

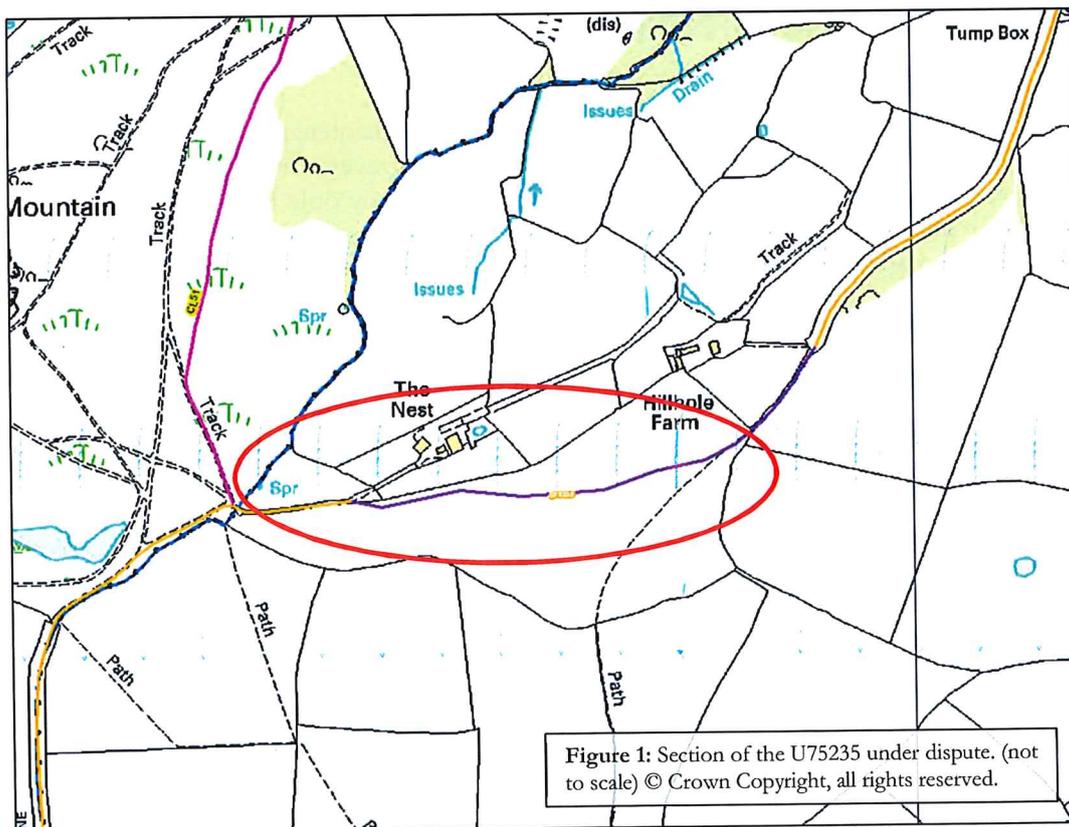
REPORT OF INVESTIGATION INTO STATUS OF THE U75235 ROAD IN THE PARISH OF DORSTONE, HEREFORDSHIRE

Introduction

1. Section 36(6) of the Highways Act, 1980 requires the council of every county to produce and keep up to date a list of streets within their area which are highways maintainable at public expense. The "List of Streets" is a public document and must be kept on deposit by the council, and may be inspected by the public. As defined by section 36(6), the List of Streets is a record of public maintenance liability, it is not a record of the status (of what particular public rights) a particular route carries. That issue must be addressed by other investigations.

Background

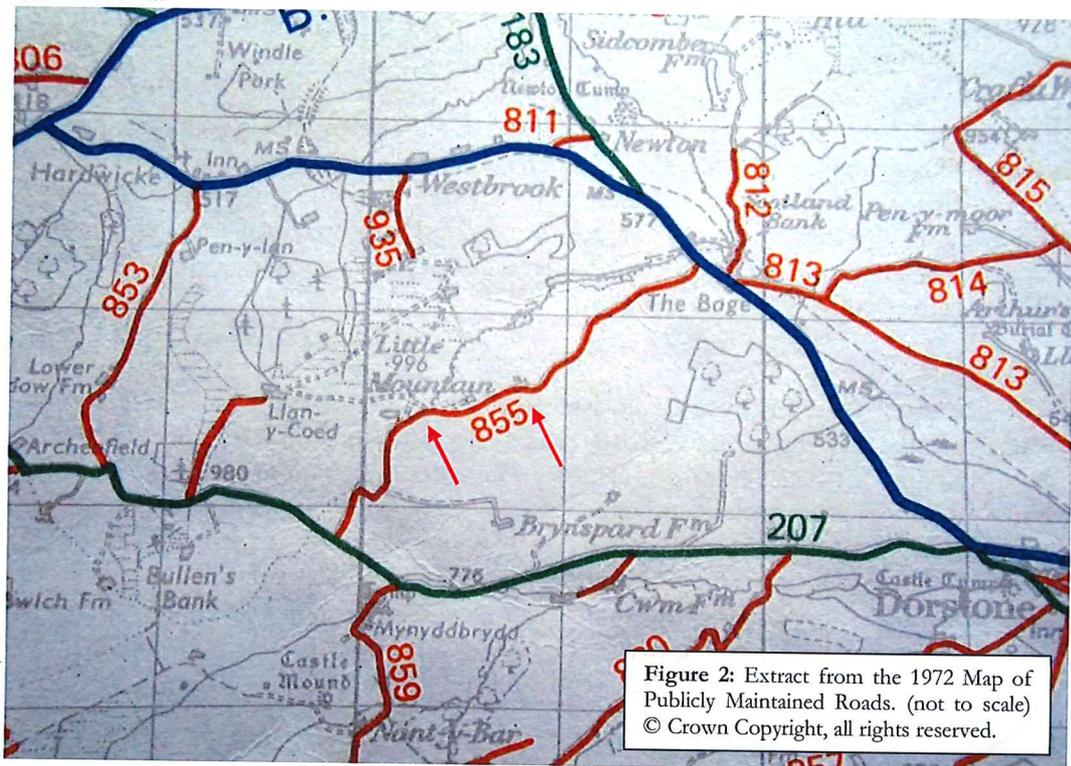
2. In 2011, Herefordshire Council received a number of complaints alleging that a section of the U75235 County Road near Little Mountain in Dorstone Parish was obstructed and not available for public use. The section of road in question is indicated within the red ellipse on the plan below (Figure 1). This section links the southwestern part of the U75235, known as Tomkyn's Lane to the northeastern part of the U75235, known as Brown's Lane. When the landowners were approached in order to secure the removal of these obstructions, the status of this section of road was vigorously denied. Consequently, further investigation was carried out to clarify the status of this section of the road.



The 1972 Map of Publicly Maintained Roads

3. This map was prepared as a paper printed map at a scale of one inch to the mile, and on this map, the route in question is shown in orange (denoting it to be an Unclassified Road) with the number 855. It is shown as through road, passing over the

top of Little Mountain. An extract of this map is shown below (Figure 2), with the route arrowed red.



1929 Handover Maps

4. Prior to the 1929 Local Government Act, the maintenance of minor roads was the responsibility of the rural district councils. However, this Act transferred that responsibility to the county councils, which had previously only been responsible for A and B roads. As part of this transfer, or handover, the rural district councils prepared maps showing the roads for which they were responsible, and for which responsibility was to pass to the county councils. It is these maps which became known as the "Handover Maps". Unfortunately, the quality and coverage of these maps is variable. Two different sets of Handover Maps exist for the Dore and Bredwardine area: one has been prepared on a one inch to the mile O.S. base map, and the other has been compiled on six inch to the mile sheets. There is no indication as to which of these maps is intended to be the "definitive" version.

5. The one inch to the mile version clearly shows the "central section" over Little Mountain as having been erased and crossed out, as shown on the extract below (Figure 3). The six inch to the mile section shows this area at the corner of several sheets. However, once these are matched up and pieced together, (see Figure 4, below), they also show that a section running across rough land over Little Mountain is shown with a faint dotted green line – as opposed to the solid line used for the sections of road either side which are numbered 18 for Brown's Lane, and 19 for Tomkyn's Lane. It is not entirely clear what was intended by showing this section with a faint dotted line in this manner, but taken into account with the other, smaller-scale map, showing the same section crossed out, it casts considerable doubt over whether this section was considered to be a publicly maintainable highway in 1929/30.

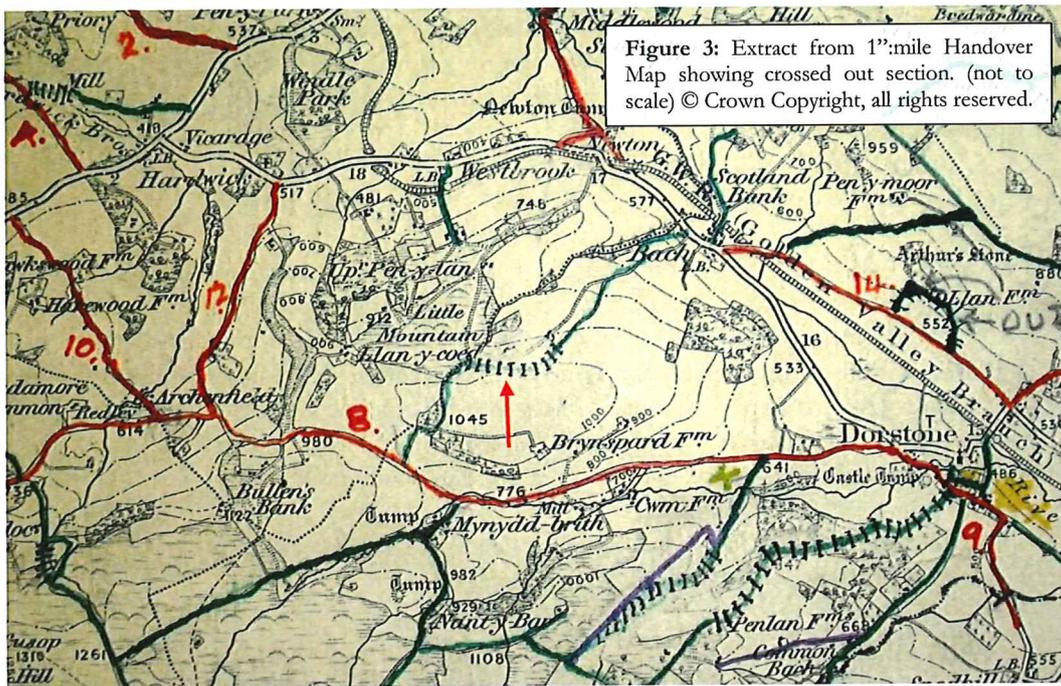


Figure 3: Extract from 1 1/2-mile Handover Map showing crossed out section. (not to scale) © Crown Copyright, all rights reserved.

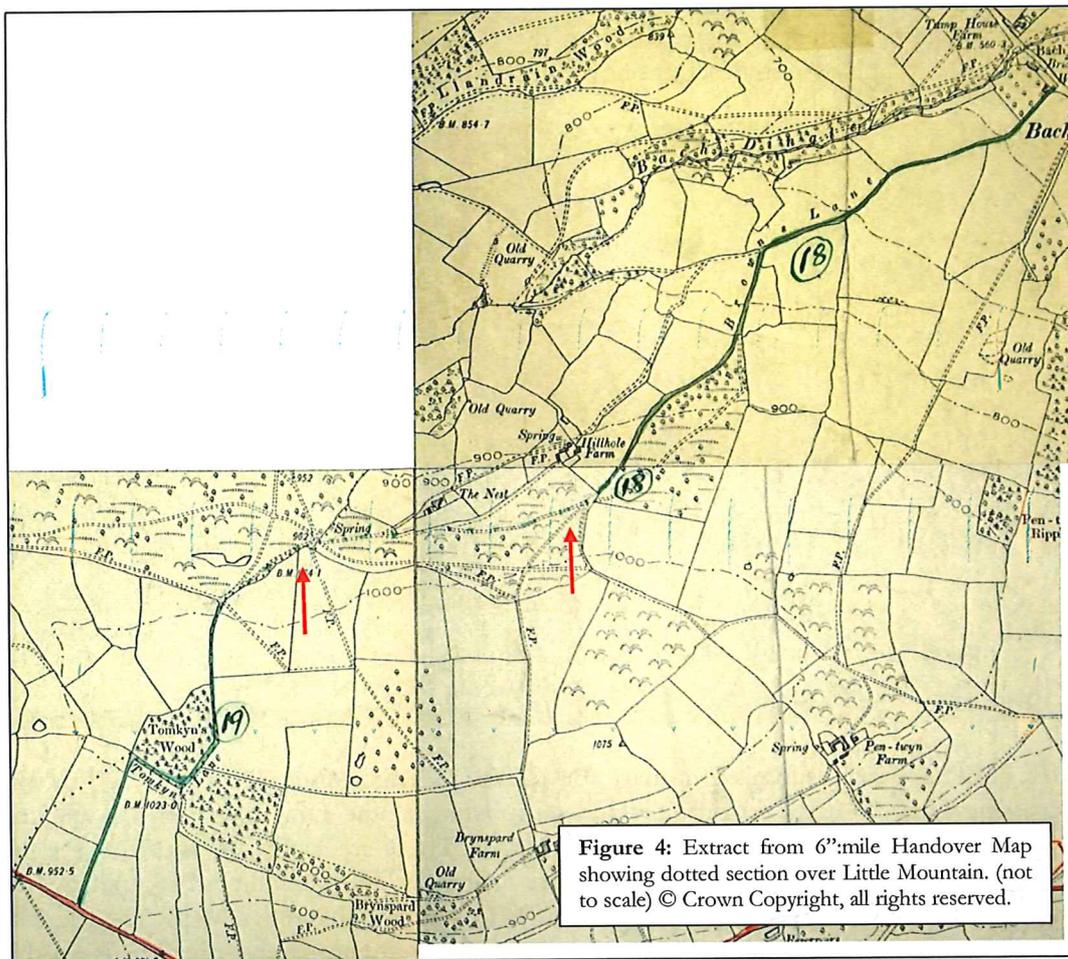


Figure 4: Extract from 6 1/2-mile Handover Map showing dotted section over Little Mountain. (not to scale) © Crown Copyright, all rights reserved.

1936 List of Unclassified Roads Maintained by Herefordshire County Council

6. This list was produced by R. G. Gurney, County Surveyor and records the unclassified roads maintained by the County Council as of 1st April 1936. Unfortunately,

no map accompanies this list. Within the list, the county is broken down into several divisions. For the South Western Division the only details given are the road number, its name, and its length in miles. There are two roads listed which may relate to the section of road in question:

- 59. Brown's Road .65 miles
- 60. Tomkyns Wood Road .50 miles

7. Assuming these are indeed the same roads as Brown's Lane and Tomkyn's Lane, the length given for Brown's Road corresponds to a distance from the B4348 road at The Bage to approximately the end of the modern tarmac surface of the U75235 near Hillhole Farm. The length given for Tomkyns Wood Road corresponds with a distance which would (approximately) take it to the southern edge of Little Mountain Common. Allowing for the absence of a map, it would seem, therefore, that in 1936, the section linking these two roads was not considered a publicly maintained road.

8. It is therefore necessary to consider whether evidence of highway status for this central section can be found in other archival sources.

1951 Parish Submissions for Draft Map and Statement of Public Rights of Way

9. In the early 1950s the parish councils compiled submissions to the county council in preparation for the production of the first Definitive Map and Statement. The parish submissions consisted of maps showing the routes which were believed to be public rights of way, and written descriptions of those routes.

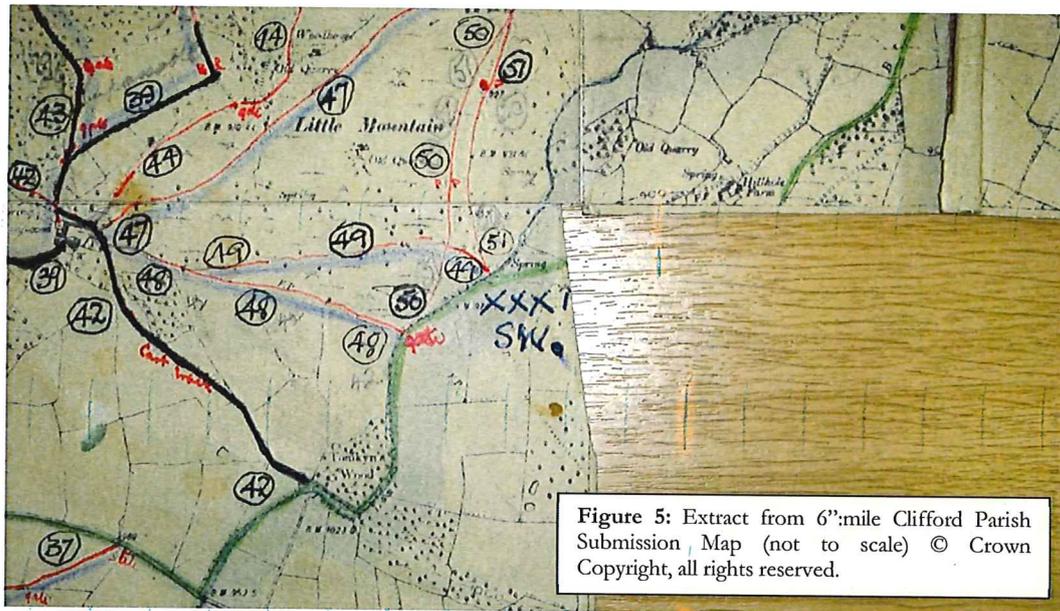


Figure 5: Extract from 6" scale Clifford Parish Submission Map (not to scale) © Crown Copyright, all rights reserved.

10. The parish submission map for Clifford depicts four alleged rights of way crossing Little Mountain Common and terminating at the Dorstone parish boundary, which is coincident with the line of the U75235. These are 48, 49, 50 and 51 – see the extract of the parish submission map (Figure 5, above). Of these alleged footpaths, only one, Clifford CL51 was approved for inclusion on the first Definitive Map. The route of the U75235 appears to be shown with a green coloured line, as are other roads on this map, and this may suggest that the parish council considered that this route was a road. However, there is no mention of the road in any of the parish council's four written descriptions for these four paths. Instead, the points of termination or commencement for these paths are specified as the parish boundary. The written description in the

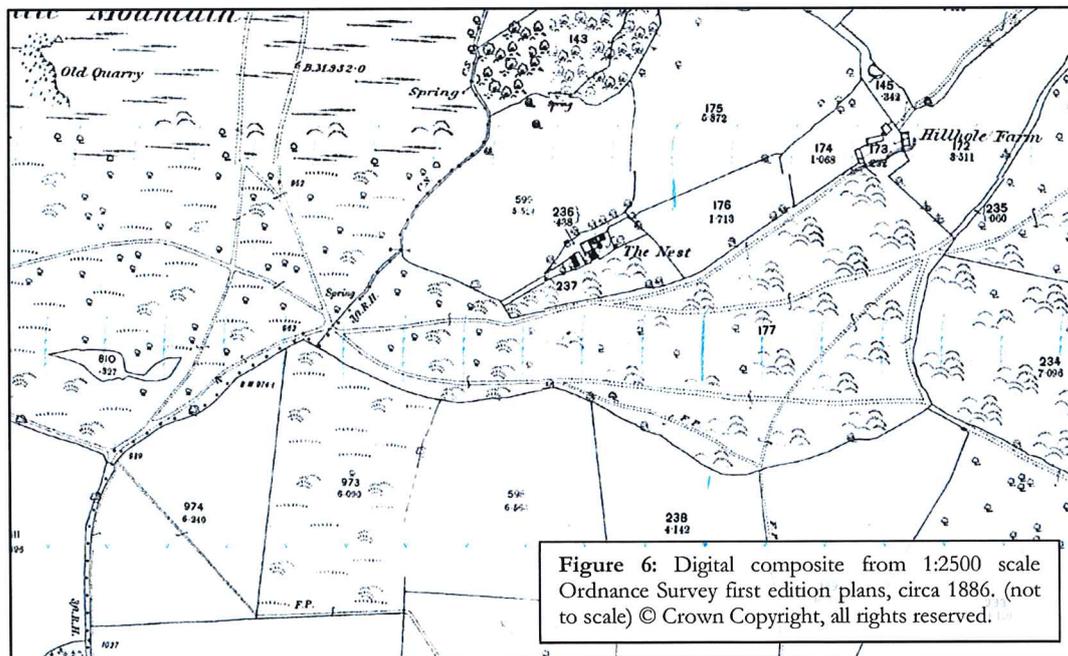
submission for footpath CL51 describes its *eastern* point of termination as being at a public road, but the description of the south-western end reads, “Leaves S.E. parish boundary...” The lack of mention of the road in the descriptions (despite *another* road being mentioned as a termination point) suggests that the route in question may *not* have been recognised as road at that time.

11. The current Definitive Statement for footpath Clifford CL51 also describes it as commencing from the “S.E. [south east] parish boundary” and there is no reference to the road.

12. As mentioned above, the parish submission map for Dorstone parish shows the route of the U75235 coloured green. However, this map shows another road (a loop off the U75218, Spoon Lane) also coloured green, and this, like the disputed section of the U75235, is also shown crossed out on the one-inch scale 1929 Handover Map (it isn't shown at all on the six-inch version). This loop of road is not shown on the 1972 Map of Publicly maintained Roads, nor is it shown in the current List of Streets. The parish submission maps were not prepared with the purpose of recording public roads, and it is not clear where the roads information was taken from. An example such as this where another road appears to be shown in error, casts doubt as to their reliability for that purpose.

Large-Scale Ordnance Survey Plans

13. The large-scale (1:2500) Ordnance Survey plans are a valuable source of topographic information which dates back to the 1880s when the original surveys were conducted.



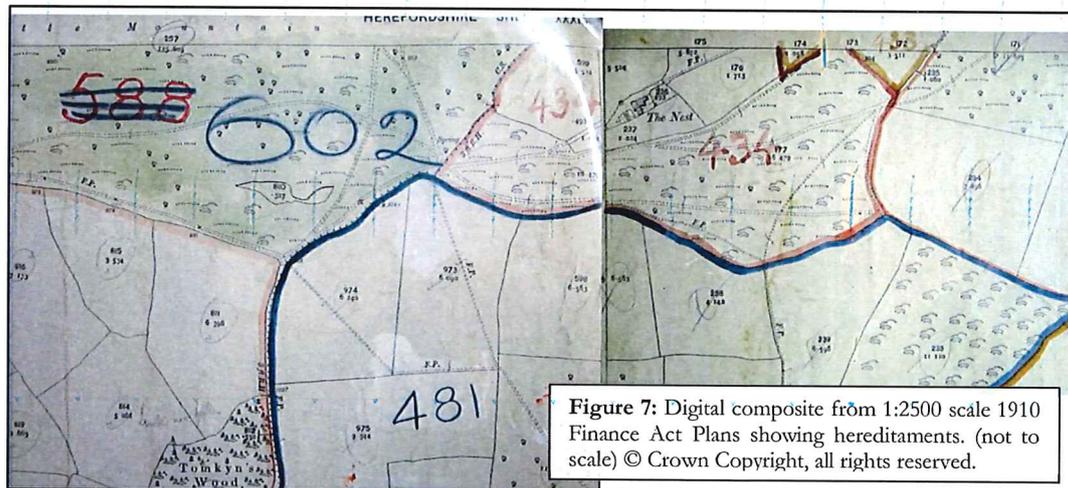
14. The digital composite copy of the first edition 1:2500-scale plans (Figure 6, above) shows a number of tracks crossing this area of land, including one track which corresponds to the disputed route. However, this is not of much assistance: the Ordnance Survey plans from this era carry a disclaimer stating that the showing of a road, track or path is not evidence of the existence of a public right of way. The Ordnance Survey plans from this period were concerned with showing what physical features existed on the ground, they were not particularly concerned with the existence

(or otherwise) of public rights. Whilst it is probable that many of the roads, tracks, and paths depicted did carry public rights, these plans, on their own, do not give evidence of those rights.

1910 Finance Act Records

15. The Finance Act 1909 - 1910 provided for the levying of a tax upon the incremental value of all land when sold. Detailed plans were prepared, based on Ordnance Survey maps, to show the land assessed. The valuation book includes details relevant to the valuation, and shows if any deductions were allowed for rights of way across the plots of land.

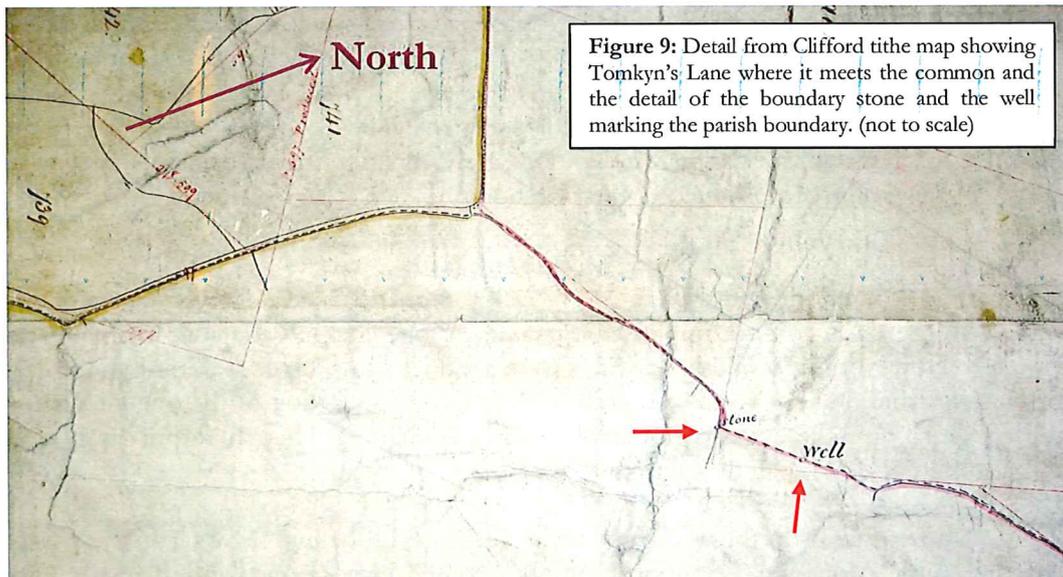
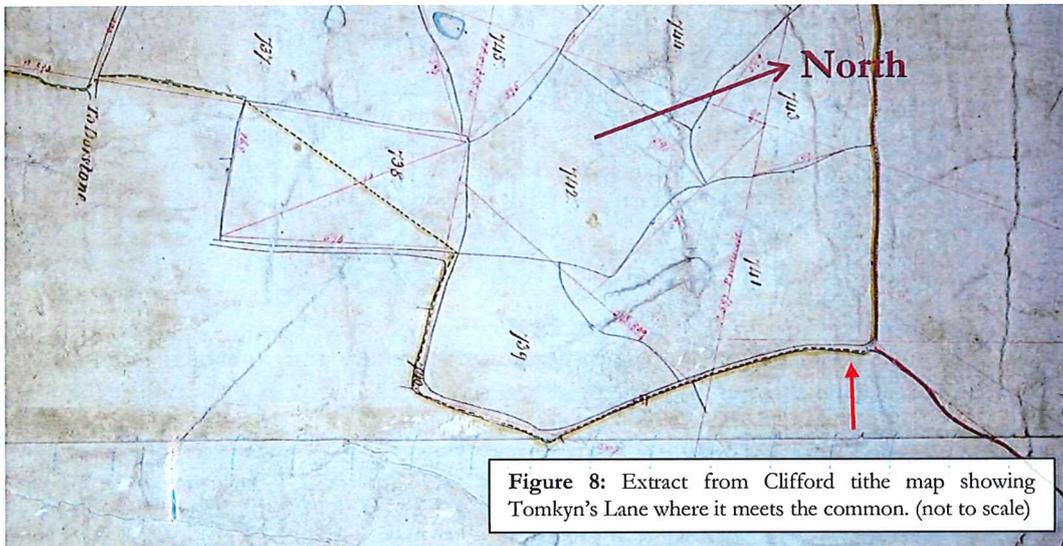
16. These maps (Figure 7, below) were prepared using the printed 1903/04 Edition of the 1:2500 scale Ordnance Survey plans as the base map, onto which plots and plot numbers were marked. It is noteworthy that where the route runs along enclosed lanes toward Little Mountain, it is shown un-coloured and excluded from the hereditaments, and this would be entirely consistent with these sections being vehicular highways. The route passes through plot numbers 602 and 434 as shown on Figure 7 (below). In the detailed Field Book entry for plot number 602, this plot is described as common land, and a deduction of £514 has been allowed for rights of common, but no deductions have been allowed for public rights of way or user across this plot. In contrast, plot 434 is referred to as Upper House or The Nest, with buildings (barn, stable, hay barn, pig sty, beast house) and includes about 16½ acres of rough hill land. Importantly, no deductions were allowed for any rights of common, or for any public rights of way or user. This is a useful indication that by this date, this area of land was not regarded as part of Little Mountain common, and no public rights of way were admitted over it. Had a publicly maintained road run across this land, it is likely that it would have been recorded in the Field Book entry: that it wasn't recorded strongly suggests that at the time of the entry in the Field Book in 1915, no such road was recognised.



Tithe Maps and Apportionments

17. Traditionally, tithes were one tenth of a farmer's annual produce which was taken to support the Church. Under the Tithe Commutation Act of 1836, this was converted to a money rate, which was simpler to administer. In each parish, Tithe Commissioners were appointed to oversee a survey to assess the productive value of each field, and a map and schedule were drawn up to record the results of the survey. Although not directly concerned with Rights of Way, tithe maps and apportionments can provide useful evidence.

18. The original maps and apportionments, sealed and approved by the commissioners were retained by the Tithe Commissioners, and are now kept in the National Archive. Two other copies were ordered to be made, one lodged with the parish and one with the Diocese. The Diocesan copies are now held at the County Records Office. The disputed route crosses land which was once contiguous with little Mountain Common. The Clifford Tithe map (1842) stops at the parish boundary, but it doesn't show any other feature than the parish boundary at the continuation over into Dorstone. It also shows Tomkyn's Lane as far as the common – arrowed in Figure 8 (below). The “Well” marked on the tithe map (Figure 9) corresponds to the “Spring” shown on the 1904 1:2500 Ordnance Survey. The Epoch 1 (c.1886) and 1904 OS map show a hedge running alongside the parish boundary and the parish boundary is mered to the hedge as indicated by the mereing “3ft. R.H.”. This possibly suggests that the hedge was established sometime between the Tithe map (1842) and the 1880s when the O.S. did the surveys for their large scale plans, and may mean that the present disputed section of land was annexed from Little Mountain Common during this period.



19. The Dorstone tithe map (extract shown at Figure 10, below) shows Tomkyn's Lane running up to the common (blue arrow), and it also shows Brown's Lane (green arrow) running up to the common from The Bache, but it does not show any connection between the two. However, it was commonplace for tithe maps not to show roads where they cross common land.

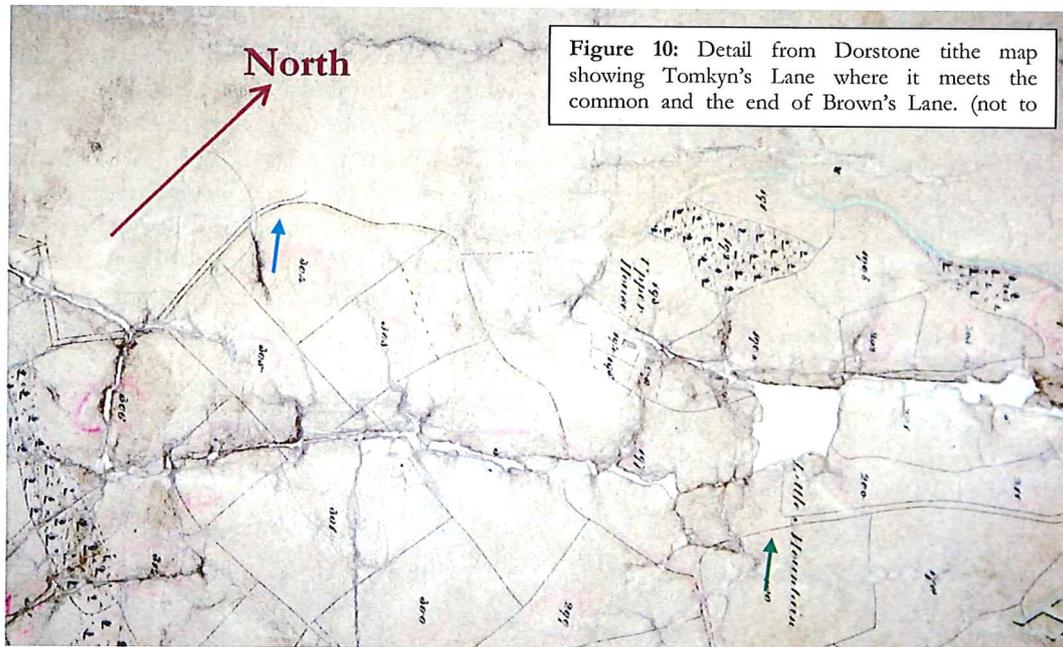


Figure 10: Detail from Dorstone tithe map showing Tomkyn's Lane where it meets the common and the end of Brown's Lane. (not to scale)

Inclosure Records

20. Inclosure Awards are particularly significant legal documents which often created new rights of way, and sometimes extinguished old ones. Unfortunately, whilst there are a number of surviving Inclosure Awards in the vicinity, none of them covers the land crossed by the route in question.

Early County Maps

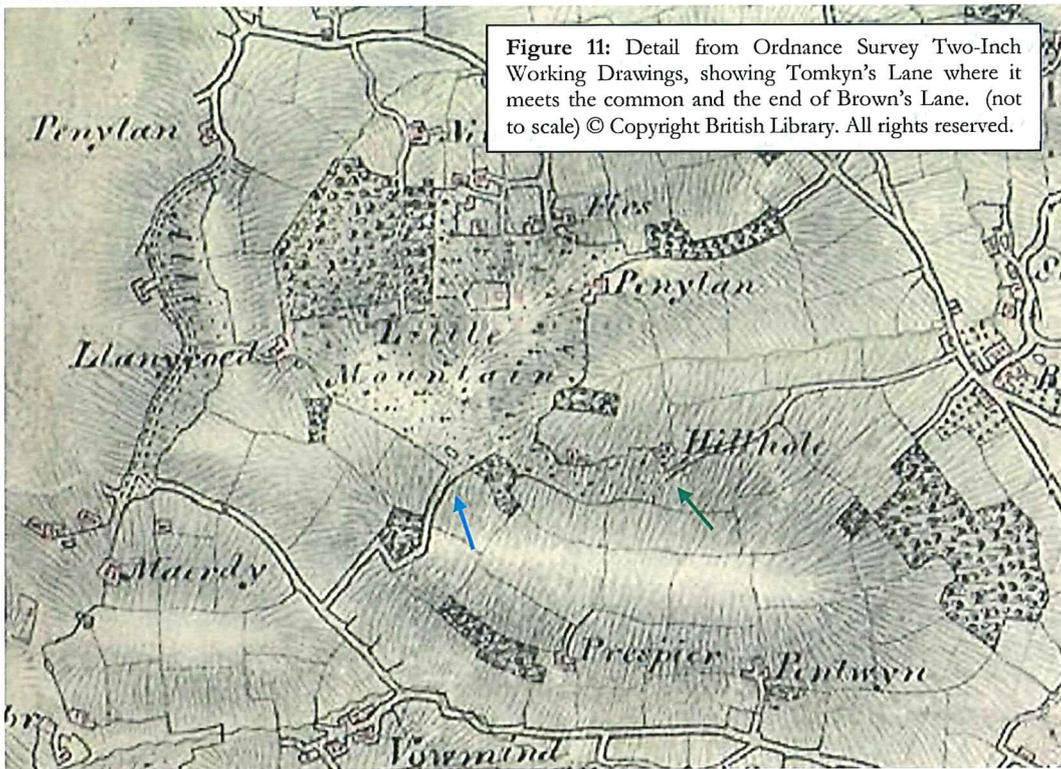
21. In the 18th and 19th centuries, map makers started to produce county maps. Individual surveyors saw an opportunity to produce small-scale maps of counties which could be purchased by individuals. A surveyor was generally concerned to show on these maps only those routes which the traveller could use. These showed features such as Turnpike roads, cross roads, lanes and bridleways. They can be useful supporting evidence in rights of way claims. In addition, the Ordnance Survey began its systematic survey of the country to produce its First Edition one-inch scale maps.

Ordnance Survey Two-Inch Working Drawings, c. 1815

22. The working drawings were produced by the Ordnance Survey circa 1815, and served as the basis for the published First Series one inch to the mile maps of the country. However, the working drawings were produced to a larger scale, and in the case of Herefordshire, twenty years were to pass before the production of the one-inch maps, during which time there was considerable landscape change. They therefore often show rather different detail than the later, published maps.

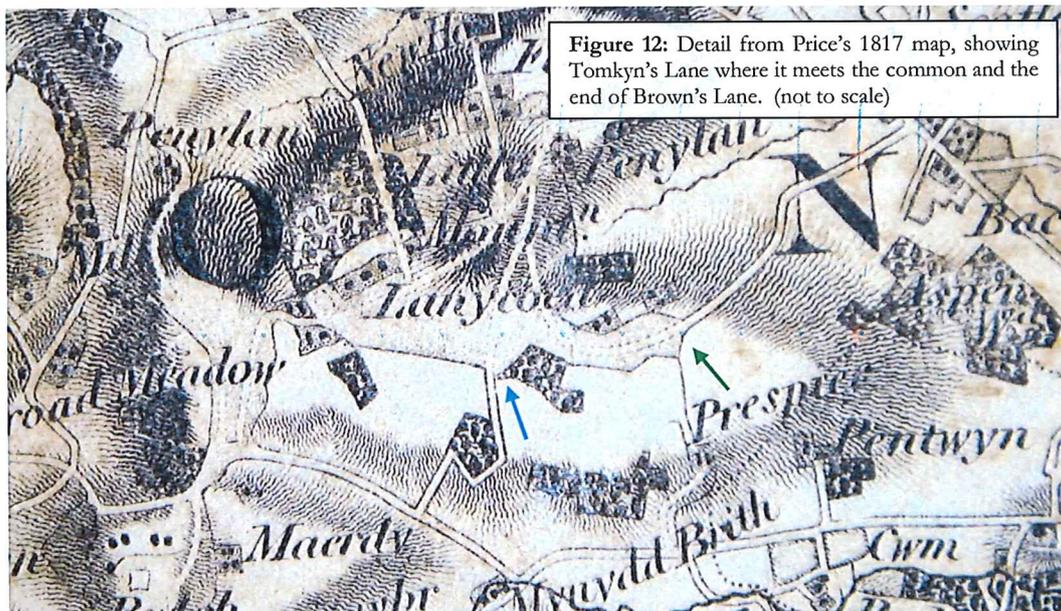
23. The extract from the working drawings (Figure 11, below) shows Tomkyn's Lane entering Little Mountain Common from the south (blue arrow), and Brown's Lane entering from the east near Hillhole Farm (green arrow). The extract does not show any connecting roads or tracks across the common. However, it does seem to indicate that

the land over which the disputed section of route runs was once contiguous with Little Mountain Common.



Henry Price's Map, 1817

24. Price's map was actually derived from the Ordnance Survey Two-Inch Working Drawings, so it is not surprising that it shows rather similar details, as can be seen from the extract below (Figure 12). Price's map shows indications of tracks across the common. How much reliance can be placed on these is questionable, but they do not appear to correspond closely to the disputed section of the U75235 road.



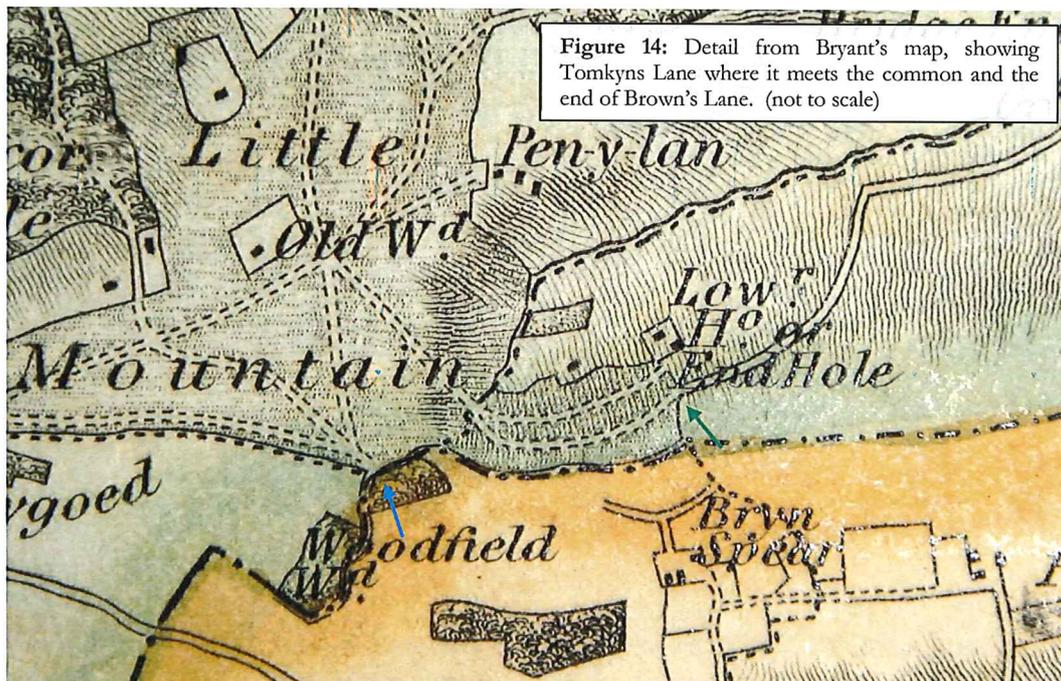
The Ordnance Survey First Edition One-Inch Map, c. 1831

25. Once again, this map (Figure 13, below) shows similar details, although it indicates a track continuing northwards from Tomkyn's Lane across Little Mountain. There does not appear to be any obvious connection between the end of Brown's Lane and Tomkyn's Lane.



Bryant's Map, 1835

26. Bryant was a private surveyor who produced maps of thirteen counties, including one of Herefordshire. For the area in question, his map shows a number of differences compared to the Ordnance Survey derived maps, and some of the place names differ.



27. However, Brown's Lane (green arrow) and Tomkyn's Lane (blue arrow) can clearly be identified on Figure 14 (above), and, as with the other maps, although tracks are shown across Little Mountain, these do not correspond well with the disputed section of the U75235.

28. Taken together, these maps appear to indicate that the land crossed by the disputed section of the U75235 road was once contiguous with what is now recorded as Little Mountain Common. In addition, the common land as a whole was traversed by a number of tracks, though none of these appear to correspond closely to the route in question. It is certainly not clear whether there was a direct, through route linking Tomkyn's Lane to Brown's Lane.

Quarter Sessions Records

29. The only indication that there is a highway across the disputed section of land is a Quarter Sessions record of 24th October on the 52nd year of the King (George III – 1812) which refers to "Browns Lane leading from the village of Bach otherwise Bage in the County aforesaid towards and unto the Town of Hay in the County of Brecon used for all the King's subjects with their Horses Carts and Carriages to return and pass at their will..." A section of this lane commencing from the Dorstone – Hay Road (now the B4348) for 700 yards ending at a place called Butcher's Gate was found to be out of repair. A distance of 700 yards only reaches about half way along Brown's Lane to a point where a track turns off to the north to a wood and a limekiln. This is nowhere near to the disputed section of road over Little Mountain. The Quarter Sessions roll is good evidence that there was a highway or road over the top of Little Mountain from Brown's Lane towards Hay, but it gives no further indication as to what route it may have taken.

Summary

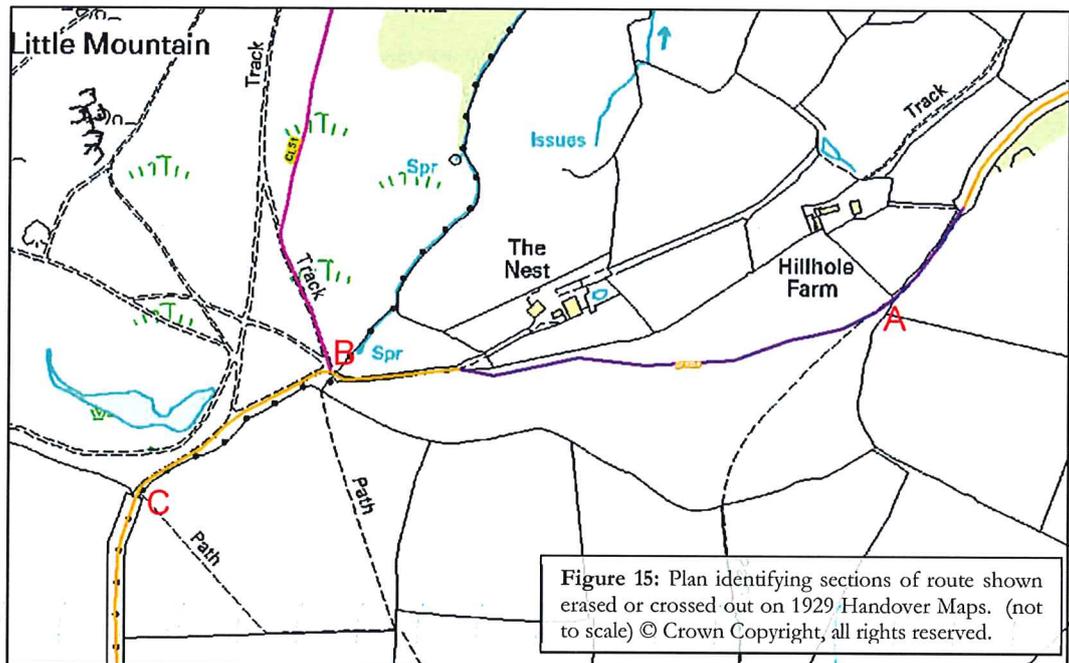
30. The map evidence from the early 1800s indicates that the land over which the disputed section of the U75235 runs was once a contiguous part of Little Mountain Common. However, it appears to have been hedged off from the main area of the common sometime between the 1842 Clifford Tithe Map (which indicates it not hedged off) and the 1880s First Edition 1:2500-scale Ordnance Survey plan (which indicates a hedge). Certainly, by the time of the completion of the Finance Act Field Book in 1915, this land was no longer regarded as common land.

32. The 1812 Quarter Sessions Roll entry for a section of Brown's Lane being out of repair is good evidence that there was a highway running over the land in question and continuing to Hay, but unfortunately, it gives no reliable evidence as to its course. The maps produced in the early 1800s by Price and Bryant and by the Ordnance Survey (2" Working Drawings and 1" First Series) also fail to provide consistent evidence of the course of such a road – and it is unlikely that such a route would continue along Tomkyn's Lane.

33. Neither the Dorstone Tithe Map (1840) nor the Clifford Tithe Map (1842) provide any evidence of a road across this land, although tithe maps frequently do not show roads across commons.

34. The 1910 Finance Act records for the land crossed by the disputed section of the route show that no deductions were allowed from the assessed value for any public rights of way or user. Whilst this is by no means conclusive, it is also significant that there are no references in the Field Book entries to a road across the affected parcels of land.

35. The county council highways records from the era when responsibility for minor roads was transferred from the rural district council to Herefordshire County Council also cast doubt on the existence of this section of road. The one-inch to the mile version of the 1929 Handover Map shows the disputed section of route (from the parish boundary and the boundary with the common land, eastward for approximately 520 metres) as erased and crossed out (see Figure 3, above). This section is shown as section A – B on the plan below (Figure 15). The six-inch to the mile scale version (see Figure 4) shows this section and an additional 220 metres (approximately) southwest across the common from point B to the enclosed section of Tomkyn’s Lane with a very faint dotted line, as opposed to the solid green of the other sections of the road. This corresponds to sections A – B – C on Figure 15 (below).



36. In addition the 1936 List of Unclassified Roads Maintained by the County Council suggests that the disputed section was not maintained as a road. The maintained length of Brown’s Road given in the list would extend to a point approximately 100 metres northeast of point A on Figure 15 – the point where the colouring for the road line changes from orange to purple on the plan. The measurement for Tomkyn’s Wood Road would extend along the length of the enclosed section of Tomkyn’s Lane to the edge of the common at point C, above.

37. The parish submissions do not give a clear picture one way or the other in relation to the status of the disputed section of the U75235. On the one hand, it is shown coloured green on the submission maps, but on the other, none of the four paths which terminate at the parish boundary make any reference to it, and at least one other route which is shown green on the Dorstone parish submission map, is also shown crossed out on the 1929 Handover Map (and is not recorded in the current List of Streets).

38. Although the 1:2500-scale Ordnance Survey plans show a number of tracks across the land, one of which happens to correspond with the disputed section of road, these maps were intended primarily to record physical features, and carry a disclaimer relating to evidence of rights of way. All that can really be established from these plans

(in the absence of other supporting evidence) is that there were tracks over the land at the time of survey.

39. The only documents specifically showing the disputed section as a publicly maintained road are the recent (1972 and present day) maps showing publicly maintained roads, and in the light of the research conducted, on the balance of probabilities there is insufficient evidence to substantiate the continued recording of the disputed section of the U75235 on the Council's highway records including the list of streets.

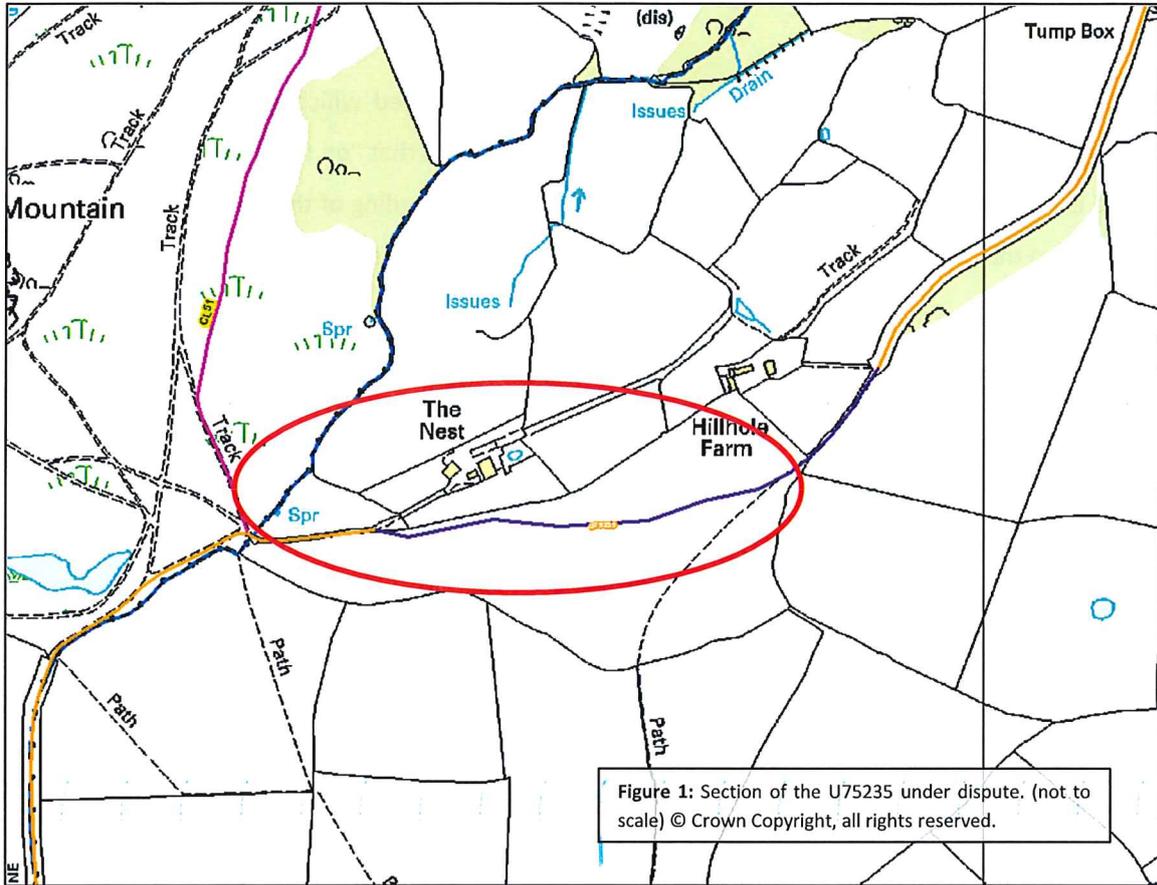
Conclusion and Recommendation

40. From the evidence, there is some question over the length of the section of road that should be removed from the records. However, the balance of the evidence, including the larger-scale Handover Maps and the 1936 list of roads and most of the historic maps, indicates that the publicly maintained roads would have extended as far as the boundary of the common land (including the land that may once have been part of the common).

41. Therefore, on the basis of the evidence discovered, it is recommended that the section A – B – C shown on Figure 15 (above) should be removed from the List of Streets and the map records of highways maintainable at public expense. Whilst it is not strictly relevant to the status of the road, the removal of this section of the U75235 from the List of Streets would appear to leave the south end of footpath Clifford CL51 as a cul-de-sac. However, Little Mountain Common is now Access Land, and as such rights of pedestrian access exist from the termination of footpath CL51 at point B on the plan at Figure 15 to the edge of the common at point C on the plan.

Supplementary Report on the Investigation into the Status of the U75235

This report relates to the section of the U75235 linking Brown’s Lane and Tomkyn’s Lane as shown highlighted within the red oval on the plan below.



Introduction

1. Section 36(6) of the Highways Act, 1980 requires the council of every county to produce and keep up to date a list of streets within their area which are highways maintainable at public expense. The “List of Streets” is a public document and must be kept on deposit by the council, and may be inspected by the public. As defined by section 36(6), the List of Streets is a record of public maintenance liability, it is not a record of the status (of what particular public rights) a particular route carries. That issue must be addressed by other investigations.

Background

2. In 2011, Herefordshire Council received a number of complaints alleging that a section of the U75235 County Road near Little Mountain in Dorstone Parish was obstructed and not available for public use. The section of road in question is indicated within the red ellipse on the plan above

(Figure 1). This section links the southwestern part of the U75235, known as Tomkyn's Lane to the northeastern part of the U75235, known as Brown's Lane. When the landowners were approached in order to secure the removal of these obstructions, the status of this section of road was vigorously denied. Consequently, further investigation was carried out to clarify the status of this section of the road.

3. Following the investigation, a draft report was produced which recommended that this section of road be removed from the list of streets on the basis that "on the balance of probabilities there is insufficient evidence to substantiate the continued recording of the disputed section of the U75235 on the Council's highway records including the list of streets."

4. Following the publication in August 2012 of the draft report into this matter, responses were received from a number of rights of way interest groups. Some of the respondents argued that the original report, whilst thorough in its examination of the available evidence approached the matter in the wrong way, and addressed the wrong legal question. They argued that the original report had sought to establish whether sufficient evidence could be found which would justify the inclusion of this route to the highway records (be this the List of Streets, or the Definitive Map and Statement). The respondents' principal argument was that this was not what the Highway Authority was required to do. They suggested instead, that to remove that section of route from the List of Streets, it was necessary to *prove* that the inclusion of this route in the List of Streets was in error; that there had to be evidence that a mistake had been made in recording the route. They argued that no such evidence had come to light as a result of the Authority's investigations. There were other points raised by the respondents and where relevant, these are also addressed. For reference, the responses are included as appendices to this report.

5. The purpose of this supplemental report is to examine these assertions, and if necessary, reassess the Council's position.

Addition of Roads

One of the points raised in the original report was that the 1929 Handover Maps were unclear in their recording of the route, and therefore were an unreliable source of evidence for the route. One of the respondents, Mr Alan Kind (representing the Motoring Organisations' Land Access and Recreation Association) suggests his investigations in other counties show that there is nothing unusual about roads not being recorded on 1929 Handover Maps but appearing on later Lists of Streets. To back this up, he cites the Council's own mileage figures for roads which were 1,651 miles

in 1839, 1,872 miles in 1960, and 1,943 miles in 1972. These figures show there has been a gradual increase in recorded road mileage: routes have been added over time.

Mr Kind also mentions that the Agriculture (Improvement of Roads) Act 1955 led to additional roads becoming publicly repairable and being improved, and this is one mechanism by which previously unrecorded routes were added to the List of Streets. However, little evidence of that process survives in Herefordshire, and no direct evidence has been found that this was the case in respect of this road.

Amending the List of Streets

The Definitive Map and Statement differs from the List of Streets in that section 53 of the Wildlife and Countryside Act 1981 provides a clear mechanism for amending the Definitive Map and Statement, but no such mechanism is prescribed for the List of Streets. However, this does not mean that the List of Streets cannot be amended. It is clear from the wording of section 36(6) of the Highways Act 1980 that the List of Streets *shall* be amended and corrected, since it states that the highway authority, "...shall cause to be made, and shall keep corrected and up to date, a list of streets within their area which are highways maintainable at the public expense."

The duty set out in Section 36(6) of the 1980 Highways Act was derived from s38(6) of the Highways Act 1959, which stated that "the council of every borough and urban district shall cause to be made, and shall keep corrected up to date a list of streets within their area which are highways maintainable at public expense;..." That duty was, in turn derived from section 84(1) of the Public Health Act 1925, which required that the council of every urban authority shall, "...cause to be prepared a list of streets within their district which are maintainable at public expense." None of these Acts set out a mechanism for compiling or updating the List of Streets: it was sufficient that it should be done. Unlike section 53(3)(c)(iii) of the 1981 Wildlife and Countryside Act, which provides for the deletion of routes from the Definitive Map and Statement where the evidence shows they are not rights of way, there is no provision for similarly modifying the List of Streets other than that provided in section 36(6) of the 1980 Highways Act.

Some of the respondents have argued that if a route were to be removed from the List of Streets, section 116 of the Highways Act 1980 would be the appropriate mechanism. However, section 116 only applies to the extinguishment of highways on the ground that they are unnecessary, or to diverting highways to make them nearer or more commodious to the public. It would not apply in the event that had been envisaged in the original report where it was considered that there was insufficient evidence of highway status, and the route was not a publicly maintainable highway.

Presumption of Regularity

However, the principal point raised by the respondents is that the List of Streets is a statutory legal document, and that at some point in time, something led to this section of road being recorded on it. One cannot now, after the passage of many years, “presume this was a mistake” simply on the basis that little evidence can now be found to support the existence of the route. Clear evidence is required to show that a mistake was made in including the route in the first instance.

Such a “presumption of regularity” can arise (as in the case here) where the validity of an act done by a public authority depends on the existence of a state of facts which cannot with the passage of time now be proved. There is a presumption of lawful action. We have to presume that the record (in this case, the List of Streets) was compiled or amended properly – unless sufficient evidence is found to demonstrate that it was not. This issue was examined in detail in the legal case below.

The Trevelyan Court of Appeal Case (*Trevelyan v. SoSETR* [2001] EWCA Civ 26)

This relates to the removal of a route from the Definitive Map, rather than the List of Streets but the issues involved are relevant and applicable. This case was focused on a Definitive Map Modification Order to delete a substantial portion of a bridleway from the Definitive Map and Statement for the area around Sawley in Lancashire. The order received objections, and a Public Inquiry was held by an Inspector appointed by the Secretary of State. The Inspector decided to confirm the Order. His decision was appealed, first in the High Court, and then in the Court of Appeal.

In his original decision letter, the inspector said the evidence to remove the route from the Definitive Map and Statement had to be clear and cogent, and demonstrate that a mistake had been made on the original claim. This approach is drawn from the Government’s own guidance published by the Secretary of State for the Environment (Circular 18/90).

Lord Phillips, when considering this case in the Court of Appeal, referred to section 32 of the Highways Act 1980, which states that a court or tribunal shall, before determining whether a way has or has not been dedicated as a highway, “...take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and 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 was produced.” Clearly, the List of Streets and the maps related to it will come into this category. Although the List of Streets was not prepared with the same requirement as the Definitive Map and Statement to be a

conclusive record of public rights, it is still a statutory record of the authority's highway responsibilities.

Lord Phillips also addressed the presumption of regularity *"...in the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed."* This principle would also be applicable to the list of streets: evidence of some substance must be put into the balance if it is to overturn the presumption from the depiction of the route on the List of Streets that the route is a publicly maintainable highway. Lord Phillips went on to say, *"Where the Secretary of State or an Inspector appointed by him has to consider whether a right of way that is marked on a definitive map exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists."*

The "balance of probabilities" test is as equally applicable to amending the List of Streets as it is to the Definitive Map and Statement, and Lord Phillips's comments would also apply to altering the List of Streets.

Conclusion

Whilst there is now little evidence to explain the inclusion of this section of the U75235 in the List of Streets, this is not the same as proving that it was recorded as the result of a mistake. No positive evidence has so far come to light to demonstrate that an error was made in the recording of this route.

The Quarter Sessions record of 1812 describing *"Browns Lane leading from the village of Bach otherwise Bage in the County aforesaid towards and unto the Town of Hay in the County of Brecon"* is good evidence that there was a public road running over Little Mountain at that time. The 1929 handover maps indicate that consideration was given to a route connecting Brown's Lane and Tomkyn's Lane, and the large-scale Ordnance Survey plans from the late 1880s to the 1920s also demonstrate that there was a physical route connecting these two sections of road at that time. The maps included with the Parish Submissions for the first Definitive Map also show the route coloured green (like the other roads) which suggest that the route was thought by the parish to be a county

road in the early 1950s. Whilst the other evidence found is inconclusive or unhelpful in establishing the existence of highway rights, there is no cogent evidence which proves that recording of the route in the List of Streets was a *mistake*. It must therefore be presumed that there was once good reason for recording this route and the Council acted properly in including it in the List of Streets as a publicly maintainable road. Consequently, the Council in its capacity as the Highway Authority is responsible for the maintenance of this route and the protection of the public highway rights over it.

Action

From the above, the route is recorded as a publicly maintainable highway, and under section 130 of the Highways Act 1980, the Council has a duty to assert and protect the rights of the public to the use and enjoyment of the highway. The Council has already received complaints of obstruction on this route, and if it does not take action on them, it is probable that it may receive more, or it may find itself forced into taking enforcement action. It would, of course be open to the landowners to challenge this action, but they would have to put forward positive evidence to demonstrate that this section of the U75235 was recorded mistakenly.

If the Council proceeded on the basis of the original report, and removed the section of route from the List of Streets, it is highly likely that it would also face a legal challenge (from one, or a number of the user groups) – on the ground that it was acting without evidence to demonstrate that the route had been recorded as a result of a mistake or an error, and it might then still be required to take enforcement action and remove obstructions from the route.