ('gates'). Weatherby level crossing is thus considered to have been an occupation crossing, being a private road for the benefit of the named landowners.

9. The railway authorized by the 1846 Act opened to the public on 03/01/1848.

10. The **Deposited Plan** for the Great Eastern Railway Act 1879 includes a page on which Weatherby level crossing is described as 'Occupation level crossing to be stopped up'. However, there is no reference to this crossing in the Act. No record has been found as to why this proposal was not proceeded with.

11. The level crossing was the only access to land south of the railway when the railway was constructed. However, the need for private vehicular use over the level crossing declined once New Cheveley Road was built around the time of the opening of the new station in 1902.

12. By the late 1960s, vehicular usage and declined and this, combined with the withdrawal of freight facilities at Newmarket, led the British Railways Board to seek economies, in particular to close the level crossing to vehicles.[1]

[1] At the time, the crossing was a 'manned' crossing.

13. The local authorities were consulted in 1968 and each confirmed that no public rights were in existence at the crossing, nor were any private (occupation) rights claimed. The crossing was hence downgraded to a pedestrian only facility in its current form.

14. Much of the land surrounding the level crossing that became surplus to operational requirements following the cessation of freight services was sold away by British Rail. When British Rail sold surplus land its policy was to do so without any right of way across the railway being included, unless in some exceptional circumstances where the sold land would become landlocked.

15. The land southwest of the level crossing, now Sovereign Court, was sold away without "any easement … which would restrict or interfere with the free use by the Board or any person deriving title under it for building or any other purpose of any adjoining or neighbouring land of the Board". See **Conveyance** dated 19/12/1983.

16. The land southeast of the level crossing, now Willow Crescent, was sold away with no right of way over the railway and a statement that there was no right of way over the level crossing, providing expressly that "There is to be no right of way included in this Conveyance over the pedestrian level crossing situated to the west of the property hereby conveyed." This covenant is included in the Land Registry titles of each of the individual houses. See second **Conveyance** dated 19/12/1983.

17. The land immediately northwest of the railway remained with the British Railways Board at privatisation of Railtrack. No right of way over Railtrack's land was granted to the British Railways Board in the **Demarcation Agreement**.

18. Suffolk County Council was again consulted in 2007 about the status of the crossing, and once again confirmed that no public rights of way are recorded, nor are any claimed. A similar response was received to the same request for information in 2011, and Suffolk County Council have again agreed that no public rights are recorded nor have they seen any evidence that a valid claim could be made.

Presumed dedication and statutory incompatibility

19. At the 4th bullet point of paragraph 2 of his rebuttal proof, Mr Kenning states that he has been advised that:

20. Recent case law [*Ramblers Association v. The Secretary of State for*

Environment Food and Rural Affairs, Network Rail & Others [2017] EWHC 716 (Admin)] demonstrates it is not possible to establish a public right of way over operational lines of railway "on the level" (i.e. across a level crossing) through presumed dedication, as this is incompatible with the Railway Operator's (Network Rail) statutory purpose.

21. I understand that this judgment, and its effect, may be the subject of legal submissions, (if and to the extent required) I set out briefly below why I consider, in my capacity as Liability Negotiations Manager that the decision is relevant in the case of the Weatherby Crossing.

22. The judgment of Dove J in the ***Ramblers*** case concerned the decision of an Inspector refusing to confirm the Nottinghamshire County Council (Burton Joyce Footpath No.17 and Stoke Bardolph footpath No.6) Modification Order 2013 in respect of a claimed footpath passing from Nottingham Road, Burton Joyce, across a level crossing over the Nottingham–Lincoln railway line. The footpath was claimed on the basis of 20 years' usage.

23. Having considered the evidence and arguments advanced by Network Rail – and by those seeking the modification order – the Inspector concluded at paragraphs 36 and 37 of his decision (quoted at paragraph 9 of the judgment) as follows:

> 36. The claimed footpath crosses an operational railway on level and the dedication of a public right of way in such a location would be incompatible with the statutory objectives of Network Rail with regard to the safe and efficient operation of the railway and its duty to ensure the safety of the public and its passengers. Under the provisions of previous and current legislation governing the operation of the railway network, Network Rail and its predecessors lacked the capacity to dedicate new public rights of way over the live rails at Zulus Crossing. As Network Rail lacks the capacity to dedicate a public right of way, the way across the live rails is of a character which could not give rise to a presumption of dedication at common law.
>
> 37. As dedication of a public right of way at common law cannot have occurred at Zulus Crossing, it follows that the provisions of section 31 of the [Highways Act 1980] are not engaged. Furthermore, at all material times during the relevant 20-year period Zulus Crossing has been subject to the provisions of section 55 of the 1949 Act. Any use of the crossing by the public has been unlawful and it is not possible for Network Rail to grant lawful authority for such use. I conclude that as it is not possible for dedication of a public right of way to have occurred at common law the Order should not be confirmed with regard to Zulus Crossing.

24. The reference to section 55 of the 1949 Act is a reference to section 55 of the **British Transport Commission Act 1949** which provides that trespass on the operational railway is a criminal offence subject to a penalty under the Act. That provision is not in play in relation to the Weatherby crossing, where Network Rail currently allows use of the crossing on a permissive basis.

25. I would note in this case, however, that the level crossing at Weatherby provided access to a goods yard situated on the west of the railway until the goods yard's closure in 1968. This means that no public right of way can be implied by presumed dedication by reason of **s. 57 of the British Transport Commission Act 1949**, which provides

> As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission.

26. The Court accepted Network Rail's position that deemed dedication of the footpath under section 31(1) Highways Act 1980 would be incompatible with key statutory duties governing railway safety and operational efficiency. He also held that section 31(8) is to be viewed as operating in parallel with the common law as the origin for incompatibility to dedicate.

27. As the Court (Dove J) upheld the Inspector's decision on all points, Network Rail therefore regards the decision in the ***Ramblers*** case as authority for the proposition I have set out at para 19 above.

28. This is the information on which I relied in discussing matters with Mr Kenning for the purposes of his rebuttal proof.

Steve Day

Network Rail Infrastructure Limited

ANNO NONO & DECIMO

VICTORIÆ REGINÆ.

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Cap. clxxii.

An Act for making a Railway from *Chesterford* to *Newmarket*, with a Branch to *Cambridge*.

[16th *July* 1846.]

WHEREAS the making of a Railway from the *Cambridge* Line of the *Eastern Counties* Railway at or near *Chesterford* in the County of *Essex* to the Town of *Newmarket* in the County of *Cambridge*, with a Branch to the Town of *Cambridge*, would be of great public Advantage, by opening additional, certain, and expeditious Means of Communication between the said Places, and also by facilitating Communication between more distant Towns and Places: And whereas the Persons herein-after named or referred to, together with other Persons, are willing, at their own Expense, to carry such Undertaking into execution, but the same cannot be effected without the Authority of Parliament: May it therefore please Your Majesty that it may be enacted; and be it

enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That the several Acts of Parliament following, (that is to say,) the Companies Clauses Consolidation Act, 1845, the Lands Clauses Consolidation Act, 1845, and the Railway Clauses Consolidation Act, 1845, shall be incorporated with and form Part of this Act.

8 & 9 Vict. cc. 16. 18. and 20. incorporated with this Act.

Short Title.

II. And be it enacted, That in citing this Act in other Acts of Parliament, and in legal Instruments and in other Proceedings, it shall be sufficient to use the Expression "The *Newmarket and Chesterford* Railway Act, 1846."

Subscribers incorporated.

III. And be it enacted, That the Honourable *George John Manners* commonly called Lord *George Manners*, *John Fairlie*, and *John Villiers Shelley*, and all other Persons and Corporations who have already subscribed or who shall hereafter subscribe to the said Undertaking, and their Executors, Administrators, Successors, and Assigns respectively, shall be united into a Company for the Purpose of making and maintaining a Railway from the *Cambridge* Line of the *Eastern Counties* Railway at or near *Chesterford* aforesaid to the said Town of *Newmarket*, with a Branch therefrom to the Town of *Cambridge*, with proper Works and Conveniences, according to the Provisions of the said recited Acts and of this Act, and other the Purposes herein and in the said recited Acts contained; and for the Purposes aforesaid such Company shall be incorporated by the Name of "The *Newmarket and Chesterford* Railway Company," and by that Name shall be a Body Corporate, with perpetual Succession, and shall have Power to purchase and hold Lands for the Purposes of the Undertaking, within the Restrictions herein and in the said recited Acts contained.

Capital.

IV. And whereas the estimated Expense of making the said Railway is Three hundred and fifty thousand Pounds: Be it enacted, That the Capital of the said Company shall be Three hundred and fifty thousand Pounds.

Number and Amount of Shares.

V. And be it enacted, That the Number of Shares into which the said Capital shall be divided shall be Fourteen thousand, and the Amount of each Share shall be Twenty-five Pounds.

Calls.

VI. And be it enacted, That Five Pounds *per* Share shall be the greatest Amount of any One Call which the Company may make on the Shareholders, and Three Fifths of the Amount of a Share shall be the utmost aggregate Amount of Calls that may be made in any One Year upon any One Share, and Two Months at the least shall be the Interval between successive Calls.

VII. And

Interest to be paid on Calls till Railway completed.

VII. And be it enacted, That, notwithstanding anything in this and the said recited Acts contained or implied to the contrary, it shall be lawful for the Directors of the Company to pay and allow Interest after the Rate of Four Pounds *per Centum per Annum* on all Calls paid in respect of the Capital hereby authorized to be raised from the Date of the Payment thereof until the Completion of the Railway hereby authorized, provided that no Interest shall accrue to the Proprietor of any Share upon which any Call shall be in arrear in respect of such Share, or of any other Share held by the same Proprietor, while such Call shall remain unpaid.

Power to borrow Money on Mortgage.

VIII. And be it enacted, That it shall be lawful for the Company to borrow on Mortgage or Bond any Sum not exceeding in the whole the Sum of One hundred and sixteen thousand six hundred and sixty-six Pounds Thirteen Shillings and Four-pence; but no Part of such Sum shall be borrowed until the whole of the said Capital or Sum of Three hundred and fifty thousand Pounds shall have been subscribed for, and One Half shall have been actually paid up.

Mortgagees may enforce Payment of Arrears by the Appointment of a Receiver.

IX. And be it enacted, That it shall be lawful for the Mortgagees of the Company to enforce the Payment of the Arrears of Principal and Interest due on any such Mortgages by the Appointment of a Receiver; and in order to authorize the Appointment of such Receiver, in the event of the Principal Money due on such Mortgages not being duly paid, the Amount owing to the Mortgagees by whom Application shall be made shall not be less than Ten thousand Pounds in the whole.

Meetings to be held in London.

X. And be it enacted, That all Meetings of the Directors and of the Shareholders of the said Company, whether ordinary or extraordinary, shall be held in *London*.

Number and Qualification of Directors.

XI. And be it enacted, That the Number of Directors of the said Company shall be Twelve, and the Qualification of a Director shall be the Possession in his own Right of Twenty Shares in the said Undertaking.

Power to vary the Number of Directors.

XII. And be it enacted, That it shall be lawful for the Company from Time to Time to increase or reduce the Number of Directors, provided that the increased Number do not exceed Eighteen, and that the reduced Number be not less than Six.

First Directors.

XIII. And be it enacted, That the Honourable *George John Manners* commonly called Lord *George Manners*, *John Fairlie*, *John Griffith Frith*, *Hugh Pitter Fuller*, *John Gandell*, *James Hunt*, *James Lys Seager*, *John Villiers Shelley*, *Frederick Taylor*, *George Tyrrell*, *Daniel Warren*, and *Daniel Watney* shall be the first Directors of the said Company.

XIV. And

Quorum of Directors.

XIV. And be it enacted, That the Quorum of a Meeting of Directors shall be Three.

Remuneration of Directors and Auditors.

XV. And be it enacted, That the Remuneration of the Directors and also of the Auditors to be appointed under the Companies Clauses Consolidation Act, 1845, shall from Time to Time be fixed by a General Meeting of the Company, and be paid out of the Funds of such Company.

Committees of Directors.

XVI. And be it enacted, That the Number of Directors of which Committees appointed by the Directors shall consist shall be not less than Three nor more than Six, and the Quorum of such Committees shall be Two Thirds in Number of the same, but such Committees shall not have Power to make Calls for Money on the Shareholders.

Resident Director.

XVII. And be it enacted, That the Board of Directors shall have the Power from Time to Time to appoint from among the Directors a resident Director upon such Terms as they may think fit, and to remove him from the Office when and as they may from Time to Time determine.

Newspapers for Insertion of Advertisements.

XVIII. And be it enacted, That the Newspapers in which Advertisements relating to the Affairs of the Company are to be inserted shall be any Newspaper or Newspapers circulating in the County of *Cambridge*, and also One daily Newspaper at least published in the City of *London*.

Railway to be made according to deposited Plans.

XIX. And whereas Plans and Sections of the said intended Railway showing the Lines and Levels thereof, and also Books of Reference containing the Names of Owners, Lessees, and Occupiers, or reputed Owners, Lessees, and Occupiers of the Lands through which the same is intended to pass, have been deposited with the Clerks of the Peace for the Counties of *Essex* and *Cambridge* and for the Borough of *Cambridge*: Be it enacted, That, subject to the Provisions in this Act and in the said recited Acts contained, it shall be lawful for the said Company to make and maintain the said Railway, Branch Railway, and Works in the Lines and upon the Lands delineated upon the said Plans and described in the said Books of Reference, and to enter upon, take, and use such of the said Lands as shall be necessary for such Purpose.

Line of Railway.

XX. And be it enacted, That the said Railway shall commence by a Junction with the *Cambridge* Line of the *Eastern Counties* Railway at, in, or near the Parish of *Great Chesterford* in the County of *Essex*, and shall pass from thence in, through, over, or into the several Parishes, Townships, Hamlets, Extra-parochial or other Places following, or some of them; (that is to say,) *Great Chesterford* in the County of *Essex*, *Hinxton*, *Pampisford*, *Great Abington*, *Little Abington*, *Babraham*, *Fulbourn*, *Great Wilbraham*, *Little Wilbraham*,

ham, Westlay Waterless, Brinkley, Burrough Green otherwise *Borough Green, Dullingham, Stetchworth, Wood Ditton,* and *Newmarket All Saints,* or some or one of them, all in the County of *Cambridge,* and shall terminate between the upper and lower Roads leading from the Town of *Newmarket* to *Ashley* and *Cheveley* in the County of *Cambridge,* in certain Fields or Paddocks of His Grace the Duke of *Rutland* situate in that Part of the Parish of *Wood Ditton* in the said County of *Cambridge* which adjoins the said Town of *Newmarket;* and the said Branch Railway from and out of the said Main Line of Railway shall commence at, in, or near the Parish of *Great Wilbraham* in the County of *Cambridge* at or near a certain Highway called *Little Field Road* in *Great Wilbraham* aforesaid leading from *Great Wilbraham* into the Turnpike Road from *Newmarket* to *Chesterford,* and shall thence pass from, in, through, over, or into the several Parishes, Townships, Hamlets, Extra-parochial or other Places of *Great Wilbraham, Little Wilbraham, Fulbourn, Fulbourn All Saints, Fulbourn Saint Vigors, Teversham, Cherry Hinton,* and *Saint Andrew the Less* otherwise *Barnwell, Cambridge,* within the Liberty of the Borough of *Cambridge,* or some or one of them, all in the County of *Cambridge,* and shall terminate either by a Junction with the *Cambridge* Line of the *Eastern Counties* Railway, or by an independent Terminus at or near the present Station of the said *Eastern Counties* Railway Company for the said Town of *Cambridge.*

Power to use the Line of the Eastern Counties Railway.

XXI. And be it enacted, That it shall be lawful for the said Company and they are hereby authorized to use the Line of the *Eastern Counties* Railway, and the *Eastern Counties* Railway Company are hereby authorized to use the Line of Railway to be constructed under the Powers of this Act; and each of the said Companies may use all Stations, Sidings, Points, Crossings, Turn-tables, Water Cranes, and Water belonging to the other of the said Companies, and shall pay to the other of them, in addition to the Tolls authorized to be raised by this Act, and by the Act incorporating the *Eastern Counties* Railway Company, or any Amendment thereof, such Sum or Sums of Money by way of Compensation for the Water, and for the Use of the Water Cranes or other Appurtenances, as may be agreed upon between the said Companies; and in the event of any Dispute as to the Amount of any such Compensation, the same shall be settled by Arbitration in the Manner provided by the Railway Clauses Consolidation Act, 1845, for the Settlement of Disputes.

As to Communications with the Eastern Counties Railway.

XXII. And be it enacted, That the Communications between the said Railway and Branch Railway and the *Eastern Counties* Railway at *Chesterford* and *Cambridge* shall be made at such particular Spots within the Limits of Deviation prescribed by the Railway Clauses Consolidation Act, 1845, and in such Manner as the respective Engineers of the Company by this Act incorporated and the said *Eastern Counties* Railway Company may agree upon, and in case of their differing in opinion, then the same shall be determined by an Engineer to be appointed by the Board of Trade.

Lands for extraordinary Purposes.

XXIII. And be it enacted, That the Quantity of Lands to be taken by the Company for extraordinary Purposes shall not exceed Fifty Acres.

Period within which Lands are to be purchased.

XXIV. And be it enacted, That the Powers of the Company for the compulsory Purchase of Lands for the Purposes of this Act shall not be exercised after the Expiration of Three Years from the passing of this Act.

Period for Completion of Works.

XXV. And be it enacted, That the Railway and Branch Railway shall be completed within Seven Years from the passing of this Act, and on the Expiration of such Period the Powers by this or the recited Acts granted to the Company for executing the Railway and Branch Railway, or otherwise in relation thereto, shall cease to be exercised, except as to so much of the Railway and Branch Railway as shall then be completed.

Power to cross Roads on a Level.

XXVI. And be it enacted, That, subject to the Provisions contained in the said Railway Clauses Consolidation Act, with reference to the crossing of Roads on the Level, it shall be lawful for the Company, in the Construction of the Railway, Branch Railway, and Works by this Act authorized to be made, to carry the same across and on the Level of the several Roads numbered on the said Plans as herein-after mentioned; (that is to say,)

In the Parish of *Great Chesterford*, the Road numbered 8:
In the Parish of *Hinxton*, the Road numbered 10:
In the Parish of *Pampisford*, the Roads numbered 7 and 10:
In the Parish of *Babraham*, the Roads numbered 12 and 15:
In the Parish or Township of *Fulbourn*, the Roads numbered 1 and 14:
In the Parish of *Little Wilbraham*, the Roads numbered 3 and 8:
In the Parish of *Westley Waterless*, the Road numbered 12:
In the Parish of *Dullingham*, the Road numbered 8:
In the Parish of *Wood Ditton*, the Roads numbered 11 and 29:
In the Parish of *Cherry Hinton*, the Road numbered 15:
In the Parish of *Feversham*, the Road numbered 8:
In the Parish of *Fulbourn Saint Vigor's* and *All Saints*, the Roads numbered 35, 53, and 72.

Company to erect a Station or Lodge at Points of crossing.

XXVII. And be it enacted, That for the greater Convenience and Security of the Public the said Company shall erect and permanently maintain either a Station or Lodge at the Points where the said Branch Railway shall cross on the Level any of the before-mentioned Roads.

Tolls.

XXVIII. And be it enacted, That it shall be lawful for the Company to demand any Tolls for the Use of the Railway and Branch Railway, not exceeding the following; (that is to say,)

1. In

1. In respect of the Tonnage of all Articles conveyed upon the Railway or any Part thereof, as follows:

(A.) For all Dung, Compost, and all Sorts of Manure, Lime and Limestone, and all undressed Materials for the Repair of public Roads or Highways, *per* Ton *per* Mile not exceeding One Penny; and if conveyed in Carriages belonging to the Company, an additional Sum *per* Ton *per* Mile not exceeding One Halfpenny; and if propelled by an Engine belonging to the Company, a further Sum *per* Ton *per* Mile not exceeding One Penny:

(B.) For all Coals, Coke, Culm, Charcoal, and Cinders, all Stones for building, pitching, and paving, all Bricks, Tiles, Slates, Clay, Sand, Ironstone and Iron Ore, Pig Iron, Bar Iron, Rod Iron, Hoop Iron, and all other similar Descriptions of Wrought Iron and Iron Castings not manufactured into Utensils or other Articles of Merchandize, *per* Ton *per* Mile not exceeding Two-pence; and if conveyed in Carriages belonging to the Company, an additional Sum *per* Ton *per* Mile not exceeding One Halfpenny; and if propelled by an Engine belonging to the Company, a further Sum *per* Ton *per* Mile not exceeding One Penny:

(C.) For all Sugar, Grain, Corn, Flour, Meal, Bread, Potatoes, Hay, Straw, Flax, Tow, Linen, or Cotton Yarn, Hides, Dyewoods, Earthenware, Timber, Stones, and Deals, Metals (except Iron), Nails, Anvils, Vices, and Chains, *per* Ton *per* Mile not exceeding Two-pence Halfpenny; and if conveyed in Carriages belonging to the Company, an additional Sum *per* Ton *per* Mile not exceeding One Halfpenny; and if propelled by an Engine belonging to the Company, a further Sum *per* Ton *per* Mile not exceeding One Penny:

(D.) For all Cotton and other Wools, Drugs, except Vitriol, manufactured Goods, and all other Wares, Merchandize, Fish, Articles, Matters, or Things, *per* Ton *per* Mile not exceeding Two-pence Halfpenny; and if conveyed in Carriages belonging to the Company, an additional Sum *per* Ton *per* Mile not exceeding One Halfpenny; and if propelled by an Engine belonging to the Company, a further Sum *per* Ton *per* Mile not exceeding One Penny:

(E.) And for every Carriage, of whatever Description, not being a Carriage adapted and used for travelling on a Railway, and not weighing more than One Ton, carried or conveyed on a Truck or Platform belonging to the Company, *per* Mile not exceeding Sixpence; and if propelled by an Engine belonging to the Company, a further Sum *per* Ton *per* Mile not exceeding One Penny:

And a like Sum of Two-pence *per* Mile for every additional Quarter of a Ton, or fractional Part of a Quarter of a Ton, which any such Carriage so conveyed may weigh; and if propelled by an Engine belonging to the Company, a further Sum *per* Ton *per* Mile not exceeding One Penny:

2. In

Tolls for Passengers and Cattle.

2. In respect of Passengers and Animals conveyed in Carriages upon the Railway, as follows:

For every Person conveyed in or upon any such Carriage, *per* Mile not exceeding One Penny Halfpenny; and if conveyed in or upon any Carriage belonging to the Company, an additional Sum *per* Mile not exceeding One Halfpenny; and if propelled by an Engine belonging to the Company, a further Sum *per* Mile not exceeding One Penny:

For every Horse conveyed in or upon any such Carriage, not exceeding Five-pence *per* Mile; and if conveyed upon any Carriage belonging to the Company, an additional Sum *per* Mile not exceeding One Penny; and if propelled by an Engine belonging to the Company, a further Sum *per* Mile not exceeding One Penny:

For every Ox, Cow, Bull, or Neat Cattle conveyed in or upon any such Carriage, *per* Mile not exceeding Two-pence; and if conveyed in or upon any Carriage belonging to the Company, an additional Sum *per* Mile not exceeding One Penny; and if propelled by an Engine belonging to the Company, a further Sum *per* Mile not exceeding One Penny:

For every Calf or Pig, Sheep, Lamb, or other small Animal, conveyed in or upon any such Carriage, *per* Mile not exceeding One Halfpenny; and if conveyed in or upon any Carriage belonging to the Company, an additional Sum *per* Mile not exceeding One Halfpenny; and if propelled by an Engine belonging to the Company, a further Sum *per* Mile not exceeding One Penny.

Maximum Charges.

XXIX. Provided always, and be it enacted, That, notwithstanding anything herein-before contained, the maximum Charges to be made by the Company in respect of all the Tolls and Charges for the Use of the Railway and Carriages, and for the locomotive Power on the Railway, shall in no Case, except where any Special or Extra Train may be required or allowed by the Company, exceed the Sums following; (that is to say,)

In respect to the Carriage of Articles conveyed upon the Railway or any Part thereof, as follows:

For all Matters herein-before mentioned under the Letter (A.), Two-pence Halfpenny *per* Ton *per* Mile:

For all Matters mentioned under the Letter (B.), Three-pence Halfpenny *per* Ton *per* Mile:

For all Matters mentioned under the Letter (C.), Four-pence *per* Ton *per* Mile:

For all Matters mentioned under the Letter (D.), Five-pence *per* Ton *per* Mile:

For all Matter mentioned under the Letter (E.), Seven-pence *per* Ton *per* Mile:

In

In respect to Passengers and Animals conveyed in Carriages upon the Railway, as follows:

For every Person conveyed in a First-class Carriage, the Sum of Three-pence *per* Mile:

For every Passenger conveyed in a Second-class Carriage, the Sum of Two-pence *per* Mile:

For every Passenger conveyed in a Third-class Carriage, the Sum of One Penny *per* Mile:

For every Horse, Mule, Ass, or other Beast of Draught or Burden, the Sum of Seven-pence *per* Mile:

For every Ox, Cow, Bull, or Neat Cattle, the Sum of Four-pence *per* Mile:

For every Calf, Pig, Sheep, or Lamb, or other small Animal, the Sum of Two-pence *per* Mile.

Regulation as to Tolls.

XXX. And be it enacted, That the following Provisions and Regulations shall be applicable to the fixing of such Tolls; (that is to say,)

For Articles or Persons conveyed on the Railway for a less Distance than Six Miles the Company may demand, in addition to the prescribed Tolls for Conveyance, a reasonable Charge for the Expense of stopping, loading, and unloading:

For a Fraction of a Mile beyond Six Miles, or beyond any greater Number of Miles, the Company may demand Tolls on Merchandize for such Fraction in proportion to the Number of Quarters of a Mile contained therein, and if there be a Fraction of a Quarter of a Mile such Fraction shall be deemed a Quarter of a Mile; and in respect of Passengers every Fraction of a Mile beyond an integral Number of Miles shall be deemed a Mile:

For a Fraction of a Ton the Company may demand Toll according to the Number of Quarters of a Ton in such Fraction, and if there be a Fraction of a Quarter of a Ton such Fraction shall be deemed a Quarter of a Ton:

With respect to all Articles, except Stone and Timber, the Weight shall be determined according to the usual Avoirdupois Weight:

With respect to Stone and Timber, Fourteen Cubic Feet of Stone, Forty Cubic Feet of Oak, Mahogany, Teak, Beech, or Ash, and Fifty Cubic Feet of any other Timber, shall be deemed One Ton Weight, and so in proportion for any smaller Quantity.

Tolls on small Parcels and Articles of great Weight.

XXXI. And with respect to small Packages and single Articles of great Weight, be it enacted, That, notwithstanding the Rate of Tolls prescribed by this Act, the Company may lawfully demand the Tolls following; (that is to say,)

For the Carriage of small Parcels, (that is to say, Parcels not exceeding Five hundred Pounds Weight each,) the Company may demand any reasonable Sum: Provided always, that Articles sent in large aggregate Quantities, although made up of several Parcels, such as Bags of Sugar, Coffee, Meal, and the like, shall not be deemed small Parcels, but such Terms shall apply only to single Parcels in separate Packages:

For the Carriage of any One Boiler, Cylinder, or single Piece of Machinery, or single Piece of Timber or Stone, or other single Article, the Weight of which, including the Carriage, shall exceed Four Tons but shall not exceed Eight Tons, the Company may demand such Sum as they think fit, not exceeding One Shilling *per* Ton *per* Mile:

For the Carriage of any single Piece of Timber, Stone, Machinery, or other single Article, the Weight of which, with the Carriage, shall exceed Eight Tons, the Company may demand such Sum as they think fit.

Passengers Luggage.

XXXII. And be it enacted, That every Passenger travelling upon the Railway and Branch Railway may take with him his ordinary Luggage, not exceeding One hundred and fifty Pounds in Weight for First-class Passengers, One hundred Pounds in Weight for Second-class Passengers, and Sixty Pounds in Weight for Third-class Passengers, without any Charge being made for the Carriage thereof.

Officers of the University of Cambridge to have Access to Railway Stations.

XXXIII. And be it enacted, That the Vice Chancellor, the Proctors, and Pro-proctors for the Time being of the University of *Cambridge*, with or without their Servants, and the Heads and Tutors of Colleges and Halls, and the Marshal and the Yeoman Bedel of the said University, or other Person or Persons, provided such other Person or Persons shall have been deputed by Writing under the Hand of the Vice Chancellor of the said University for the Time being, or of the Head or Governor, or, in his Absence, the Vicegerent of any College or Hall in the said University, shall at or about the Times of Trains of Carriages upon the said Railway starting or arriving, and at all reasonable Times, have free Access to every Depôt or Station for the Reception of Passengers proceeding by the Trains upon the said Railway, and to every Part thereof, and to every Booking Office, Ticket Office, or other Office or Place for Passengers upon the said Railway, wheresoever such Office or Place shall be, and shall then and there be entitled to demand and take and have, without any unreasonable Delay, from the proper Officer or Servant of the Company, such Information as it may be in the Power of any Officer or Servant of the Company to give with reference to any Passenger or Person having passed or applying to pass on the said Railway, or otherwise coming to or being in or upon the said Depôt or Station or Place, who shall be a Member of the said University, or suspected of being such; and in case the said Company or their Officers or Servants, or any of them, shall not permit such free Access to the said Depôts or Stations as aforesaid, or shall not furnish such Information

mation as herein-before mentioned, the said Officer or Servant of the said Company shall for each Default forfeit a Sum not exceeding Five Pounds.

Penalty for conveying Members of the University after receiving Notice from the University Authorities not to convey them.

XXXIV. And be it enacted, That if the said Vice Chancellor or Proctors or Pro-proctors for the Time being of the said University, or Heads or Tutors of Colleges and Halls of the said University, or any of them, or any other Person or Persons deputed as aforesaid, shall at any Time or Times previous to the starting of any Train of Carriages upon the said Railway, notify to the proper Officer, Book-keeper, or Servant of the said Company that any Person or Persons about to travel in or upon the said Railway is a Member of the University not having taken the Degree of Master of Arts or Bachelor in Civil Law or Medicine, and shall identify such Member to such proper Officer, Book-keeper, or Servant of the Company at the Time of giving such Notice, and require such Officer, Book-keeper, or Servant to decline to take such Member of the University as a Passenger upon the said Railway, the proper Officer, Book-keeper, or Servant of the said Company shall immediately thereupon, and for the Space of Twenty-four Hours after such Notice, Identification, and Requirement, refuse to convey such Member of the said University in or upon the said Railway, and which he is hereby authorized to do notwithstanding such Member may have paid his Fare; and in case such Member of the said University shall be knowingly and wilfully allowed to be conveyed thereon after such Notice within the Time aforesaid, the said Company shall for each Passenger so conveyed forfeit a Sum not exceeding Five Pounds: Provided always, that no Member of the University represented as such to the said Company, or any of their Officers or Servants, by the said Vice Chancellor, Proctors, Pro-proctors, Heads, or Tutors of Colleges and Halls, or other Person or Persons deputed as aforesaid, or any of them, who shall refuse to be carried by the said Company, or by any of their Officers or Servants, shall on that account be entitled to claim or recover any Damage or Compensation from the said Company, or such Officers, Book-keepers, or Servants, provided that in case such Member shall have paid his Fare the same shall have been tendered or returned to him.

Company to take up and set down Members of the University at appointed Stations only.

Penalty.

XXXV. And be it enacted, That it shall not be lawful for the said Company to take up or set down any Person or Persons who shall be known to the Company or their Officers as Members of the University, but not having taken the Degree of Master of Arts or Bachelor in Civil Law or Medicine, on any Part of the said Railway, except at the regular appointed Stations of the Line; and in case the said Company shall take up or set down any such Person or Persons except at such regular appointed Stations of the Line, they shall forfeit a Sum not exceeding Five Pounds for each Person so taken up or set down.

Officers of the University to have

XXXVI. And be it enacted, That it shall be incumbent upon the said Company and they are hereby required from Time to Time at

the Control of the Special Constables employed during the Construction of the Railway.

at all Times during the Progress of all or any Part of the Works in, upon, or about the said Railway within Three Miles of the Town of *Cambridge*, and until the Completion of the said Works and the opening of the said Railway for the Conveyance of Passengers, constantly to employ a sufficient Number of fit and proper Persons as Special Constables, whose Duty it shall be to superintend, manage, and control the Workmen engaged in or about such Works; and the said Special Constables shall be subject to the Order and Direction of the Vice Chancellor and the Proctors and Pro-proctors of the said University for the Time being; and if the Vice Chancellor of the said University for the Time being shall have Cause to think the Number of Special Constables to be employed by the Company as last aforesaid not sufficient, it shall be lawful for him to appoint such additional Number as he shall judge expedient, such Special Constables to be paid by the Company in like Manner as the Special Constables who may be employed by them.

Company not to take up or set down Passengers at the Cambridge Station between certain Hours on Sunday.

XXXVII. And be it enacted, That it shall not be lawful for the said Company to take up or set down any Passenger or Passengers at the *Cambridge* Railway Station, or at any Place within Three Miles of the same, between the Hours of Ten in the Morning and Five in the Afternoon on any *Sunday*, unless it should happen that any Train usually arriving at or departing from the said Station at or before the said Hour of Ten in the Morning has been delayed by some unavoidable Accident; and that for every Person so taken up or set down the said Company shall forfeit a Sum not exceeding the Sum of Five Pounds, to be recoverable and levied by summary Conviction and Distress and Sale before any Justice of the Peace for the County of *Cambridge* not holding any Office in the said University; and that such Justice of the Peace shall have Jurisdiction whether the said Person or Persons, or any of them, shall have been taken up or set down within the Borough of *Cambridge*, or the Precincts of the said University, or at any Place within the said County; the said Forfeiture or Penalty to be paid and applied to and for the Benefit and Use of *Addenbrooke*'s Hospital, or other County Charity that may in lieu thereof be hereafter from Time to Time declared for the Purpose under the Seal of the said University, and that the said Conviction may be in the following Form:

'County of Cambridge } BE it remembered, That on the
'to wit. } Day of in the Year of our
'Lord at in the County of Cam-
'bridge [*the Name of the Company*] were duly convicted before
'me *A.B.*, One of Her Majesty's Justices of the Peace for the said
'County, of having on the Day of in the
'Year of our Lord taken up divers, to wit
'Passengers [*or* set down Passengers, or taken up
'and set down Passengers, *as the Case may be*,]
'contrary to the Form of the Statute in such Case made and provided,

'and

'and were adjudged and determined to have forfeited in respect 'thereof the Sum of to be paid and applied as the Act 'directs. Given under my Hand and Seal the Day 'of in the Year of our Lord .'

And that Service of any Information, Summons, or other legal Document upon any Clerk, Officer, or other Agent of the said Company at any Station of the said Company within the said County or Borough of *Cambridge* shall be sufficient Service on the said Company.

Saving the Rights of the University of Cambridge.

XXXVIII. And be it enacted, That nothing herein contained shall in any Manner alienate, prejudice, alter, interfere with, or impede the Exercise of any of the Rights, Privileges, or Authorities whatsoever of the said University, or of any of the Officers, Ministers, or Servants thereto belonging.

Railway to be subject to the Provisions of 1 & 2 Vict. c. 98., 3 & 4 Vict. c. 97., 5 & 6 Vict. c. 55., and 7 & 8 Vict. c. 85.

XXXIX. And whereas an Act was passed in the Second Year of the Reign of Her present Majesty, intituled *An Act to provide for the Conveyance of the Mails by Railway;* and another Act was passed in the Fourth Year of the Reign of Her said Majesty, intituled *An Act for regulating Railways;* and another Act was passed in the Sixth Year of the Reign of Her said Majesty, intituled *An Act for the better Regulation of Railways, and for the Conveyance of Troops;* and another Act was passed in the Eighth Year of the Reign of Her said Majesty, intituled *An Act to attach certain Conditions to the Construction of future Railways authorized or to be authorized by any Act of the present or succeeding Sessions of Parliament, and for other Purposes in relation to Railways:* Be it enacted, That nothing in this Act contained shall be held to exempt the said Railway and Branch Railway or the said Company from the Provisions of the said several Acts respectively, but that such Provisions shall be in force in respect to the said Railway and Branch Railway and Company as far as the same shall be applicable thereto.

Railway to be subject to Provisions of any future general Act.

XL. And be it enacted, That nothing herein contained shall be deemed or construed to exempt the Railway and Branch by this Act authorized to be made from the Provisions of any general Act relating to this Act, or of any general Act relating to Railways, which may hereafter pass during the present or any future Session of Parliament, or from any future Revision and Alteration, under the Authority of Parliament, of the maximum Rates of Fares and Charges authorized by this Act.

Saving the Rights of the Crown.

XLI. Provided always, and be it declared and enacted, That nothing in this Act contained shall extend or be construed to extend to alienate, defeat, lessen, prejudice, or derogate from any Estate, Right, Title, Interest, Franchise, Prerogative, or Authority of or appertaining to the Queen's most Excellent Majesty, Her Heirs or Successors, in right of Her Crown, or otherwise.

Public Act. XLII. And be it enacted, That this Act shall be a Public Act, and shall be judicially taken notice of as such.

LONDON:
Printed by GEORGE EDWARD EYRE and WILLIAM SPOTTISWOODE,
Printers to the Queen's most Excellent Majesty. 1849.

Plan and Sections OF THE CHESTERFORD AND NEWMARKET Railway.

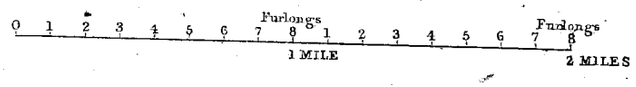
WITH A BRANCH TO CAMBRIDGE

November. 1845.

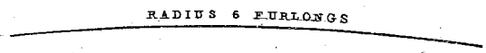
C. F. Cluffins. SURVEYOR Saffron Walden

Note.

The Line of Railway and the divisions marked thereon in the Plan, and also upon the Datum Line of the Section, are in Miles & Furlongs from one of the termini, & correspond with each other, & is described thus.



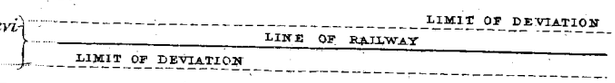
The Radius of every Curve where such Radius does not exceed one Mile is marked upon the Plan thus



County Boundaries are described thus — . — . — . — . — . —

Parish Boundaries are described thus — — — — — — — —

The extent to which it is proposed to obtain a power of lateral deviation from the centre Line is indicated by the dotted Lines thus

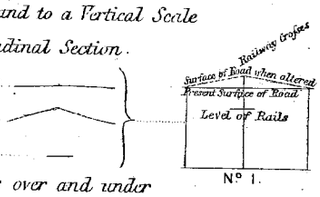


The Grofs Sections of Roads are drawn to a Horizontal Scale of 5 Chains to an Inch, and to a Vertical Scale of 40 feet to an Inch, and the Nos on the Grofs Sections correspond with those on the Longitudinal Section.

In the Grofs Sections of Roads the present surface of Ground is represented by a fine line thus

The Surface of Road when altered by a dotted line thus

& the Level of the Rails by a short black line thus



No 1.

Where the letter H *stand thus* 20 H *the figure denotes in feet the clear height of Arches over and under Roads, Canals, Navigable Rivers, and Railways.*

Where the letter S *stands thus* 25 S *the figure denotes in feet the Span of Arches acrofs Roads, Canals, Navigable Rivers, & Railways.*

No Property is intended to be taken where not shewn upon the Plan, or if shewn upon the Plan, not numbered thereon; or if numbered thereon, not contained and described in the Book of Reference.

Where Property is situate in more than one Parish, the number and description are limited in each Parish to the particular portion of the Property comprised in such Parish.

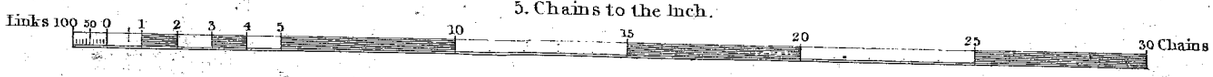
And where lands are shewn upon the Plan, either wholly or partially, and comprise buildings either shewn or not shewn thereupon, the number upon the Plan designates only such part of the Property as is described in the Book of Reference, and as is within the limits of deviation denoted upon the Plan.

SCALES FOR PLAN AND SECTION

Which are the same throughout.

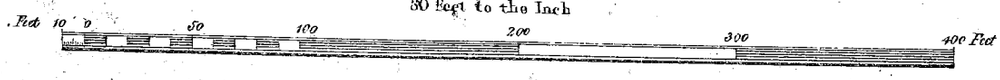
HORIZONTAL

5. Chains to the Inch.



VERTICAL

80 Feet to the Inch

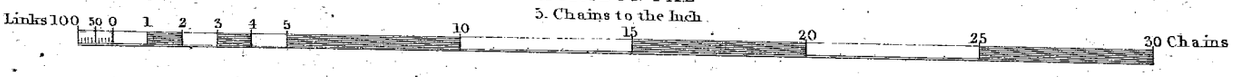


SCALES FOR CROSS SECTION OF ROADS

Which are the same throughout.

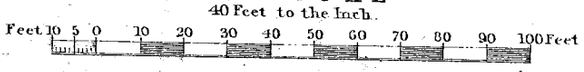
HORIZONTAL

5. Chains to the Inch



VERTICAL

40 Feet to the Inch.



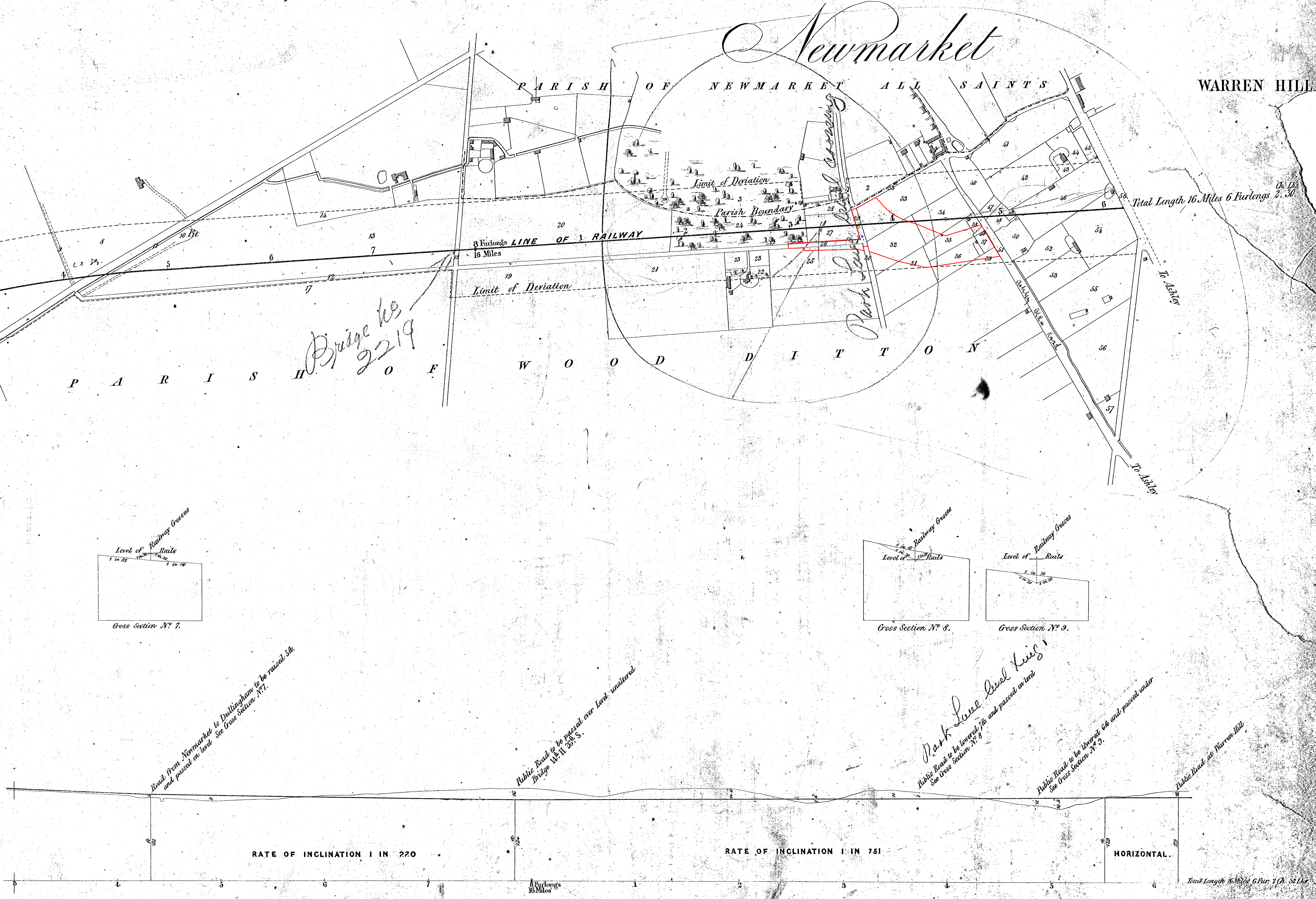
The following Abbreviations when they occur signify

M. Miles.	*Occ. Occupation.*
F. Furlongs.	*Ft or ft. Feet.*
C. Chains.	*In. or in. Inches.*
L. Links.	

Newmarket & Chesterford Railway 1846

C. & N. No 10.

County of Cambridge



10/1846

Newmarket & Chesterford Railway Act 1846

East Anglia BoR's

E 10 / 1846

9&10V : 172

Book Of Reference

Newmarket & Chesterford Railway Act

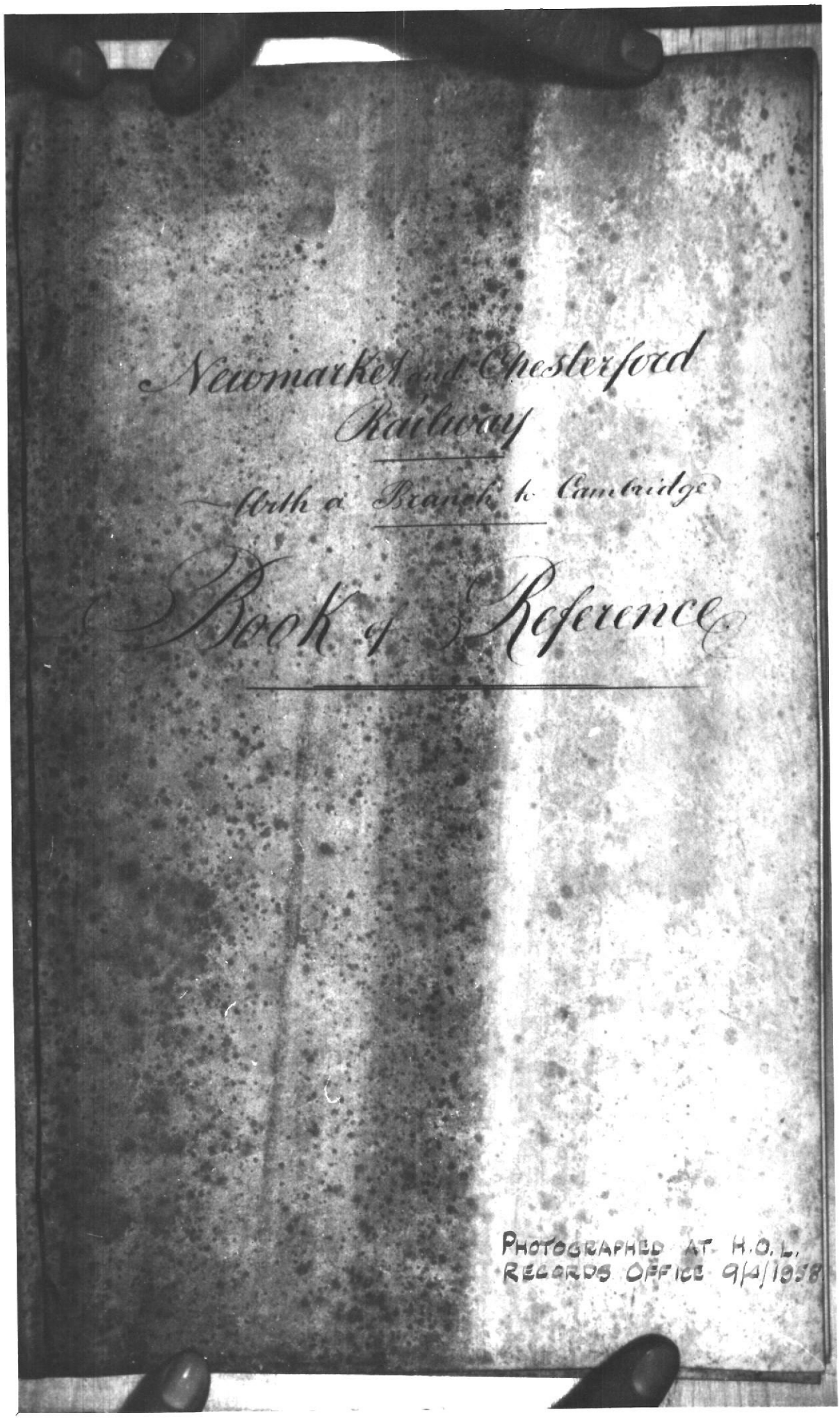
1846

Index To Parishes

Main Line

Branch Line To Cambridge

No Pages 20, 26 or 32
In House of Lords Copy.


Newmarket and Chesterford Railway

North & Branch to Cambridge

Book of Reference

PHOTOGRAPHED AT H.O.L. RECORDS OFFICE 9/4/1958

Parish of Woodditton in the County of Cambridge

No. on Plan.	Description of Property.	Owner or reputed Owner.	Lessee.	Occupiers.
1	Devils Ditch and Mound	His Grace the Duke of Rutland		John Lyles King
2	Arable field Outhouse & Occupation Rd.	do.		do.
3	Arable Field	do		John Bell
4	Pasture field	do		Duke of Rutland & John Bell
5	Plant.n & Past.e field & shed	do		In hand
6	arab.e field & Occ.n Road	do.	Chas. Holmes	Chas. Holmes
7	Public Highway	The Parish Surv.r of Highways		
8	Arable field	Duke of Rutland	Chas. Bottom Jno Bottom & Will.m Bottom	Chas. Bottom Jno Bottom & Will.m Bottom
9	Private Road	do.	do.	do. and Stewards of the Jockey Club
10	Public Gravel Pit and Road	The Parish Surv.r of Highways		
11	Common Watercourse	do & Duke of Rutland		James Gardner
12	Private Road and Bridge	Duke of Rutland	James Gardner	do & Stewards of the Jocky Club James Gardner
13	Arable field	do		
14	do	Duke of Rutland and Molly Norton		Molly Norton
17	do	Duke of Rutland		James Gardner
18	Public Highway	The Parish Surveyor of Highways		
19	Arable field	Duke of Rutland	Henrietta Hill Weatherby and Maria Hill Weatherby	Henrietta Hill Weatherby & Maria Hill Weatherby
20	Pasture field	do		Jas Gardner

Parish of Woodditton in the County of Cambridge

No. on Plan.	Description of Property.	Owner or reputed Owner.	Lessee.	Occupiers.
21	Arable Field	Ann Seaber	Chas Bottom John Bottom & Willm Bottom	Chas Bottom John Bottom & Willm Bottom
22	House Buildgs Gardens & Pasture Land	Henry Hammond		The Revd Francis Sands Bradshaw
23	Garden Ground & Occupatn Road	do		do
24	Pasture Field Pleasure Ground & Plantations	Willm Parr Isaacson		In hand
25	Pasture Field	Duke of Rutland		Mrs Ridsdale
26	Public Highway	The Parish Surs of Highways		
27	Pasture field & Building	Honble Colonel Geo. Anson M. P		In hand
28	Pasture	ditto		do
29	Public Highway	The Parish Surrs of Highways		
30	Private Road	Duke of Rutland		Henrietta Hill Witherby Marsh Hill & Weatherby Chas Bottom John Bottom Willm Bottom Richd Cooper Robt James Peck Willm Ridsdale Benjamin Miller John Ashford
31	Pasture field	Duke of Rutland		Richd Cooper
32	do	do		Robt Jas Peck
33	do	do		Benjamin Miller
33a	Public Highway	The Parish Surveyrs of Highways		
34	Pasture field	Duke of Rutland		Robt Jas Peck

Parish of *Woodditton* in the County of *Cambridge*

No. on Plan.	Description of Property.	Owner or reputed Owner.	Lessee.	Occupiers.
36	Pasture field and Footpath	Duke of Rutland		Charles Clarke and William Barrett
36	Pasture field Garden Shed and Occupation Road	do		Charles Chapman Henry Hull and Flatwood Hull
37	Cottage Garden and Shed and Occupation Road	do		Samuel Hatley
38	Garden Ground and Shed and Occupation Road	do		William Barrett
39	Arable field			Henrietta Hill Heatherby and Maria Hill Heatherby
40	Pasture field and field	do		Elizabeth Flatmore
41	Pasture field and Well	do		Thomas Thornhill Lord Reay Harry Spencer Watlington and Samuel Chifney
42	Pasture field	do		do
43	Yard Plantation and Shed	do		do
44	Pasture field Plantation and Occupation Road	do		do
45	Garden ground	do		do
46	Pasture field Shed and Plantation	do		Henrietta Hill Heatherby do Hill Heatherby
47	Garden ground	do		do Stitchiner
48	Pasture field and Shed	do		do

Parish of Woodditton in the County of Cambridge

No. on Plan.	Description of Property.	Owner or reputed Owner.	Lessee.	Occupiers.	No. on Plan.
49	Garden ground and shed	Duke of Rutland		William Cripps Kitchiner	1
50	Pasture field & Shed	do		do	2
51	Public highway	The Parish Surveyors of Highways			
52	Pasture field and shed	Duke of Rutland		John Hewe	3
53	do	do		do	
54	Pasture field Plantation Shed	do		do	4
55	Pasture field and sheds	do		William Edwards	
56	Pasture field Plantation and Well	do		Thomas Fredk Sabin	
57	Arable field	do		do	
58	Public highway	The Parish Surveyors of Highways			

The Duke of Rutland Lord of the Manor of Dillon Vallance Dillon Cumois ance Saxton Hall in Woddditton

Parish of Newmarket All Saints in the County of Cambridge

No. on Plan.	Description of Property.	Owner or reputed Owner.	Lessee.	Occupiers.
1	Public Highway	The parish Surveyors of Highways		
2	Pasture field	Stephen Piper Sarah Piper and Elizabeth Piper		Sarah Butler
3	Pasture Pleasure Ground and Plantation	William Parr Swanson		In hand
4	Pasture and Building	The Honorable Coventry George Anson M.P		In hand

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Received the day and year first within written of and from the within named Company [illegible]

W. [illegible]

Signed sealed and delivered by the within named [illegible] Duke of Rutland in the presence of

W. [illegible] Hanley Esq
21 [illegible] St London
[illegible]
Albany London

Signed sealed and delivered by the [illegible] named [illegible] in the presence of

George [illegible] , Goadby [illegible]

Signed [illegible]
Henry [illegible]

Frederick [illegible] Hants

[illegible] a Conveyance dated 5th September 196[illegible] [illegible] Railways Board conveyed to Regent [illegible] Company Limited property containing 3530 square yards or thereabouts situate at the junction of Upper Station Road and All Saints Road Newmarket in the County of Suffolk (part of the property comprised in the within written deed) in fee simple

MEMORANDUM By a Conveyance dated the 23rd day of December 1969 the British Railways Board conveyed unto Tattersalls Limited in fee simple a piece of land which fronts [illegible] Road Newmarket in the County of West Suffolk being part of the site of Newmarket Railway Station together with the buildings erected on some part thereof and part of such land is part of the land comprised in the within written deed and the right of the Purchaser to production and delivery of copies of the within written deed was acknowledged and an undertaking given for safe custody by the Board.

Duke of Rutland

Newmarket Railway Company

S35/6[illegible]

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This Indenture

Sold by ... Law Stationers, No 8, Birchin Lane Cornhill

made the twenty sixth day of November One thousand eight hundred and forty nine Between The Most Noble John Henry Duke of Rutland of the first part The Right Honorable John James Robert Manners commonly called Lord John Manners, Andrew Robert Drummond of Cadland in the County of Southampton Esquire and Henry Norman of ... in the Parish of Saint ... in the City of ... Esquire of the second part and The Newmarket Railway Company ... of the ... part ...

... William Earl of Mansfield of the other part ... fifth days of December One thousand seven hundred and seventy nine ... and Charles Duke of Rutland charged divers messuages farms lands and hereditaments therein described ... Cheveley and Ditton and Ditton Camoys in the County of Cambridge with the payment of the sum of Six thousand ... subject to redemption on payment of the said six thousand pounds and Interest after the ... mentioned And reciting that by Deed Poll (endorsed on the ... Indentures) bearing date the twenty first and twenty second days of August One thousand seven hundred and ninety eight and made between the parties therein ... mentioned and described the said messuages farms lands tenements and hereditaments comprised in the said Indentures of Lease and Release of the twenty fourth and twenty fifth days of December One thousand seven hundred and seventy nine and the said sum of Six thousand pounds thereby secured became vested in Henry Duke of ... Henry Charles Marquis of Worcester and George Norman (subject nevertheless to the same equity of redemption as the same were subject to by virtue of the proviso ... in the first recited Indenture of Mortgage) And it was declared by the said recited Deed Poll ... that the said Duke of Beaufort Marquis of Worcester and George Norman their executors administrators and assigns should stand possessed of the said sum of Six thousand pounds and Interest upon and to and for the trusts intents and purposes and under and subject to such provisos declarations and agreements as were expressed and declared concerning the same in ... Indenture of three parts bearing even date therewith and made or expressed to be made between the said Richard Norman of the first part the said Lady ... his wife (then Lady Elizabeth Manners) of the second part and the said Henry Duke of Beaufort ... Henry Duke of Rutland the said Henry Charles Duke of ... then Marquis of Worcester and George Norman of the third part (being the Settlement made in contemplation of the marriage then intended and shortly afterward solemnized between the said Richard Norman and Lady Elizabeth Manners) And it was further declared that the receipt of the said Trustees their executors administrators or assigns for the said principal sum of Six thousand pounds and Interest should at all times be a sufficient discharge to such person or persons as should be entitled to the equity of redemption of the said premises or any assignee of that security and that after such ... such person or persons or his or their heirs executors administrators should not be obliged to see to the application thereof or in any wise answerable for the misapplication or nonapplication thereof And reciting that ... the death of the said Henry Duke of Beaufort the same premises became vested in the said Henry Charles Duke of Beaufort (formerly Marquis of Worcester) and George ... And reciting that the said Henry Charles Duke of Beaufort and George Norman at the request of the said John Henry Duke of Rutland had agreed to release the ... and premises comprised in the said recited Indenture of the twenty fifth day of December One thousand seven hundred and seventy nine from the said ... Six thousand pounds and Interest and to accept other security for the payment of the same ... and were satisfied that the hereditaments by ... released granted and released were an ample security in point of value for the said ... thousand pounds and Interest And reciting that ... executed ...

... unto the said John Henry Duke of Rutland and his heirs the said messuages farms lands ... hereditaments comprised in and ... by the said recited Indentures of the twenty fourth and twenty fifth days of December One thousand seven hundred and seventy nine ... freed and discharged from the said sum of Six thousand pounds and all Interest in respect of ... And reciting that the said John Henry Duke of Rutland was seized of the messuages and other hereditaments by the now reciting Indenture granted and released and the inheritance thereof in fee simple free from encumbrances except that the same hereditaments were by virtue of ... the Will and Testament of Charles late Duke of Rutland dated the fifteenth day of January One thousand seven hundred and eighty four subject ... charged with the payment of an annual sum or yearly rent charge of One thousand ... hundred pounds to the said Mary Isabella Duchess Dowager of Rutland and her assigns during her life although the said Dowager Duchess had ... accepted other security of ample value for the payment thereof It was by the Indenture now in recital Witnessed that in pursuance of the said therein recited Agreement and in consideration of the release and Conveyance made by the said Henry Charles Duke of Beaufort and George Norman by the said Indentures of even date with the now reciting Indentures to the said John Henry Duke of Rutland his heirs and assigns and for securing unto the said Henry Charles Duke of Beaufort and George Norman as Trustees as aforesaid their executors administrators and assigns payment of the said sum of Six thousand pounds and Interest as hereinafter mentioned And in consideration of five shillings paid to the said John Henry Duke of Rutland by the said Henry Charles Duke of Beaufort and George Norman He the said Duke of Rutland did grant bargain sell release and confirm And the said Mary Isabella Duchess Dowager of Rutland did remise release and for ever quit claim unto the said Henry Charles Duke of Beaufort and George Norman and to their heirs amongst other hereditaments certain Lands in the parish of Wood ditton in the County of Cambridge comprising the pieces or parcels of Land hereinafter mentioned and described as being numbered 6 and 13 in the Book of Reference and Plan of the said Newmarket Railway Company To hold the same unto the said Henry Charles Duke of Beaufort and George Norman their heirs

ENDORSEMENT (to be attached to Conveyance dated 26-11-1849)
By a Conveyance dated 24th November 1972
BRITISH RAILWAYS BOARD conveyed to RICHARD GEORGE REAS and IRIS KATHLEEN REAS in fee
simple a part of the land described in the attached Deed and
his/her/their right to the production thereof was
acknowledged.

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And assigns for ever subject nevertheless to a proviso for redemption of the same premises by the said John Henry Duke of Rutland his heirs executors administrators or assigns on payment to the said Henry Charles Duke of Beaufort and George Norman their executors administrators or assigns of the full sum of six thousand pounds with Interest as therein mentioned And it was thereby declared that the said Henry Charles Duke of Beaufort and George Norman their executors administrators and assigns should stand possessed of and interested in the said sum of six thousand pounds and Interest secured to them as aforesaid upon the trusts affecting the same by virtue of or under the said Indenture of Settlement of three years dated the twenty second day of August One thousand seven hundred and ninety eight And Whereas by and by a certain Indenture bearing date the seventeenth day of May last made between The Most Noble Henry Duke of Beaufort of the first part The Right Honorable Fitz Roy James Henry Somerset commonly called Lord Fitz Roy James Henry Somerset of the second part and the said Lord John Manners Andrew Robert Drummond and Henry Norman the third part After reciting the hereinbefore [illegible] thousand eight hundred and thirty [illegible] the said Henry Charles then Duke of Beaufort [illegible] died on the twenty third day of November One thousand eight hundred and thirty five Intestate as [illegible] freehold estates vested in him as mortgagee and thereupon the legal estate in the mortgaged lands and hereditaments comprised in the said recited Indenture of Release and thereby released or otherwise conveyed and assured by way of mortgage as aforesaid descended upon the said Henry Duke of Beaufort the eldest son and heir at Law of the said Henry Charles late Duke of Beaufort And reciting the Will of the said Henry Charles late Duke of Beaufort dated the twenty seventh day of July One thousand eight hundred and nineteen and a Codicil made dated the fifteenth day of September One thousand eight hundred and twenty eight whereby he appointed the said Lord Fitz Roy James Henry Somerset and The Right Honorable Granville Earl and Viscount Granville executors who on the eighteenth day of March One thousand eight hundred and thirty six proved the said Will and Codicil in the Prerogative Court of the Most Reverend Father in God Archbishop of Canterbury And reciting that the said Granville Earl and Viscount Granville had since departed this life leaving the said Lord Fitz Roy James Henry Somerset him surviving And reciting that the said Lord John Manners Andrew Robert Drummond and Henry Norman having been appointed Trustees of the said Indenture of Settlement bearing date on or about the twenty second day of August One thousand seven hundred and ninety eight made in contemplation of the marriage then intended and shortly afterwards solemnized between the said Richard Norman and Lady Elizabeth Manners the said Henry Duke of Beaufort proceeded as the Heir at Law of the said Henry Charles late Duke of Beaufort who was the last surviving Trustee of the said Indenture of Settlement and the said Lord Fitz Roy James Henry Somerset as the surviving Executor of the said late Duke of Beaufort had agreed to transfer the hereinbefore recited Mortgage Security to the said said [illegible] Manners Andrew Robert Drummond and Henry Norman in manner hereinafter appearing Now by the Indenture now in recital Witnessed that for a nominal consideration paid by the said Trustees to the said Duke of Beaufort and Lord Fitz Roy James Henry Somerset He the said Henry Duke of Beaufort as such heir at [illegible] of the said Henry Charles Duke of Beaufort as aforesaid And at the request of the said Lord Fitz Roy James Henry Somerset testified by his being a party to and executing the now reciting Indenture Did [illegible] grant release and convey And the said Lord Fitz Roy James Henry Somerset as such Executor of the said Henry Charles late Duke of Beaufort as aforesaid Did release and quit claim unto the said Lord John Manners Andrew Robert Drummond and Henry Norman and their heirs All and singular the messuages lands and hereditaments comprised in and described by the said hereinbefore recited Indenture of the twenty second day of May One thousand eight hundred and seventeen Together with the rights members and appurtenances to the same hereditaments belonging or appertaining And all the estate right title interest inheritance use [illegible] property claim and demand whatsoever at Law and in Equity of the said Henry Duke of Beaufort and his Executors and Administrators of in to or out of the same premises And the said Lord Fitz Roy James Henry Somerset as such Executor aforesaid of in and to the same premises and every part and parcel thereof To hold the same unto the said Lord John Manners Andrew Robert Drummond and Henry Norman and their heirs To the use of the said Lord John Manners Andrew Robert Drummond and Henry Norman their heirs and assigns for ever subject nevertheless to the proviso for redemption contained in the said Indenture of Mortgage And it is by the Indenture now in recital further witnessed that for a nominal consideration paid by the said Lord John Manners Andrew Robert Drummond and Henry Norman to the said Lord Fitz Roy James Henry Somerset He the said Lord Fitz Roy James Henry Somerset Did thereby assign and transfer unto the said Lord John Manners Andrew Robert Drummond and Henry Norman their executors administrators and assigns All that the principal sum of six thousand pounds secured by the said Indenture of the twenty second day of May One thousand eight hundred and seventeen with all sums then due or which might thereafter become due in respect of the Interest of the said sum of six thousand pounds and the full benefit of the Covenants for payment of the same principal sum and Interest in the same Indenture contained and all the estate right title interest property possibility claim and demand whatsoever both at Law and in Equity of him the said Lord Fitz Roy James Henry Somerset as such Executor of the said Henry Charles late Duke of Beaufort as aforesaid of to or out of the same premises respectively Together with full power and authority to the said Lord John Manners Andrew Robert Drummond and Henry Norman and the survivor of them and the executors and administrators of such survivor and their or his assigns and also to any person or persons whom they or he may appoint as their or his substitute or substitutes or any of them to ask demand sue for recover and receive the said sum of six thousand pounds and Interest or any part thereof in the name of him the said Lord Fitz Roy James Henry Somerset and to give effectual receipts and discharges for the same To hold the said principal sum and interest and other the premises thereinbefore assigned or expressed or intended so to be unto

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The said Lord Abt Manners Andrew Robert Drummond and Henry Norman their executors administrators and assigns as and for their own monies and effects but subject to the trusts expressed and declared of and concerning the same sum and interest by a certain Indenture bearing even date with but executed before the now recited Indenture and made or expressed to be made between the said Lady Elizabeth Norman of the first part the said Lord Abt Manners Henry Somerset of the second part the said John Henry Duke of Rutland of the third part and the said Lord John Manners James the fourth part and therein referring to the now recited Indenture AND WHEREAS in the Session of Parliament held in the ninth and tenth years of the reign of Her present Majesty an Act was passed intituled "An Act for making a Railway from Chesterford to Newmarket with a Branch to Cambridge" and the said Newmarket Railway Company by their then title of "The Newmarket and Chesterford Railway Company" were thereby incorporated and empowered to contract for and purchase and hold lands without being liable to the penalties of the Statutes of Mortmain AND WHEREAS the said Company have under the powers of the said last mentioned Act and the said herein recited contracted and agreed with the said John Henry Duke of Rutland for the purchase of the several pieces of land hereinafter mentioned and described comprising part of the land mentioned and expressed in the hereinbefore in part recited Indentures and [illegible] pieces at or for the price or sum of Eighteen thousand four hundred and sixty six pounds which sum it has been agreed between the parties hereto shall include and be in satisfaction of all Compensation to which the said Duke of Rutland might be entitled by reason of and by [illegible] damage to be sustained by severance or otherwise by the taking and using of the said purchased premises for all or any of the purposes in the said Acts mentioned AND WHEREAS in pursuance of the powers and authorities of the said recited Act of the ninth and tenth years of the reign of Her present Majesty and of the Acts therein recited the said parties hereto of the second part considering that the remaining portions of the said lands and premises jointly subject to the said mortgage debt of six thousand pounds as hereinbefore is mentioned are a sufficient security for the same have agreed upon the request of the said Duke of Rutland to release such of the pieces of land and premises so contracted to be purchased as aforesaid as are comprised in the said recited security from such mortgage debt and interest and all claims and demands in respect thereof and for that purpose to join in these presents in manner hereinafter expressed NOW THEREFORE THIS INDENTURE WITNESSETH that for and in consideration of the sum of Eighteen thousand four hundred and sixty six pounds of lawful money of Great Britain to the said Duke of Rutland and the parties hereto of the second part (testified by their respective execution of these presents) in hand well and truly paid pursuant to "The Newmarket and Chesterford Railway Act 1846" by the said Newmarket Railway Company so incorporated by the said Act as aforesaid the receipt and payment of which said sum of Eighteen thousand four hundred and sixty six pounds the said Duke of Rutland doth hereby acknowledge and of and from the same doth hereby acquit and release and for ever discharge the said Company their successors and assigns HE the said John Henry Duke of Rutland HATH granted bargained sold aliened released and conveyed And by these presents DOTH grant bargain sell alien release and convey And the said Lord [illegible] Manners Andrew Robert Drummond and Henry Norman as to so much and such part or parts of the lands hereinafter mentioned and described as are subject to the said mortgage debt of six thousand pounds and Interest and to the end and intent that the remaining hereditaments and premises comprised in the hereinbefore in part recited Indentures of the twenty first and twenty second days of May One thousand eight hundred and seventeen may henceforth be and remain wholly and exclusively charged with and subject thereto HAVE and each and every of them HATH bargained sold aliened and released And by these presents DO and each of them DOTH bargain sell alien and release unto the said Newmarket Railway Company their successors and assigns ALL THOSE several pieces or parcels of land and premises [illegible] Inprior & Leyther Twenty six acres three roods and twenty two perches or thereabouts scituate lying and being respectively parcels of the several Closes and lands and premises [illegible] in the Parish of Ward Ditton in the County of Cambridge as mentioned in the first Schedule hereunder written and also the Station Buildings Warehouse and other Buildings erected or intended so to be as shown on the said County of Cambridge as mentioned in the first Schedule hereunder written and also the Station Buildings Warehouse and other Buildings erected or intended so to be as shown on thereon which said pieces or parcels of land are also delineated and the quantity of each piece or parcel thereof conveyed or intended so to be as shown on the Map or Plan thereof drawn in the margin of these presents being thereon colored red together with all ways rights and appurtenances thereto belonging and the reversion and reversions remainder and remainders rents issues and profits thereof and of every part thereof and all such right title and interest in and to the same as the said parties hereto of the first and second parts or either of them are is or shall become entitled or possessed of or are or is by the said "Newmarket and Chesterford Railway Act 1846" and the Acts therein recited empowered to convey TO HAVE AND TO HOLD the said pieces or parcels of land hereinbefore mentioned and intended to be hereby conveyed with the appurtenances unto and to the use of the said Newmarket Railway Company their successors and assigns for ever according to the true intent and meaning of "The Newmarket and Chesterford Railway Act 1846" hereinbefore referred to AND the said parties hereto of the second part do hereby for themselves their heirs executors and administrators covenant and declare to and with the said Newmarket Railway Company their successors and assigns That they the said parties hereto of the second part have not made done executed permitted or suffered any act deed matter or thing whatsoever whereby or by means whereof the said lands and hereditaments hereinbefore described and intended to be hereby conveyed can in any wise be impeached charged affected or encumbered in title estate or otherwise howsoever AND the said John Henry Duke of Rutland for himself his heirs executors and administrators doth covenant promise and agree to and with the said Newmarket Railway Company their successors and assigns by these presents in manner following that is to say That for and notwithstanding any act deed matter or thing whatsoever at any time heretofore had made done committed or suffered to the contrary by him the said Duke of Rutland or any

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Person or persons whomsoever lawfully or equitably claiming by from through under or in trust for him they the said parties hereto of the first and second parts or some or one of them are or is at the time of the sealing and delivery of these presents lawfully and rightfully seized of and or the said pieces or parcels of land hereditaments and premises hereinbefore mentioned to be hereby conveyed or intended so to be with their and every of their appurtenances of and for a good true perfect absolute and indefeasible estate of inheritance in fee simple in possession And that for and notwithstanding any such act deed matter or thing as aforesaid they the said parties hereto of the first and second parts now have or themselves or one of them hath in himself good right full power and lawful and absolute authority by these presents to grant release and convey the said pieces or parcels of land hereditaments and premises with their appurtenances unto and to the use of the said Newmarket Railway Company their successors and assigns in manner aforesaid and according to the true intent and meaning of these presents And also that it shall and may be lawful to and for the said Newmarket Railway Company their successors and assigns from time to time and at all times for ever hereafter peaceably and quietly to enter into hold and occupy possess and enjoy the said Lands Hereditaments and premises hereby conveyed or intended so to be with their respective appurtenances and [illegible] and for their own use and benefit without any lawful let suit trouble interruption molestation hindrance or disturbance whatsoever of from or by the said parties hereto of the first and second parts or either of them or any person or persons lawfully or equitably claiming or who shall or may at any time or times hereafter lawfully or equitably claim by from through under or in trust for them or either of them And that free and clear and freely clearly and absolutely acquitted exonerated and discharged or otherwise well and sufficiently save defended kept harmless and indemnified by him the said John Henry Duke of Rutland his heirs executors and administrators of from and against all and all manner of former and other gifts grants bargains sales leases mortgages dowers frebenches joinhures uses trusts willsentails statutes recognizances debts to the Crown and all other debts titles troubles charges and incumbrances whatsoever at any time or times heretofore had made done committed or suffered by the said John Henry Duke of Rutland or any other person or persons whatsoever claiming or to claim by from through under or in trust for him And further that the said John Henry Duke of Rutland and his heirs and all and every other person or persons whomsoever having or lawfully or equitably claiming or who shall or may at any time or times hereafter have or lawfully or equitably claim any estate right title or interest of in to or out of the said lands ++++ hereditaments and premises hereby conveyed or intended so to be or any of them or any part thereof by from through under or in trust for the said John Henry Duke of Rutland shall and will from time to time and at all times hereafter upon every reasonable request and at the proper costs and charges of the said Newmarket Railway Company their successors or assigns make do acknowledge execute and perfect or cause and procure to be made done acknowledged executed and perfected all and every such further and other lawful and reasonable acts deeds conveyances and assurances in the law whatsoever for the further better more perfectly and absolutely granting releasing and conveying all and singular the said lands hereditaments and premises with their appurtenances unto the said Newmarket Railway Company their successors and assigns for ever as by the said Newmarket Railway Company or their Counsel in the law shall be reasonably devised advised and required And Whereas the Title Deeds Evidences and Writings relating to the said several pieces or parcels of land hereditaments and premises hereinbefore mentioned or intended to be hereby conveyed relate also to other estates lands and hereditaments of the said John Henry Duke of Rutland of much greater value and it hath been agreed that the said Title Deeds Evidences and Writings shall be retained by the said John Henry Duke of Rutland upon his entering into the Covenants hereinafter contained for the production thereof to the said Newmarket Railway Company Now this Indenture further Witnesseth that the said John Henry Duke of Rutland doth hereby for himself his heirs executors and administrators covenant promise and agree to and with the said Newmarket Railway Company their successors and assigns that he the said John Henry Duke of Rutland his heirs and assigns shall and will from time to time and at all times hereafter (unless prevented by fire or some other inevitable accident) upon every reasonable request or notice in writing and at the proper costs and charges of the said Newmarket Railway Company their successors or assigns produce and shew forth or cause and procure to be produced and shewn forth to the said Newmarket Railway Company their successors or assigns or to their Counsel Agents or Attorneys and at any Trial Hearing Commission or Examination in or directed by any Court or Courts of Law or Equity in Great Britain the Title Deeds Evidences and Writings mentioned and contained in the Second Schedule thereof hereunder written when and as often as there shall be occasion to inspect or produce the same for the maintenance manutenation making out defending or proving the estate interest right title property and possession of the said Newmarket Railway Company their successors or assigns into or out of the said Lands Hereditaments and premises hereby conveyed or intended so to be or any part or parcel thereof And also shall and will from time to time and at all times hereafter at the request costs and charges of the said Newmarket Railway Company their successors or assigns make or cause to be made and delivered to the said Newmarket Railway Company their successors or assigns such fair and attested Copy or Copies or Extracts from the said Title Deeds Evidences and Writings or any part or parts thereof as the said Newmarket Railway Company or their Counsel Agents or Attorneys may desire And shall and will in the mean time keep and preserve the said Title Deeds Evidences and Writings safe whole uncancelled and undefaced (all loses or damages by fire or some other inevitable accident as aforesaid only excepted) In Witness whereof the parties hereto of the first and second parts have hereunto set their hands and seals and the said Company have affixed their Common Seal the day and year first above written.

19-11-49

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The First Schedule

to which the above written Indenture refers

Parish of Woodditton in the County of Cambridge

No. on Plan	Description of Property	Owner or reputed Owner	Lessee	Occupier
1	Devils Ditch and Mound	Duke of Rutland	John Lyles King	John Lyles King
2	Arable field and Occupation Road	Ditto	Ditto	Ditto.
5	Plantation and pasture field	Ditto	In hand	In hand.
6	Arable field and Occupation Road	Ditto	Charles Holmes	Charles Holmes
9	Arable field and private Road	Ditto.	Charles Bottom, John Bottom and William Bottom.	Charles Bottom John Bottom and William Bottom.
13	Arable field	Ditto	James Gardner	James Gardner
21	Pasture field	Ditto		James Gardner
25	Pasture field	Ditto		William Riddesdale
26	Private Road (by mistake described as Public Highway)	Ditto		Stewards of Jockey Club Henrietta Hill Weatherby and Maria Hill Weatherby and other Occupiers.
29	Ditto	Ditto.		Henrietta Hill Weatherby and Maria Hill Weatherby
31	Pasture Field	Ditto		Richard Cooper
32	Ditto	Ditto		Robert James Rook
33	Ditto	Ditto		Benjamin Miller
34	Pasture field	Duke of Rutland.		Robert James Rook
35	Pasture field and Occupation Road	Ditto		Charles Clark and William Barrett
36	Pasture field, garden, Shed and Occupation Road	Ditto.		Charles Chapman, Henry Hall and Fleetwood Hall.
37	Cottage Garden and Shed and Occupation Road	Ditto.		Samuel Hatley.
38	Garden Ground and Shed and Occupation Road	Ditto.		William Barrett
39	Arable Field	Ditto.		Henrietta Hill Weatherby and Maria Hill Weatherby
46	Pasture field Shed and Plantation	Ditto.		Ditto, Ditto.
48	Pasture field and Shed	Ditto.		William Cripps Tickhemer
49	Garden ground and Shed	Ditto.		Ditto.
50	Pasture field and Shed	Ditto.		Ditto.
51	Public Highway (now stopped up by Order of Sessions)	Ditto		Henrietta Hill Weatherby and Maria Hill Weatherby, John Herve.
52	Pasture field and Shed	Ditto.		Ditto.
54	Pasture field Plantation Shed	Ditto		

ROAD OVER WEATHERBY'S XING

The Second Schedule to which the above written Indenture refers

27 June 1800 — **Indenture** between the said John Henry Duke of Rutland of the first part Joseph Hill therein described of the second part and Samuel Vines Gentleman of the third part.

[illegible] — **Exemplification** of Recovery Cambridge [illegible] wherein the said Samuel Vines was Demandant the said Joseph Hill Tenant of the said John Henry Duke of Rutland Vouchee.

2nd August 1800 — **Indenture** between Mary Isabella Dowager Duchess of Rutland, The Duke of Beaufort and the The Right Honorable William [illegible] one part and the said Duke of Rutland of the other part.

21st and 22nd May 1817 — **Indentures** of Lease and Release hereinbefore recited.

17th and 18th September 1826 — **Indentures** of Lease and Release the Release made between the said John Henry Duke of Rutland of the one part and Sir Charles Morgan Baronet Richard Clark Robert Kay Miles Stringer and Newman Knowles therein respectively described of the other part.

17th April 1850 — **Indenture** between the said Duke of Rutland of the one part and the said Sir Charles Morgan Richard Clark Robert Kay Miles Stringer and Newman Knowles of the other part

9th June 1857 — **Indenture** between Richard Travers Ralph Price Henry Kemble and William Samuel Jones therein respectively described of the one part and the said Duke of Rutland of the other part.

17th May 1919 — **Indenture** hereinbefore recited.

As to Land formerly Crockfords

31st and 1st January 1841 — **Indentures** of Lease and Release the Release made between the said Duke of Rutland of the first part William Crockford of Newmarket Gentleman of the second part and Thomas Crockford of the same place Gentleman of the third part.

30th March 1841 — **Indenture** between Sarah Frances Crockford of Seymour Place Mary Fair in the City of Westminster Widow of the first part William Rae Isaacson of Newmarket Gentleman of the second part the said Duke of Rutland of the third part and the said Lord John Manners of the fourth part.

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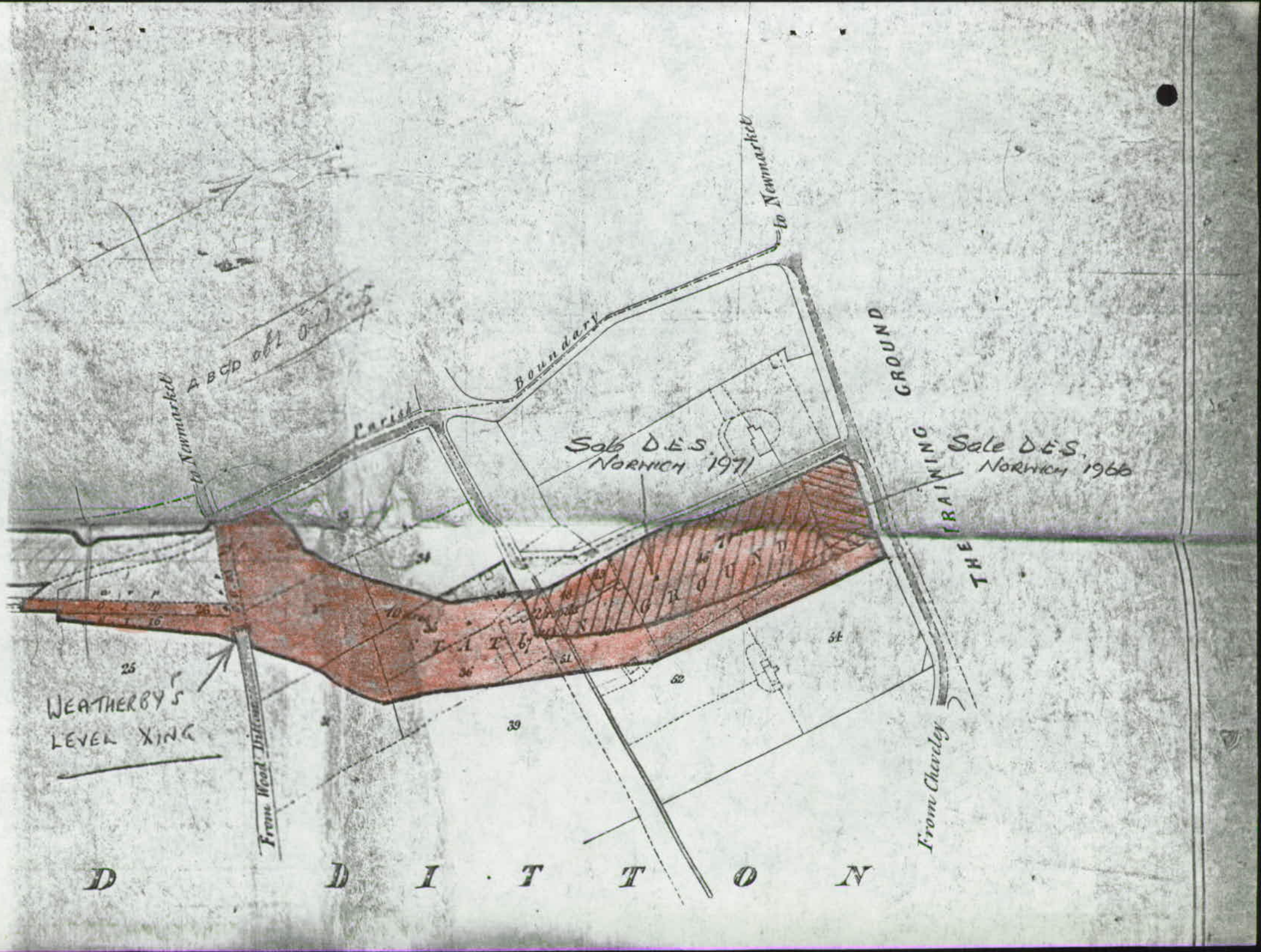

to Newmarket
GROUND
THE TRAINING
Boundary
Parish
to Newmarket
A B C D
Sale D.E.S.
NORWICH 1971
Sale D.E.S.
NORWICH 1966
WEATHERBY'S
LEVEL XING
From Wood Ditton
From Chevely
D I T T O N

ANNO OCTAVO

VICTORIÆ REGINÆ.

****

CAP. XX.

An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the making of Railways. [8th *May* 1845.]

WHEREAS it is expedient to comprise in One General Act sundry Provisions usually introduced into Acts of Parliament authorizing the Construction of Railways, and that as well for the Purpose of avoiding the Necessity of repeating such Provisions in each of the several Acts relating to such Undertakings as for ensuring greater Uniformity in the Provisions themselves: And whereas a Bill is now pending in Parliament, intituled *An Act for consolidating in One Act certain Provisions usually inserted in Acts authorizing the taking of Lands for Undertakings of a public Nature*, and which is intended to be called "The Lands Clauses Consolidation Act, 1845:" May it therefore please Your Majesty that it may be enacted; and be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That this Act shall apply to every Railway which shall by any Act which shall hereafter be passed be authorized to be constructed, and this Act shall be incorporated with such Act; and all the Clauses and Provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the Undertaking authorized thereby, so far as the same shall be

Operation of this Act confined to future Railways.

PRICE 4/-.

Authentication of Certificates of the Board of Trade, Service of Notices, &c.

LXVII. And be it enacted, That all Regulations, Certificates, Notices, and other Documents in Writing purporting to be made or issued by or by the Authority of the Board of Trade, and signed by some Officer appointed for that Purpose by the Board of Trade, shall for the Purposes of this and the Special Act, and any Act incorporated therewith, be deemed to have been so made and issued, and that without Proof of the Authority of the Person signing the same, or of the Signature thereto, which Matters shall be presumed until the contrary be proved; and Service of any such Document, by leaving the same at One of the principal Offices of the Railway Company, or by sending the same by Post addressed to the Secretary at such Office, shall be deemed good Service upon the Company; and all Notices and other Documents required by this or the Special Act to be given to or laid before the Board of Trade shall be delivered at, or sent by Post addressed to, the Office of the Board of Trade in *London*.

Works for Protection and Accommodation of Lands.

And with respect to Works for the Accommodation of Lands adjoining the Railway, be it enacted as follows:

LXVIII. The Company shall make and at all Times thereafter maintain the following Works for the Accommodation of the Owners and Occupiers of Lands adjoining the Railway; (that is to say,)

Gates, Bridges, &c.:

Such and so many convenient Gates, Bridges, Arches, Culverts, and Passages over, under, or by the Sides of or leading to or from the Railway as shall be necessary for the Purpose of making good any Interruptions caused by the Railway to the Use of the Lands through which the Railway shall be made; and such Works shall be made forthwith after the Part of the Railway passing over such Lands shall have been laid out or formed, or during the Formation thereof:

Fences:

Also sufficient Posts, Rails, Hedges, Ditches, Mounds, or other Fences for separating the Land taken for the Use of the Railway from the adjoining Lands not taken, and protecting such Lands from Trespass, or the Cattle of the Owners or Occupiers thereof from straying thereout, by reason of the Railway, together with all necessary Gates made to open towards such adjoining Lands, and not towards the Railway, and all necessary Stiles; and such Posts, Rails, and other Fences shall be made forthwith after the taking of any such Lands, if the Owners thereof shall so require, and the said other Works as soon as conveniently may be:

Drains:

Also all necessary Arches, Tunnels, Culverts, Drains, or other Passages, either over or under or by the Sides of the Railway, of such Dimensions as will be sufficient at all Times to convey the Water as clearly from the Lands lying near or affected by the Railway as before the making of the Railway, or as nearly so as may be; and such Works shall be made from Time to Time as the Railway Works proceed:

Watering Places.

Also proper Watering Places for Cattle where by reason of the Railway the Cattle of any Person occupying any Lands lying near thereto shall be deprived of Access to their former Watering Places; and such Watering Places shall be so made as to be

Works for Protection and Accommodation of Lands.

at all Times as sufficiently supplied with Water as theretofore, and as if the Railway had not been made, or as nearly so as may be; and the Company shall make all necessary Watercourses and Drains for the Purpose of conveying Water to the said Watering Places:

Provided always, that the Company shall not be required to make such Accommodation Works in such a Manner as would prevent or obstruct the working or using of the Railway, nor to make any Accommodation Works with respect to which the Owners and Occupiers of the Lands shall have agreed to receive and shall have been paid Compensation instead of the making them.

Differences as to Accommodation Works to be settled by Justices.

LXIX. If any Difference arise respecting the Kind or Number of any such Accommodation Works, or the Dimensions or Sufficiency thereof, or respecting the maintaining thereof, the same shall be determined by Two Justices; and such Justices shall also appoint the Time within which such Works shall be commenced and executed by the Company.

Execution of Works by Owners on default by the Company.

LXX. If for Fourteen Days next after the Time appointed by such Justices for the Commencement of any such Works the Company shall fail to commence such Works, or having commenced shall fail to proceed diligently to execute the same in a sufficient Manner, it shall be lawful for the Party aggrieved by such Failure himself to execute such Works or Repairs; and the reasonable Expenses thereof shall be repaid by the Company to the Party by whom the same shall so have been executed; and if there be any Dispute about such Expenses the same shall be settled by Two Justices: Provided always, that no such Owner or Occupier or other Person shall obstruct or injure the Railway, or any of the Works connected therewith, for a longer Time nor use them in any other Manner than is unavoidably necessary for the Execution or Repair of such Accommodation Works.

Power to Owners of Land to make additional Accommodation Works.

LXXI. If any of the Owners or Occupiers of Lands affected by such Railway shall consider the Accommodation Works made by the Company, or directed by such Justices to be made by the Company, insufficient for the commodious Use of their respective Lands, it shall be lawful for any such Owner or Occupier at any Time, at his own Expense, to make such further Works for that Purpose as he shall think necessary, and as shall be agreed to by the Company, or, in case of Difference, as shall be authorized by Two Justices.

Such Works to be constructed under the Superintendence of the Company's Engineer.

LXXII. If the Company so desire, all such last-mentioned Accommodation Works shall be constructed under the Superintendence of their Engineer, and according to Plans and Specifications to be submitted to and approved by such Engineer; nevertheless the Company shall not be entitled to require either that Plans should be adopted which would involve a greater Expense than that incurred in the Execution of similar Works by the Company, or that the Plans selected should be executed in a more expensive Manner than that adopted in similar Cases by the Company.

LXXIII. The

GREAT EASTERN RAILWAY.
(GENERAL POWERS.)
STOPPING UP OF OCCUPATION LEVEL CROSSING
NEAR THE NEWMARKET STATION.
SESSION 1879.

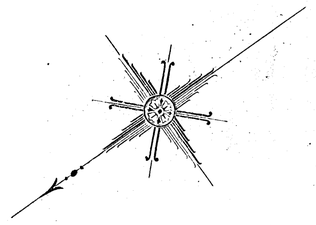
(47)

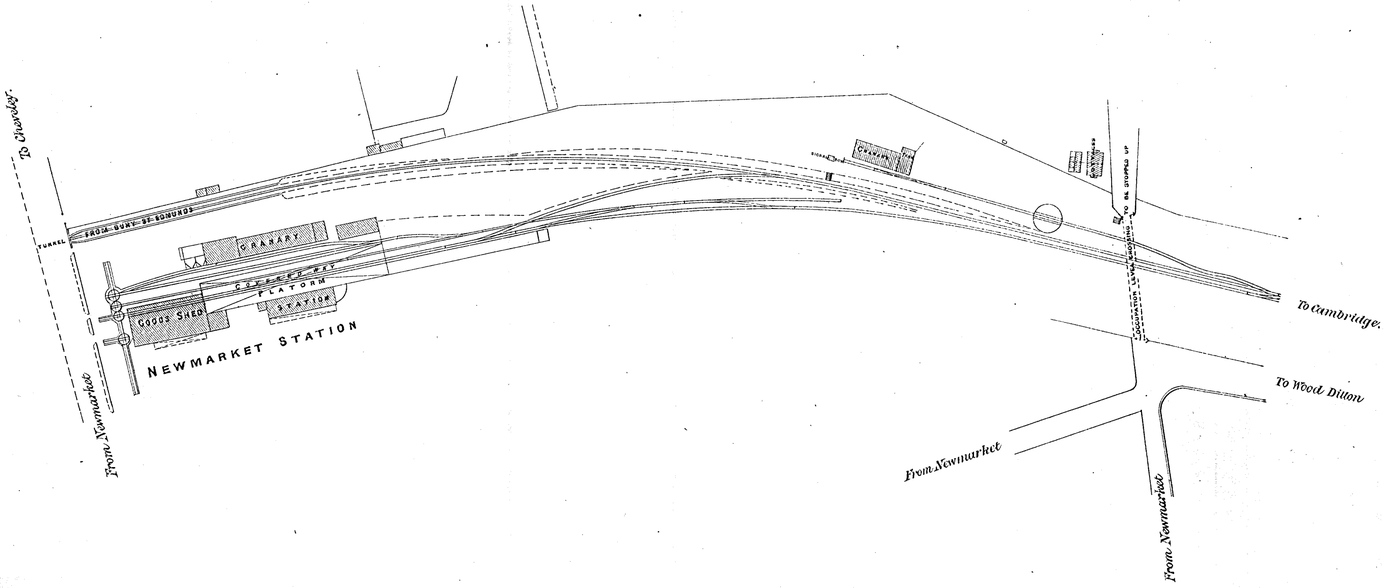
? stopped

PLAN

COUNTY OF CAMBRIDGE

PARISH OF WOOD DITTON





SCALE OF CHAINS.

Links 100 50 0 1 2 3 4 5 6 7 8 9 10 Chains.

020740

020740

Agadamley
ENGINEER.

41.

NEWMARKET RURAL DISTRICT COUNCIL

R. [illegible] DAVIES, A.I.M.T.A.
CLERK & CHIEF FINANCIAL OFFICER
TEL.: NEWMARKET 2362/3/4

Our Ref. Hy.190/P
Your Ref. N/FB.316/13

When calling please ask for :- Mr. Davies

RURAL DISTRICT COUNCIL OFFICES,
PARK LANE,
NEWMARKET,
SUFFOLK.

17th December, 1968.

Dear Sir,

Newmarket: Weatherby's Level Crossing.

With reference to your letter of the 12th November, neither my Council nor the Woodditton Parish Council have any observations to make on the above proposal, but look forward to seeing the detailed plans when available.

Yours faithfully,

The District Estate Surveyor,
British Railways,
Eastern Region,
Grosvenor House,
112, Prince of Wales Road,
NORWICH,
Norfolk, NOR. 09A.

Clerk,
Newmarket Urban District Council,
Severals House,
Newmarket.

JC:VU GP 6/1
N/FB. 316/13

16th December, 1968

Dear Sir,

NEWMARKET: WEATHERBY'S LEVEL CROSSING.

I thank you for your letter of 13th December and am pleased to hear that the Chairman of your Highways and Buildings Committee will be favourably recommending to the Council the Board's proposals in respect of the above mentioned level crossing. The Board's Engineer is drawing up a detailed plan of these proposals and I will let you have a copy as soon as these are available.

With reference to your last paragraph, I note that you agree that the level crossing is of private status and that you do not consider it will be necessary to make an application under Section 108 of the Highways Act, 1959 in order to stop up the vehicular rights.

Yours faithfully,

P.P. Thomas.
FB/Sw

JOHN CRABB, F.C.I.S.
CLERK OF THE COUNCIL.

NEWMARKET URBAN DISTRICT COUNCIL.
SEVERALS HOUSE. NEWMARKET.
TELEPHONE NO. 2321-3

YOUR REF. N/FB/316/13
OUR REF. JC:VU GP.6/1

13th December 19 68.

P.P.Thomas Esq., F.R.I.C.S.,
District Estate Surveyor,
British Railways,
Eastern Region,
Grosvenor House,
112/114, Prince of Wales Road,
Norwich. Nor. 09A.

Dear Sir,

Weatherby's Level Crossing

The Highways & Buildings Committee has considered your letter of 12th November, 1968 and their Chairman, after meeting your Officers on site today, has asked me to say that he will be recommending favourably to the Council that they should agree to both the proposals in your letter.

The Council must be satisfied about the safety measures you propose to adopt and they would now like you to submit precise plans of your proposals.

I have seen a copy of the Inclosure Award for Woodditton and am satisfied about the status of the crossing. I do not think an application under Section 108 of the Highway Act, 1959 is necessary, nor do I think any occupation rights exist over the crossing.

Yours faithfully,

Clerk of the Council.

5/11/69

COUNTY OF WEST SUFFOLK

E. L. WILLIAMS
A.M.I.C.E., A.M.I.Mun.E., A.M.B.I.M.
Chartered Civil Engineer
County Surveyor

Telephone No. 2281
Ext. No. 255

SHIRE HALL
BURY ST. EDMUNDS

Your ref: N/FB.316/13
Our ref: DJH/AGB. UD.8

22nd November, 1968

The District Estate Surveyor,
British Railways Eastern Region,
Grosvenor House,
112/114 Prince of Wales Road,
Norwich. NOR09A.

Dear Sir,

Newmarket: Weatherby's Level Crossing

I refer to your letter dated 12th November regarding the above and note your proposals as outlined in the copy of the letter and plan which you have sent to the Clerk of the Newmarket Urban District Council.

The road in question is not a County Road and the County Council have no interest in it either as a road or public footpath.

Yours faithfully,

E L Williams

County Surveyor

BRITISH RAILWAYS
DISTRICT ESTATE SURVEYOR
27 NOV 1968
NORWICH.

P.C. Ack (for little matter)

B/7/5/12/6 f

CAMBRIDGESHIRE AND ISLE OF ELY COUNTY COUNCIL

719

County Surveyor
Shire Hall, Castle Hill, Cambridge CB3 0AP
Telephone 58811 Extension 427

15 November 1968

My Reference JAJ/REL/G74 gen. Your Reference N/FB.316/13

Dear Sir,

Weatherby's Level Crossing at Newmarket

Thank you for your letter of 12th November and the copy enclosed therewith of a letter and plan you have sent to the Newmarket Urban District Council.

This particular level crossing lies wholly within the boundaries of Newmarket Urban District Council and thus within West Suffolk County.

Although the county boundary comes close to the south-eastern gate marked B on your plan, the approach road on this side of the level crossing is also within Newmarket Urban District as far as the junction between the Cheveley and Ashley roads.

Strictly speaking therefore this Council has no standing in the matter and would not wish to comment on your proposals.

Yours faithfully,

County Surveyor

BRITISH RAILWAYS E.R.
DISTRICT ESTATE SURVEYOR
18 NOV 1968
NORWICH.

The District Estate Surveyor,
British Railways Eastern Region,
Grosvenor House,
112/114 Prince of Wales Road,
Norwich,
Norfolk NOR 09A.

B17 15/12/68

203

Clerk,
Newmarket Rural District Council,
Council Offices,
Park Lane,
Newmarket,
Suffolk.

N/FD.316/13 12th November, 1968

Dear Sir,

NEWMARKET: WRATHERBY'S LEVEL CROSSING.

I enclose copy of a letter and plan which I have today forwarded to the Clerk of the Newmarket Urban District Council and shall be pleased to receive your observations on the Board's proposals in due course.

I enclose an additional copy of the letter to enable you to consult the Parish Council concerned.

I am also seeking the views of the West Suffolk and Cambridgeshire County Councils in this matter.

Yours faithfully,

J. M. ISAAC, A.A.I.

P.P. Thomas.
FB/SW

County Surveyor,
West Suffolk County Council,
Shire Hall,
Bury St. Edmunds,
Suffolk.

N/TB.316/13 12th November, 1968

Dear Sir,

NEWMARKET: WEATHERBY'S LEVEL CROSSING.

I enclose copy of a letter and plan which I have today forwarded to the Clerk of the Newmarket Urban District Council and shall be pleased to receive your observations on the Board's proposals in due course.

I am also consulting the Newmarket Rural District Council and Cambridgeshire County Council on this matter.

Yours faithfully,

J. N. ISAAC, A.A.I.A

P.P. Thomas.
EB/SW

County Surveyor,
Cambridgeshire and Isle of Ely County Council,
Shire Hall,
Castle Hill,
Cambridge.

N/FB.316/13 12th November, 1968

Dear Sir,

NEWMARKET: WRATHERBY'S LEVEL CROSSING.

I enclose copy of a letter and plan which I have today forwarded to the Clerk of the Newmarket Urban District Council and shall be pleased to receive your observations on the Board's proposals in due course.

I am also consulting the Newmarket Rural District Council and the West Suffolk County Council in this matter.

Yours faithfully,

J. N. ISAAC, A.A.I.A.

P.P. Thomas.
FB/SW

Clerk of the Council,
Newmarket Urban District Council,
Severals House,
Newmarket,
Suffolk.

N/F8. 316/13

12th November 1968

Dear Sir,

NEWMARKET : WEATHERBY'S LEVEL CROSSING.

The attached plan No.12793 shows by brown colour the position of "Weatherby's" level crossing at Newmarket; it also shows the existing railway track layout. You will see that I have coloured certain tracks over the crossing in red. These are the sidings which will shortly be lifted, thereby leaving only those which I have shown in green. The most southerly track marked green will be the running line for trains in each direction between Newmarket and Kennett; the remaining green coloured tracks will be retained as sidings. The middle one of the group of three is primarily to give access from Newmarket Station to the other two sidings remaining, and, therefore, will normally be kept clear. The signalbox, known as Newmarket Yard, is being abolished, only the one at the end of the platform being retained.

At the present time the gate marked 'A' on the plan serves as the entrance to the yard. The gate 'B' on the opposite side of the railway is kept locked, being opened as and when required by the attendant crossing keeper. Wicket gates are provided for the use of pedestrians and cyclists. It appears that the level crossing is rarely used as a through road by road vehicles. In fact, I understand that in the normal course of events gate 'B' has to be opened on only one occasion each week, this being to allow the passage of the local refuse cart. You will, of course, be aware that there is a convenient alternative route via the nearby underline bridge.

You will not be surprised, therefore, to hear that we have been looking into the possibility of relieving the British Railways Board of the cost of providing attendance at this crossing and with a number of railway tracks over the level crossing about to be removed the occasion now presents itself to effect this economy. Once this has been done, we would like to be in a position to withdraw attendance from the level crossing by closing it to through road traffic, maintaining entrance 'A' for access to the malt house. At the same time we appreciate that the crossing is used by pedestrians and cyclists and for their benefit we would provide wicket gates with suitable fencing nearer to the running line in the approximate positions shown by the letters 'X' and 'Y' on the plan. Visibility of trains, which will not pass over the crossing at any great speed, is very good at this point and we would instal suitable warning notices in the vicinity of the crossing.

/contd.....

In any case pedestrians appear to be well accustomed to crossing the yard at the present time and with less tracks to worry about, plus the wicket gates to alert them, we feel that our proposals are reasonable.

I should be glad, therefore, if you would place these proposals before your appropriate Council or Committe after which I look forward to hearing we may rely on your support in carrying them out.

Should you require any further details or feel that a site meeting is desirable perhaps you will let me know.

Although the roadway over this crossing is described as a "Public Highway" in the Deposited Plan and Book of Reference to the Special Act authorising this railway (the Newmarket and Chesterford Railway Act, 1846) the Board's Title Deeds describe it as "No.29 Private Road (by mistake described as Public Highway) in the ownership of the Duke of Rutland and occupied by Henrietta Hill Weatherby" and I understand that this private status is supported by the Inclosure Award for the Parish of Wood Ditton dated 19th April, 1824.

In the light of this evidence, do you agree that there will be no necessity for an application under Section 108 of the Highways Act, 1959 in order to stop up the portion of the level crossing to vehicular traffic.

There is one further point on which I should appreciate your views. Presumably the remainder of the road outside the railway ownership is now maintained by your Council as a public highway and, this being so, will you please let me have your views as to who, if anyone, might now claim to have occupation rights over the level crossing.

Yours faithfully,

J. N. ISAAC, A.M.I.

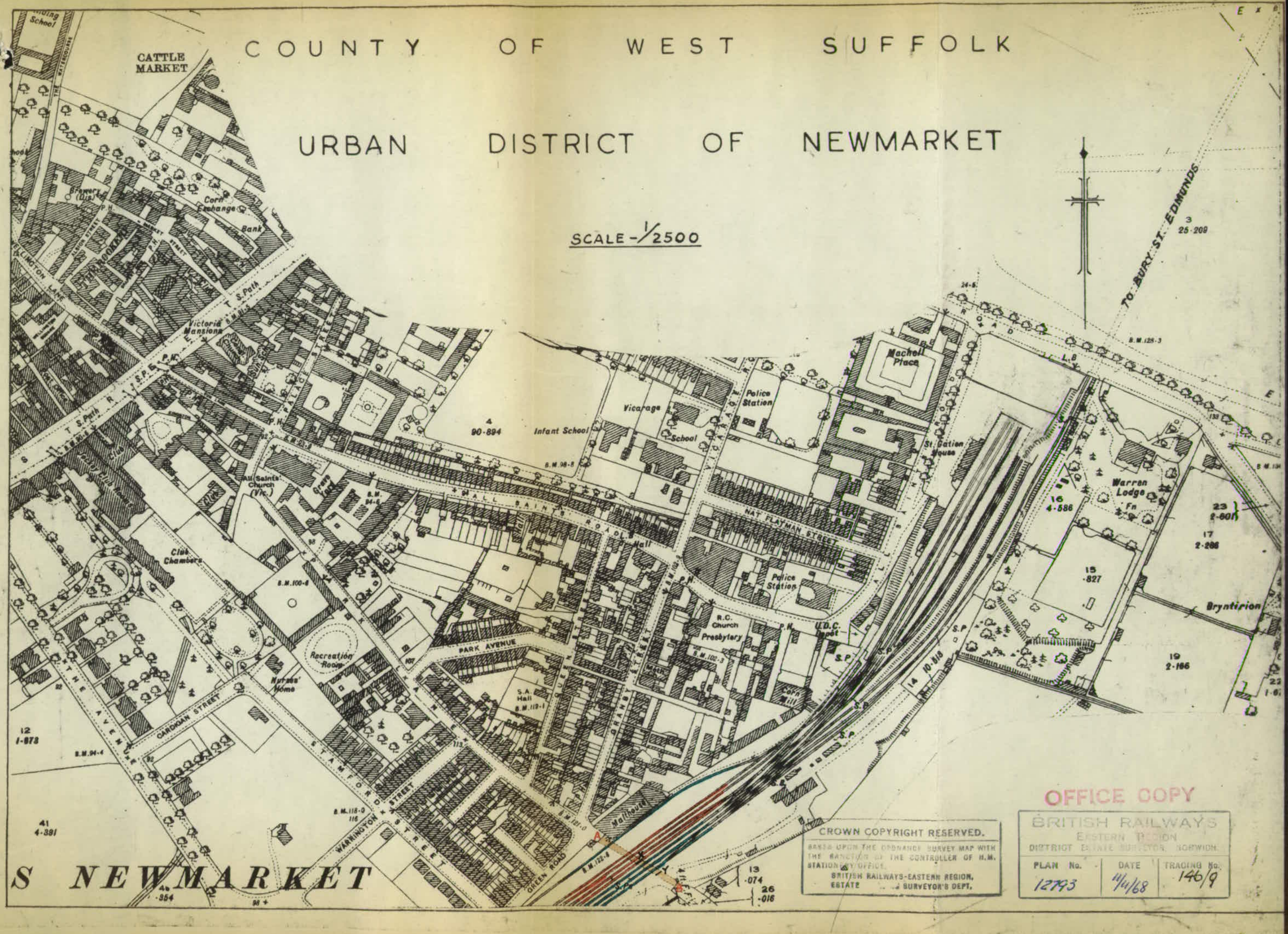
P.P. THOMAS.

P.S. I am also seeking the views of the R.D.C. and the West Suffolk and Cambridge County Councils to our proposals.

COUNTY OF WEST SUFFOLK

URBAN DISTRICT OF NEWMARKET

SCALE - 1/2500



FORM K22

LAND CHARGES ACT 1972

ACKNOWLEDGEMENT OF APPLICATION

The Chief Land Registrar acknowledges receipt of the under-mentioned application to which effect has been given on the date and under the official reference number shown below.

TYPE OF APPLICATION	OFFICIAL REFERENCE NUMBER	DATE OF REGISTRATION
NEW REGISTRATION	LC/24644/84	02 FEB 1984

NAME OF THE ESTATE OWNER/CHARGOR / Particulars of the entry	IMPORTANT PLEASE READ THE NOTES OVERLEAF

DUFFLELAND LIMITED

(1) D(II) NO. 24644 REGISTERED ON 02 FEB 1984
(2) LAND SITUATE IN CRICKETFIELD ROAD NEWMARKET
(3) FOREST HEATH
(4) SUFFOLK

ER deed 3110.5

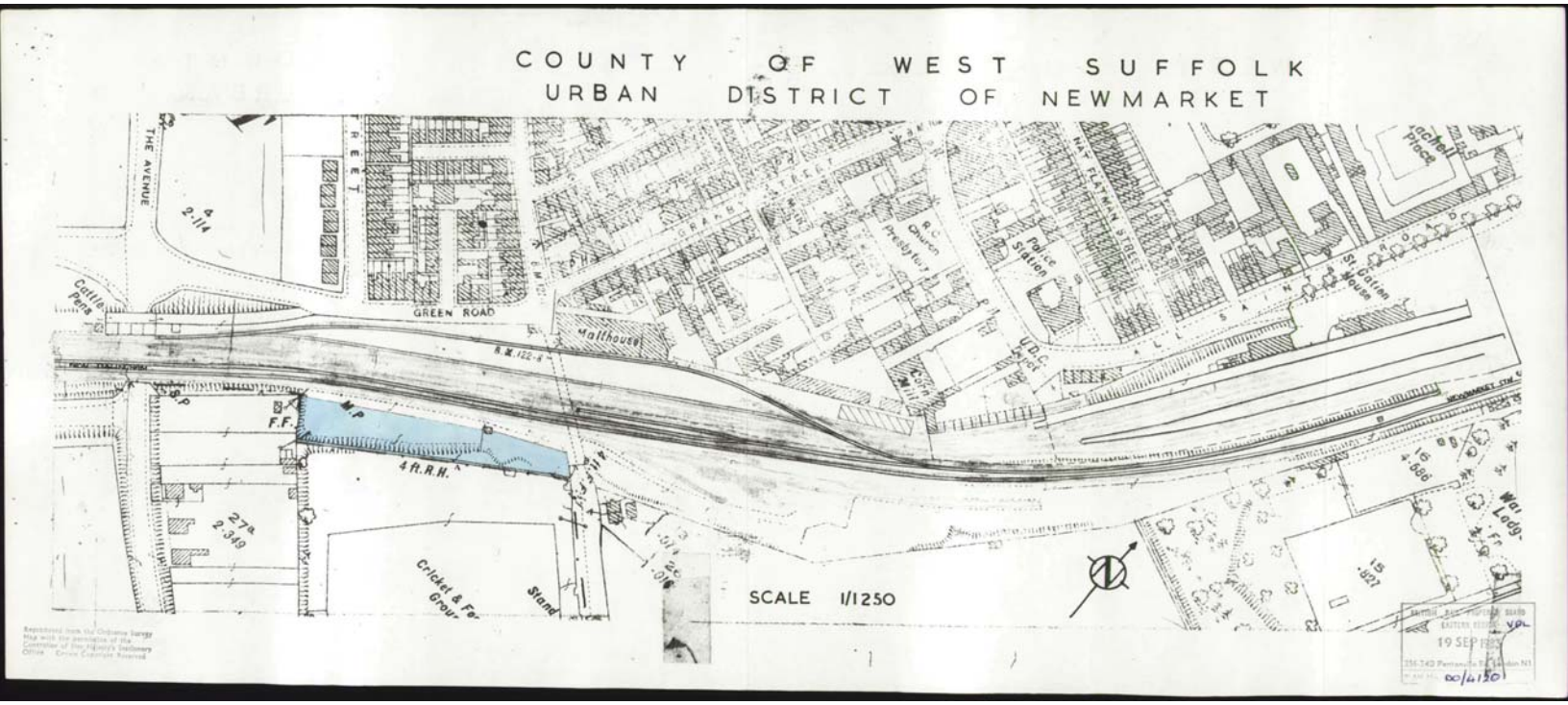
APPLICANT'S REFERENCE	701(LOT4)	APPLICANT'S KEY NUMBER	1258575	AMOUNT PREPAID	£	0.50

FRANCIS & CO.
10 PEAS HILL
CAMBRIDGE
CB2 3PW

Any enquiries concerning this acknowledgement to be addressed to:-

The Superintendent
Land Charges Department
Burrington Way
Plymouth PL5 3LP

COUNTY OF WEST SUFFOLK
URBAN DISTRICT OF NEWMARKET



Reproduced from the Ordnance Survey Map with the permission of the Controller of Her Majesty's Stationery Office. Crown Copyright Reserved

(2) Not to discharge drainage from the property hereby conveyed onto the adjoining land of the Board

3. The Purchaser HEREBY FURTHER COVENANTS with the Board to observe and perform all the covenants stipulations restrictions provisos and declarations affecting the property hereby conveyed contained in the Lease and to indemnify the Board against actions costs claims and expenses in respect thereof

4. The Purchaser HEEBY RELEASES the Board from all obligations (if any) as to fencing in relation to the property hereby conveyed (including fencing bounding the railway) and indemnifies the Board from its liability (if any) in respect of any such fencing

5. There are not included in this Conveyance:-

(i) Any mines or minerals under the property hereby conveyed or any right of support from any mines or minerals whatsoever

(ii) Any easement or right of light air or support or other easement or right which would restrict or interfere with the free use by the Board or any person deriving title under it for building or any other purpose of any adjoining or neighbouring land of the Board (whether intended to be retained or to be sold by it)

6. IT IS HEREBY DECLARED that the carrying on by the Board of its undertaking on its adjoining or neighbouring land in exercise of its powers and subject to its statutory and Common Law obligations shall not be deemed to be a breach of the covenant for quiet enjoyment implied herein by reason of the Board being expressed to convey the property as beneficial owner nor to be in derogation of its grant

7. The Board hereby acknowledges the right of the Purchaser to production of the documents referred to in the Schedule hereto

FORM K22

LAND CHARGES ACT 1972

ACKNOWLEDGEMENT OF APPLICATION

The Chief Land Registrar acknowledges receipt of the under-mentioned application to which effect has been given on the date and under the official reference number shown below.

TYPE OF APPLICATION	OFFICIAL REFERENCE NUMBER	DATE OF REGISTRATION
NEW REGISTRATION	LC/24646/84	02 FEB 1984

NAME OF THE ESTATE OWNER/CHARGOR	IMPORTANT PLEASE READ THE NOTES OVERLEAF
Particulars of the entry	

DUFFLELAND LIMITED

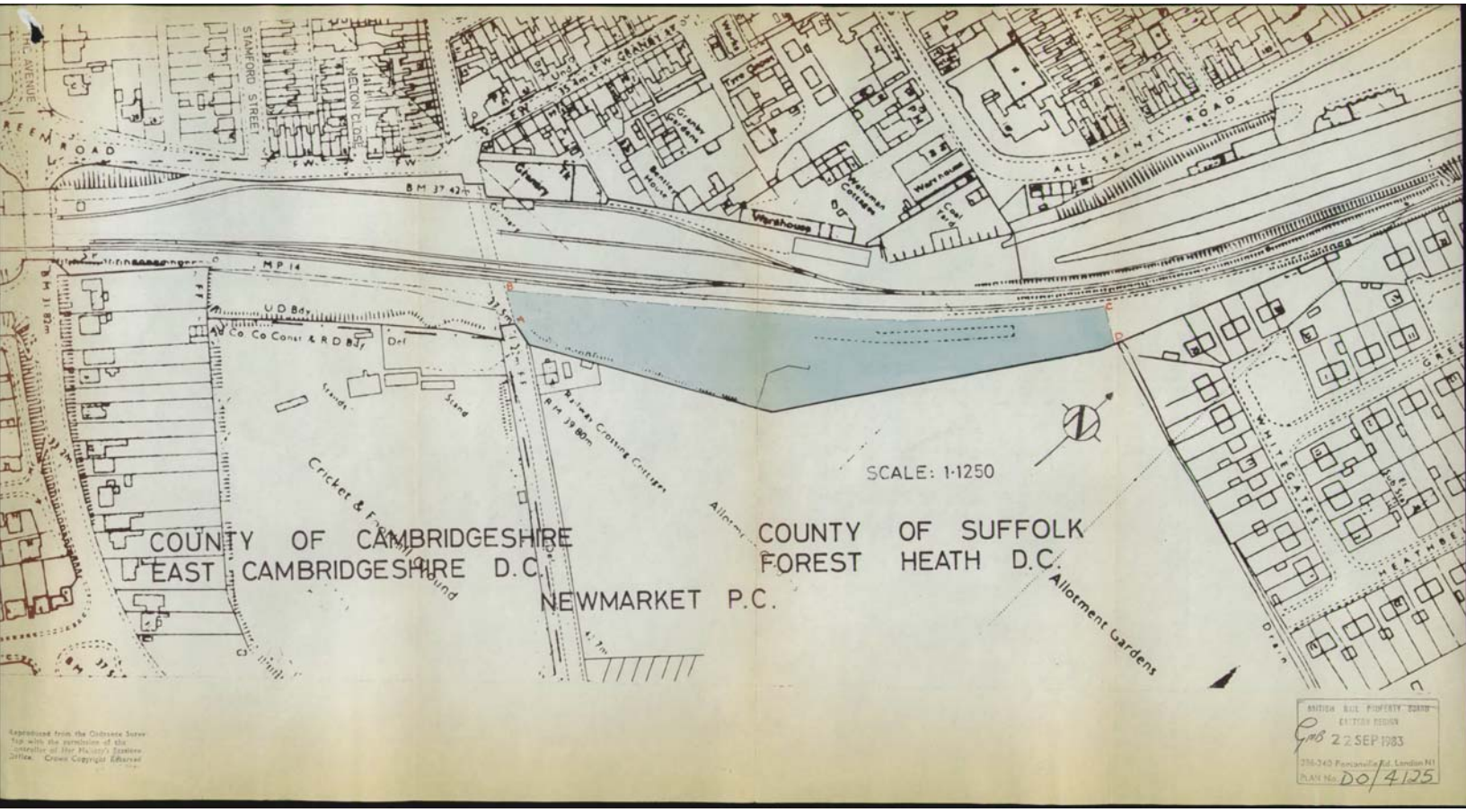
(1) D(II) NO. 24646 REGISTERED ON 02 FEB 1984
(2) CRICKETFIELD ROAD
(3) NEWMARKET
(4) SUFFOLK

APPLICANT'S REFERENCE	701(LOT25)	APPLICANT'S KEY NUMBER	1258575	AMOUNT PREPAID £	0.50

FRANCIS & CO.
10 PEAS HILL
CAMBRIDGE
CB2 3PW

Any enquiries concerning this acknowledgement to be addressed to:-

The Superintendent
Land Charges Department
Burrington Way
Plymouth PL5 3LP



the property as beneficial owner nor to be in derogation of its grant

(c) there is to be no right of way included in this conveyance over the pedestrian level crossing situated to the west of the property hereby conveyed

5. The Purchaser HEREBY RELEASES the Board from all obligations (if any) as to fencing in relation to the property hereby conveyed (excluding fencing between points ABCD on the plan) and indemnifies the Board from its liability (if any) in t respect of any such fencing

6. The Board hereby acknowledges the right of the Purchaser to the production of the document referred to in the Schedule hereto and to delivery of copies thereof and undertakes for the safe custody of the same

IN WITNESS whereof the Board and the Purchaser have caused their respective Common Seals to be hereunto affixed the day and year first before written:

THE SCHEDULE hereinbefore referred to

Date	Document	Parties
26th March 1849	Conveyance	The Most Noble John Henry Duke of Rutland (1) The Right Honourable James Robert Manners Andrew Robert Drummond and Henry Norman (2) The Newmarket Railway Company (3)

135/61

THE COMMON SEAL of the BRITISH RAILWAYS BOARD was herreunto affixed in the presence of:

A PERSON AUTHORISED BY THE BOARD TO ACT INSTEAD OF THE SECRETARY
61958

D.A. 45 17

DATED 22nd December 1995

BRITISH RAILWAYS BOARD

- and -

RAILTRACK PLC

SHORT FORM
(Stream-line procedure)

DEMARCATION AGREEMENT

under

RAILTRACK TRANSFER SCHEME

Location: Land on the eastern side of Green Road Newmarket in the County of Suffolk

Route: Ely Bury Stowmarket Ipswich (ESI)

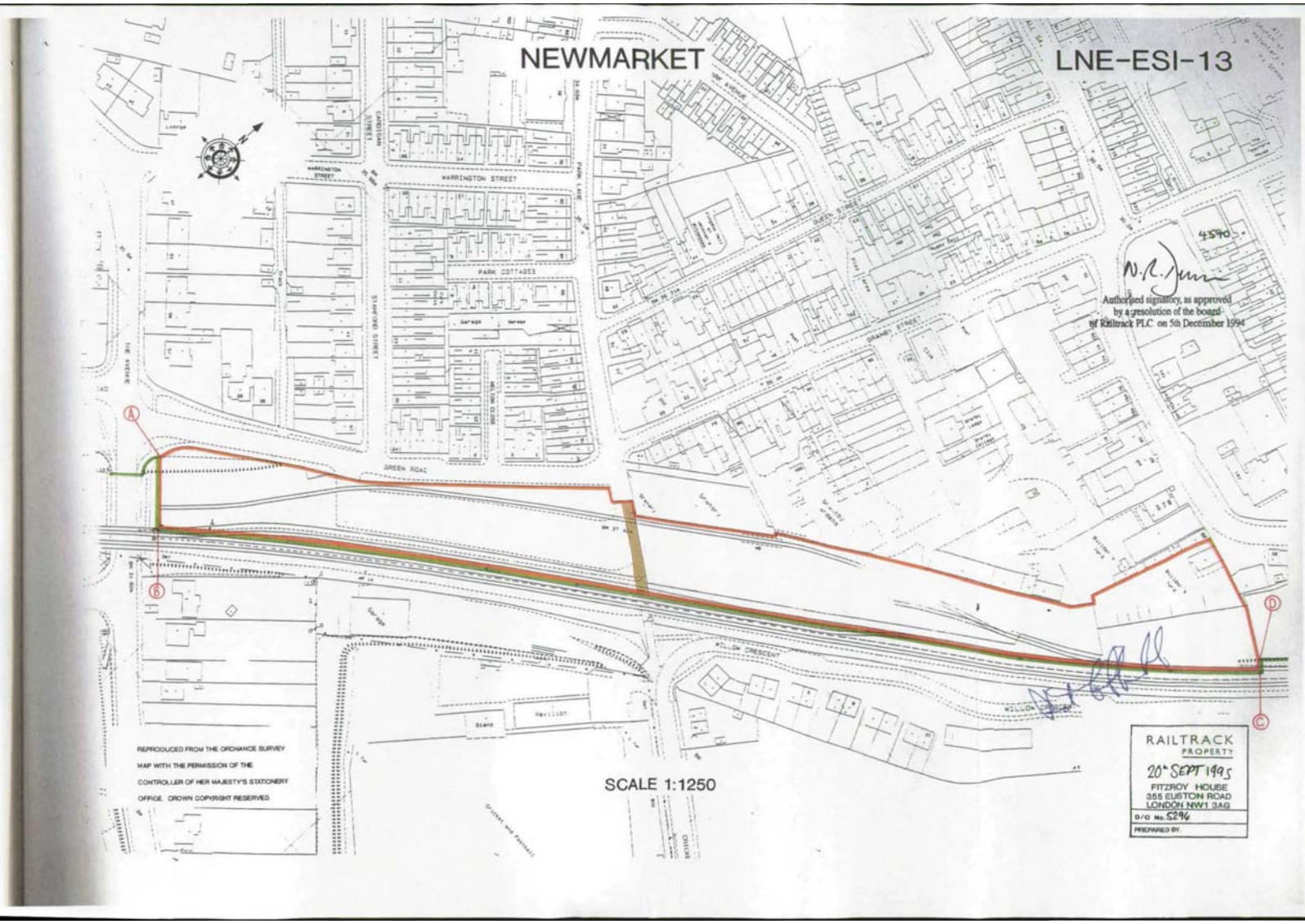
Plan No (under Scheme): LNE - ESI - 13

Land Charge(s) registered number(s):

RAILTRACK OPERATIONAL/B.R. NON-OPERATIONAL INTERFACE

REES & FRERES
1 The Sanctuary
Westminster
London SW1P 3JT

Tel: (0171) 222 5381
Fax: (0171) 222 4646


NEWMARKET
LNE-ESI-13
WARRINGTON STREET
PARK COTTAGES
GREEN ROAD
WILLOW CRESCENT
QUEEN STREET
GRAND STREET
A
B
C
D
4590
Authorised signatory, as approved by a resolution of the board of Railtrack PLC on 5th December 1994
REPRODUCED FROM THE ORDNANCE SURVEY MAP WITH THE PERMISSION OF THE CONTROLLER OF HER MAJESTY'S STATIONERY OFFICE. CROWN COPYRIGHT RESERVED.
SCALE 1:1250
RAILTRACK PROPERTY
20th SEPT 1995
FITZROY HOUSE
355 EUSTON ROAD
LONDON NW1 3AG
D/O No. 5294
PREPARED BY.

available to it (but so that this shall not oblige Railtrack to carry out any site inspection).

5.6.2 If Railtrack shall fail to respond to such written request or if it shall reasonably and properly appear to the Board that any response given is incomplete, then Railtrack shall afford access to its records or records available to it so as to permit the Board to pursue reasonable investigation of them.

5.6.3 The Board and Railtrack agree to sign in duplicate plans showing all the Defined Service Media so identified and to annex one copy to their part of this Agreement.

5.6.4 Railtrack may (if so required in connection with any existing or proposed grant or disposal in relation to Railtrack's Land) implement the procedures for annexation of agreed plans as follows :

5.6.4.1 Railtrack may notify the Board that it wishes (for the reasons stated above) to confirm the effect of this clause 5.6

5.6.4.2 With that notification, Railtrack shall forward to the Board a plan showing the Defined Service Media. In the event that there are no such Service Media, none will be shown on the plan and this fact will be stated.

5.6.4.3 The plan shall be agreed on the basis of the same principles appearing under 5.6 above and the Board and Railtrack agree to sign in duplicate plans showing the Defined Service Media (or, where applicable, statements as to the absence of Defined Service Media) and to annex one copy to their part of this Agreement.

6. **Mines and minerals**

Railtrack's Land includes any mines or minerals under the Board's Land and which at the Transfer Date were owned by the Board and to the extent necessary to give effect to this this Agreement operates as a transfer of such mines and minerals

7. **Easements excluded**

Railtrack's Land is not subject to any easement or right of light, air or support or other easement or right whatsoever in favour of the Board's Land except:

7.1 to the extent (if at all) resulting from clause 4 of this Agreement or stated in any Schedule to this Agreement

7.2 for a right of support to the extent currently enjoyed by the Board's Land in respect of Railtrack's Land (but so that this does not imply any ancillary right of entry upon Railtrack's Land)

8. **Easements included**

The following easements subsist for the benefit of Railtrack's Land and each part of it and the Board grant and confirm these (as necessary) to Railtrack :-

8.1 the right at any time to erect or suffer to be erected any buildings or other erections and to alter any building or other erection now standing or afterwards to be erected on any part of Railtrack's Land in such a manner as to obstruct or interfere with the passage of light or air to any building which is or may be erected upon the Board's Land and any access of light and air over Railtrack's Land shall be treated as enjoyed by the licence or consent of Railtrack and not as of right

8.2 the right of support from the Board's Land for Railtrack's Land and works

8.3 the right with or without workmen and equipment at all reasonable times (after giving reasonable prior written notice where practicable) to enter upon the Board's Land (but not into any buildings there) for the purpose of inspecting, maintaining, repairing, renewing, altering or removing any fences, walls, railway banks, abutment or retaining walls, bridges and other works on Railtrack's Land subject to clause 8.4 below

8.4 the above right of entry is subject to Railtrack minimising inconvenience and as soon as reasonably practicable making good all damage occasioned to the Board's Land in its exercise

8.5 the right with or without workmen and equipment to enter on the Board's Land for the purpose of ascertaining performance of the Board's obligations under clauses 9.3 and 9.4 below and (if necessary in the opinion of Railtrack) carrying out those obligations

9. **Covenants by Board**

THE Board covenant with Railtrack for the benefit and protection of such part of Railtrack's Land as is capable of being benefited or protected and with intent to bind so far as legally may be the Board and the Board's successors in title, owners for the time being of the

Day Steve

From: Robert Kensit <Robert.Kensit@suffolk.gov.uk>
Sent: 28 November 2011 10:37
To: Steve Kerr; Day Steve
Cc: Mary George
Subject: RE: Status of Weatherby's level crossing, Newmarket

Steve,

I can confirm that there are no Public Rights of Way, or any recorded claims in the vicinity of this crossing.

Robert A. Kensit Consolidation Technician
Rights of Way and Access Team
Economy Skills and Environment
Suffolk County Council
Desk 27, Block 2, Floor 4
Endeavour House, Ipswich IP1 2BX

☎ 01473 264580

robert.kensit@suffolkcc.gov.uk

From: Steve Kerr
Sent: 28 November 2011 09:48
To: Robert Kensit
Cc: Mary George
Subject: FW: Status of Weatherby's leve crossing, Newmarket

Robert,

Please would you double check whether this is a recorded ROW and whether any claims have been submitted and confirm to all, inc me.

thanks

steve

From: Day Steve [mailto:Steve.Day@networkrail.co.uk]
Sent: 25 November 2011 16:31
To: Steve Kerr
Cc: Esterhuizen Tina
Subject: Status of Weatherby's leve crossing, Newmarket

Steve

26.2.07

Suffolk County Council

RECEIVED
- 5 MAR 2007

Dear Steve

Attached plan shows publicly maintainable highway at the Newmarket Cricket Field Road level crossing.

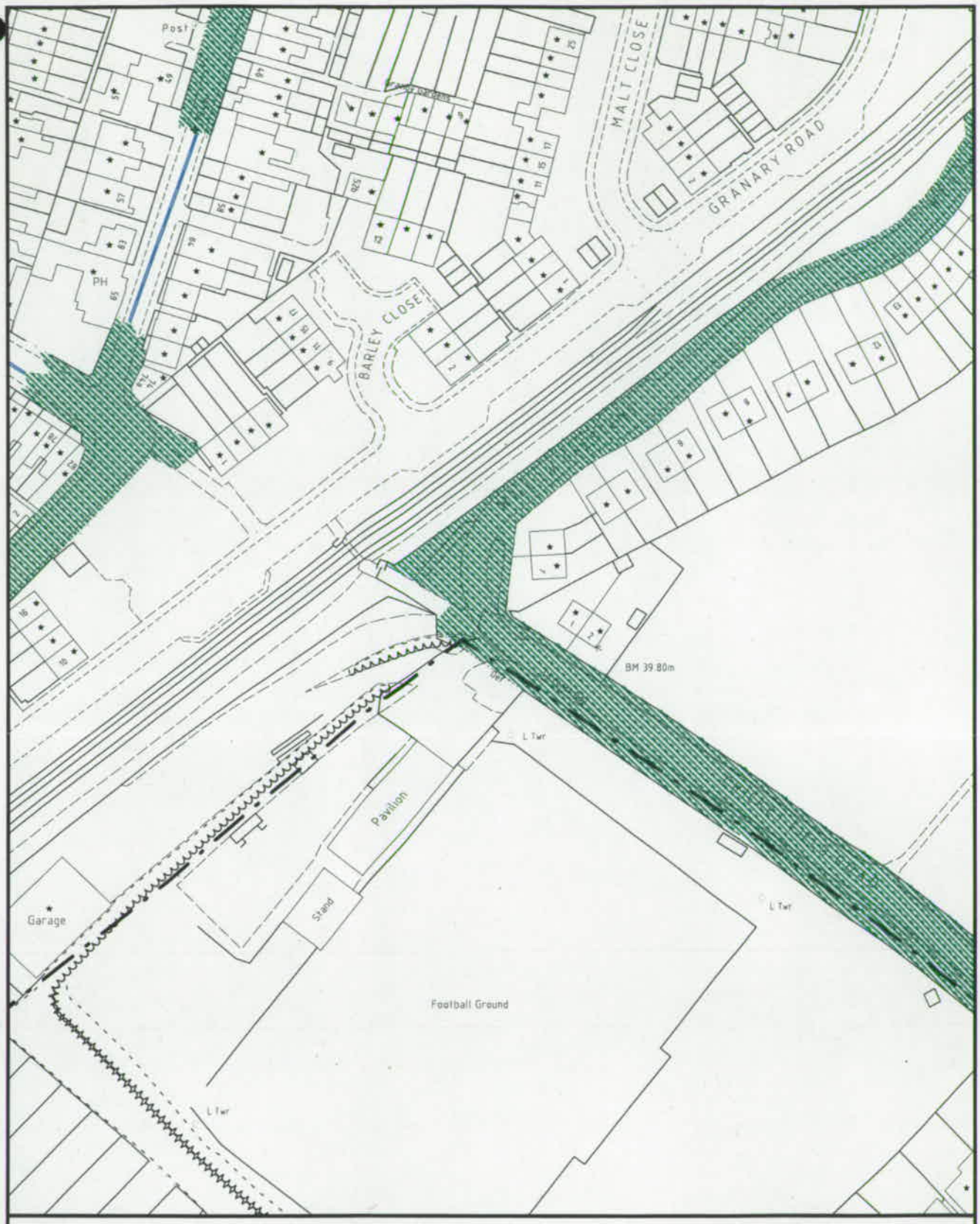
(See my email 26/2/07.

Regards

Mary George.

Endeavour House
8 Russell Road, Ipswich, Suffolk IP1 2BX
Website: www.suffolkcc.gov.uk
01473 264742

With Compliments



TITLE

Newmarket - extent of highway considered maintainable at public expense shown shaded green.

Suffolk County Council
Environment & Transport

Lucy Robinson
Director of Environment & Transport
Endeavour House, 8 Russell Road, Ipswich, Suffolk. IP1 2BX.

Scale 1:1250

NORTH
Grid North

PRODUCED BY
CHECKED BY
DRAWING No.
DATE

Highways Records officer - Pam Ward 01473 265034

Day Steve

From: Mary George [Mary.George@et.suffolkcc.gov.uk]
Sent: 26 February 2007 16:46
To: Day Steve
Subject: RE: Newmarket Level Crossing–Cricket field Road

Dear Steve

I have checked the Definitive map and can confirm that there are no recorded public rights of way affecting your crossing, neither do we have any recorded claims or anomalies.

I have also checked the extent of the publicly maintainable highway with my colleagues in Highways Records, their plans correspond to yours except that the narrow "tail" extending SE from the crossing shown green on your plan also appears to be shown as maintainable on their plan. I've put a copy in the post for you.

Yours sincerely

Mary George
Definitive Map Officer
Countryside Access Team
Endeavour House, 8 Russell Road
Ipswich, IP1 2BX
Tel: 01473 264742

-----Original Message-----
From: Day Steve [mailto:Steve.Day@networkrail.co.uk]
Sent: Friday, February 23, 2007 10:18 AM
To: mary.george@et.suffolkcc.gov.uk
Subject: Newmarket Level Crossing--Cricket field Road

Mary

I wonder if you could have a look at the attached footpath level crossing site at the centre of the attached plan. We have no public rights recorded, but I'd like to make sure there is nothing on the Definitive Map.

Thank you in advance for your help.

Warmest regards

Steve Day

Liability and Clearance Advisor, Network Rail

Room 101 Suite 2, General Offices, Waterloo Station

LONDON SE1 8SW

Tel. 020 7921 5757

Neutral Citation Number: [2017] EWHC 716 (Admin)

Case No: CO/421/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2017

Before :

MR JUSTICE DOVE

- -

Between :

THE RAMBLERS ASSOCIATION	**Claimant**
- and -	
SECRETARY OF STATE FOR ENVIRONMENT FOOD AND RURAL AFFAIRS	**Defendant**
- and -	
NOTTINGHAMSHIRE COUNTY COUNCIL	**First Interested Party**
- and -	
NETWORK RAIL INFRASTRUCTURE LIMITED	**Second Interested Party**
- and -	
SEVERN TRENT WATER LIMITED	**Third Interested Party**

- -

George Laurence QC & Luke Wilcox (instructed by **Bates Wells Braithwaite LLP**) for the **Claimant**
Tim Buley (instructed by **Government Legal Department**) for the **Defendant**
Juan Lopez & Charles Forrest (instructed by **Network Rail Infrastructure LTD**) for the **Second Interested Party**
The first and third interested parties were not represented and did not appear

Hearing dates: 14th & 15th February 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR JUSTICE DOVE

Mr Justice Dove :

Introduction

1. This is an application for judicial review in relation to the decision of an Inspector appointed by the defendant dated 26th October 2015, whereby he refused to confirm the Nottinghamshire County Council (Burton Joyce Footpath No.17 and Stoke Bardolph footpath No.6) Modification Order 2013 ("the Order"). On 1st May 2006 the claimant made an application to the first interested party ("NCC"), who are the highway authority, to add the footpath to the Definitive Map and Statement for which they have responsibility. The application was made under section 53(5) of the Wildlife and Countryside Act 1981. On 5th October 2011 the application was refused and the claimant appealed to the defendant. That appeal was allowed on 21st February 2012 by the defendant's duly appointed Inspector, and NCC were directed to modify the Definitive Map and Statement to include the footpath, leading to NCC (having concluded that they would accept the decision and not seek to challenge it by way of judicial review) to make the Order on 1st February 2013. The second interested party ("NR") objected to the making of the Order for reasons which are set out below, leading to the convening of a public inquiry in relation to whether or not the Order should be confirmed and the decision under challenge.

The facts

2. The claimant's application related to a claimed footpath passing from Nottingham Road, Burton Joyce in the north-west, passing in a south-easterly direction across country and over a level crossing of the railway line running from Nottingham to Lincoln, until it intersected with the Stoke Bardolph Footpath No.1. The proposed footpath passed over land belonging to the third interested party ("STW"), and also, obviously, railway land operated by NR. The footpath was claimed on the basis of 20 years' usage, and evidence of user forms were submitted from people who had used the route to establish that the requirements of section 31 of the Highways Act 1980 (as set out below) were met. In all, 33 evidence forms were ultimately provided to NCC describing use of the way. In the analysis of the forms provided by the Inspector who considered the appeal against the refusal of NCC to grant the application for modification she describes the evidence as follows:

> "14. A total of 33 user evidence forms…provide evidence of claimed use, the earliest use dating from 1956. Fifteen forms indicate for the full 20 year period 1986-2006, with 13 people claiming use weekly and 15 people claiming use monthly, mostly for recreational purposes. Of the 19 forms relating to the 20 year period 1970 to 1990, 3 people claim use for the full 20 year period with a further 16 claiming use for periods of 5 to 15 years. Frequency of use during this earlier period varies from 2 or 3 times a year to daily, with 6 claiming monthly use, 3 claiming use twice a month, and 4 claiming use more than twice a week. None of the users refer to notices or challenges to their use prior to 2006, suggesting that the use was as of right…Some mention warning signs carrying instructions, but these were directed at those crossing the railway with vehicles or animals."

3. The objections raised by NR were both legal and factual. Dealing firstly with the factual points, an analysis was presented of the private Act of Parliament, the Midland Railway (Nottingham and Lincoln) Act 1845 and its accompanying material in the form of the Deposited Plan and Book of Reference detailing the survey of affected land interests at the time of the Act receiving assent. This material did not show the existence of any public right of way at that time. It showed that the land either side of the present level crossing was in the same ownership and at the point of the level crossing there was in existence at that time an "occupation road". It was therefore concluded that the level crossing was created to enable continued access along this private road for the benefit of the landowner. This reflected the position of STW, who owned the land either side of the railway lines at the point of the level crossing and who had the benefit of a right of way across it over the level crossing. In addition to this point, NR's witness gave evidence of a photograph from 1993 showing that the gates at the level crossing were chained and locked at that time. NR also relied upon the evidence of STW, and in particular Mr Jackson (one of their estate managers for the land either side of the level crossing over which the proposed footpath ran) that the gates at the level crossing were chained and padlocked, cross-referencing this to evidence from the claimant's user forms which alluded to gates at the level crossing being padlocked.

4. In relation to their legal objections, NR contended that there were three separate reasons in law why the Order should not be confirmed. These arguments are more fully developed below, as they form a significant part of the subject matter of this case. The first reason was that it was contended that NR had no capacity to dedicate a new public right of way on the basis that dedication would be inconsistent with its obligations to operate a safe and efficient railway network.

5. The second reason relied upon was the contention that the Licence under which NR operate the rail network would not permit the creation of new rights over railway land without the consent of the Office of Rail and Road ("ORR"). The terms of the licence which were in issue were contained in the version of the Licence dated 1 April 2014 as follows:

> "7 Land Disposal
>
> 7.1 The licence holder shall not dispose of any land otherwise than in accordance with this condition.
>
> 7.2 The licence holder may dispose of any land where:
>
> (a) ORR consents to such disposal; or
>
> (b) The disposal is required by or under any enactment…
>
> "disposal" includes any sale, assignment, gift, lease, licence, the grant of any right of possession, loan, security, mortgage, charge or the grant of any other encumbrance to subsist (other than an encumbrance subsisting on the date when the land was acquired by the licence holder or on 15th November 2001) or any other disposition to a third party, and "dispose" shall be construed accordingly;"

6. The third legal issue raised by NR was the contention that since trespass on the railway was rendered a criminal offence by section 55 of the British Transport Commission Act 1949 the footpath could not be the subject of dedication. The claimant sought to refute this argument through reliance upon the case of Bakewell Management Ltd v Brandwood and others [2004] UKHL 14. The claimant submitted that the principle should not be given effect in the present case so as to deprive the public of the benefit of the right of way which would otherwise be established.

7. Having heard the evidence and the arguments at the inquiry, and having conducted a site visit, the Inspector reached conclusions in relation to the merits of confirming the Order. It is necessary in order to understand the arguments raised in this judicial review to set out the Inspector's findings and conclusions at some length. He dealt first with the issues that arose in respect of whether or not the Order should be confirmed in so far as it affected NR's land and the level crossing. At the outset he addressed the arguments about incompatibility with NR's statutory objects and the point about the ORR Licence as follows:

> "8. The RA submit that for the purposes of the statutory scheme there is no requirement for the applicants to demonstrate that there was anyone with the legal capacity to dedicate. The RA says that the purpose of section 1(2) of the Rights of Way Act 1932 was to eradicate the need for capacity to be demonstrated once use had been established for a period of 40 years. That specific section was repealed under the National Parks and Access to the Countryside Act 1949 (the 1949 Act) so that since the coming into operation of the 1949 Act a way can be deemed to have been dedicated irrespective of whether there was a person or body with the capacity to dedicate.
>
> 9. However, for the statutory scheme to be engaged in the first place, the clause 'whether the way is of such a character that use of it could not give rise at common law to a presumption of dedication' must be addressed. At common law, there remains a requirement for the person or body against whom dedication is inferred to have the capacity to dedicate. Whilst section 1 of the Rights of Way Act 1932 established a statutory framework whereby the capacity to dedicate requirements could be dispensed with following a necessary period of use, the common law principle involving the capacity to dedicate remains relevant in certain circumstances. If Network Rail does not have the capacity to dedicate a public right of way over its operational land either because such a dedication would be inconsistent with its statutory duties or because it could not authorise use which would otherwise be criminal, a public right of way could not come into being at common law or under the statutory scheme.
>
> 10. Network Rail drew support from the case of British Transport Commission v Westmoreland County Council [1958] (the Westmoreland case). As contested by Network Rail, this case established a number of principles:

(i) A statutory undertaker (such as Network Rail) cannot voluntarily release or otherwise abandon a statutory power that has been conferred upon it by special Act of Parliament and that concerns the manner in which that statutory undertaker may permissibly deal with land acquired for the purposes of that Act;

(ii) A statutory undertaker cannot, in the absence of an express statutory power, grant any easement over land acquired for the purposes of its special Act if the existence of such an easement – in any possible circumstances and at any future time – would undermine the statutory undertaker's satisfaction of the purposes of the special Act;

(iii) a statutory company has no power to grant a public right of way where the enjoyment thereof by the public *is incompatible* with the statutory objects of the company; and

(iv) for the purposes of adjudging *incompatibility*, it is a question of fact whether, at the date when the question is considered by a tribunal of fact, that there is any likelihood that the existence of an alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duty.

11. In the Westmoreland case, the route at issue ran over a bridge spanning the railway; the court found that the existence of the bridge did not endanger the running of trains upon the lines. In that case, statutory incompatibility did not arise, nor did the issue of criminal trespass under section 55 of the British Transport Commission Act 1949 (BTCA). The question of incompatibility is therefore a question of fact in each case. The circumstances in the Westmoreland case are different from that at Zulus Crossing where it is claimed a public right of way has come into existence crossing the live rails of the railway on the level.

12. Mr Jones's evidence was that an assessment had been made of the risk to users of the crossing using Networks Rail's ALCRM model. The assessment gave the crossing a score of C6, which reflected the number of vehicular traverses by the private rights holder against the number and speed of the trains passing over the crossing. The risk assessment did not take into account public use of the crossing as there was no empirical data for public use of the crossing to insert into the model.

13. A covert camera installed at Zulus Crossing for a period of 9 days in August 2015 had revealed around 60 crossings of the tracks by members of the public. The photographs showed single pedestrians crossing the railway, cyclists, dog walkers and families with small children and / or pushchairs. In Mr

Jones' view, those members of the public encumbered with children, dogs or other accompaniments placed themselves at greater risk in crossing the railway as their primary attention may not be upon looking and listening for approaching trains. Factoring in 20 pedestrian crossings per day into the ALCRM model raised the crossing risk assessment to C5. Based on the ALCRM model, it was Mr Jones' view that public use of Zulus Crossing increased the level of risk to crossing users and train passengers with a corresponding reduction in safety at the crossing.

14. Mr Greenwood's evidence was that Network Rail's licence included conditions under which the railway must operate and is the primary tool which the Office of Rail and Road (ORR) has for holding Network Rail to account in respect of safety and operational efficiency. The Licence contained conditions which govern Network Rail's competence to grant new rights which affect operational land; the grant of any such rights would require the consent of the ORR. Mr Greenwood said that Network Rail would not receive such consent from ORR to grant a new public right of way over the railway as the grant would undermine the business of operating and improving the network. Condition 7 of the licence prevented the disposal of railway land without ORR consent and 'disposal' for the purposes of condition 7 included the 'grant of any other encumbrance or knowingly permitting any encumbrance to subsist". It was submitted that a change of the status of the crossing from a private vehicular crossing to one which also carried public rights was a 'disposal' of the land which given the implications regarding safety and risk would not be consented to by ORR.

15. Although there had been no fatalities at Zulus Crossing, an increase in pedestrian use of the crossing as a result of the existence of a public right of way is likely to increase the risk of an accident or fatality occurring. Such increase in risk and danger to both crossing users and passengers on the railway is reflected in the revised ALCRM risk assessment. In my view, use by the public of Zulus Crossing would be incompatible with Network Rail's ability to undertake and execute its statutory objectives as set out by the legislation governing the operation of the railway network."

16. Section 55 (1) of the BTCA provides that 'Any person who shall trespass any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection

with the working of the railway shall on summary conviction be liable to a penalty…'.

17. The claimed footpath crosses the Nottingham – Newark railway on the level and it is clear that the land is part of the operational railway. The crossing therefore satisfies the description of land found in section 55 as being 'the lines of the railway'. Use of Zulus Crossing by the public therefore constitutes an offence under section 55 of the 1949 Act.

18. It was argued by the RA that the principles established in Bakewell Management Ltd v Brandwood [2004] (Bakewell) could be applied to pedestrian use of Zulus Crossing. In Bakewell the House of Lords found that rights could be acquired over land through unlawful long use if that unlawful use could have had been authorised. The RA contended that although section 55 of the 1949 Act makes trespass over '*the lines of the railway*' a criminal offence, it must be within Network Rail's power to authorise what would otherwise be a trespass since customers have to go '*in dangerous proximity to lines of railway*' in the ordinary course of using the railway.

19. At issue in Bakewell was whether the use prohibited by statute could have been authorised and therefore not be a criminal act. In that case the offence of driving across a common was committed when done '*without lawful authority*'. The House of Lards found that authority to drive over the common could have been given and therefore no offence would have been committed. The Road Traffic Act 1988 and the Law of Property Act 1925 both prohibit the driving on a common '*without lawful authority*'. The RA contends that although section 55 of the BTCA does not include the term '*without lawful authority'*, the concept of trespass is such that it implies that authority could be given by the landowner. The RA notes that rail passengers are regularly in '*close proximity to lines of railway'* when they stand on platforms waiting for their train; these people must be trespassers under the provisions of section 55 but are permitted to remain by Network Rail.

20. I am not persuaded by the RA's line of argument on this point for a number of reasons. First, Bakewell concerned criminality because the landowner could give, but had not given lawful authority to drive over the common. This is in direct contrast to section 55 of the BTCA which makes trespass on the railway a criminal act and where there is no provision for the network operator to give 'lawful authority' for such acts. Secondly, Network Rail cannot grant such authority as it would be contrary to the terms of the license under which it operates. Finally, the analogy drawn by the RA regarding passengers standing on a platform as engaging in 'authorised trespass' when they are in 'close proximity of the rails' is

incorrect; any passenger present on a platform is an invitee or client of the railway company and is therefore not a trespasser.

21. Furthermore, passengers standing on platforms are presented with a number of safety related messages regarding where not to stand so that they are not placed at risk; notices such as 'keep away from the platform edge' and the line painted on the platform edge to mark out where it is safe to stand prevent passengers from being in 'close proximity of the rails'. Trespass on the railway at railway stations is committed when and if passengers contravene those notices which warn against trespass which are usually located at the ends of the platform.

22. In any event, in Bakewell the House of Lords drew a distinction between those cases where it was possible to authorise use and remove the element of criminality and those in which it was not; "*It allows a clear distinction to be drawn between cases where a grant by the landowner of the right to use the land in the prohibited way would be a lawful grant that would remove the criminality of the user and cases where a grant of the landowner of the right to use the land in the prohibited way would be an unlawful grant and incapable of vesting any right in the grantee. It is easy to see why, in the latter class of case, long and uninterrupted use of the land contrary to a statutory prohibition cannot give rise to the presumed grant of an easement that it would have been unlawful for the owner to grant*." Zulus Crossing falls into this latter category as it is not possible for Network Rail to authorise the use which the public have made of the crossing.

23. There can be no doubt that the action of members of the public walking over Zulus Crossing is a trespass 'over the lines of railway' in contravention of section 55 of the BTCA. The only persons authorised to use Zulus Crossing are Severn Trent Water as successors in title to the owner whose land were bisected by the construction of the railway and for whom the crossing was constructed.

24. For a penalty of trespass to be applicable under section 55 of the 1949 Act it is necessary that notice to not trespass on the railway has been given at the railway station nearest to the point where the trespass is alleged to have taken place and that such notices have been renewed when defaced or destroyed.

25. Network Rail submitted copies of photographs of signs at Burton Joyce and Carlton stations taken in June 2015 and September 2015 respectively. I viewed the signs at Burton Joyce station myself as part of my unaccompanied site visit. The photographs show signs located at the ends of the platform which give warning to pedestrians not to cross the line or pass

beyond the sign. It was Miss Bedford's evidence that the signs at Burton Joyce and Carlton stations had always been in place and that although the current signs did not mention the word 'trespass', their meaning was clear and unambiguous. It was Miss Bedford's understanding that the required signs had always been in place and although there was no photographic evidence to that effect from the 1950's to the 1990's, Miss Bedford considered it to be more likely than not that the required signs had been maintained in place at all material times.

26. There is no direct evidence that the relevant signs have been in place at Burton Joyce or Carlton stations since 1949 but equally no evidence has been submitted to demonstrate that such notices had not been present. In the absence of any contrary evidence I attach some weight to Miss Bedford's evidence which was subject to cross-examination and was not demonstrated to be incorrect. Given that the network operator has a statutory duty to prevent trespass on the railway, I consider it more likely than not that the required prohibitory notices have been present at Burton Joyce and Carlton stations to give effect to section 55 of the 1949 Act in respect of pedestrian use of Zulus Crossing.

27. Notices and signage has also been present at Zulus Crossing to advise authorised users on the safe use of a 'user-worked' crossing. A photograph of the site taken in 1993 shows a sign which is headed 'Stop Look Listen'; other words are also present on the sign but the quality of the photograph and the graffiti on the sign makes the remaining wording illegible. The Council stated in its report to the Rights of Way Committee that the additional wording was 'Notify local British Rail Manager before crossing with a vehicle which is unusually long, wide, low, heavy or slow moving. 1. Open both gates quickly and look in both directions before crossing. 2 Cross quickly. 3. Close and secure gates after use. Penalty for not doing so £100'. This same signage appears to have remained in place until at least 2006 and is shown in a photograph taken in July of that year.

28. Currently present at Zulus Crossing is a large sign on each gate which reads 'Private level crossing authorised users only'; further signs on the gates warn of a 'penalty for not closing gates £1000'. There are other signs which give advice on the safe use of the crossing with vehicles and animals and a sign with the legend 'warning do not trespass on the railway penalty £1000'. I accept that the signs currently in place were not present in 2006 when the RA's application was made and that the signs which were present during that period were not as comprehensive as they are today.

29. The witnesses I heard from at the inquiry confirmed that there had been signs present on site although recollections about the precise wording of those signs was mixed. Mrs Wollacott recalled a sign saying '*please close the gate*' but no other signs; Mrs Gretton recalled a sign on the gate which read '*failure to close gate penalty'*; Mr Wright had seen a sign near the gate but he could not recall the wording. Mr Bethell had used the crossing as part of his duties for Severn Trent Water and recalled cast iron signs being present at the crossing prior to the printed steel signs which had been present since at least 1993; he recalled signs along the lines of *'keep gate closed*' or '*close gate after use*'. Mr Parkes recalled the existence of signs but not the wording.

30. The RA submit that to all intents and purposes the signage present during the 20-year period did not convey to the user that the crossing was a private accommodation crossing; the absence of appropriate signage meant that the user had deduce from the physical characteristics of the crossing as to whether it could be used. It was submitted that at many crossings there are signs which say 'do not trespass on the railway' which is likely to be understood by users not to turn left or right to walk along the tracks. In the RAs view, Zulus Crossing was not dissimilar to the other crossings of the Nottingham – Newark line that the public were used to using.

31. It was Network Rail's case that appropriate signage had been erected and maintained at all times at Zulus Crossing and that the signage was directed at the authorised users of the crossing; that is, those who held a private vehicular right of way - the signage which had been present prior to 2006 could not be construed as implying a licence to the public to use the crossing.

32. The photographic evidence demonstrates that signage was present at Zulus Crossing. I agree with Network Rail that the wording of the signs present from at least 1993 until at least 2006 was directed at the private user of the crossing; the public having no rights over the crossing, let alone rights with large, wide, low, heavy or slow vehicles. These signs clearly offer advice to the private rights holder on how to safely cross the railway. There does not appear to have been any signs which specifically warned against trespass on the railway at Zulus Crossing until after 2006. However, the absence of such signage is immaterial given that I have concluded that signs which complied with section 55 (3) of the BTCA were present at Burton Joyce and Carlton stations during the relevant period; in such circumstances any use by the public of Zulus Crossing would have amounted to criminal trespass."

8. The Inspector then went on to consider the factual questions which had been raised as to whether the requirements as to user had been met. His factual findings in relation to the evidence before him were expressed in the following terms:

> "33. It is apparent from the images recorded by the covert camera during August 2015 that public use of Zulus Crossing is continuing despite the existence of signs warning against trespass and despite both gates being locked to prevent unauthorised use. Although the RA submits that there are good sight lines at Zulus Crossing which allows pedestrians to cross in safety, the ALCRM methodology employed by Network Rail suggests that there is a high risk of accidents occurring at this crossing; just because there has been no fatality at the crossing does not mean it is safe to use.
>
> 34. I only heard from 5 user witnesses as the inquiry and a total of 33 user evidence forms were submitted in support of the application. The user evidence collectively demonstrates that the public has habitually crossed the rails at Zulus Crossing throughout the 20 years prior to 2006, with some users claiming to have walked over the rails on a weekly basis and others on a monthly basis.
>
> 35. Some of this use must have involved climbing over a locked gate at the Stoke Bardolph side of the railway prior to 2002 when Mr Jackson replaced the padlock with a hook and eye fastening. The locking of the gate to prevent unauthorised use of the crossing would effectively interrupt the public's enjoyment of the way and the action of climbing over a gate which has been specifically locked to prevent access can be regarded as use with force. In such circumstances, at least some of the claimed use during the 20 years prior to 2006 would have been interrupted and some would have been use which was not '*as of right*' if the provisions of section 31 (1) were applicable to this case. However, any of the use by the public after 1949 is negated by the continuing effect of section 55 of the BTCA."

9. The Inspector drew together all of his conclusions in relation to these issues and whether or not the Order should be confirmed, in so far as it affected the railway land and the level crossing, as follows:

> "36. The claimed footpath crosses an operational railway on level and the dedication of a public right of way in such a location would be incompatible with the statutory objectives of Network Rail with regard to the safe and efficient operation of the railway and its duty to ensure the safety of the public and its passengers. Under the provisions of previous and current legislation governing the operation of the railway network, Network Rail and its predecessors lacked the capacity to dedicate new public rights of way over the live rails at Zulus

> Crossing. As Network Rail lacks the capacity to dedicate a public right of way, the way across the live rails is of a character which could not give rise to a presumption of dedication at common law.
>
> 37. As dedication of a public right of way at common law cannot have occurred at Zulus Crossing, it follows that the provisions of section 31 of the 1980 Act are not engaged. Furthermore, at all material times during the relevant 20-year period Zulus Crossing has been subject to the provisions of section 55 of the 1949 Act. Any use of the crossing by the public has been unlawful and it is not possible for Network Rail to grant lawful authority for such use. I conclude that as it is not possible for dedication of a public right of way to have occurred at common law the Order should not be confirmed with regard to Zulus Crossing."

10. The Inspector then turned to consider the question of whether the Order should be confirmed in relation to the STW land. This aspect of the case involved consideration both of the question of the evidence in relation to use of the parts of the footpath in question on the STW land, and also the question of whether those parts of the footpath should be confirmed when they had the effect of forming two culs-de-sac. The Inspector's conclusions were as follows:

> "38. The remainder of the Order route crosses land owned by Severn Trent Water and that land is not subject to the same statutory restrictions as the land owned by Network Rail. The available user evidence is of use of the path throughout the 20 years prior to 2006 and other than the challenges to use said to have been made by Mr Jackson in around 2007, there is little evidence to suggest that use was interrupted or was by stealth, force or with the permission of the owner. In addition, no evidence was presented to demonstrate that Severn Trent Water took active steps to inform the public that there was no intention to dedicate a right of way over what is an internal access road. Mr Jackson spoke of signs being present around the estate at the time when waste treatment took place in large open lagoons, but modern methods meant that the estate now had the appearance of a normal farm estate.
>
> 39. Whilst there is nothing to prevent a public right of way being a cul-de-sac at one end, the result of the section over Zulus Crossing not being recorded as a public right of way would be the recording of two culs-de-sac each one ending at the railway. These footpaths would not connect with any other path in the network in the vicinity of the railway and would only lead to the railway at Zulus Crossing. To use the 'missing link' between these two paths would constitute a criminal trespass, and the 'missing link' cannot therefore be regarded as a legitimate point of termination sufficient to justify public rights leading directly to either side of the railway.

> 40. I consider that as there is no legitimate place of public resort at either cul-de-sac, the remainder of the Order route could not be lawfully established as a public highway at common law. It follows that the Order should not be confirmed to show the residual part of the Order route as two cul-de-sac paths."

11. In the light of the conclusions that the Inspector had reached his decision was that the Order should not be confirmed.

The issues in the case

12. As originally formulated the judicial review proceeded on 13 Grounds ranged across several forms of allegation that there were errors in the Inspector's decision. As the arguments (both written and oral) emerged, the positions on both sides of the case were clarified and refined. Some issues fell away. In short, in the final analysis the claimant relies upon three reasons why the Inspector erred in law in concluding that the Order should not be confirmed.

13. Firstly, the Inspector was wrong to conclude that the confirmation of the Order would conflict with NR's statutory duties, and therefore that they did not have capacity to give rise to the right of way. In essence, the claimant's arguments are that firstly, the Inspector assessed the issue at the wrong date, secondly, that he assessed it as part of the assessment of the "character" exception under section 31(1) of the Highways Act 1980 and should have assessed it under the "incompatibility" exception in section 31(8) of that Act, and thirdly, that the conclusions which he reached in relation to the assessment of risk were irrational. This latter point, is in my view, not at all evident from the claimant's Statement of Facts and Grounds, and objection was taken to it being raised for the first time at the hearing by both the defendant and NR. The claimant applied for permission to raise this argument at the hearing and I heard submissions from all sides about it. I shall assess those submissions below and in that context conclude whether permission to amend should be granted and express my conclusions on the points raised.

14. The second reason why it is said that the Inspector erred in law relates to his consideration of the issues raised under section 55 of the 1949 Act. The claimant contends that the Inspector was wrong to conclude that the signs which were relied upon in this case could properly give rise to criminal trespass. Furthermore, the claimant submits that in any event the illegality principle was not available in this case and that the Inspector was wrong to dismiss the argument which was raised under Bakewell Management, in particular in the light of the further guidance provided by the Court of Appeal in R(Best) v Chief Land Registrar [2015] EWCA Civ 17. The claimant accepts that it is necessary for them to succeed in relation to both the first and second reason for the Inspector's decision to be quashed. Either one of the Inspector's conclusions in relation to these issues would be sufficient to lead to the Order not being confirmed, and his decision upheld.

15. The third reason relied upon by the claimant relates to the treatment by the Inspector of the STW land and in particular the conclusion that he could not confirm the footpath in the form of the two culs-de-sac which would remain if he were correct about the inability to confirm the Order over NR's land and the level crossing.

16. It is right that I should record that there are some matters which were originally raised in the case, but which as the matter was finally argued did not need to be pursued, and which it is not necessary for me to form conclusions about. Whilst written submissions were made in detail about the ORR Licence, and whether or not it had the effect of preventing NR through statutory incompatibility from dedicating a footpath, the parties accepted that it is clear from the Inspector's decision that he did not found his conclusions in relation to statutory incompatibility on the terms of the Licence, and therefore this point was not pursued at the hearing. All parties reserved their position in relation to it. Further, the defendant accepted that in so far as the Inspector had only considered the 20-year period from 1986 to 2006, and not other potential alternative periods for which the claimant could have contended, the conclusions reached by the Inspector in paragraphs 35 and 36 were not a complete answer to the claimant's case in the form of an alternative basis upon which the decision not to confirm the Order could be upheld. The claimant's criticisms of that part of the decision related to the reasons given by the Inspector for concluding that on the facts the user was not sufficient were, therefore, not pursued.

17. I propose to examine each of the three reasons, and the arguments advanced on either side of the case, separately before reaching my overall conclusions as to whether or not relief should be granted.

Reason 1: errors of law in relation to the "incompatibility" exception

18. Before examining the arguments in detail it is necessary to set out a little of the statutory history which provides the background to the argument. At common law it was possible to defeat dedication of a public right of way through proof that the landowner was under an incapacity. Such an incapacity could arise from legal obligations such as a mortgage over the land, or that the land was the subject of a settlement, or that the landowner was a public body and dedication would be incompatible with its statutory powers and duties.

19. As the Inspector observed, this position in relation to capacity was revised by statute. The Rights of Way Act 1932 as originally enacted provided as follows at section 1.

> "1 (1) Where a way, not being of such a character that user thereof by the public could give rise at common law to any presumption of dedication had been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such a way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period, or unless during such period of twenty years there was not at any time any person in possession of such land capable of dedicating such way.
>
> (2) Where any such way has been enjoyed as aforesaid for a full period of forty years, such a way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way.
>
> …

(7) Nothing in this section contained shall affect any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate such way where such way would be incompatible with such public or statutory purposes."(emphasis added)

20. As can be seen, the statute amended the position at common law in relation to the relevance of capacity as a means of defeating the allegation that there had been dedication of a right of way. The words underlined in the section above were deleted by section 58 of the National Parks and Access to Countryside Act 1949, thereby further amending the position in relation to the role of capacity in the consideration of whether there could be held to have been a dedication of a way. The position at common law in relation to incapacity as a consequence of statutory incompatibility was retained and restated in section 1(7) of the 1932 Act. In due course this section was replaced by section 31 of the Highways Act 1980 as follows:

"31 (1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2)The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3)Where the owner of the land over which any such way as aforesaid passes—

(a)has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b)has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

…

(8)Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for

> public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes."

21. The question which arises in the present case is the time at which the issue in relation to section 31(8) is to be determined. That section reiterated the restatement of the common law set out in s1(7) of the 1932 Act. The first case in time to which I was referred was the decision of Farwell J in A-G ex rel Barnes Urban District Council and London and South Western Railway (1905) 69 JP 110. The facts of that case were that in March 1847 an agreement had been made between Mortlake Vestry and the predecessors in title of the plaintiff council and the defendant railway company whereby a path, which had been closed, was to be replaced with a path across the railway with a level crossing with gates and a watchman. In October 1903 the defendant railway company prevented the use of the footpath over the railway line and provided a footbridge which they compelled the public to use to cross the line. The defendant contended that the agreement was ultra vires and void. The report records Farwell J's judgement in the following terms:

> "The defendant company has closed the gates and abolished the level crossing, thereby compelling the users of the footway to cross by the bridge, and by that alone. In my opinion the bridge is not convenient for such foot traffic as takes place, with handcarts and perambulators, etc. The defendants contend that the dedication of a footpath under the agreement of March 1847 was ultra vires ab initio, for the reason that it was not compatible with the statutory objects of the company. This contention is not in its entirety supported by authority. In R v Leake (1833) 5 B & Ad 469, cited by Esher MR in Grand Junction Canal v Petty (1888) 21 QBD 273,275, 52 JP 692 it was said by Parke B at p478: "If the land was vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public is not incompatible with the objects prescribed by the Act, then it is clear that the commissioners have that power"…In a case like the present a limited dedication is taken by the public, a responsibility being cast of the users of the path to look out for themselves, and this apart from the common law liability of the railway company for negligence. A statutory company can dedicate a footway so long as its user is not inconsistent with the objects and obligations of the company. This being so, the question is really reduced to one of fact. The evidence has been adduced to two points-the public safety and that of the traffic on the line. I find that no danger has been proved either to the user of the line or to the safety of the public who use the trains; if there is danger to any one, it is to the public who come and take what the company has given them. I think that the public use their rights by virtue of the dedication and subsequent user,

> subject to any inconvenience and risk arising from the use of the railway; they cannot claim that the railway shall not be used at all. It might, of course, be possible to show such a user by the public-as if streams of people were continually passing over a crossing-as would seriously hamper the railway service, and in such case it might be held that the dedication was of a very limited character; but in the present case the principal user of the level crossing was by the passage of children to and from school, and I cannot say that the possible risk is sufficient ground for allowing the company to avoid the duty that it undertook by the agreement arrived at in 1847. In my opinion no case has been made out by the company…"

22. The next case where the question of statutory incompatibility arose for consideration was South East Railway Company Limited v Warr (1923) 21 LGR 669. This was an action for trespass for climbing over a wicket gate at a level crossing, to which the defence was that a public right of way ran through the crossing. It is a curious case on the facts, since it appears from the judgment that the right of way did not in fact cross the lines of the railway. However, notwithstanding this, the railway company argued that as a railway company it was not possible for a footpath to be dedicated across their land as any such dedication would be ultra vires. The Court of Appeal did not agree. Lord Sterndale MR observed:

> But, at the expiration of a very long argument, another point was raised, which is the only point that has given me any difficulty at all, and that is this : There is a decision in Great Central Railway Co. v. Balby with Hexthorpe Urban District Council (1912), 2 Ch. 112; 10 L. G. R. 687 ; 81 L. J. Ch. 596, and I think it must be taken to be the opinion of the learned Judge who gave that decision, that a railway company has not got the power to dedicate a public highway across its lines. I doubt if the learned Judge meant more than this: that if all you know is that the railway company is proposing to dedicate, or is said to have dedicated, a public highway across its lines of metals, and the conclusion is obvious that it must interfere with the working of the railway, then it is beyond the powers of the company to make such a dedication, because, as I have said, nobody disputes that a railway company cannot grant a public or private right in such a way as to interfere with the carrying out of its statutory powers. That being so, it is said that the company here have no power to dedicate this strip, or whatever you call it, this infinitesimal piece of ground, to dedicate that as a public highway, because it would be dedicating a highway across its metals. In the first place, it is not anything of the sort; it does not dedicate anything across the line at all, the highway is there before, and what is more, it is not necessary that the person who comes over this gate, or through this gate at A, should go across the line at all. He is upon another highway, another public footpath going to the westwards, and, therefore,

> the dedication of a highway over or through that gate is not a dedication of a highway across the lines at all.
>
> A person coming that way need not cross the lines, he may go to the westwards, and not cross the lines at all, but undoubtedly the effect of the dedication is to give access to the public highway which does go across the lines from a direction in which there was not access before that dedication, that is to say, from the eastwards and north wards. The argument before us was this: the result of that is exactly the same as a dedication in the first instance of a footpath or public highway across the line. It does not seem to me that it is anything of the sort. If it could be shown that the result of the dedication which gives access to the footpath across the line by a large number of persons would be such as to interfere with the statutory powers of the company, then the company could not gate that access. That does not seem to me to be doubted. It seems to me that must be shown in some way. I do not care to discuss now upon whom the onus is, because when you have got evidence on both sides the matter of the question of onus does not become as a rule very important. There must be disclosed by the evidence, such as it is, something which shows that the company cannot dedicate because to do so would be to interfere with its statutory powers. There is here no such evidence given on either side, and I decline entirely to say that, apart from evidence, the giving of access to an unknown number of persons, who may be few or may be many, to cross an existing highway is prima facie doing something that will interfere with the statutory working of the railway. The evidence discloses nothing of the kind."

23. Warrington LJ delivered a concurring judgment.

> "So far as the actual findings of the learned Judge are concerned, I see no reason whatever for disagreeing with the conclusions at which he arrived that a public way had, prior to some year in the nineties which is immaterial, been acquired by the public as far as the northern boundary of the railway company's land. Further than that, I think, so far as the facts are concerned, that the learned Judge was justified in coming to the conclusion that, treating the company for the moment as an individual, under no statutory restrictions, the public way extended over the two or three inches in question. But now it is said that the plaintiffs are not an ordinary individual, but that they are a statutory company, subject to the restrictions which are applicable to any person of that nature, and that that person is incompetent to create a public right of footway, I say nothing about a cart or carriage way, over land which is traversed by its rails, and that this is a case in which it is sought to establish against the railway company such a right of way.

> Now this, I think, is really indisputable and established by a long line of authorities, that in the case of a statutory body such as a railway company which has acquired land for the purposes of its undertaking, it is not competent for a company to deal with its land by way of partial alienation in such a way that the result may be in compatible with the use by the company of the land which was so acquired for the purposes for which it was acquired. But the appellants here go further, and they say that in the case of a right of way over the metals it is enough to prove that what is claimed is a public right of way in that place to establish that such a dedication would be ultra vires the railway company and that, therefore, such a public way cannot exist: in the first place, even if that proposition were made out, it would not, in my opinion, apply to the facts of the present case, because at the point of the railway company's property immediately south of the strip of land of two or three inches wide there were, and always have been, two public ways, one running east and west along the northern boundary of the company's property and not crossing the lines, and one running south and crossing the lines. There is, therefore, no question of a fresh dedication of a public way across the line or on any part of the line of the railway company which could, or is even intended to be, used for lines; therefore, strictly, the proposition I have referred to, if it could be supported, would not be applicable to the present case, but, in my opinion, that proposition in its wide terms is not capable of being supported if it be alleged that it is a presumption of law, quite irrespective of the facts of the present case, that a railway company cannot create a public footpath across its rails. If that is put forward as a proposition of law, I venture, with all respect, to disagree with it."

24. These two cases, decided at common law, were the backdrop to the centrepiece of the authorities in this part of the case: British Transport Commission v Westmorland County Council 1958 AC 126. The facts of that case were that the County Council had prepared a provisional map under the 1949 Act which marked a footpath across a bridge spanning a railway which had been constructed under statutory powers conferred by a private Act of Parliament in 1845. The railway owners applied to the Quarter Sessions under section 31 of the 1949 Act for a declaration that no right of way existed over the bridge. The Quarter Sessions held that although the bridge had not been expressly dedicated to the public as a right of way, its use by the public for a period of over more than 20 years had been such as to raise a presumption that it had been dedicated. They went on to find that the continued existence of the bridge would not endanger the running of the trains nor the operation of the railway and that, thus, a footpath had been dedicated and was properly marked on the provisional map.

25. During the course of argument counsel representing the railway owner submitted that the test of incompatibility with statutory powers was not to be examined solely at the time of the alleged dedication. He submitted that "one must ask whether it is remotely possible that in the future the dedication might interfere with the purposes of the

railway, and, if it is even remotely possible there can be no dedication". By contrast counsel on behalf of the County Council submitted that the correct approach to the question of incompatibility, having accepted that the duty of a railway operator to the public was to run its train safely and efficiently, was "whether, at the date when the question is considered by the tribunal of fact, there was any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties".

26. All five members of the Committee provided opinions which concurred in the result that the decision of the Quarter Sessions should be upheld. In order to provide the context for the submissions made by all parties it is necessary to set out relevant extracts from each of the speeches given. The first speech was given by Viscount Simonds and the relevant passages are as follows:

> "Any examination of this question must begin with the case of *Rex v. Inhabitants of Leake*, which has been cited in many cases, some of them in this House, and never disapproved. The decision goes to the root of the matter, and, often as they have been cited, I think I should remind your Lordships of the words of Parke J. in that case. "If," he said, "the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for a special purpose, incompatible with its public use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power."
>
> Here a principle is laid down which is supported not only by a great weight of succeeding authority but by its inherent reasonableness. For, though, on the one hand, it would be improper that commissioners or other persons having acquired land for a particular statutory purpose should preclude themselves from using it for that purpose, on the other hand, if consistently with its user for that purpose, it can be used for some other purpose also, I see no impropriety in such secondary user. If the usefulness of a parcel of land is not exhausted by its user for its statutory purpose, why should it not be used for some other purpose not incompatible with that purpose?...
>
> If I am right in saying that the principle of *Leake's* case must be applied here, I must next consider what is the test of incompatibility, which, as I have already said, appears to me to be the real difficulty in the case. This is a question of fact. It can be nothing else and it has been so treated, and expressly so treated, in many of the cases to which I have referred. But to say this does not completely solve the problem. For the jury or tribunal of fact must still be properly directed what is the test, and it is to this point that counsel for the appellants directed his attack. He urged that there could only be incompatibility, or,

perhaps I should here say, compatibility, if it could be proved that in no conceivable circumstances could the proposed user at any future time and in any way possibly interfere with the statutory purpose for which the land was acquired. If he is right, it is clear that the justices in the present case did not ask themselves the right question or ascertain the relevant facts.

My Lords, I am satisfied that this argument is misconceived. In the first place, in none of the relevant cases, neither in those that I have already mentioned nor in those, far more numerous, that I have examined, has anything of the kind been suggested. Parke J.'s use of the word "never" in ***Leake's*** case was clearly not intended to have so dramatic an effect. But in the second place, to give to incompatibility such an extended meaning is in effect to reduce the principle to a nullity. For a jury, invited to say that in no conceivable circumstances and at no distance of time could an event possibly happen, could only fold their hands and reply that it was not for them to prophesy what an inscrutable Providence might in all the years to come disclose. I do not disguise from myself that it is difficult to formulate with precision what direction should be given to a jury. But, after all, we live in a world in which our actions are constantly guided by a consideration of reasonable probabilities of risks that can reasonably be foreseen and guarded against, and by a disregard of events of which, even if we think of them as possible, we can fairly say that they are not at all likely to happen. and it is, in my opinion, by such considerations as these, imprecise though they may be, that a tribunal of fact must be guided in determining whether a proposed user of land will interfere with the statutory purpose for which it was acquired…

I should upon this part of the case add that there was some discussion whether a tribunal of fact must look at the facts as they are at the date when the matter arises for determination or, disregarding the present, try to look at them as they existed when the dedication was presumed to be made. It is possible, my Lords, that a case may arise in which it becomes relevant to decide this question, but inasmuch as a presumption of dedication arises after user for a number of years but there is no presumption of the date of dedication and in the present case the justices adopted the course most favourable to the appellants by looking at the facts as they are today and can today reasonably be foreseen, I do not think it necessary to say any more on this question."

27. The next speech came from Lord Morton and he observed as follows

"My Lords, in my opinion, the only rule applicable to the present case is that a statutory company has no power to grant a public right of way the enjoyment whereof by the public is incompatible with the statutory objects of the company. This

> rule was established as a rule of law by a long series of cases, starting with *Rex v. Inhabitants of Leake* and has been recognized by this House in *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation.*
>
> It is common ground between the parties that the question of incompatibility is a question of fact, but there is a vital difference in the views put forward on behalf of each party as to the proper question to be put to the tribunal of fact. Sir Andrew Clark submitted that the question should be "whether the existence of the alleged right of way might, in any possible circumstances, at any future time, hamper the undertaker in carrying out to the best advantage the purposes of its special Act." Mr. Rowe, for the respondent council, submitted that the question should be "whether at the date when the question is considered by the tribunal of fact, there is any likelihood that the existence of the alleged right of way would interfere with the adequate and efficient discharge of the undertaker's statutory duties."
>
> My Lords, I can find no decision, in the long line of authority cited in argument, which is clearly in favour of Sir Andrew Clark's version, and I find several cases in which the court appears to have acted upon the view that Mr. Rowe's version is the right one. As examples I would mention Grand Junction Canal Co. v. Petty and In re an Arbitration between Gonty and Manchester, Sheffield and Lincolnshire Railway Co."

Having accepted the formulation of the test put forward by the County Council Lord Morton then went on to apply that test to the facts and was satisfied that the conclusions which had been reached by the Quarter Sessions were appropriate.

28. Lord Radcliffe was in particular troubled by how subsequent authorities had treated the decision of Sir George Jessel MR's judgment in Mulliner v Midland Railway Company [1879] 11 Ch.D 611. The effect of the proposition laid down by Sir George Jessel is described by Lord Radcliffe as being "to the effect that a railway company, which operates under statutory powers of managing its railway conferred upon it for the furtherance of the public interest, is devoid of legal capacity to grant any easement or right of way over land acquired by it unless expressly authorised by statute so to do". He reviewed the authorities in which the decision in Mulliner was considered. In the course of doing so he observed that "few authorities can have been explained so often with such little fidelity to the original source". This concern about the treatment of Sir George Jessel's proposition in subsequent authorities led him to express his opinion in the following terms:

> "In my opinion, the root of the trouble lies in the fact that the courts have not truly accepted the validity of Sir George Jessel's proposition that a railway company lacks legal capacity to grant an easement over railway land "except ... with a view to the traffic of their railway." Side by side with this proposition and without explicitly rejecting it they have in fact been accepting

and working on a different rule for statutory undertakers, viz., that they can grant easements over their land so long as the exercise of such easements is not inconsistent or incompatible with the fulfilment of the statutory purpose. This rule is regarded as being derived from *Rex v. Inhabitants of Leake.* I do not think it profitable to inquire at this date whether that case, fairly considered, did amount to a decision of the court embodying any such rule. If we were reviewing it for the first time today I should feel much doubt about that. But I think that we are bound to recognize that for very many years and on many occasions courts have taken as their test the words of Parke J. : "... if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power," and have treated this test as a pragmatic one, to be answered according to the facts ascertainable at the time when the question arises. Some of the cases which recognize this test as the governing rule have been referred to in the speech of the noble and learned Viscount on the Woolsack. As he says, there are others.

Such a rule has many drawbacks. It means that the validity of any easement must depend on the state of facts ascertained or reasonably foreseeable at the time when it is challenged in legal proceedings; and no one can tell in advance upon what occasion a challenge will arise. It is very hard to know what measure of foresight or what extremity of prudence to allow to the judge of fact. It leads to what may well be, I think, misleading comparisons between different statutory undertakers and their works - railway lines, reservoirs, canals, towpaths, drains and bridges. It has led to much confusion between the voluntary grant or dedication of a right de novo, the provision of accommodation ways or works under statutory obligation, and the voluntary enlargement of rights of way existing before the creation of the works and therefore necessarily preserved. Each of these classes may involve different considerations. When the distinctions have all been allowed for, I think that it is accurate to say that, although the test derived from *Rex v. Inhabitants of Leake* has often been accepted and propounded, it has never yet resulted in a finding that the voluntary grant by a railway company of a right of way over its lines on the level of the lines is an effective grant. A possible exception is the case of *South Eastern Railway Co. v. Cooper*: but the judgments delivered by the Court of Appeal in that case are not so expressed as to enable me to say with any certainty what was the ratio decidendi that formed the ground of their decision.

Nevertheless, I think that the accepted rule, with all its defects, is better than no rule at all. The construction of railways, at any rate, drove steel barriers over many hundred miles of the

> English countryside. To hold that at no time, at no point, and in no circumstances could a railway company grant de novo even a footway over, across, or under its lines would be a grave impediment to public amenity. In my opinion, therefore, we ought to say that Mulliner cannot stand today as a binding decision in so far as it laid down the proposition that a railway company lacks legal capacity to grant a right of way over or under its railway lands, including the site of the permanent way."

29. In his speech Lord Cohen observed that counsel on behalf of the railway owners had submitted reasons to distinguish the case of Leake on the basis that it did not lay down as the test of incompatibility whether there was any likelihood of dedication of a right of way materially hindering the statutory undertaker from an appropriate and efficient discharge of its duties. Addressing that second reason Lord Cohen stated as follows:

> "If his second reason were well founded, it is difficult to conceive of a case in which a tribunal of fact could arrive at the conclusion that the dedication of the right of way was compatible with the objects prescribed by the Act. I doubt whether it could ever be said that in no possible circumstances at any future time could a railway company desire, for example, to widen its track. Sir Andrew, however, says that his proposition is supported by the language of Parke J. in Rex v. Inhabitants of Leake, where he says: "I think, that if it is quite clear that such works would never be required, the commissioners, whether special or general, might give the right to the public." Sir Andrew stresses the word "never." The sentence, divorced from its context, lends some support to his argument, but reading the judgment as a whole, and having regard in particular to the next following paragraph thereof, I think it is clear that Parke J. regards the question as one of fact, to be determined, no doubt not merely in the light of the position on the date of trial but in the light also of the probable future requirements of the company in the fulfilment of its railway purposes."

30. Lastly, Lord Keith agreed that the appeal by the railway owners should be dismissed and expressed his opinions briefly in the following terms:

> "On the facts proved here the assumed inconsistency of the existence of a right of way with the subsidiary powers conferred on the appellants by section 16 of the Railways Clauses Consolidation Act, 1845 , seems to me unreal. Whether the appellants could at some future time remove the bridge does not at the moment call for consideration. Even if they could and did, it does not follow that the right of way would disappear, nor has it been shown that the exercise of the right of way would then become incompatible with the running of the railway. Incompatibility is a question of fact, not a question of law, and where the facts are such as would be sufficient to

> presume dedication to the public of a right of way in all other respects it is, in my opinion, for the statutory undertaker to prove incompatibility, and not for those asserting the right to prove compatibility. The speech of Lord Sumner in *Birkdale District Electric Supply Co. Ltd. v. Southport Corporation*, though given in a somewhat different kind of case, contains passages to the same effect and in this matter I think no distinction can be taken between the two cases."

31. Against the background of these authorities Mr Laurence forged the following submissions. Firstly, he submitted that the question of the date at which statutory incompatibility under section 31(8) of the 1980 Act was not settled by the British Transport Commission case. Viscount Simonds expressly left open the date at which the tribunal of fact should make the assessment as to whether or not there was incompatibility. The decision was confined to the evaluation of the competing submissions in relation to the standard of proof of incompatibility with statutory purposes, whether merely a likelihood of interference, or whether a remote possibility of interference would be sufficient. Mr Laurence submitted, therefore, that this was the first occasion at which the question of the date at which the assessment should occur was in point. He submitted that at common law the presumed dedication was at the start of the period. In Turner v Walsh (1881) 6 App Cas 636 (which was applied in the context of section 31 of the 1980 Act by Lightman J in Oxfordshire County Council v Oxfordshire City Council [2004] Ch 253 at paragraph 98) the following was observed by the court as to the approach to the evidence of dedication:

> "Would not the inchoate right run on to maturity rather than be blocked by the intermediate passing of this Act? This language does not accurately express the presumption which arises from long-continued user. It is not correct to say that the early user establishes an inchoate right capable of being subsequently matured. If the right had been inchoate only in 1861, the argument of the Appellant that it could not have been matured or acquired after 1861, except in the mode prescribed by the Act, would have had great force. The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coeval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses."

Thus Mr Laurence submitted that the appropriate time for the assessment under section 31(8) to be undertaken is the point at which dedication is deemed to have occurred, namely the start of the 20 year period under section 31(1). He submitted that there is no reason for adopting a different timescale for the assessment of deemed dedication to the assessment of incompatibility. Indeed, he submitted that there is very good reason based upon the deeming of the dedication to take the same date for the assessment of both. As a fall-back, he submitted that at the very least the assessment should be undertaken at the end of the 20-year period, were he wrong in his

submissions that the start of the 20-year period is the appropriate point in time to make the appraisal.

32. Bringing these submissions back to the circumstances of the present case, he therefore submitted that the Inspector erred in law when at paragraph 10(4) and paragraph 15 and 36 of the decision the Inspector adopted the date of his decision as being the time at which he undertook the assessment. Mr Laurence's submission was that the assessment should have been made as at the start of the 20-year period. For the purposes of these submissions he contended that the way had been called into question at a time in or around 1990 when there was evidence that a gate had been locked. That would lead to the assessment being made as at 1970. Alternatively, on the facts before the Inspector the relevant date for assessment applying Mr Laurence's contention could not in any event be later than 1986.

33. Mr Laurence made further submissions in relation to the Inspector's treatment of this issue. He submitted that when the Inspector addresses this question in paragraph 9 of his decision he treats the incompatibility point as being an aspect of the "character" exception, namely the exception that "the ways of such a character that use of it could not give rise in common law to a presumption of dedication" which is included within section 31(1). Mr Laurence observed that nowhere does the Inspector allude to section 31(8), which was in truth the exception which he was being encouraged to apply by the objector. Thus Mr Laurence submitted that the Inspector erred in law as he treated the question of incompatibility as being a feature of the "character" exception rather than under the correct limb of section 31, namely the "incompatibility" exception provided by section 31(8).

34. Mr Laurence also submitted that the Inspector erred in that he failed to examine the question of whether or not there was any limitation which could be imposed upon the Order which would respect the statutory duties of the objector, to the extent that it was proper for the Inspector to have held that the objector's statutory duties were incompatible with the Order. During the course of the hearing, and in order to illustrate this limb of his argument, Mr Lawrence produced a draft limitation which provided that the exercise of the right of way should only be limited to occasions when no train was approaching or on the level crossing. He submitted that it was open to the Inspector to address the concerns of the objector under section 31(8) and resolve them by the creation of such a limitation, which would operate so as to ensure that the right of way could exist alongside the satisfactory discharge of NR's statutory duties. The draft limitation which he proffered was in the following terms:

> "The lawful exercise of the right of way over land belonging to Network Rail and lying between the gates which bound Network Rail's operational land on either side of the railway ("the crossing") is limited to occasions when no train is approaching or on the crossing."

35. Finally, and in what was as set out above effectively a fresh Ground, Mr Laurence submitted that it was irrational for the Inspector to have concluded that the existence of the right of way on the level crossing would be incompatible with NR's statutory duties. It was common ground that those statutory duties, as in the British Transport Commission case, were related to the need for NR to ensure public safety whilst operating the railway and also to ensure that the railway operated efficiently. Mr

Laurence submitted that the evidence which was before the Inspector could not sustain any conclusion that those objects would be imperilled by the making of the Order.

36. Firstly, he noted that there are a significant number of level crossings which accommodate rights of way across NR's railway network, including in particular a number of crossings of the railway lines in question (of the order of 12 or so) between the level crossing concerned in the present case and Newark. In relation to the evidence which was before the Inspector Mr Laurence noted that the increased volume of pedestrians using the right of way, namely 20 crossings per day, which led to the increase in the crossing risk assessment from C5 to C6 (see paragraph 13 of the decision) was not demonstrated by any of the empirical evidence as to the number of people who were crossing at the height of summer in August 2015 (an average of 6-7 per day). Thus, the conclusion that there would be an increase in the risk assessment score was not founded on the evidence. In any event, he submitted that a mere increase in risk does not equate to statutory incompatibility. Mr Laurence submitted that there had to be a real and material increase in risk for statutory incompatibility to be made out and thus he contended that on the basis of the material before the Inspector it was not open to the Inspector to find that there was statutory incompatibility.

37. In response to these submissions Mr Buley, on behalf of the defendant, contended that the question of the date at which the assessment under section 31(8) of the 1980 Act fell to be determined had been settled in the British Transport Commission case and that whilst Viscount Simonds had left the point open, a proper analysis of the other speeches in the House of Lords demonstrated that Lords Morton, Radcliffe and Cohen all formulated the test as one which had to be assessed at the date at which the question of fact as to whether or not there was incompatibility fell to be determined. He therefore submitted that this question as to the proper date for the appraisal had been settled in the British Transport Commission case. He submitted it formed part of the ratio of that case. In any event, he submitted that the adoption of the date of the fact-finding exercise in three of the five judgments in the House of Lords provided compelling obiter dicta, even if he was wrong as to the ratio of that case, indicating that the right answer was that the date was as at the date of the factual findings. Thus, he submitted that Mr Laurence's concerns about the potential mismatch between the date at which dedication of the way was assumed under section 31(1) and the date at which incompatibility was considered did not arise, in the sense that it was already settled law that the date was the date of the factual assessment. In any event, he submitted that use of the date of the fact-finding exercise for the purpose of assessing the question under section 31(8) was not a strange mismatch on the basis that the question under section 31(8) was a forward looking exercise, and thus it was not appropriate or proper to confine that enquiry to the claim period.

38. As a fall back, he submitted that the proper construction of section 31(1) meant that the date at which dedication should be presumed was at the end of the 20-year period, rather than its beginning. He submitted that Lightman J was wrong in the Oxfordshire County Council case to adopt the common law position from Turner v Walsh. He submitted that the deemed dedication should be at the end of the 20-year period on the basis of the statutory language of section 31(1) ("has been enjoyed") which made clear that the deeming of the existence of the way was at the end of the 20 year

period. Thus it was his fall back submission that in any event the assessment should not occur at the start of the 20 year period which is the basis of the dedication but rather at its conclusion.

39. Dealing with the submissions made in relation to paragraph 9 of the decision letter and the suggestion that the Inspector had erroneously applied the "character" exception, Mr Buley submitted that there was no error at all in anything that the Inspector had stated in paragraph 9. The Inspector's text sets out the requirement at common law to have capacity to dedicate, and then goes on to explain the basis upon which statutory incapacity or incompatibility arose to be considered in the case before him. The absence of mention of section 31(8) was wholly inconsequential when the Inspector accurately set out the relevant principles, observing that section 1 of the 1932 Act preserved "the common law principle involving the capacity to dedicate" with it remaining "relevant in certain circumstances". Thus Mr Buley's submission was firstly there was no error of law in the Inspector's paragraph 9. Even if the Inspector had treated the "incompatibility" exception incorrectly as being part of the "character" exception there was no respect in which it could be said that he had misapplied the appropriate legal test or applied a legal test which was in error. In substance he had applied the test under section 31(8) and therefore there was no reason to consider that the decision would be other than highly likely to be the same and the principles in section 31(2)(a) of the Senior Courts Act 1981 should apply so as to deprive the claimant of relief.

40. Turning to the question of the suggested limitation Mr Buley contended that the limitation could not in truth address the problem raised in relation to incompatibility. The question is not related to the extent of the care used by the public, but rather that the answer should be not to have the right of way at all.

41. In respect of the rationality argument, Mr Buley complained that there was no pleaded Ground on this basis and therefore permission had not been granted to raise the point. In any event, he submitted that the reality was that the only evidence before the Inspector, certainly of any technical character, was that produced by NR. The evidence from August 2015 was of the number of users when there was a locked gate in place, and the existence of a right of access was not advertised on the definitive map and statement. The predicate of NR's case, namely that the existence of the path made it clearly foreseeable that there would be greater public use and therefore greater potential conflict between pedestrian and rail movements, was self-evident and thus the decision which the Inspector reached was entirely rational and based on the evidence before him.

42. The defendant was supported in these submissions by Mr Lopes on behalf of NR. He submitted that there were insurmountable difficulties in drafting a limitation on the Order of the kind posited by Mr Laurence. Quite apart from the fact that there appeared to be no positive invitation to the Inspector to seek to identify any limitation, the drafting proposed by Mr Laurence to illustrate his submission was said by Mr Lopes to effectively make NR's case. It did not deal, for instance, with vulnerable users who would be slower to cross the level crossing. Further, it failed to engage with what might be meant by a train approaching and thus when the limitation might or might not apply. In reality, Mr Lopes submitted, any material increase in the use of the level crossing created a lack of safety which led to the overarching statutory powers being brought into play and the question of incompatibility arising.

43. My conclusions in relation to these competing submissions are as follows. Firstly, I am entirely satisfied that the question of when the assessment of statutory incompatibility under section 31(8) of the 1980 Act falls for determination was settled in the British Transport Commission case. It is clear to me from an analysis of the speeches which I have set out above that whilst Viscount Simonds expressly reserved his position, firstly, there was argument on the point in the case as he observed and secondly, that at least three of the members of the Committee accepted the formulation which was provided by counsel on behalf of the County Council, namely that the assessment was to be made at the date when the fact finding tribunal was considering the question. Thus, the British Transport Commission case is in my view binding authority at the highest level to the effect that the Inspector in the present case was correct to undertake his determination in relation to section 31(8) at the time when he was reaching his decision on the Order. Even were I wrong in concluding that the British Transport Commission case was binding in relation to this point, nonetheless I would accept and endorse Mr Buley's submission that the adoption of counsel for the County Council's formulation of the test by three of the members of the Committee in that case is very persuasive authority in support of that proposition. I have no difficulty in accepting that persuasive authority and concluding that the correct date for the examination of the issues in respect of section 31(8) is the date on which the fact finding exercise is occurring and the order is being examined.

44. At first sight there is some force in Mr Laurence's submission that this conclusion creates something of a mismatch between the assessment of whether or not dedication is possible under section 31(8), and the assessment of the evidence in relation to the 20-year period relied upon under section 31(1). However, further reflection in my view underlines the good sense and practicality of adopting the date of decision-making in relation to the order as the date when the assessment of statutory incompatibility should occur. As Lord Radcliffe observed, the test itself from the case of Leake is essentially a pragmatic one. There are in my view sound practical reasons why the facts should be assessed at the point in time when the question arises. Firstly, the consideration of whether or not the recognition of the right of way would be incompatible with the statutory undertaker's statutory duties is in large part going to be a forward-looking exercise. It is an examination of the position at the time when the order is being considered, but against facts and forecasts which consider the question not simply at that moment, but also looking forward to consider whether on the balance of probabilities it is likely that in future the statutory undertaker's statutory duties would be compromised and there would be incompatibility between the operator's statutory objects and the existence of the way. The fact that it is a forward-looking exercise would render it peculiar for that test to be applied at some point in the past.

45. Secondly, it would be a curious factual enquiry for an examination to be made as to the safe and efficient operation of the railway, for instance, in the present case either at 1970 or 1986. Such an enquiry would have to be taken on the basis of technical standards and engineering knowledge at that point in time in the past (assuming that could be reliably ascertained). Evidence of accidents or near misses or other difficulties in operating the railway after the date in 1970 or 1986 would be inadmissible or at least arguably irrelevant. The artificiality of such an enquiry is in my judgment a strong pointer towards it being inappropriate to examine the question under section 31(8) at some earlier date than the date of determination. Mr Laurence

recognised the force of the difficulties created by the exclusion of supervening events bearing directly upon the safe and efficient operation of the railway, and in his reply he sought to develop a hybrid approach whereby it would be possible for the Inspector to take account of such evidence, albeit still reaching a conclusion based upon a date at the start of the relevant 20 year period. In my view, whilst respecting Mr Laurence's endeavour to try to find a solution to the problem created by adopting an earlier date for examination of the question, this hybrid approach throws into sharper focus the practical problems created by taking the earlier date as the date for assessment. How such a hybrid approach could operate in practice is, in my view, very unclear and uncertain. Whilst there may be a mismatch between the timescales for the questions posed under section 31(1) and 31(8) when considering whether an order should be made or confirmed, the nature of those enquiries (retrospective under section 31(1), and both retrospective and importantly prospective under section 31(8)) and the practical issues with which they are engaged justify the difference in the times at which those questions are to assessed.

46. It follows that not only am I satisfied that the British Transport Commission case settled that the question of fact under section 31(8) is to be examined at the point in time when the order is being examined, I am also satisfied that there is very good reason for taking that as the appropriate date for consideration of that particular forward-looking question.

47. The conclusions which I have reached effectively dispose of the subsidiary issue (which was in any event academic, on the basis that if I found that the date was not the date when the order was being examined the decision would be unlawful in any event) as to whether the presumed date of dedication is at the start of the period in accordance with the common law rule established by Turner v Walsh or, alternatively, as Mr Buley submitted at the end of the 20-year period in accordance with his construction of section 31(1). On the findings which I have made there was no error of law in the Inspector's decision and therefore this point does not arise for my determination. With due deference to the arguments which I heard, I prefer to leave the resolution of this issue to another case in which it is material and in point.

48. The next question is whether the Inspector fell into error in paragraph 9 of the decision by thinking that he was applying the "character" exception, when he should properly have been applying the "incompatibility" exception. I am not persuaded that there is any error of the kind claimed by the claimant in the Inspector's decision. In paragraph 9 the Inspector accurately sets out the law, starting by introducing the statutory scheme in the first sentence, then setting out the common law requirement for capacity to dedicate in the second sentence, before in the remainder of the paragraph explaining that whilst there had been adjustments to that requirement by the 1932 Act "in certain circumstances", the requirement that dedication should not be inconsistent with NR's statutory duties both at common law and under the statutory scheme remained a basis on which the Order could not be confirmed derived from capacity. This was an accurate statement of the law. As set out above section 1(7) of the 1932 Act and section 31(8) of the 1980 Act make clear that the common law in relation to statutory incompatibility have been preserved as part of the statutory scheme. Thus, whilst it is true that the Inspector did not specifically reference section 31(8) he did not need to do so. He had carefully set out the relevant law and no cross-reference was necessary to show that he was correctly directing himself to the issue

which he had to decide. I do not accept, therefore, that the Inspector misdirected himself as the claimant alleges. Whilst Mr Buley and Mr Lopez raised the question as to whether in the event that I concluded there had been a misdirection of law, the provisions of section 31(2A) of the Senior Courts Act 1981 would operate so as to deprive the claimant of the benefit of relief, in the light of the conclusions which I have reached this point does not arise.

49. I turn then to the question of whether or not the Inspector ought, notwithstanding his conclusions, to have contemplated the imposition of a limitation on the order so as to enable it to be made and the statutory duties of the railway operator to be accommodated. I share the view given in his submissions by Mr Lopez that there are formidable difficulties in drafting any such limitation. Whilst respecting the spirit in which Mr Laurence's draft limitation was offered, the debate around it demonstrated how difficult it would be to identify when, in particular, a train on the railway lines was to have precedence such that the right of way over the level crossing was effectively suspended.

50. In my view there is a further, more significant, objection to this approach. In reality any person using the level crossing as a pedestrian as a trespasser at present will no doubt exercise circumspection and not wish to find themselves on the railway lines at any point when a train is on its approach or actually crossing. The existence of that natural desire for self-preservation, which is in truth no more or less than what is reflected in the limitation, is not a complete answer to resolving the safety issues which arise or the instances which may occur affecting the efficiency of the railway. With the best will in the world human error occurs. It is the existence of conflict, and the increased extent of such conflict, between pedestrian movements and train movements that increases the chance of human error and the number of times when there is a danger to public safety. Thus, the limitation is not an answer to the conclusions reached by the Inspector under section 31(8) because the limitation cannot itself avoid the impact on public safety and the efficiency of the railway which would arise with an increase in use of the level crossing caused by its recognition as a public right of way. There is force in the submission made by Mr Lopez that in fact the Inspector could not properly be criticised in this respect since the possibility of such a limitation was never raised with him. However, notwithstanding that point, even had it been raised I am satisfied that it would not have provided a conclusive answer to the findings which he made in respect of the impact of making the Order upon the statutory duties of the second interested party.

51. I turn then to the rationality Ground which was raised by Mr Laurence. Whilst I recognise that the matters raised were essentially matters of argument based on material which was already before the court, nevertheless in my view seeking to amend pleadings and argue new points at the hearing of a judicial review is in principle inappropriate. I allowed the argument to be heard and will offer my conclusions upon it, simply because I have been able to form conclusions upon the point with relative ease and for the assistance of the parties who engaged with the point. I am not, however, minded to allow the claimant to amend at the very late stage which it sought to since, as Mr Buley rightly points out, to do so would enable the claimant to avoid all of the disciplines and strictures of formal responses by the defendant and NR, and the necessary examination of arguability at the permission stage. Without prejudice to that position my conclusions are as follows.

52. I am satisfied that the Inspector's conclusions on the question of whether or not the safe and efficient operation of the railway would be affected so as to interfere with NR's statutory duties were entirely rational and open to him. As was observed in the course of argument, the reality in this case was that the Inspector only had technical evidence from NR on this point. That evidence addressed in detail objective engineering modelling of the risk presented by an increase in the number of persons using the way in the event that the order was confirmed. Paragraphs 12 and 13 of the Inspector's decision record that evidence, which forecast that were pedestrian movements across the railway line to increase to 20 crossings per day there would be an identifiable increase in the risk which use of the level crossing presented to the public and therefore, as the Inspector noted, a corresponding reduction in the safety of the crossing.

53. In my view Mr Laurence's point in relation to the CCTV survey recorded in paragraph 13 of the decision does not provide any argument that this analysis was fundamentally flawed or irrational. The CCTV survey provided some indication of the present level of usage. It was not presented on the basis that that would be the level of usage after the Order had been made and the right of way recognised. The CCTV survey enabled two conclusions to be reached. Firstly, the level of pedestrian usage was such at present that it would be likely to increase (and the forecast was to 20 pedestrians per day) if the Order was made. That led to the conclusion that safety at the crossing would be materially reduced. Secondly, it demonstrated that there were vulnerable users using the crossing who, if the right of way were recognised and the use persisted, would be at particular risk in using the level crossing as a right of way. It follows that the conclusions which the Inspector reached in paragraph 15 of his decision were securely founded upon the evidence before him, and conclusions that were clearly open to him on the evidence which he received at the inquiry. Thus, even had I permitted an amendment to allow this argument to be presented I would have concluded that the point was not arguable and refused permission for it to be raised as part of this judicial review.

Reason 2: the issues in respect of section 55 of the British Transport Commission Act 1949

54. Whilst the relevant text of section 55 of the British Transport Commission Act 1949 was set out by the Inspector in his decision, it is worthwhile for reference purposes to set out the full text relevant to these arguments which (as originally enacted) is as follows:

> "55.— For better prevention of trespass on railways &c.
>
> (1) Any person who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands of the Commission in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty not exceeding forty shillings…

> (3) No person shall be subject to any penalty under this section unless it shall be proved to the satisfaction of the court before which complaint is laid that public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such offence is alleged to have been committed and such notice shall be renewed as often as the same shall be obliterated or destroyed and no penalty shall be recoverable unless such notice is so placed and renewed."

55. All parties accept that the doctrine of illegality operates as a free-standing principle upon which the Order could be defeated, as opposed to being a factor which is part and parcel of the considerations under section 31(1) of the 1980 Act. In essence, as set out above, the Inspector concluded that on the basis that the use of the level crossing by pedestrians amounted to a trespass which was rendered criminal by section 55 of the 1949 Act, the Order should not be confirmed. This contention is the subject of challenge in these proceedings, as it was at the inquiry before the Inspector.

56. On behalf of the claimant Mr Luke Wilcox, who advanced this part of the claimant's case, made his submissions on essentially two bases. Firstly, he submitted that on the facts of this particular case the offence under section 55 of the 1949 Act did not in fact arise. Secondly, he submitted that even if it did, the principle of illegality was not engaged in the context of this particular offence, and therefore any crime which might have been committed under section 55 of the 1949 Act could not operate so as to defeat the Order. This latter submission was based upon an examination of two authorities which were key to the claimant's case: firstly, Bakewell Management Limited v Brandwood [2004] UKHL 14; [2004] 2 AC 519 and secondly R (Best) v Chief Land Registrar [2015] 3 WLR 1505.

57. Under section 55(3) of the 1949 Act it is in effect a defence to a charge under section 55 that no "public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such an offence is alleged to have been committed". It will be recalled that in paragraphs 25 and 26 of the decision the Inspector found that there had been signs in place at the nearest stations, namely Burton Joyce and Carlton, since 1949 and that such notices as were found by the Inspector "give warning to pedestrians not to cross the line or pass beyond the sign". In fact the full text of those signs as exhibited in the trial bundle are as follows:

> "Passengers must not pass this point or cross the line"

It appears from the photographs that the signs are situated at the end of the platforms at the stations.

58. Mr Wilcox submitted that the signs are not adequate to give rise to criminal liability under section 55. He submitted that where criminal liability was to be imposed it was essential that such was made clear in any relevant notice. He further submitted that since the 1949 Act was a private Act of Parliament there was a particular need for clarity in relation to the creation of the offence. He contended that it was particularly pertinent that the sign was directed only towards passengers at the station, and further

did not clearly identify that failure to comply with the sign would amount to a criminal offence. In all of these circumstances he submitted that the requirement that a notice should be provided had not been met, in particular in terms of the contents of these signs, and therefore they were incapable of satisfying the requirements necessary in order to give rise to criminal liability under section 55.

59. To understand Mr Wilcox's submissions in relation to his second point as to the application of the principle of illegality it is necessary to set out the substance of the authorities upon which he relied as set out above, starting with the Bakewell Management case. That case concerned the owners of property who accessed their homes by driving vehicles from the public highway along tracks or roads over common land. A deed had been deposited on 31st December 1927 pursuant to section 193(2) of the Law of Property Act 1925 by the owner of the common land declaring it to be common land to which section 193 of the 1925 Act applied. As a consequence of that declaration section 193(4) created a statutory prohibition upon vehicular use of the common in the following terms:

> "(4) any person who, without lawful authority, draws or drives upon any land to which this section applies any carriage, cart, caravan, truck or other vehicle, or camps or lights any fire thereon, or who fails to observe any limitation or condition imposed by the minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding level 1 on the standard scale for each offence."

60. No lawful authority was granted by the owner of the common land, but the occupiers of the homes who were accessing them upon the common land claimed entitlement to an easement by virtue of evidence of protracted use and the effluxion of time under section 2 of the Prescription Act 1832 or, alternatively, under the doctrine of lost modern grant. The claims were resisted by the land owner on the basis that since the use of the accesses over the common land was a criminal offence the doctrine of illegality applied so as to prevent the establishment of the easements claimed. In advancing the case on behalf of the owner of the common land reliance was placed on the case of Hanning v Top Deck Travel Group Limited 68 P&CR 14. In his speech Lord Scott identified that in the leading judgment of the case of Hanning Dillon LJ, having analysed the relevant authorities, concluded that they established the rule that:

> "an easement cannot be acquired by conduct which, at the time the conduct takes place, is prohibited by a public statute."

Lord Scott concluded that the cases did not establish that rule. He stated that instead:

> "what they establish is a rather different rule, namely, that an easement cannot be acquired to do something the doing of which is prohibited by a public statute. "

The distinction between those two propositions is made clear in paragraph 39 of his speech in the following terms:

> "The feature of Hanning's case, and the present case, that distinguishes them from such cases as Legge's case and *Cargill*

v Gotts is that the servient owner was able, notwithstanding the statutory prohibition, indeed by the very terms of section 193(4) , to make a lawful grant of the easement. A statutory prohibition forbidding some particular use of land that is expressed in terms that allows the landowner to authorise the prohibited use and exempts from criminality use of the land with that authority is an unusual type of prohibition. It allows a clear distinction to be drawn between cases where a grant by the landowner of the right to use the land in the prohibited way would be a lawful grant that would remove the criminality of the user and cases where a grant by the landowner of the right to use the land in the prohibited way would be an unlawful grant and incapable of vesting any right in the grantee. It is easy to see why, in the latter class of case, long and uninterrupted use of the land contrary to a statutory prohibition cannot give rise to the presumed grant of an easement that it would have been unlawful for the landowner to grant. It is difficult to see why, in the former class of case, the long and uninterrupted user should not be capable of supporting the presumed grant by the landowner of an easement that if granted would have been lawful and effective notwithstanding that the user was contrary to a statutory prohibition. I can see no requirement of public policy that would prevent the presumption of a grant that it would have been lawful to grant. On the contrary, the remarks of Lord Denning MR and Stamp LJ in *Davis v Whitby [1974] Ch 186* , 192 and of Lord Hoffmann in R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335 , 349 to which I have referred provide sound public policy reasons why, if a grant of the right could have been lawfully made, the grant should be presumed so that long de facto enjoyment should not be disturbed."

61. This analysis led Lord Scott to his conclusions at paragraph 46 in the following terms:

> "My Lords, in my opinion, the decision in Hanning's case and the subsequent justifications of that decision are wrong and ought not to be followed. I accept that, at the end of the day, the issue is one of public policy. It is accepted, however, that a prescriptive right, or a right under the lost modern grant fiction, can be obtained by long use that throughout was illegal in the sense of being tortious. That is how prescription operates. Public policy does not prevent conduct illegal in that sense from leading to the acquisition of property rights. The decision in Hanning's case can only be justified on the footing that conduct illegal in a criminal sense is, for public policy purposes, different in kind from conduct illegal in a tortious sense. Why should that necessarily be so? Why, in particular, should it be so where the conduct in question is use of land that is not a criminal use of land against which the public law sets

its face in all cases? It is criminal only because it is a user of land for which the landowner has given no "lawful authority". In that respect, the use of land made criminal by section 193(4) of the 1925 Act, or by section 34(1) of the 1988 Act , has much more in common with use of land that is illegal because it is tortious than with use of land that is illegal because it is criminal."

62. Lord Walker also emphasised the dispensing power of the land owner in the case of a criminal offence under section 193(4) of the 1925 Act in his speech. Like Lord Scott, he made reference to the public policy dimension of the illegality principle. His conclusions were expressed as follows:

> "56. The present case is exceptional because of the unusual nature of the offence created by section 193(4) of the Law of Property Act 1925. It creates a criminal offence but it is, most unusually, an offence in respect of which the owner of the soil of the common has a dispensing power. It is common ground that that is the effect of the words "without lawful authority" in subsection (4). Moreover the landowner does not hold his dispensing power in any sort of fiduciary capacity. He is not bound to exercise it in the public interest. He can if he thinks fit exercise his dispensing power in his own private interest, by levying a charge for the grant of his authority. Miss Williamson (for the claimants) candidly agreed that from her clients' point of view the appeal is ultimately about money…
>
> 59. My Lords, in my view this House should not readily conclude that the decision of the Court of Appeal in Hanning's case was mistaken, especially as it has been followed, not only by the Court of Appeal in this case, but also on other occasions. Nevertheless I am satisfied that the wide formulations of the principle by Templeman LJ in *Cargill v Gotts [1981] 1 WLR 441* and by the Court of Appeal in Hanning's case, although producing the right result in the generality of cases, are too wide in a case like the present. That is not to say that the residents of houses near Newtown Common did not commit a criminal offence (of a fairly venial nature) when they drove across the common to and from their houses. The principle of legal certainty requires the criminality or lawfulness of an act to be determined at the time when it takes place, and not with the advantage (or disadvantage) of hindsight. Nevertheless the prior authority of the owner of the common would have provided a complete defence to any criminal charge. In the ordinary case of prescription of a private right of way, the prior authority of the landowner (in the solemn form of a grant by deed) is presumed or inferred from long user, even though every act of user during the prescription period takes place without his actual prior authority and is a tortious (though not a criminal) act. I cannot see that any public interest would be

> served by holding that the absence of the landowner's actual prior authority should produce a completely different result in cases where section 193(4) is in play.
>
> 60. I do not see this as reintroducing the "public conscience" test which this House disapproved in *Tinsley v Milligan [1994] 1 AC 340* . It is merely a recognition that the maxim ex turpi causa must be applied as an instrument of public policy, and not in circumstances where it does not serve any public interest: see for instance *National Coal Board v England [1954] AC 403*. In my opinion it is the landowner's unfettered power of dispensing from criminal liability, exercisable at his own discretion and if he thinks fit for his own private profit, which is the key to the disposal of this appeal. Since a dispensing power of that sort is very unusual, it is unlikely to apply to many other cases of criminal illegality."

63. Against the backdrop of these conclusions Mr Wilcox submitted that in the present case the second interested party had a dispensing power in respect of any offence under section 55. It was perfectly possible for NR to authorise the use of the level crossing without being in breach of their statutory powers, and by doing so they would have obviated any offence under section 55 since they had authorised the pedestrian use of the level crossing. In those circumstances there would be no trespass upon which section 55(1) of the 1949 Act could bite. He submitted that the Inspector was therefore in error in paragraph 37 of his decision when he concluded that "it is not possible for network rail to grant lawful authority for such use". NR could have granted permission for the level crossing to be used. The offence under section 55 is analogous to that under section 193(4) of the 1925 Act and thus the principle of illegality should not have been deployed so as to defeat the Order.

64. Turning to the second authority upon which the claimant relies, it is important to note that this decision was not made available to the Inspector. The case of Best concerned the claimant's application to the Land Registry to have himself entered on the Register as the registered proprietor of a property which he had entered as a vacant residential building without the registered proprietor's consent, and to which he had carried out building and other works of repair so as to make it his permanent residence. His evidence was that he had treated it as his own property since 2001. The Chief Land Registrar rejected the application on the basis that his occupation from 1st September 2012 (when section 144(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 came into force) had been a criminal trespass and could not therefore give rise to a claim for adverse possession. The Court of Appeal concluded that section 144 of the 2012 Act did not affect the settled law of adverse possession in relation to registered or unregistered land, and therefore the existence of section 144 did not prevent the claimant from having acquired a possessory title which should be registered.

65. The relevant offence under section 144 is established as follows:

> "144(1) a person commits an offence if:

(a) the person is in a residential building as a trespasser having entered as a trespasser

(b) the person knows or ought to know that he or she is a trespasser, and

(c) the person is living in the building or intends to live there for any period"

66. In giving the leading judgment in the Court of Appeal Sales LJ identified in paragraph 51 of his judgment that the best guidance on the question of the operation of illegality is to be found in the speech of Lord Wilson JSC in Hounga v Allen (Anti-Slavery International intervening) [2014] 1 WLR 2889. Sales LJ set out his analysis of the decision in Hounga in the following terms:

> "52. In doing so, the Supreme Court confirmed the position arrived at in *Tinsley v Milligan* [1994] 1 AC 340: the law of illegality does not operate to confer a broad discretion on a court to take any illegal actions on the part of a claimant into account when deciding the extent to which such illegality has an impact upon the relief sought by the claimant. Rather, the task for the court is to identify in the specific context in question a particular rule which reflects in an appropriate way the relevant underlying policy in that area: see *Hounga*, paras. [42] et seq.; also *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] AC 1339, paras. [30]-[31] per Lord Hoffmann; *Stone & Rolls Ltd v Moore Stephens* [2009] UKHL 39; [2009] 1 AC 1391, paras. [20]-[25] per Lord Phillips of Worth Matravers; and now *Les Laboratoires Servier v Apotex Inc.*, supra, paras. [13]-[22] per Lord Sumption JSC. Although in each case a rule is to be identified, rather than just taking a discretionary approach of a kind disapproved in *Tinsley v Milligan*, *Hounga* and *Les Laboratoires Servier*, there is not one single rule with blanket effect across all areas of the law. Instead, there are a number of rules which may be identified, each tailored to the particular context in which the illegality principle is said to apply: see *Gray v Thames Trains Ltd* (para. [30]: the *ex turpi causa* policy is based "on a group of reasons, which vary in different situations"; and para. [32]: as between rules applicable in different contexts, "the questions of fairness and policy are different and the content of the rule is different. One cannot simply extrapolate rules applicable to a different kind of situation") and *Les Laboratoires Servier*, paras. [19] and [22].
>
> 53. The issue in *Hounga* was, "In what circumstances should the defence of illegality defeat a complaint by an employee that an employer has discriminated against him by dismissing him contrary to section 4(2)(c) of the Race Relations Act 1976?" (para. [1]). In a significant respect, therefore, the question was similar to that before us, depending as it did on the extent to which the Supreme Court considered that the rights conferred

by the 1976 Act should be treated as impliedly qualified so as to be subject to a defence of illegality. At paras. [42]-[44] of his judgment in *Hounga*, Lord Wilson said this:

"42. The defence of illegality rests on the foundation of public policy. "The principle of public policy is this …" said Lord Mansfield by way of preface to his classic exposition of the defence in *Holman v Johnson* (1775) 1 Cowp 341, 343. "Rules which rest on the foundation of public policy, not being rules which belong to the fixed or customary law, are capable, on proper occasion, of expansion or modification": *Maxim Nordenfelt Guns and Ammunition Co v Nordenfelt* [1893] 1 Ch 630, 661 (Bowen LJ). So it is necessary, first, to ask "What is the aspect of public policy which founds the defence?" and, second, to ask "But is there another aspect of public policy to which application of the defence would run counter?"

43. An answer to the first question is provided in the decision of the Canadian Supreme Court in *Hall v Hebert* [1993] 2 SCR 159. After they had been drinking heavily together, Mr Hebert, who owned a car, allowed Mr Hall to drive it, including initially to give it a rolling start down a road on one side of which there was a steep slope. The car careered down the slope and Mr Hall was seriously injured. The Supreme Court held that the illegality of his driving did not bar his claim against Mr Hebert but that he was contributorily negligent as to 50%. At the outset of her judgment on behalf of the majority, McLachlin J, at p 169, announced her conclusion about the basis of the power to bar recovery in tort on the ground of illegality, which later she substantiated in convincing terms by reference to authority. Her conclusion was as follows:

'The basis of this power, as I see it, lies in [the] duty of the courts to preserve the integrity of the legal system, and is exercisable only where this concern is in issue. This concern is in issue where a damage[s] award in a civil suit would, in effect, allow a person to profit from illegal or wrongful conduct, or would permit an evasion or rebate of a penalty prescribed by the criminal law. The idea common to these instances is that the law refuses to give by its right hand what it takes away by its left hand.'

44. Concern to preserve the integrity of the legal system is a helpful rationale of the aspect of policy which founds the defence even if the instance given by McLachlin J of where that concern is in issue may best be taken as an example of it rather than as the only conceivable instance of it. I therefore pose and answer the following questions: (a) Did the tribunal's award of compensation to Miss Hounga allow her to profit from her wrongful conduct in entering into the contract? No, it was an award of compensation for injury to feelings consequent

> on her dismissal, in particular the abusive nature of it. (b) Did the award permit evasion of a penalty prescribed by the criminal law? No, Miss Hounga has not been prosecuted for her entry into the contract and, even had a penalty been thus imposed on her, it would not represent evasion of it. (c) Did the award compromise the integrity of the legal system by appearing to encourage those in the situation of Miss Hounga to enter into illegal contracts of employment? No, the idea is fanciful. (d) Conversely, would application of the defence of illegality so as to defeat the award compromise the integrity of the legal system by appearing to encourage those in the situation of Mrs Allen to enter into illegal contracts of employment? Yes, possibly: it might engender a belief that they could even discriminate against such employees with impunity."
>
> 54. Lord Wilson's assessment was that the considerations of public policy militating in favour of applying the *ex turpi causa* defence to defeat the claim were very slight: para. [45]. He then went on to consider the countervailing public policy considerations which were in play, in favour of allowing the claimant to rely on the Race Relations Act and to bring her claim. He concluded that these outweighed the public policy considerations in favour of allowing an illegality defence to the claim and that therefore the claim should proceed: paras. [46]-[52]. Lord Hughes JSC (with whom Lord Carnwath JSC agreed) agreed "that the claim of statutory tort in the present case was set in the context of the claimant's unlawful immigration, but that there was not a sufficiently close connection between the illegality and the tort to bar her claim": para. [59]."

67. Sales LJ applied the guidance given in Hounga to the particular circumstances of Best as follows:

> "69. Following this approach, I accept Mr Rainey's submission that the relevant balance of public policy considerations shows clearly that the fact that a relevant period of adverse possession for the purposes of the LRA included times during which the possessor's actions constituted a criminal offence under section 144 of LASPOA does not prevent his conduct throughout from qualifying as relevant adverse possession for the purposes of the LRA.
>
> 70. For these purposes, what is required, following the guidance given by Lord Wilson in *Hounga* at para. [42], is an amalgamated approach, balancing the public policy considerations which underlie and find expression in the provisions of the LRA governing acquisition of title by adverse possession against the public policy considerations which underlie and find expression in section 144 of LASPOA.

> Addressing that focused issue, I consider that it is clear that in enacting section 144 of LASPOA, Parliament did not intend that it should have any impact on the law of adverse possession set out in the LRA. The mischief which section 144 was intended to address and the objective it was intended to achieve had nothing to do with the operation of the law of adverse possession. (I would add that, in my opinion, each of the authorities relied upon by Mr Rainey for his wide submission is capable of being explained by application of the same approach).
>
> 71. The object of section 144 appears both from its own terms and from the Government's stated reasons for seeking its enactment by Parliament, as set out in the Response to Consultation. Although that response was not in formal terms a White Paper, in substance it fulfilled the same role of explaining the background to a legislative proposal introduced by the Government. In my view, therefore, the consultation paper has similar status to a White Paper as a legitimate aid to interpretation of section 144, and in particular as a legitimate source for guidance as to the policy objective which was sought to be achieved by section 144 (cf *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591). The stated objective of section 144 was to provide deterrence and practical, on the ground assistance for home-owners in removing squatters from their property. Disruption of the law of adverse possession was not mentioned as an intended effect of the provision, nor was it suggested that it was being introduced to try to re-balance the rights of property owners as against those of adverse possessors with respect to the entitlement to be treated as title-holder in relation to property."

68. In his submissions Mr Wilcox drew parallels with the case of Best and sought to apply the balancing of public policy interests required by paragraph 42 of Lord Wilson's judgment in the following way. He submitted that like Best the provisions of section 31 of the 1980 Act are grounded in principles akin to adverse possession in terms of the requirement for long usage, and he drew attention to the public benefit to be derived from certainty as to the existence of rights of way, both in terms of the interests of land owners in knowing whether or not rights of way existed across their land, and also in terms of the public who might wish to use the right of way and the public benefits which were thereby provided. He submitted that the strong public interest in the secure and certain identification of rights of way provided by section 31 had to be balanced with the public policy interest of keeping trespassers off the railway, but contended that much more limited weight had to be given to that latter public policy consideration in the light of the fact that the sentence which the offence under section 55 attracts is very light, and far lighter than the sentence under section 144 of the 2012 Act. For these reasons he submitted that the doctrine of illegality ought not to apply in relation to section 31, which is premised on the tort of trespass in just the same way as were the easements in Bakewell Management and the adverse

possession in Best. The acquisition of those rights should not, as a matter of public policy, be precluded by the section 55 offence.

69. In response to these submissions Mr Buley on behalf of the defendant submitted in response to the claimant's first point that in relation to the notices containing the prohibition upon entering onto the railway lines all that was required was the necessity of making clear that there was no lawful authority for persons to enter upon operational railway land and in particular to walk upon the railway lines. It was not necessary for the notice either to cite the word "trespass", or to identify that going on to the railway land would give rise to a criminal liability. He contended that the use of the word "passengers" was a perfectly sensible use of language bearing in mind the context that the notice appeared in a station. It was, he submitted, quite unrealistic to suggest that such a notice could not apply to any person who happened to be on the station who was not catching a train. In particular, he drew attention to the fact that section 55(3) is simply a defence to the crime created under section 55(1). In particular that defence does not require the offender to have seen the notice or even to have had access to the notice. All that is required is for notices to be exhibited at the station and that was what had occurred in the present case.

70. Turning to the submissions made by the claimant in relation to Bakewell Management, Mr Buley submitted that the factual circumstances of the present case were very different from that which pertained in that case. As Lord Walker had emphasised in paragraph 60 of his speech, the doctrine of illegality "must be applied as an instrument of public policy, and not in circumstances where it does not serve any public interest". In the present case Network Rail were serving the public interest by excluding trespassers from their land in the interests both of public safety and also the efficient operation of the railway. Thus, the present case engaged a wider and more important public interest, and the illegality doctrine was undoubtedly engaged. The public interest could not sensibly be measured in the present case simply by reference to the extent of the sentence which might be imposed for the crime concerned. Turning to the exercise of the principles set out in Best, Mr Buley accepted that the policy of section 31(1) was broadly similar to those legal principles associated with rights of prescription or adverse possession and that, as in Best, those principles are underpinned by a public interest which has to be afforded some weight in the overall balance. However, he submitted that on the other side of the balance was to be set the critically important public interest in the safe operation of the railway and the safety of the public, as well as the efficient operation of the railway as a piece of public transport infrastructure. He contended that the public interest in the safe and efficient operation of the railway will clearly outweigh any interest in the public policy lying behind section 31(1).

71. Mr Buley emphasised, further, that which had been observed by Lord Scott in paragraph 24 in his speech about the limitations upon what "lawful authority" could be granted by the owner of the common. In paragraph 24 Lord Scott observed as follows:

> "24 The words in subsection (4) "without lawful authority" deserve careful attention. They have been taken, in cases like the present and like *Hanning v Top Deck Travel Group Ltd 68 P & CR 14* , to refer to an authority given by the owner of the common. They might also, if proviso (a) is applicable, refer to

> an authority given by some public official or public body pursuant to the Act, scheme, byelaw or regulation in question. But the ability of the owner of the common in question to give someone a "lawful authority" to do one or other of the things prohibited by subsection (4), or, indeed, to do one or other of those things himself, is subject, in my opinion, to an important qualification. The owner of a common cannot lawfully do anything on the common that would constitute an unreasonable interference with the rights of the commoners: see section 30 of the Commons Act 1876 (39 & 40 Vict c 56). To do so would be a nuisance: see Clerk & Lindsell on Torts, 18th ed (2000) para 31-27. Nor could the owner of a common lawfully authorise things to be done by others on the common that, if done, would constitute a nuisance. The reference to "lawful authority" in subsection (4) does not, therefore, mean that the owner of a common can authorise to be done whatever he pleases. Authority given to too many people to camp on the common and light too many fires could damage the sufficiency of grass on the common for the commoners' grazing rights. If that were so, the authority would not, in my opinion, be a lawful one. Similarly, authority to too many people to drive too many cars or other vehicles over the tracks on the common might not be lawful. It would depend on the facts. But, subject to that qualification, subsection (4) allows the owner of a common to which section 193 applies to authorise the doing of an act that if done without that authority would be an offence under the subsection."

Mr Buley submitted that this passage in the Bakewell Management case recognised that there was a limitation on the dispensing power of the land owner, namely that the land owner could not grant authority to a person to do whatever they pleased, and in particular could not grant authority to undertake acts which would harm the interests of the commoners. Thus, in the present case he submitted there were necessary limitations on the dispensing power of the second interested party founded upon the need for the second interested party to comply with its statutory duties in terms of operating the railway safely and efficiently. Mr Lopez supported Mr Buley's submissions on behalf of NR.

72. Having considered Mr Wilcox's submissions in relation to the form of the notice which was exhibited at the relevant stations from 1949 I am unable to accept his contention that, in substance, the notices were of no effect such that any person using the level crossing could have relied upon the defence under section 55(3) of the 1949 Act. In my view they provide a public warning to persons not to go onto the land occupied by the operational railway, and in particular the railway lines. I do not consider that it was necessary for the notice to specifically use the words "trespass", in circumstances where the obvious substance of the notice was to make clear that being present on the railway lines was prohibited (or not authorised) which is clearly the meaning of trespass as it is applied in section 55. The notice made clear that passing onto the railway lines was prohibited. Had it used the word "trespass" it

would not have in any way changed the substance of the contents of the notice. As such it satisfied the requirements of section 55(3).

73. The notice is not required by section 55(3) to specify that going onto the railway lines when prohibited from doing so would amount to a criminal offence. I therefore do not accept that the failure of the notices in the present case to do so rendered them incompetent to preclude the defence under section 55(3). Thus I am satisfied that the Inspector was correct as a matter of law to conclude that the notices were adequate, and therefore on the factual findings which he made he was entitled to conclude that the use of the level crossing during the relevant period gave rise to a criminal offence.

74. Moving to consideration of the issues raised under the Bakewell Management and Best cases I accept the submission of Mr Buley that there is not, in substance, equivalence between the offence created by section 193(4) of the 1925 Act and that created by section 55(1) of the 1949 Act. When consideration is given to Mr Wilcox's suggestion that there is under section 55(1) a dispensing power whereby NR might grant an exemption by permitted pedestrian use of the level crossing, it has to be recognised immediately that such could only occur to the extent that it was consistent with the statutory duties of NR to preserve the safety and safeguard the efficiency of the operation of the railway. As is clear from NR's case and the findings of the Inspector in the present case, permitting public use of the level crossing as a right of way would both give rise to increased risk to public safety and also be inconsistent with the efficient operation of the railway. Thus any suggested power to grant exemption from the offence under section 55(1) immediately runs across the same issues which are raised in relation to statutory incompatibility. Unlike Lord Walker's conclusions in paragraph 56 as to the dispensing power under section 193(4) of the 1925 Act, in the present case the public interest would be directly engaged in any exercise of any apparent dispensing power on behalf of NR. Thus Mr Wilcox's submission as to dispensing powers is not an answer to the issue in the present case.

75. It is necessary to undertake the exercise contemplated by Lord Wilson in paragraph 42 of Hounga and Sales LJ in paragraph 52 of Best. Firstly, it is necessary to ask what is the aspect of public policy which underpins section 31 of the 1980 Act. In that respect I accept that, akin to cases of adverse possession or prescription, section 31 is designed to provide clarity in respect of the rules relating to recognition of public rights of way where they have been the subject of long usage, and also to provide certainty and clarity for land owners and the public in respect of any public rights existing over land. As in the cases of Bakewell Management and Best the public interest in those factors is clear and obvious. Set against that must be such public interest as underlies the creation of the offence under section 55 of the 1949 Act. I have no doubt that the creation of an offence of preventing trespass on the railways had the objective of promoting and securing the safe and efficient operation of the railways. There is a clear public interest in excluding trespassers from the railway lines who may not only come to harm not only themselves, but also may give rise to health and safety risks for those working on the railway. Furthermore, the presence of trespassers on the railway line gives rise to obvious risks to the efficient operation of the railway and the provision of timely rail services.

76. Balancing those respective public interests I am in no doubt that the weightier public interests at stake in this case are those which are represented by section 55 of the 1949 Act and the safe and efficient operation of the railway. In my view the public safety

objective of preventing people from trespassing on the railway by means of a criminal sanction is of particular weight in striking the balance. It follows that I am satisfied that it was appropriate for the Inspector to conclude that the principle of illegality did apply to the consideration of whether or not the Order should be made in this case, and his conclusion that the use of the level crossing had amounted to an offence under section 55(1) of the 1949 Act justified a finding that the Order should not be made.

Reason 3: The cul-de-sac

77. It will be apparent from paragraph 38 of the Inspector's decision set out above that he declined to make the Order on the basis of the objection of the NR. On behalf of the claimant it is submitted that even were the Inspector correct about that, and the inappropriateness of confirming the order in so far as it affected the level crossing, there was no reason why he could not have confirmed the order as, in effect, two cul-de-sacs, each running up to the railway lines and then terminating at the point where the level crossing commenced.

78. Issues of this kind were considered by Farwell J in the case of Attorney General v Antrobus [1905] 2 Ch 188. That case concerned an action brought against the land owner of Stonehenge. The land owner erected fences precluding the public from visiting the monument and an action was brought seeking the removal of the fences which had been erected. Part of the plaintiff's case was that there were public rights of way running up to and through Stonehenge which had been blocked by the land owner's fencing. Having heard evidence Farwell J found as a fact that there had for many years past been a large amount of traffic to Stonehenge as "the end and object of the journey". He concluded on the facts that there had in truth been no through traffic by any of these visitors but that the object of their journey had been to visit and enjoy the monument. He further concluded that on this basis permission must have been granted by the land owner for that activity and therefore no public right had in fact been created.

79. Part of the reasons for him concluding that the case should be dismissed related to the fact that the tracks relied upon as public rights of way simply led to the monument but did not pass through it. His conclusions were expressed in the following terms:

> "Further, the tracks which lead into the circle cease there and do not cross, and the public have no jus spatiandi or manendi within the circle. The claim, therefore, is to use tracks which in fact lead nowhere. Now, the cases establish that a public road is primâ facie a road that leads from one public place to another public place (see per Lord Cranworth in Campbell v. Lang and Young v. Cuthbertson), or as Holmes L.J. suggests in the Giants' Causeway case, there cannot primâ facie be a right for the public to go to a place where the public have no right to be. But the want of a terminus ad quem is not essential to the legal existence of a public road; it is a question of evidence in each case, and it is, after all, only a question between the landowner and the public. It is competent to the landowner to execute a deed of dedication, or by similar unmistakable evidence to testify to his intention. But in no case has mere user by the public without more been held sufficient… In Bourke v. Davis

> Kay J. says: "But it is argued that a cul-de-sac may be a highway. That is so in a street in a town into which houses open and which is repaired, sewered, and lighted by the public authority at the expense of the public. …. But I am not aware that this law has ever been applied to a long tract of land in the country on which public money has never been expended." Eady J.'s decision in Attorney-General v. Richmond Corporation accords with this. I venture to think that this expenditure of money is the important consideration, and that in such a case the landowner who has permitted the expenditure cannot be heard to say that a roadway on which he has allowed public money to be spent is his private road; but the mere transit of passengers to see a view or a house at the end will create no right, as Lord Cranworth says. But the landowner may by express words, or by conduct inducing the expenditure of money on the track in question, be shewn to have dedicated even a cul-de-sac to the public. There are doubtless drives in many seaside places and elsewhere which may have become public ways by this means. This explains the Giants' Causeway Case, for in that case the road in question had been "presented" by the Grand Jury in 1814, and had been repaired by the public authority."

80. In the Oxfordshire County Council case Lightman J observed at paragraph 101 as follows:

> "a cul-de-sac may be a public highway if there is some kind of attraction at the far end which might cause the public to wish to use the way."

81. On the basis of these authorities Mr Laurence submits that at common law it was possible for a viewpoint, or point of particular resort as an attraction, to justify a cul-de-sac to being dedicated as a public right of way. At common law the land owner could evidence an intention to dedicate if the requirements under section 31 were satisfied. Furthermore, he submits that the railway line could properly be regarded as a point of resort or viewpoint which could properly lead to the dedication of the two cul-de-sacs running up to each side of the level crossing. As such the Inspector erred in law in failing to modify the order to reflect this submission and make the Order in those terms.

82. Mr Buley submits that the Inspector was perfectly entitled to reach the conclusion which he did in paragraphs 38-40 of the decision, namely that bearing in mind the missing link between the cul-de-sacs would involve a criminal trespass, and there was no "legitimate place of public resort" at the end of either cul-de-sac, the remainder of the route could not be established as a public highway at common law. Thus the Inspector was entitled to conclude that the Order should not be confirmed. He submitted that it was simply unrealistic to suggest that the railway line in and of itself amounted to a popular place of resort or local viewing attraction so as to amount to evidence of dedication.

83. I am satisfied that the conclusions which the Inspector reached in relation to the question of whether or not it would be lawful to confirm the Order in the form of two disconnected cul-de-sacs was entirely correct. As Farwell J in the Antrobus case observed, there cannot be any prima facie right for the public to pass from the public highway (where they have a right to be) to a location where they have no right to be (such as a location which does not join up with other parts of the rights of way network or over which there is no other public right of use). Furthermore, as Farwell J emphasised, the question is one of evidence in each case. In the absence of any express dedication or public expenditure on the way claimed, mere use by the public without more of a cul-de-sac in the absence of some particular point of attraction could not amount to evidence justifying a finding that dedication had occurred. In the present case there was simply no evidence to suggest that people were using the two cul-de-sacs to gain access to the railway as a point of popular resort. Rather, all of the evidence suggested that the parts of the claimed right of way which formed the two cul-de-sacs were in fact being used as parts of a single journey traversing the whole length of the path identified in the order. There was not therefore in the present case the evidence necessary to demonstrate the dedication of two cul-de-sacs omitting the "missing link" indentified by the Inspector. I am therefore satisfied there is no substance in the claimant's contentions in this respect and that the Inspector's conclusions on this part of the case were legally robust.

Conclusions

84. For all of the reasons which have been set out above, I am satisfied that the decision which was reached by the Inspector in relation to this Order was lawful and that there was no error of law in the decision which he reached in any of the respects which have been presented by the claimant. It follows that this claim must be dismissed.

CHAPTER xxix

An Act to empower the British Transport Commission to construct works and to acquire lands to empower the Mersey Docks and Harbour Board to dispose of certain lands to the Commission to make provision as to the rates dues and charges leviable by the Commission at certain of their docks to authorise the closing for navigation of portions of certain inland waterways to amend in certain respects the River Lee Water Act 1855 as amended by subsequent enactments to extend the time for the compulsory purchase of certain lands the completion of certain works and the exercise of certain powers to confer further powers on the Commission and for other purposes. [30th July 1949.]

WHEREAS by the Transport Act 1947 (in this Act referred to as "the Act of 1947") the British Transport Commission (in this Act referred to as "the Commission") were established: 10 & 11 Geo. 6. c. 49.

And whereas it is the duty of the Commission (inter alia) so to exercise their powers under the Act of 1947 as to provide or secure or promote the provision of an efficient adequate economical and properly integrated system of public inland transport and port facilities within Great Britain for passengers and goods and for that purpose to take such steps as they consider necessary for extending and improving the transport and port facilities within Great Britain in such manner as to provide most efficiently and conveniently for the needs of the public agriculture commerce and industry:

And whereas it is expedient that the Commission should be empowered to construct the works authorised by this Act and to acquire the lands referred to in this Act:

PART VII —*cont.*

For better prevention of trespass on railways &c.

55.—(1) Any person who shall trespass upon any of the lines of railway or sidings or in any tunnel or upon any railway embankment cutting or similar work now or hereafter belonging or leased to or worked by the Commission or who shall trespass upon any other lands of the Commission in dangerous proximity to any such lines of railway or other works or to any electrical apparatus used for or in connection with the working of the railway shall on summary conviction be liable to a penalty not exceeding forty shillings.

(2) The provisions of the Railways Clauses Consolidation Act 1845 with respect to the recovery of damages not specially provided for and of penalties and to the determination of any other matter referred to justices shall apply to this section.

(3) No person shall be subject to any penalty under this section unless it shall be proved to the satisfaction of the court before which complaint is laid that public warning has been given to persons not to trespass upon the railway by notice clearly exhibited and that such notice has been affixed at the station on the railway nearest to the place where such offence is alleged to have been committed and such notice shall be renewed as often as the same shall be obliterated or destroyed and no penalty shall be recoverable unless such notice is so placed and renewed.

(4) A notice shall not be invalid for the purposes of this section by reason only that it refers to an enactment other than this Act.

(5) In the application of this section to Scotland—

(*a*) the words " sheriff or justices " shall be substituted for the word " justices " ;

(*b*) for the reference to the Railways Clauses Consolidation Act 1845 there shall be substituted a reference to the Railways Clauses Consolidation (Scotland) Act 1845. 8 & 9 Vict. c. 33.

Stone throwing on railway.

56.—(1) Any person who shall unlawfully throw or cause to fall or strike at against into or upon any engine tender motor carriage or truck used upon or any works or apparatus upon any railway or siding now or hereafter belonging or leased to or worked by the Commission any stone matter or thing likely to cause damage or injury to persons or property shall on conviction be liable to a penalty not exceeding forty shillings and the provisions of the Railways Clauses Consolidation Act 1845 with respect to the recovery of damages not specially provided for and of penalties and to the determination of any other matter referred to justices shall apply to this section.

(2) In the application of this section to Scotland—

(*a*) the words " sheriff or justices " shall be substituted for the word " justices " ;

PART VII —*cont.*

(*b*) for the reference to the Railways Clauses Consolidation Act 1845 there shall be substituted a reference to the Railways Clauses Consolidation (Scotland) Act 1845.

As to rights of way over roads footpaths &c.

57. As from the passing of this Act no right of way as against the Commission shall be acquired by prescription or user over any road footpath thoroughfare or place now or hereafter the property of the Commission and forming an access or approach to any station goods-yard wharf garage or depot or any dock or harbour premises of the Commission.

Incorporation with certain enactments of provisions as to byelaws &c.

58.—(1) As from the passing of this Act sections 108 to 111 (inclusive) of the Railways Clauses Consolidation Act 1845 shall be deemed to be incorporated with every enactment in force at the passing of this Act by which any railway of the Commission was authorised to be constructed and with which the said sections are not incorporated.

(2) For the purposes of such incorporation the expressions "the company" and "the railway" in the said sections shall mean respectively the Commission and the railway and works authorised to be constructed by the enactment with which the said sections are deemed to be incorporated.

(3) To the extent that any provisions contained in any such enactment with respect to regulating the use of the railway thereby authorised to be constructed may be inconsistent with any of the provisions of the said sections the same are hereby repealed but such repeal shall be without prejudice to the validity of any regulation or byelaw duly made under such repealed provisions and in force at the passing of this Act and any such regulation or byelaw shall continue to have effect except in so far as it may be repugnant to or inconsistent with the provisions of the said sections.

(4) In the application of this section to Scotland for the references to sections 108 to 111 (inclusive) of the Railways Clauses Consolidation Act 1845 there shall be substituted references to sections 101 to 104 (inclusive) of the Railways Clauses Consolidation (Scotland) Act 1845.

As to rights of pre-emption.

59.—(1) As from the passing of this Act the provisions of sections 127 to 131 (inclusive) of the Lands Clauses Consolidation Act 1845 (which relate to the sale of superfluous lands) and any other provisions to the same or similar effect incorporated with or contained in any enactment relating to any undertaking now forming part of the undertaking of the Commission shall not apply to any land which is now vested in or may hereafter be acquired by the Commission under the powers of such enactment.

Highways Act 1980

CHAPTER 66

ARRANGEMENT OF SECTIONS

PART I

HIGHWAY AUTHORITIES AND AGREEMENTS BETWEEN AUTHORITIES

Highway authorities

Section

Agreements between authorities

PART II

TRUNK ROADS, CLASSIFIED ROADS, METROPOLITAN ROADS, SPECIAL ROADS

Trunk roads

Classified roads

Powers as respects roads that cross or join trunk roads or classified roads

Metropolitan roads

Special roads

Ancillary matters with respect to orders under section 14 *or* 18 *and schemes under section* 16

PART III

CREATION OF HIGHWAYS

PART III

path or way would have been actionable at his suit if it had been effected otherwise than in the exercise of statutory powers.

(5) In this section " interest ", in relation to land, includes any estate in land and any right over land, whether the right is exercisable by virtue of the ownership of an interest in land or by virtue of a licence or agreement, and in particular includes sporting rights.

Protection for agriculture and forestry.

29. In the exercise of their functions under this Part of this Act relating to the making of public path creation agreements and public path creation orders it shall be the duty of councils and joint planning boards to have due regard to the needs of agriculture and forestry.

Dedication of highway by agreement with parish or community council.

30.—(1) The council of a parish or community may enter into an agreement with any person having the necessary power in that behalf for the dedication by that person of a highway over land in the parish or community or an adjoining parish or community in any case where such a dedication would in the opinion of the council be beneficial to the inhabitants of the parish or community or any part thereof.

(2) Where the council of a parish or community have entered into an agreement under subsection (1) above for the dedication of a highway they may carry out any works (including works of maintenance or improvement) incidental to or consequential on the making of the agreement or contribute towards the expense of carrying out such works, and may agree or combine with the council of any other parish or community to carry out such works or to make such a contribution.

Dedication of way as highway presumed after public use for 20 years.

31.—(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes—

(*a*) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(*b*) has maintained the notice after the 1st January 1934, or any later date on which it was erected,

the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.

(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.

(6) An owner of land may at any time deposit with the appropriate council—

(*a*) a map of the land on a scale of not less than 6 inches to 1 mile, and

(*b*) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways;

and, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time—

(i) within six years from the date of the deposit, or

(ii) within six years from the date on which any previous declaration was last lodged under this section,

to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway.

PART III

(7) For the purposes of the foregoing provisions of this section " owner ", in relation to any land, means a person who is for the time being entitled to dispose of the fee simple in the land ; and for the purposes of subsections (5) and (6) above " the appropriate council " means the council of the county or London borough in which the way (in the case of subsection (5)) or the land (in the case of subsection (6)) is situated or, where the way or land is situated in the City, the Common Council.

(8) Nothing in this section affects any incapacity of a corporation or other body or person in possession of land for public or statutory purposes to dedicate a way over that land as a highway if the existence of a highway would be incompatible with those purposes.

(9) Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years, or being presumed or proved in any circumstances in which it might have been presumed or proved immediately before the commencement of this Act.

1949 c. 97.

(10) Nothing in this section or section 32 below affects subsection (4) of section 32 of the National Parks and Access to the Countryside Act 1949 (which provides that a map and statement prepared under that section are conclusive evidence as to the existence of the highways shown on the map and as to certain particulars contained in the statement), or of that subsection as applied by section 34(1) of that Act.

(11) For the purposes of this section " land " includes land covered with water.

Evidence of dedication of way as highway.

32. A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

Protection of rights of reversioners.

33. The person entitled to the remainder or reversion immediately expectant upon the determination of a tenancy for life, or pour autre vie, in land shall have the like remedies by action for trespass or an injunction to prevent the acquisition by the public of a right of way over that land as if he were in possession thereof.