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THE *DUNLOP* JUDGMENT:A PERILOUS PATH TO FOLLOW

1 The Judgment delivered by Sedley J in the High Court on 29th March 1995 in the matter of *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council* is unsafe and fatally flawed.

2 This Judgment is being applied and followed by Inspectors when making their decisions, and is also being pleaded in the Courts where a private carriage road is at issue. The time has come to place this Judgment in its true light: unsafe and flawed

3 On the basis of that put before him Sedley J slowly climbed the wall of truth. He nearly got to the top. But because learned counsel for both parties failed to provide him with the right foot holes, in his final paragraphs he crashed to the bottom leaving a Judgment which was unsound. I am convinced that if the Court had heard the full evidence, instead of only a part of it, Sedley J would have decided that the thoroughfare in question was a public vehicular road maintainable by the Highway Authority and thus qualified as a Byway Open to All Traffic (subject, of course, to the *Nettlecombe* test).

4 I intend to go through the original Judgment of 29 March 1995 page by page (as numbered) and comment as appropriate on the content. I also refer readers to the article by Christine Willmore, LL.B., Barrister, in the 'Rights of Way Law Review' July 1995 Section 9.3 Pages 73 to 79 regarding "What is a 'private carriage road' ?".

5 It appears from those who were there, that the Court and the four inquiries* were never presented with the vital piece of evidence "An Act for inclosing Lands in the Parish of Glatton with Holme, in the County of Huntingdon" dated 27th May 1809 (49 Geo 3 c.136). This was a fatal omission because this Act at Section 1 varied and altered the "recited Act" (i.e. the Inclosure Consolidation Act 1801) as it was allowed to do by Section 44 (1801). Section 14 of the Local Act required such roads as the Denton road to be "Forty Feet at the least" and to continue in existence as a "public Road or Meer-Way" (i.e. a boundary lane between parishes). For this single reason alone the Judgment is unsound and cannot be relied upon when

* Upon examination of the papers Cambridge CC confirmed, 16/7/99, that neither the Glatton Act of 1809 nor the Highway Act 1773 were specifically considered.

other cases are being decided. However, there are many other matters upon which the Court misdirected itself, maybe because learned counsel failed to appreciate the proper meaning of the evidence they were presenting. The whole case developed into a catalogue of errors, each compounding the other, leaving Sedley J confused and floundering as he attempted to draw all the threads together.

6 Page 1 para 2: Denton Road and Mill Lane acknowledged to be a thoroughfare connecting the villages of Denton and Glatton As such, in 1809, it was a highway, regardless of whether it was a public highway or a private highway ('New Law Dictionary' Jacob 5th Ed 1744 "a private way that leads from town to town, and is a thoroughfare, may properly be called the Highway")

7 Page 4 para 2: The matter did not depend upon the proper construction of the Award alone, it depended primarily upon the proper construction of the Glatton Act of 1809, passed 11 years previously. The Inspector was not confined to the words of the Award; he should have considered the Act just like the Court should have done. Above all, the Award had to firstly follow the 1809 Act, and secondly, the 1801 Act where it was not varied by the former.

8 Page 4 para 2: Sedley J quoted Lord Blackburn as to the intention of the words used (in the Award) but by failing to consider the Glatton Act failed to investigate properly the very intention which he was concerned with.

9 Page 4 para 3: The Glatton Act at Section 14 would have placed the whole issue of the status of the road into a different perspective. The intentions of The Commissioners in 1820 would have become apparent, as it became clear that, by awarding the Denton Road 40 feet in width, they were strictly following the directions of the 1809 Act NOT the 1801 Act.

10 * This section demonstrates, when taken with the Award, that private carriage roads were set out in lieu of former customary or public ways which they replaced. As the former rights were not stopped-up they remained and public use continued as before as of right – especially where the old way was 'continued' and became part of a new way

Page 5 para 2: The Judge misdirected himself when stating that the single issue to be decided was the proper meaning of the 1820 Award. If there was a single issue it was the proper meaning of Section 14 of the Glatton Act of 1809* which states:

> "XIV. And be it further enacted, That in case any public Carriage Roads or Highways shall be set out, or continued in any Situation or Direction, where the said Parish is divided from any adjoining Parish, and where there now is and usually hath been a public Road or "Meer-Way", and such adjoining Parish or Place hath hitherto been charged or liable to be charged with One half Part of the Repair and Support of the said Road or Way, then and in such Case the said Commissioners shall and they are hereby authorized and required to set out so many Feet only, or so much Land from and out of the said Lands and Grounds hereby directed to be divided and inclosed as will enlarge the Breadth of such Road or Way to Forty Feet at the least"

The Denton Road was one such public Road or "Meer-Way", which followed in part the boundary between Denton and Glatton, and which was accepted by the Inspector as having existed prior to the Award.

11 Page 5 para 3: This is not totally correct. The Award was carried out under the 1809 Glatton Act, which in turn took its authority from the 1801 Act "except in such cases where the same are hereby varied and altered" (Section 1 1809)

12 Page 5 para 4: I find it strange that it was put to Sedley J that the Commissioners were appointed in 1809 (as they were by Section 1 of the Act) but, seemingly, the Act itself was not produced. Or, if it was, the Court failed to explore Section 14 regarding Denton Road.

13 Page 6 para 1 : This clause in the Award confirms that Denton Road commenced at an ancient lane in Glatton and ended at an ancient lane which led to the 'Town of Denton'. 'Ancient lanes' by their very nature were common ways or highways, they were not private as we use the word today (see 'Hansard' 24.10.83 Col 124 which followed the doctrine of Parker J in *AG v Watford*(1911) 76 JP 74 and *in AG v Godstone RDC* (1912) JP 188). Other evidence confirmed that a way connected these two ancient lanes before inclosure. Thus the Commissioners were not setting out a new route between Glatton and Denton. It must be presumed that the former rights over this route were also continued, for if the Commissioners intended to diminish any former public rights they had to abide by Section 13 of the Glatton Act and obtain consent from two Justices. There was no evidence(that I am aware of) presented to the Court whereby any former rights were extinguished i.e. Quarter Session Minutes.

14 Page 6 para 2: It does not matter that both sides considered that the wording of the Award was definitive, what matters is whether the Commissioners abided by the requirements of the 1809 Act. Section 14 of the Act stipulating that such roads as Denton Road (which existed prior to inclosure and was a "Meer-way") be made 40 feet wide, not 30 feet as required by Section 8 of the 1801 act. This road served a public purpose as a boundary between the two parishes, apart from its public purpose as a highway. As such a boundary it would have been perambulated annually by The Jurors of the Manor as was the practice throughout the land.

15 Page 6 para 3: The conclusions of the Inspector confirm that the route existed before inclosure; that the road was not set out for the sole use of anyone; and that it was to be repaired (and I quote the Award)"by the Surveyors of the Highways . . . in the same way and manner as the charges and expenses of repairing the public roads are by law directed". These findings of fact are very important to the final judgment:

(a) Strictly private roads were usually set out as being, for example, "the sole and separate use of Thomas Norfolk the Elder" (Tockwith : WR York Award 1797). Strictly private roads usually were not named because they were not intended to be used and enjoyed by the public, i.e. the 15 feet private carriage road at Tockwith above, and three private

roads of 12 feet set out in the Wakefield (WR York) Award of 1805.*

* Evidence p12 Seymour to House of Lords Private Bill Committee 1990. In the matter of the River Calder (Welbeck Site) Bill.

(b) As the Court found, the Commissioners were very experienced men, who would not have directed that the private carriage roads be repaired in the same manner as public highways if there was any doubt in their minds as to whom could use those roads and with what. Fresh in their minds in 1809 would have been the Judgment in *R v Cottingham*(1794) 6TR 20, where the Court held that the Commissioners acted unlawfully when they ordered that "all roads . . whether public or private . . be maintained and repaired by such ways and means and in such manner as the public highways were repaired by the laws of this realm". * Lord Kenyon Ch J held that as the parish received no allotment under the Award it derived no benefit from the Award, therefore as the parish were not bound to repair private roads (although bound to repair public roads) for this reason the Commissioners exceeded their powers. Many people using this case today fail to understand the reason why the Commissioners exceeded their powers. It was not because they ordered the private roads to be repaired by the parish * but because the parish did not receive an allotment under the Award. If the parish had received such an allotment, for example for gravel, the Commissioners would have been acting lawfully. One of the pleadings in this case by Holroyd * is relevant to Dunlop - he said "But it does not necessarily follow from what appears on the record, that an additional burden is thrown on the inhabitants by this Award; for if there were a public road here before, which the Commissioners thought (after having set out all other public roads under the inclosure) need no longer continue a public, but should be used only as a private road; in such case . . . it was just that the Commissioners should direct this road to be repaired by the parishioners". What this confirms, and which hundreds of examples verify, is that it was common practice for Commissioners to replace existing common or public roads with private roads at inclosure * - whilst at the same time allowing user to continue as before, with the same rights and enjoyment. In the Glatton Award the Inhabitants received two allotments for Public Stone Pits, therefore, following Cottingham, the Commissioners could lawfully order the private carriage roads to be repaired as public highways were. However, the Inhabitants could not repair roads which they could not as a body use: highway law has always held

* See also R v East Mark (1848) 11 QB 877 where the lack of benefit was the deciding factor re repair of private roads being in that instance unlawful.

* Christine Willmore makes this mistake RWLR p.76 s.9.3 when she quotes this case and states "a private right of way cannot be publicly maintainable".

* Holroyd was following the Judgment of Lord Mansfield in R v Flecknow (1758) I Burr 461 at 466: the obligation lay after inclosure upon those same persons who repaired that same road before inclosure.

* See 'The Methley Prosecution' papers (appendix below)

that they who repaired could use *. Therefore, if Denton Road was repaired as a private carriage road, by the Inhabitants, it followed that it could be used by all those same Inhabitants with their private carriages also. It is inconceivable that all the Inhabitants could take their waggons and teams along the road when required to carry out their Statute Duty to repair, but once those repairs were completed, were then prohibited, as a body, from using the very road which they had just repaired for the use of private carriages and waggons of other members of the parish. As Littledale J said in *R v Leake*(1833) 5 bB & AD 466 at 484 "if the parish have repaired it, it furnishes a strong inference that it is a public highway, or else they would not have been at that expense." * It must not be forgotten that under Sections 8-10 (1801 Act) anyone aggrieved by the directions of the Commissioners regarding roads could have appealed to the Justices at Quarter Sessions. It seems logical to assume, that the Inhabitants would have appealed if they believed that a road which they had to repair with their waggons and teams was barred to them when using the same waggons for any other purpose, especially when the route in question was a thoroughfare leading to the next township. As to who were the Inhabitants i.e. the local public - see para 18 below.

"In my opinion, the duty to repair an ancient highway was always co-extensive with the right of passage by the public" Wills J 519 Eyre v New Forest Highway Board (1892) 56 JP 517

* In the same case at 482 Parke J commented that by repairing parish roads the inhabitants were bearing their share of the general burden and in return received "an equivalent not in the use of that road in particular, but in the use of all the public roads in the realm".

One final matter regarding repair of private roads. The Commissioners awarded the gravel pits to be used for ever hereafter by the Surveyor "in the repairs of the public and Private Highways and Roads". The use of the term "Private Highways" was not a slip of the pen or a badly drafted phrase. The Commissioners would have been well aware that there were two sorts of highways: public highways and private highways, and that some highways were private roads, and many private roads were highways. This distinction is not understood today, for example RWLR 1994 p.59 section 9.3, where Dr Hart states "There is no such thing in Law as a private highway". Parliament however took a different view * - see para 39 below and Appendix re The Methley Papers.

* R v Flecknow (1758) 1 Burr 461 at 463 "and this Act directs public and private highways to be laid out" . See also Methley Act 1786 p.18

16 Page 7 paras 1+2: Mr Burton for Dunlop failed to realise that the Glatton Act overrode the 1801 Act and it was the 1809 Act which the Commissioners were fulfilling when they made the Denton Road 40 feet, rather than the 30 feet which he finds so significant.

17 Page 7 para 3: Mr Burton states that 'private carriage road' is not a statutory term of art. He misdirects himself, whilst neither the 1801 nor the 1809 Act refer to private carriage road, by 1820 the term had been used by Commissioners to describe thousands of inclosure roads. As Inclosure Awards are, to quote re Turnworth Down (1976) 1 Ch 251, at 257F "a form of delegated legislation, its provisions having the same effect as if they had been enacted in the Act itself" - it can be argued that the term is indeed a statutory term of art. Two later Acts at least use the words 'private carriage road'; Railway Clauses Consolidation Act (1845) Sections 49 and 50, and the Highway Act 1862 s.36 where the phrase is 'private carriage or occupation road' (here the argument for the word 'private' applying to the word 'carriage' rather than 'road' comes over even more strongly)*

* The law recognised Footroads, Driftroads, Carriageroads, Occupation Roads – so why is there difficulty in accepting that there may have been both public carriage roads and private carriage roads, especially when the occupation roads fell into two categories: private occupation roads and public occupation roads.

18 Page 7 para 4: Here Mr Burton sows the seeds which eventually doom the Judgment. He fails to recognise that there was no difference between the general public and the inhabitants at large: they were, and are, THE PUBLIC. The 'Oxford English Dictionary on Historical Principles' states that the word 'public' means 'pertaining to the people of a country or locality'. Lord Coleridge C J. in the matter of *R v Inhabitants of Southampton* (1887) 19 QBD 590 at 598, said "since its opening there has been a considerable user by the public of the bridge, using the word 'public' in a somewhat limited sense. . . . . the word 'public' in this connection must not be taken in its widest sense; it cannot mean that it is user by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the neighbourhood who ever use a particular road or bridge. In the present case, however, there is no doubt abundant proof of the user of the bridge by, and of utility to, the public, confining the meaning of that word to that portion of the public which used it". There are other similar cases making the same distinction. See also articles in RWLR and Byway and Bridleway * on this theme following a spate of erroneous Inspectors' Decisions whereby The Inhabitants were stated NOT

My emphasis

* BBT 1997 8/53

RWLR 1998 s.6.3 p.55

to be 'The Public'. The Inhabitants at Large were the public, but these Inhabitants were not everyone who lived in the Township, they were those who paid Poor Rates only * - nevertheless, those who did not pay Poor Rates still had the right to use all the roads be they public or private highways, in the same fashion as those people today who do not pay Council Tax but retain the same rights as those who do. The Denton Road was therefore repaired by those Inhabitants only who by Law were responsible for the repair of the public roads, in effect these were the proprietors affected by the inclosure along with their tenants and lessees. Thus user of the road was intended to cover The Inhabitants, i.e. The Public.

* 43 E/12 C.2 section 1 (1601)

19 Page 8 Para l: This quotation cannot be taken in isolation, it must be set against the total state of the law at the time. The essential difference between 'public' and 'private' was the mode of prosecution for nuisance: indictment or private suit.

20 Page 8 Para 2: This is not correct. *Communis strata* which were thoroughfares were private highways open to all who needed to use them, the only limitations being those imposed by statute.

21 Page 8 Para 3 : Mr Burton misdirected the Judge when he claimed that the note in Pratt & Mackenzie "is wrong". Indeed, the whole of this submission regarding ancient sources is so confused, and edited to suit the cause, that there was no wonder that Sedley J also became confused. Glen, 'The Law Relating to Highways' (1883) Page 1, stated "A common street (*communis strata*) and a queen's highway(*alta via regia*), though formerly distinguished, are now equally public highways" He cited *R v Hammond* (1717) using the report 1 Str 44 (rather than 10 Mod 382 cited to the Court in Dunlop this report also added to the confusion, see para 51 below). In 1862, Shelford 'Law of Highways' page 8, also stated "A common street and public highway, though formerly distinguished, are now equally public ways". He also cited 1 Str 44, and also 11 & 12 Vict c.63 s.2 (The Public Health Act 1848) in support of the proposition. In 1967 Pratt & Mackenzie were following what they said in earlier editions (i.e. 19th and 20th), and were following what Glen said in 1883 and Shelford in 1862 (both very experienced highway barristers as the Reports confirm). What Mr Burton failed to realise, and the Court never picked up, was that all the

Mr. Burton did not cite the 1848 Act which at s.2 defined what was a "street".

Under this section common ways were clearly "streets".

cases he cited to show *Hammond* to be wrong were heard between 1672 and 1704, whereas *Hammond* was decided 13 years later, and was considered to have clarified the law at the time. The *Thrower* Case of 1672 is constantly wrongly interpreted. It is often cited as an example of a case in which an indictment could not lie because it concerned the infringement of a right common only to the inhabitants of a particular district (see '*Archbold*' (1995) Vol. 1 Para 1-10). However, Sir Matthew Hale found that the indictment was good because the way was a thoroughfare and therefore a highway existed. Glen (1883 above) page 126 refers to the *Hebborne* Case (Popham 206)* which found that an indictment was good if the way was communis via. Thus *Hammond* confirmed what the law already held, which was that there was no legal difference between highways and common ways: both could be the subject of an indictment.

* Popham's King's Bench Reports (1592 to 1672)

22 Page 9 Para l: This quotation from Hawkins of 1824 supports the highway from Denton to Glatton rather than denies its existence. Hawkins was simply repeating what Jacob had said between 1729 and 1744 that any thoroughfare, be it a private way or a public way, leading from town to town, was a highway. Significantly, Hawkins does not say 'highway leading from village to village' he says "any way" i.e. either public or private. The Denton Road was such a thoroughfare, and as such was a highway: a private highway.

23 Page 9 Para 2: This quotation from 'Hawkins Pleas of the Crown' (1 Hawk PC 201) varies from textbook to textbook, however, each volume contains the most important lines which read - "because it belongs not to all the King's subjects, but only to the particular inhabitants of such parish, house or village, each of which, as it seems, may have an action for a nuisance therein". By putting the word 'house' within the definition Hawkins was placing all the various sorts of private ways within one category - which confuses the issue today when the word 'private' is under examination. But the crucial words in this definition of a 'private way' were, and are, "<u>each of which, as it seems, may have an action for a nuisance therein</u>." These crucial words may not have been put to Sedley J by Mr Burton, or, at the very least they were not explained to him. A nuisance on a highway (be it public or private) was prosecuted in the name of the Crown by indictment, but a nuisance upon a private way (which was not a thoroughfare) was by a common plea. In the *King v Richards* (1800) 8 TR 634 at 637 it was held that because the way was a

Taken from Jacob (1772) 9th Ed 'New Law Dictionary'

This case however did concern a thoroughfare and in another day and age would have been

held a highway, as regards user is was clearly a 'private highway' used by everyone with cattle and carriages

private way an indictment was not good because "each party injured might bring his action against those on whom the duty was thrown . . in truth the parties injured had another legal remedy".

24 In *Austin's* Case (1672) 1 Vent 189, Sir Matthew Hale went further than Lord Coke (Reports 1572-1616) when he stated re a way "but if it leads only to a church, to a private house or village, or to the fields, there it is a private way. But tis a matter of fact, and much depends upon common reputation". This last sentence is often omitted from any quotation from *Austin'* Case. Again it is a crucial sentence - as Hale himself found in the same year when giving his judgment on the *Thrower* Case(1672) 1 Vent 208. - here the way did not end at the Church but continued as a common footway and was therefore properly the subject of an indictment.

25 Page 10 Para 1 : This paragraph is confused. Mr Burton fails to realise that The Inhabitants are the Public as per Southampton and as per many other cases cited in the Articles referred to above.

26 Page 10 Para 2 : Mr Burton is wrong. The overriding statute (the 1809 Act) required such roads as Denton Road to be 40 feet, not 30 feet as required by the 1801 Act.

27 Page 10 Paras 2+3: Here he misdirects the Court regarding the significance of the last three awarded private carriage roads and driftways. He fails to draw the distinction between these three ways (two of which are not named- two of which are not thoroughfares either) and those three "public bridle and drift road and footpath and private carriage roads", which are named, and which are thoroughfares. This is the real distinction between private ways as Sir Matthew Hale stated in *Thrower*, those which are thoroughfares may be the subject of an indictment and as such are highways. See para 31 below re significance of the name of a way, and para 15 above.

28 Page 10 Para 4: Here, he misses a crucial point of law regarding Section 57 Highways Act 1773, see para 45 below.

29 Page 12 Para 1 : Mr Cunningham failed here to give Sedley J the foothold which might have swung the balance of probabilities. Whilst he pleaded that such roads would be open to all who wished to use them, “even if in practice this meant mainly local inhabitants”, he failed to cite the relevant law. If only the *Southampton* Case had been cited, the Court would have realised that the law regarded ‘local inhabitants’ as The Public are far as user is concerned.

30 Page 12 Para 2 : At this point the Award should have been examined to find out if the roads were set out before the residue was allotted, and whether the Lord was fully compensated for his interests in the whole of the commons and wastes. The enabling Act of 1809 was crucial as it sets out in detail the procedure to be followed by the Commissioners. Once it was established that the Lord was compensated and that the roads were set out before the allotments were made, then the soil of the roads passed to the Churchwardens. The Commissioners would have been well aware, in 1820, of the significance of Section 17 of The Poor Relief Act (1819) passed the year before, which vested parish property in the Overseers to hold in trust for the parishioners - see *Haigh v West* (1893) 2QB 19.

31 Page 12 Para 3: The point about the road having a name was never fully explored by Mr Cunningham, as mentioned above, those roads in the Award which were not thoroughfares did not have names. In my view, a road without a name was, and is, unlikely to be a common highway. Shearman J in *AG v Woolwich* (1929) 93 JP 173 considered that the names of the lanes at issue were significant, when deciding that they were highways which led from one main road to another. Section 69 of the Highways Act 1773 (under which the Award was made) required that the forms set out in the Schedule to the Act “be used upon all occasions”. Form XXX11 re Presentment required that part of The King’s Highway to be named. Thus all common highways were required to be named before Indictment could take place - but as private roads which were not thoroughfares could not be the subject of an indictment it did not matter if they did not have a name. Significantly, forms 42,53 and 63, Highway Act 1835, also required the roads to be named, but whereas form 63 (Indictment for non repair of a carriageway) required a name, form 64, which was for an indictment of a horse and footway, did not require the way to have a name, presumably because such ways were not usually

'laned-off' from the adjoining lands. The 'Naming of Streets' was required in 1847 by Section 64 of the Towns Improvement Clauses Act. Common-sense also dictates that when the Inhabitants of Glatton were directed to carry out their Statute Duty, the names of the roads to be repaired were identified by the Surveyor.

32 Page 12 Para 4: As stated at para 15 above, truly private roads were awarded to named persons for their own particular use. Failing any such designation, the law presumed that those who repaired the way could use that way, in this instance The Inhabitants.

33 Page 12 Para 5: If there was a public right for horses and cattle, that right encompassed the whole of the awarded way. As the road was a thoroughfare it was a highway, be it a private highway or a public highway. Public repair, "in the same way and manner as public roads", did not differentiate between parish roads which were public roads and parish roads which were private roads, they were all vehicular ways used by the Inhabitants at Large, and were all repaired as carriage roads. Today, the present Highway Authority, as successors to the Glatton Vestry, must also repair those roads as directed within the Award.

34 Page 13 Paras 1,2,3: Sedley J took a poor view of Mr Cunningham's arguments here. There is a lot of good evidence to support these views but seemingly it was not pleaded.

35 Page 13 Para 5 : In response, Mr Burton again misdirected the Court. He chose two bad examples to set against Denton Road. These two roads were not thoroughfares, and as such were not private highways. They fell within Hawkin's description of a private way (i.e. a cul de sac which the law did not recognise at this time as capable of being a highway) * . Neither of these two ways could be the subject of an indictment, but were open only to private suits. Mr Burton also missed the point of the name 'Lambs Lane Road'. When the Commissioners wished to incorporate an ancient lane into a new road, rather than give the new way a new name, they incorporated the old name 'Lambs Lane' and added the word 'Road' on to the end (they had no powers to set out 'lanes'). There are countless examples of this throughout the country i.e. Green Lane Road; Street Lane Road etc .

After 1852 following Bateman v Buck 18 QB 870, and in 1856 Gwyn v Hardwick 1 H & N 49, Cul de sacs were recognised as highways

36 Page 14 Para2 : Mr Burton is correct when he states that public and private roads were 'not precisely the same' but the reason was not to do with user as he infers, it was to do with other matters as set out above.

37 Page 14 Para 3: Mr Burton accepts that there was a distinction between private carriages and public carriages, but rejects the argument that the word 'private' could apply to 'carriage' rather than 'road'. Sedley J later followed up this argument by showing that he was not impressed by Christine Willmore's article in 'Rights of Way Law Review'. Before 1765, Commissioners simply used the term 'private road' when setting out private ways. After this date, in hundreds of Awards, the term 'private carriage road' appears. The 'Oxford Dictionary on Historical Principles' states that the word 'carriage', in 1771, was "a wheeled vehicle kept for private use for driving" - in other words it was a private carriage. In 1718, 5 Geo 1 c.12 differentiated between carts and waggons "travelling for hire" and "the covered carriages of noblemen and gentlemen for their own private use". The former being limited to the amount of horses allowed, whilst the latter, along with all vehicles used "about husbandry" were not so restricted. Section 55 of the Highway Act 1773 (which applied to the Glatton Award) was the forerunner of the Traffic Regulation Order. It barred the heavy public carriages from the private parish highways. These public carriers were confined to the public Turnpike Roads, thus saving the parish roads from extreme wear and tear caused by those who transported the nation's heavy goods from town to town. There was therefore, a difference between those roads termed private carriage roads and those roads termed public carriage roads, furthermore, private carriages were not restricted in the same manner as public carriages. These differences were over and above the other differences referred to earlier.

38 Page 14 Para 3: Mr Burton stated that it was fanciful to 'use private to qualify carriage' in the term 'private carriage road'. One Award does just this by implication: The Garforth (WR York) Award of 1815, was made under a Local Act of 1810, which in turn was made under the 1801 Act(all the same time-scale as Glatton). Under the heading "Public Roads" the Commissioners awarded "a private carriage and occupation road" * of the width of 30 feet. This road, as were the rest of the "Public Roads", was directed to be repaired "as other

* At this time the law recognised a way called a "Public Occupation Road". Lindsey QS Easter 1808

This figured in Seymour v WYMCC (1983) and Seymour v Makin (1983) re its status as a Public Highway Maintainable at Public Expense: The case was conceded by the County Council

public highways are by Law directed to be kept in repair". The road was named 'Peckfield Road' it led to 'Peckfield Bar' where the Leeds Selby Turnpike met the Great North Road. The road was a thoroughfare leading to the Aberford Road which also met the Great North Road to the north. Peckfield Road avoided Garforth Cliff (a very steep part of the Turnpike). If set out as a Public Carriage Road the road would have been used by heavy vehicles as a short cut. But, as a Private Carriage Road it fell within Section 55 Highway Act 1773 and therefore the heavy public carriers were excluded.

39 Page 14 Para 3: What Mr Burton failed to do was to put the whole 'private road' argument into perspective (and neither did Mr Cunningham) thus leaving the Court confused and hearing only one side of the debate. In 1820, the Law recognised that there was a category of way called a "Private Highway", see para 15(b) above. Confirmation can be found in 'Jacob' 1744 (5th Ed): *R v Flecknow* 1758: The Skeffling Award 1765(ER York): The Methley Inclosure Act 1786(WR York): The Barkisland Inclosure Act 1814 (WR York) and also the Award in question, the Glatton Award 1820. A private road was both a private way and a highway if it was a through route leading from one public road or highway to another. * Inclosure Commissioners knew this and set out thousands of private carriage roads which they expected to be "used by everyone" (See Methley Papers below) *

* As per Jacob and Hawkins above

* Appendix p.25

40 Page 16 Para 1: Sedley J recognised that the Award was drawn up by "experienced hands". But he failed to realise that when those Commissioners ordered the private carriage roads to be repaired in the same manner, and by the same persons, as the public roads were to be repaired - they were in fact implying that both roads were open to public user. The Commissioners being 'men of their time' would have known only too well that the Inhabitants who repaired those roads would expect to use them with their vehicles.

41 Page 17 Para 5: Here Sedley J comments on the lack of evidence put before him to support Christine Willmore's article. Clearly he was open to suggestion and guidance . Sadly, that evidence was available but was not presented.

42 Page 18 Para 1: Here Sedley J misdirects himself, due to Mr Burton's failure to properly inform the Court as to the Law. He sees the 1801 Act as the definitive one, not the 1809 Act (which clearly was not put before him). As Section 55 Highway Act 1773 was not put before him either, he wrongly concludes that highway law did not differentiate between public and private vehicles.

43 Page 18 Para 2 : Here Sedley J seeks to make sense of the true construction of 'private carriage road' in its context as Denton Road. If the Glatton Act had been before the Court, it could have explained why that road "between a village and a mill" was set out at 40 feet, and made repairable in the same manner as the public roads. Section 55 HA 1773 would also have helped to set the scene. And the 'thoroughfare' doctrine should have swung the balance of probabilities against the Plaintiff. The matter was a simple matter of law, rather than legal construction : sadly, the Law was not produced in Court.

44 Page 19 Para 1: Here Sedley J again misdirects himself due again to lack of guidance from both barristers. If Section 55 HA 1773 had been before him, he would have realised that there was a legal difference between private and public roads, and that heavy public vehicles were excluded from private parish highways. There was also the legal difference created by the mode of prosecution of nuisances : indictment or private suit.

45 Page 19 Para 2: It is surprising that Section 57 HA 1773 was never mentioned regarding the steepness of the way. The Section allowed extra horses in Winter to be used upon application to the Quarter Sessions. Such Q.S. Orders were made for private carriage roads, thus equating such roads with highways, for the General Highway Act of 1773 was not concerned with private matters but only with those matters which concerned the public. On the 14th October 1822, the Kesteven Q.S. Minute Book records "Order for additional number of Horses on private roads under the General Highway Act of 13 Geo 3".

46 Page 20 Para 1 : Sedley J was left with unanswered questions because as pointed out at para 30 the 1809 Act had not been examined, and placed against the directions of the Award. The answers to the questions lay in the inclosure papers. The Judge acknowledges that the fact that the two ways had names was relevant, but not decisive. As pointed out above, the relevance of the names was not properly pleaded.

47 Page 20 Paras 2+3: Sedley J looks in vain for some definite meaning from dictionaries. The meaning was in the 'common knowledge' of the people at the time; knowledge often not recorded; knowledge which died with those who understood it; being taken for granted and then lost. Nevill J (*Trafford v St Faiths RDC* (1910) 74 JP 297 at 299) understood this very well in relation to highways. He commented that local people knew perfectly well whether a road was being used as a public road or as a private road, but that not one in a thousand would know whether the people using those roads were using them as members of the public or from where these people came.

48 Page 20 Paras 2 and 3: It was considered in *R v Secretary of State (Environment) ex parte Andrews* (1995) 52 JPL that the word 'private' in Section 10 1801 Act, applied to everything which followed i.e. roads, bridleways, footways, ditches, drains, watercourses, watering places, quarries, bridges, gates, stiles, mounds, fences, banks, bounds and land marks". An examination of dozens of Acts and Awards made under the 1801 Act confirm that the word 'private' was not intended to mean exclusive to certain individuals. What it was intended to mean was the mode of prosecution for nuisances which arose as a consequence of those conveniences not being properly maintained. * This is made clear in the Glatton Act of 1809 at Section 13 which refers to 'Public Bridle Roads and Footways", and at Section 18 to 'Public Stone, Gravel, Sand, and Mortar Pits'. If the minor ways can be 'public' although required by the 1801 Act to be set out as 'private', and the stone quarries can be 'public' although also required to be set out as 'private' - why cannot a 'private carriage road', which was a thoroughfare, and "Meer-way", also be a public convenience for public use. Thus when the Commissioners set out the various 'private' conveniences for public use they knew perfectly well the differences in the usage of the word despite what the English Dictionary now states.

* The Tockwith Act 1792 and the Barwick Act 1796 (see para 48 below) contained an almost identical list of conveniences which were the concern of the Court Leet, and were therefore of public rather than merely private concern using the word in the same limited sense as Coleridge CJ in the Southampton Case

See Methley Papers below, Appendix p.25

49 Page 21 Para 2: This quotation of 1398, as translated, "The private way belongeth to no town" is misleading. By 1820 the soil of many inclosure roads, as pointed out above, was vested in The Churchwardens by means of Section 17 Poor Relief act 1819. This ownership carried on up to 1894 when property of The Vestry was transferred to the Parish Council. Denton Road, in 1820, would have fallen within Form XV HA 1773 re "Common highways, bridges, causeways, streets, and pavements belonging to the Parish".

My emphasis

50 Page 21 Para 4: Sedley J misdirects himself. He was not presented with the Glatton Act which altered in places Sections 8 and 10 of the 1801 Act. There can be no realistic belief that at this time such an entity as a "private public gravel pit" existed, or for that matter a "private public bridleway", which were for the exclusive use of certain private individuals. The concept is nonsense. These were public conveniences which were expected to be used by all the Inhabitants of the Township at their free will and pleasure, but as these matters did not concern the whole of the public of the nation, any prosecution for nuisance was by private suit in the Court of Common Pleas or at the Court Leet for the Manor. *

* Jury of the Court Leet of Tockwith (WR York) was required by the Tockwith Inclosure act (1792) 32 Geo 3.c.58 p.13 to inspect every year all the roads drains etc. and present those who failed to keep the same in repair

51 Page 21 Para 5: Here Sedley J considers R v. Hammond, but only the report 10 Mod 382, not the report 1 Str. 44, relied upon by Glen and Shelford (above). In the latter appear the words of Lord Chief Justice Parker: "... the High-way is infinite, and leads from sea to sea". This ruling was followed by a strong court in R v. Haddock (1737) And 137. It was held that in an indictment concerning a highway it was not necessary to state the termini of the way. Here there was a difference between a highway and a private road because the latter had a beginning and an end within the township to which it was private and to which it belonged. Nevertheless, if the private road led to 'The Great Road', and was a thoroughfare, it was properly called a highway.

The Barwick in Elmet (WR York) Act of 1796 p.18 contained an identical clause. The list of conveniences being the same as s.10 1801 Act.

52 Page 22 Paras 1+2: Sedley J fails to grasp the proper distinction made by Hale CJ in *Austin* and *Thrower* (my sources quote both cases as 1672 not 1683/4). The *Austin* Case succeeded because the way was not a thoroughfare and therefore could not be the subject of an indictment, whereas *Thrower* succeeded because the way was a thoroughfare and could properly be the subject of an indictment. As Sir Matthew Hale said in *Austin* "But tis a matter of fact, and much depends upon common reputation".

53 Page 22 Para 3: Here Sedley J picked up the words in *Thrower* regarding private ways which were not thoroughfares being subject to private suits. He recognised that this may well be the true distinction between a private and a public road but failed to realise that the distinction was not about access or repair, but was about mode of prosecution for nuisance upon those private ways which were not thoroughfares.

54 Page 23 Para 2: Here Sedley J misdirects himself, the difference was between those private and common ways which were not thoroughfares (and were not therefore highways- re Hawkins and Jacob) and those common ways which were thoroughfares (and were therefore highways). The 1773 HA at Section 12 required the Surveyors to view "all the common highways" and 'bridges, causeways and pavements" within the parish or township. Form 15 of the Act went further and added the word "streets" in addition. Thus all the "common streets" within a township were regulated by the General Highway Act - the Act never put before Sedley J., the Act which the Award was made under. Sedley J further misdirects himself by confusing access with whether a way was public or private. Access can only be limited where there is someone with the authority to implement that limitation. Where roads were repaired by the Inhabitants, those same Inhabitants were not likely to prevent their own use.

55 Page 23 Para 3 : Sedley J continues to misdirect himself, based upon the incorrect analysis put forward by Mr Burton. The catalogue of errors begins to compound itself, mainly through the failure of the Court to examine the Act of 1809 and the General Highway Act of 1773.

56 Page 24 Para 1: Here Sedley J. again taking his lead from Mr Burton, fails to recognise that the example he quotes from the Award, 'Lambs Lane Road', was not a thoroughfare, and did not carry horse, cattle and foot passengers. Whereas the Denton Road was a thoroughfare, and did carry public bridleway, driftway and footway users as well as accommodating private carriages. As pointed out above, there were two categories of private roads set out in the Award: named thoroughfares, and unnamed cul de sacs.

57 Page 24 Paras 2, 3+4: Here again Sedley J loses the thread of the argument. Denton Road and the other thoroughfares were set out at 40 feet, 40 feet and 30 feet respectively - thus they satisfied Section 8 of the 1801 Act. But more importantly, the High Hadden Road and the Denton Road satisfied the requirements of Section 14 of the 1809 Act. Even the private carriage roads of 20 feet only, as referred to by Sedley J, "satisfied" Section 15 HA 1773, and were repairable by the Inhabitants in the same manner as were the public roads, indicating that although they were not thoroughfares (and thus not highways) they were usable by those who repaired them as of right. His argument that Section 8 of the 1801 Act was indicative that if roads were not 30 feet wide they were not public, falls when the Denton Road was set out at 40 feet and satisfied the 1801 Act - even though the purpose of the 40 feet was to completely satisfy the 1809 Glatton Act. Again and again the significance of the Glatton Act within the Award comes through loud and clear.

58 Page 25 Para 1: Sedley J misses the fact that Section 10 1801 was open to such public examination, as to private roads or paths, as were the public roads. Certainly, in this case, if the Inhabitants were required to repair the private roads they must have had a say in their route and in the matter of their use. Repair of roads was one of the most important issues ever considered by the Vestry.

59 Page 25 Para 2: Here Sedley J makes the important point “No internal evidence suggests that the choice of words in the Award is casual or accidental”. Therefore when the Commissioners ordered the private carriage roads to be repaired at public expense they did so fully expecting public user, especially of those three roads which were thoroughfares, and in particular the Denton Road, which being a “Meer-way” running partly along the parish boundary between Glatton and Denton, was required by Section 14 1809 to be 40 feet wide. The Commissioners were following not only the 1801 Act, the 1809 Act, the General Highway Act of 1773 - but also the Common Law principles as they applied to highways - principles which stated that whether a road was public or private, if it was a thoroughfare it was a highway.* There was no need for the Commissioners to write this down, they ‘knew’ that the world ‘knew’ that this was the state of the Law.

* And that a road had to be repaired by those who repaired it before Inclosure (in this case the Inhabitants who repaired the old road between Glatton and Denton) as per R v Flecknow above.

60 page 26 Para 1: At this point, Sedley J may have found differently if he had been presented with *Grand Surrey Canal v Hall* (1840) 1 Man & G 392; *R v Inhabitants of Southampton* (1887) 19 QB 590; *Trafford v St Faiths RDC* 74 JP 297; *Weir v Fermanagh* (1913) 1 Ir R 63 CA; *Jennings v Stephens* (1936) 1 Ch 469*; *Wyld v Silver*(1963) 1Ch 243. He conceded that "if the class is large or vague enough it may be indistinguishable from the public at large". But, he failed to make the step forward (due to lack of guidance) of realising that repair by the Inhabitants at Large equated with user by those same Inhabitants, and thus user by the Inhabitants was user by the public, because the Inhabitants were the public, as Lord Coleridge said in *Southampton*, and as was said in *Weir* "The inhabitants of a parish are a class of the public". At this point Sedley J slipped down the wall of truth, and concluded "In the absence of any evidence that the permitted class of vehicular users of this private carriage road was so large as to make their right of way a public rights of way, the test posed by section 54(3)(a) is not met". The evidence was in the cases cited above. It was in the Award regarding public repairs. And it was in the Glatton Act regarding roads (Which were Public Roads or "Meer-Ways" following Parish Boundaries)to be set out at not less than Forty Feet. It is clear that throughout the case Sedley J was looking for guidance from the very sort of evidence which was available but which was not given to him. This evidence could have tipped the scales of justice over the other side.

"The public … may mean for practical purposes only the inhabitants of a village" Lord Wright MR at 476

61 The conclusion to be drawn from the *Dunlop* Case is set out by Christine Willmore in her article 'What is a 'private carriage road' ? in 'The Rights of Way Law Review' Section 9.3 Pages 73 to 79 at page 79. She says "The case undoubtedly helps remove some of the uncertainties surrounding the meaning of 'private carriage road', but it does not, and indeed could not, offer a conclusive interpretation to be used on all occasions. Other documents, or even the same document given different evidence, may give rise to different meanings for the same phrase. In any event such investigations at best can only decide the legal status of the actual award subject to the decision". These wise words sum up perfectly the scope of the *Dunlop* Judgment. All that *Dunlop* really decided was that the word 'private', in the light of the evidence presented to the Judge, qualified the word 'road' rather than the word 'carriage' in the term 'private carriage road'. *Dunlop* did not, and cannot be taken as excluding all public vehicular users from all roads set out by Inclosure Commissioners as 'private carriage roads'. Every Award was different, every physical location was unique, and every road pattern was particular to that place. In other words, the *Dunlop* Judgment applies to Glatton with Holme, and to the particular roads at issue - the only part of the Judgment which can be applied to other cases (but subject to rebuttal when taking the locus of that place into consideration) is the application of the word 'private' to the word 'road' rather than to the word 'carriage'.

62 See Smith v Anderson BBT 1999/5/32

Also Wyld v Silver (1963) 1 Ch 243

There is one final point. Even though Sedley J found that no public vehicular right existed, the Inhabitants of the Township, each and every one of them, have a private vehicular right along Denton Road by reason of the Glatton Act and Award. There is no one with the authority to bar such user because the Award was silent as to specific and exclusive user. Such private rights may be declared by the Courts upon application from any such Inhabitant: thus the victory for Mr Dunlop was a hollow one.

APPENDIX 1: THE METHLEY PAPERS

A	Leeds Archives: Mexborough Collection My emphasis The private roads and ways were thus defined as private highways	Para 39 above refers to 'The Methley Papers'. These documents help to clarify this 'private road' debate. The Methley Inclosure Act was made in 1786. At page 18 it required that the Commissioners set out "all such public and private roads and ways as they shall think necessary and convenient . . and that all such public and private highways shall, from time to time, be repaired and kept in repair by such person or persons as is or are now by Law chargeable with the repairs of the several public highways, in lieu of which such new ones shall be respectively assigned and laid out as aforesaid; and that, after such new ones shall be so set out and made, it shall not be lawful for any person or persons, in any manner whatsoever, to use any public or private way or road heretofore used in the parish of Methley, and in lieu of which such new highway or road shall be so set out and made".
B		The Award was made in 1789 and the old ways were stopped up where they formed part of the new allotments. These new fences were broken down by people who claimed that the old way to the Church had been unlawfully obstructed. On 5th August 1790, 7 men and 5 women broke down the new fences. On the 20 August the 12 offenders were arrested. They were charged under the Malicious Injury Act 1768/9(9 Geo 3 c.29 s.3) which made it an Offense to destroy fences erected under an Inclosure Act. The penalty was 7 years Transportation.
C	John Wilson v The Landowners of Methley. Bradford QS 15 July 1790. Wilson lost his case and presumably the case against him and the others succeeded.	Meanwhile, on the 7th July 1790, the Commissioners were presented with a Notice from a landowner (one of the fence breakers) stating that on the 15th July he would appeal to the Quarter Sessions because the Commissioners had stopped up an ancient public highway without awarding any other public highway in lieu thereof.

D	As underlined in Court Papers	The Commissioners responded on the 15 July. They said that various new roads had been made and put into repair, these were generally approved by the whole parish. After dealing at length with the procedures, the Respondents stated "we shall contend, not only that the new roads are much more convenient than the old ones to everybody having occasion to use them (except the Appellant) - and not more inconvenient to him". They continued. "Two of the Commissioners, will produce the Map of the Parish, and prove that the New Roads are much more convenient than the old ones to every Body, except the Appellant, and as convenient to him as any Road can be unless made for his own private particular purpose".
E		Every new road leading from Methley Town Street to the outside world was awarded as a 'Private Road'. Each of these roads began and ended in the Parish. They were all thoroughfares and connected with 'the great road' ("which was infinite and ran from sea to sea") and thus under the Common Law were highways. Indeed, the Methley Inclosure Act referred to them as "Private Highways".
F		When setting out private roads in lieu of the common and customary ways which existed before their Award, the Commissioners were not setting out private ways as we understand the term today. The Commissioners were aware that the word 'private' had two distinct meanings in the 18th century as is clear from their words to the Quarter Sessions "The New Roads (i.e. the Private Roads) are much more convenient than the old Ones to every Body, except the Appellant, and as convenient to him as any road can be unless made for his own private particular purpose". Thus the private roads were intended to be used by "everybody having occasion to use them"
G	* Other examples can be found all over the country of similar situations. RWLR 1995 – s.93 p.77	Methley was not an isolated example.* Every Parish adjoining Methley would have been cut off from the outside world if their private inclosure roads had not been intended for use by all the Inhabitants.