

## SECTION 8     TITHE COMMUTATION DOCUMENTATION

### REFERENCE MATERIAL

#### Statute

Tithe Commutation Act 1836 ((as amended by the Tithe Act Amendment Act, 1837)

#### Case Law

*Robinson Webster (Holdings) Ltd v Agombar (2001)*(9 April 2001 HC 000095): weight attached to evidence of occupation of land by the parish officers

*Attorney – General v Antrobus [1905] 2 Ch 188*: Whether or not a piece of land is a road *is one of the matters material to the preparation of the award and plans*. This is subsequently qualified by... *I must not be understood as deciding that, in my opinion, the tithe map would be evidence on any matter (although it is a public document) which is not within the scope and purview of the authority of the Commissioners who made it*

*Copestake v West Sussex County Council [1911] 75 JP 465*: The tithe map is not admissible as evidence of the extent of a public right ... *It was the business of the person responsible for making this map to ascertain what land in the parish was, and was not, titheable. It was not their business to define the extent of public rights of way*. However, this would not be regarded as correct today. (See *Maltbridge Island Management Co v SSE* below)

*Maltbridge Island Management Co v SSE and Hertfordshire County Council [1998] EWHC Admin 820*: Sullivan J held that evidence based on an analysis of Tithe Maps and Apportionments may be admissible as to the existence or non-existence of a public right of way. The weight to be attached is a matter for the Inspector. It cannot be conclusive. He also approved the passage in *Sauvain*, 2<sup>nd</sup> Ed, p47, paragraphs 2-72

*Kent County Council v Loughlin [1975] JPEL 348, 235 EG 681*: The judgment asserts that *on the question of whether there was a road at the specific place the tithe map was of much importance*. The judgment continues that the absence of a lane from the tithe map is sufficient to show that the lane did not exist as a road at the time, but Lord Denning MR acknowledged that it could have existed as a footpath. (But see also *Gallagher*)

*Giffard v Williams (1869) 38 LJ Ch 597*: It is impossible to treat the tithe map otherwise than as a public document

*Smith v Lister (1895) 64 LJ QB 709*: Accepts both first and second-class maps as evidence

*Stoney v Eastbourne Rural District Council [1927] 1 Ch 367*: The judgment maintains that ..to say that an ordinary pasture or arable field, over which a right of public footpath exists, has its titheability confined to other parts of the field, not including the small strip of land covered by the footpath, seems to me quite contrary to common sense and to the documents which we have before us

*Attorney – General v Stokesley Rural District Council [1928] 26 LGR 440*: If produced from proper custody, tithe maps may, in cases where the question is whether a highway was dedicated to the public before or after 1836, be used in conjunction with evidence of uninterrupted user within living memory as evidence that the way was dedicated to the public

*Webb v Eastleigh Borough Council 1957*: Although maps may be evidence of the existence of a highway, they are not evidence of the legal boundaries of the highway

*Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77*: Tithe maps make no distinction between a public and a private road, their object is to show what is titheable and the roadways are marked upon them as untitheable parts of land whether they are public or private

*Attorney-General v Beynon [1970] 1 Ch 1*, a tithe map was stated to be admissible evidence for determining the physical boundary of a road

*Commission for New Towns v J J Gallagher Ltd [2002] 2 P & CR 24*: A lane, owned by two people, farmed as pastureland with tithe rent-charge apportioned to it is not inconsistent with it being a public carriageway

## **Other Publications**

'Rights of Way: A guide to law and practice' by John Riddall and John Trevelyan (published by the Open Spaces Society and the Ramblers' Association), pages 139 and 140

The Tithe Surveys of England and Wales, by Roger Kain and Hugh Prince, CUP 1985

The Tithe Maps of England and Wales, by Roger Kain and Richard Oliver, CUP 1995

The Planimetric Accuracy of Tithe Maps, *The Cartographic Journal* vol 13 part 2 (Dec 1976) pages 177-183

Tithe Surveys for Historians' by Roger J P Kain and Hugh C Prince (published by Phillimore & Co. Ltd) 2000

Instructions issued by the Tithe Commissioners to the tithe map surveyors for the purpose of the Tithe Commutation Act 1836 (PRO IR18 14586)

'Conventional Signs to be used in the Plans made under the Act for the Commutation of Tithes in England and Wales (British Parliamentary Paper 1837 XLI 405)

Relevant articles may be found in the Rights of Way Law Review

## **GUIDANCE**

### **Introduction**

- 8.1 The 1836 Act converted tithes (the tenth part of the annual produce of agriculture), provided for the support of the priesthood and religious establishments, into a tithe rent-charge, a monetary payment based on the seven year average price of wheat, oats and barley. This was normally done parish by parish and resulted in some 12,000 documents which apportioned the payment fairly over the different lands in the tithe district. The apportionment of tithes was recorded in a schedule and on a map. Files containing correspondence pertaining to the production of the documents occasionally survive in local record offices.
- 8.2 Tithe documents are solely concerned with identifying titheable land. Apportionments are statutory documents which were in the public domain and tithe maps have been treated by the courts as good evidence as to whether land was titheable or not titheable. However, tithe maps were not intended to establish or record rights of way. There are a number of reasons why land might not have been subject to tithe in addition to the possibility of it being highway land. One of these was that the land was barren, but other examples include land held either by the church or some other religious community, or land which had only recently been converted to productive land from previous barren heath or waste land. It is dangerous to assume the maps to be proof of something that it was not the business of the Commissioners to ascertain, or to lay down rigid rules for their interpretation. Tithe commutation documents vary considerably from one to another in quality and detail.
- 8.3 The referenced article 'Interpreting Tithe Map Evidence', includes a useful extract from the instructions issued to the tithe map surveyors, and provides a helpful insight into the subject. The remaining 'other publications' provide additional insight into the tithe commutation process. However, the importance and interpretation they place on the depiction of a route as a separate parcel of land is not altogether agreed.

### **Case Law**

- 8.4 While there appears to be some divergence of opinion between some of the judgments, this is not necessarily the case. Both *A – G v Antrobus* and *Kent County Council v Loughlin* relate to roads which would have crossed someone's titheable landholding and which were not shown on

the tithe map (negative evidence). In *Copestake v West Sussex County Council* the road was shown bounded on either side by the fences of old enclosures (positive evidence). In the former cases, but not the latter, the presence, or not, of a road was clearly a material matter, as it would have affected the productivity of the landholding and hence the rent payable. (See also *Gallagher*.)

### **Evidential Value**

- 8.5 Tithe documents can generally give no more than an indication as to whether any way is public or private. This is because a private right of way can diminish to no less an extent than a highway the productiveness of the land for tithe assessment. Nevertheless, the absence of a route from a Tithe Map does not necessarily mean that no highway existed. It may simply mean that its existence had no effect on the tithable value of the land (see also 'Status' below). Where tithe maps are shown to have been based on earlier parish or estate maps (see below at 8.10, they may have evidential value relating to the purpose for which they were originally produced.

### **First and Second Class Maps**

- 8.6 The Tithe Commissioners appointed Lieutenant R K Dawson as the Assistant Tithe Commissioner and Superintendent of the surveys. He produced advice and instructions on the technical specifications for the maps which, in part, led to the amendment of the Tithe Commutation Act.
- 8.7 The amending Act of 1837 established two classes of tithe map. First class maps had the Commissioners' seal attached, showing them to be reliable as a true record of matters relating to the purposes for which the map was designed. However, second class maps, which failed in some, often minor, way to meet the stringent test for first class status, are not necessarily inferior from a cartographic point of view. Both first and second class maps have been accepted by the courts as evidence.
- 8.8 Following the amendment to the 1836 Act, the Tithe Commissioners revised their instructions on the form of maps, setting out that the most acceptable plans would be the plain working plans containing little ornamentation and colour. (See below with regard to copies.) Whilst First Class Maps still had to conform to the prescribed technical specifications in terms of surveying techniques, the Commissioners no longer considered it essential for a system of conventional signs to be used.
- 8.9 Maps may have been newly prepared for the tithe survey, but existing maps could also be used as a base. These varied from estate maps to Township and Parish Maps, some of which may have dated from many years prior to the tithe commutation process. The decision on whether or not to commission a new survey was entirely a matter for the landowners concerned.

## **Statutory Copies**

8.10 The 1836 Act required three maps to be produced: an original and two statutory copies. The original was retained by the Tithe Commissioners; one copy was for the relevant diocesan office and the second copy was for local deposit in the tithe district. The original map may be less colourful than the copies produced for local use and there may be variations between the maps. Some of the variations may be due to copying error and some may be deliberate (for example the use of extra colour or adornment). It is therefore important to identify which copy of the map is being examined. The original maps are generally the ones to be found in the Public Record Office.

## **Other Related Documents**

8.11 Each Tithe Map will have been accompanied by an Apportionment giving the details of the way in which payment of the commuted tithes had been divided up or 'apportioned'. In addition there may be a file of incidental notes and documentation containing information on a variety of related matters and in varying detail. Either of these documents may provide information which can assist in the interpretation of the map in relation to the existence of highway rights. Without reference to these documents, the value of the evidence of the map alone may be affected.

## **Colouring of Roads**

8.11 The colouring of a road (usually sienna) on a tithe map is not, in itself good evidence of public vehicular rights. There is general agreement among the RWLR authors that the colouring on maps varies. It is therefore important to establish whether there is a key or other information in the tithe documents which provides an explanation. In the absence of such an explanation or other corroborative evidence the colouring is arguably of little evidential value in itself.

## **Status**

8.12 Both public and private roads had the capacity to diminish the productiveness of land for the assessment of tithe. It follows therefore that the inclusion of a road under the heading 'roads and waste' is not, in itself, good evidence that it was public. However, the annotation of a road 'to' or 'from' a named settlement is suggestive of public rights. Where a road is shown braced to adjacent titheable land, this indicates that the parcels have been measured together and tithe apportioned accordingly. It is not inconsistent with the existence of highway rights (see *Gallagher*). The Award will sometimes establish the ownership of the way depicted, but again, this does not preclude the existence of highway rights. It is unlikely that a tithe map will show public footpaths and bridleways as their effect on the tithe payable was likely to be negligible.

## **Concluding Comment**

8.13 Tithe maps are generally good evidence of the topography of the roads they portray, especially those which form boundaries of titheable land.

They may not necessarily be good evidence either of public rights or the nature of any public right that may exist. The full value of a particular map can only be determined by careful consideration of all the available title documents, including any relevant contemporaneous instructions or keys, and by comparing it with other reputable maps of the time to establish the relevance of the way to the overall road network. However, as statutory documents, where they do provide evidence it should be given the appropriate weight bearing in mind the original purpose of the documents concerned and the issues identified above.