

CARTOGRAPHIC AND DOCUMENTARY EVIDENCE AND ITS USE IN RIGHTS OF WAY LEGAL DISPUTES



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Abstract

The status of roads, bridleways, and footpaths has formed the subject of countless legal inquiries. From the faintest desire path to the newest motorway, the right of way network is omnipresent and overlooked unless use or maintenance is thrown into question. When disputes occur, evidence is sought to ascertain the precise legal status of the right of way.

This thesis is concerned with historical evidence which draws its value from the maxim *once a highway always a highway* which means highways will continue to exist unless a statutory enactment has been made. This research examines the three sources used most often to determine the historic status of rights of way: the Parliamentary enclosure Acts, awards, and maps; the Tithe Act 1836 apportionments and maps; and the Finance Act 1910 documents and maps. Such documentary and cartographic evidence is rarely viewed within the context in which it was made, and too much focus is placed on how individual rights of way appear. This thesis seeks to rectify this by examining how roads, bridleways, and footpaths are described and depicted across all these sources. Such a comprehensive analysis has elucidated several notable patterns which clarify how rights of way were viewed in the past and suggest more appropriate methodology for using these sources in legal inquiries.

This research is increasingly important as upcoming legislative changes, introduced by the Countryside and Rights of Way Act 2000, are due to be implemented on 1 January 2026. After this cut-off date, unrecorded rights of way created before 1949 will be extinguished and historic evidence will no longer provide proof of public rights. These legislative changes have brought renewed attention to rights of way and it is hoped that this research will throw greater light on how historic sources are valued, aiding future legal disputes.

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Contents

List of Figures	v
List of Tables	xvi
Abbreviations	xvii
Legislation	xviii
Cases	xix
Acknowledgements	xxi
1 Introduction	1
1.1 Historical context	8
1.2 Methodology.....	18
2 Cartographic and documentary evidence	20
2.1 Parliamentary enclosure Acts, awards, and maps	20
2.2 Tithe apportionments and maps	32
2.3 Finance Act 1910 documents and maps	42
2.4 Conclusions	50
3 Rights of way law	51
3.1 Legal principles	51
3.2 Parliamentary enclosure Acts, awards, and maps	71
3.3 Tithe apportionments and maps	80
3.4 Finance Act 1910 documents and maps	89
3.5 Conclusions	97
4 Public roads	98
4.1 Public roads in the pre-enclosure landscape.....	105
4.2 Public roads in pre-enclosure tithe apportionments and maps	117
4.3 Public roads in post-enclosure tithe apportionments and maps	139

4.4	Public roads in Finance Act documents and maps	156
4.5	Public roads: conclusions	173
5	Private roads	175
5.1	Private roads in the pre-enclosure landscape	180
5.2	Private roads in pre-enclosure tithe apportionments and maps.....	184
5.3	Private roads in post-enclosure tithe apportionments and maps ...	205
5.4	Private roads in Finance Act 1910 documents and maps	230
5.5	Private roads: conclusions	265
6	Bridleways and footpaths	268
6.1	Bridleways and footpaths in the pre-enclosure landscape	270
6.2	Bridleways in pre-enclosure tithe apportionments and maps	278
6.3	Footpaths in pre-enclosure tithe apportionments and maps	287
6.4	Bridleways in post-enclosure tithe apportionments and maps.....	295
6.5	Footpaths in post-enclosure tithe apportionments and maps	301
6.6	Bridleways in Finance Act documents and maps.....	307
6.7	Footpaths in Finance Act documents and maps	321
6.8	Public right of way deductions in Finance Act documents	331
6.9	Bridleways and footpaths: conclusions	349
7	Conclusions	352
	Glossary	366
	Bibliography	369
	Primary Sources.....	369
	Secondary Sources	370

List of Figures

FIGURE 1	Map showing Roberts and Wrathmell's 'Central Province' alongside the sample counties.	9
FIGURE 2	TNA IR 126/4/48, Finance Act record sheet Hertfordshire VII 8, c. 1910.....	12
FIGURE 3	How are roads established by Parliamentary enclosure described by tithe apportionments and maps?	38
FIGURE 4	NHRO Map/3009, Collyweston enclosure map, 1842.....	65
FIGURE 5	NHRO T/169, Collyweston tithe map, 1842.....	65
FIGURE 6	Map showing the sample parishes coloured based on Parliamentary enclosure Act date.	99
FIGURE 7	Number of public roads described by Parliamentary enclosure awards.....	102
FIGURE 8	Average length of public roads described by Parliamentary enclosure awards.	102
FIGURE 9	Average width of public roads described by Parliamentary enclosure awards.....	103
FIGURE 10	Average number of connections of public roads described by Parliamentary enclosure awards.....	104
FIGURE 11	NHRO ML/1285, Foscoate survey, c. 1725–1728.....	108
FIGURE 12	NPL/1084, Paulerspury estate map, c. 1725.	109
FIGURE 13	HALS DP/107/29/1a, Map of the Enclosed Part of the Parish of Therfield, 1724.	110
FIGURE 15	HALS DP/107/26/1, Therfield enclosure map, 1848.....	111
FIGURE 14	HALS DSA4/102/2, Therfield tithe map, 1843.....	111
FIGURE 16	Boughton House, Little Oakley estate map, 1727.	112
FIGURE 17	NHRO Map/4219, Duke of Grafton's lands in Greens Norton, 1767.	114
FIGURE 18	HALS A/2832, Standon estate map, 1778.....	115
FIGURE 19	HALS QS/E61, Standon enclosure map, 1835.....	116

FIGURE 20	Sliding scale of changes made to the road network by Parliamentary enclosure Commissioners.	117
FIGURE 21	How are roads established by Parliamentary enclosure described by tithe apportionments and maps?	119
FIGURE 22	HALS DSA4/6/2, Ashwell tithe map, 1841.....	122
FIGURE 23	HALS QS/E9, Ashwell enclosure map, 1862.	122
FIGURE 24	HALS DSA4/102/2, Therfield tithe map, 1843.....	124
FIGURE 25	HALS DP/107/26/1, Therfield enclosure map, 1848.	124
FIGURE 26	NHRO T/007, Towcester tithe map, 1844.....	125
FIGURE 27	HALS DSA4/120/2, Wormley tithe map, 1841.....	126
FIGURE 28	HALS QS/E79, Wormley enclosure map, 1854.	126
FIGURE 29	TNA IR 30/15/29, Buckland Commissioner tithe map, 1844.	127
FIGURE 30	HALS DP/25/27/1, Buckland parochial tithe map, 1844.....	127
FIGURE 31	NFRO DN/TA 653, Elsing tithe map, 1841.	128
FIGURE 32	NHRO T/236, Castor tithe map, 1846.	129
FIGURE 33	NHRO 060p 504, Castor and Ailsworth enclosure map, 1898.	129
FIGURE 34	HALS DAcc 1154, Aston tithe map, 1840.	130
FIGURE 35	HALS QS/E10, Aston enclosure map, 1860.....	130
FIGURE 36	HALS DSA4/6/2, Ashwell tithe map, 1841, overlaid with the first and third public roads set out by HALS QS/E9, Ashwell enclosure map, 1862.	131
FIGURE 37	NFRO DN/TA 653, Elsing tithe map, 1841.	132
FIGURE 38	NFRO C/Sca 2/106, Elsing enclosure map, 1849.	132
FIGURE 39	HALS DP/25/26/2A, Buckland enclosure map, 1853.	133
FIGURE 40	HALS DSA4/6/2, Ashwell tithe map, 1841.....	134
FIGURE 41	HALS QS/E9, Ashwell enclosure award, 1862.	134
FIGURE 42	HALS QS/E75, Wigginton enclosure award, 1854.....	135
FIGURE 43	HALS DSA4/118/2, Wigginton tithe map, 1841.	135
FIGURE 44	NHRO T/241, Lutton tithe map, 1842.....	136
FIGURE 45	NHRO Map/2111, Lutton enclosure map, 1867.....	136
FIGURE 46	How did the 33 enclosure award public roads appear on earlier tithe maps?	137

FIGURE 47	NFRO C/Sca 2/14, Barney enclosure map, 1814.....	143
FIGURE 48	NFRO DN/TA 80, Barney tithe map, 1838.....	143
FIGURE 49	HALS DSA4/114/2, Westmill tithe map, 1841.	145
FIGURE 50	NFRO DN/TA 525, East Ruston tithe map, 1841.....	148
FIGURE 51	NHRO T/022, Bugbrooke tithe map, 1849.....	150
FIGURE 52	NHRO Enclosure 50, Bugbrooke enclosure map, 1779.	150
FIGURE 53	NHRO T/129, Greens Norton tithe map, 1848.....	151
FIGURE 54	HALS 26875, Weston tithe map, 1847.....	152
FIGURE 55	NFRO PD 696/2, Ringstead tithe map, 1841.	153
FIGURE 56	How did the 275 enclosure award public roads appear on later tithe maps?	154
FIGURE 57	TNA IR 126/4/38, Finance Act record sheet Hertfordshire VI 14, c. 1910.....	159
FIGURE 58	HALS IR1/72, Finance Act working sheet Hertfordshire VI 14, c. 1909–1910.	159
FIGURE 59	TNA IR 127/7/123, Finance Act record sheet Northamptonshire XVIII 9, c. 1910.	160
FIGURE 60	TNA IR 126/4/197, Finance Act record sheet Hertfordshire XXII 9, c. 1910.....	161
FIGURE 61	TNA IR 126/4/119 and IR 126/4/120, Finance Act record sheets Hertfordshire XIII 5 and 6, c. 1910.....	162
FIGURE 62	TNA IR 126/4/139, Finance Act record sheet Hertfordshire XIV 9, c. 1910.....	163
FIGURE 63	HALS IR1/129, Finance Act working sheet Hertfordshire XIV 9, c. 1909–1910.	163
FIGURE 64	TNA IR 126/5/125, Finance Act record sheet Northamptonshire XXVIII 16, c. 1910.....	164
FIGURE 65	TNA IR 126/5/134, Finance Act record sheet Northamptonshire XXIX 9, c. 1910.	165
FIGURE 66	TNA IR 126/5/519, Finance Act record sheet Northamptonshire LXII 12, c. 1910.....	165

FIGURE 67	TNA IR 127/7/118, Finance Act record sheet Northamptonshire XVII 3, c. 1910.....	166
FIGURE 68	TNA IR 126/4/91 and IR 126/4/92, Finance Act record sheets Hertfordshire XI 7 and 8, c. 1910.	167
FIGURE 69	TNA IR 127/6/98, Finance Act record sheet Norfolk XVII 14, c. 1910.	169
FIGURE 70	NFRO PD 696/2, Ringstead tithe map, 1841.	170
FIGURE 71	TNA IR 127/8/21, Finance Act record sheet Norfolk VI 6, c. 1910.	170
FIGURE 72	How did the 339 enclosure award public roads appear on the Finance Act maps?	171
FIGURE 73	Number of private roads described by Parliamentary enclosure awards.....	178
FIGURE 74	Average length of private roads described by Parliamentary enclosure awards.	178
FIGURE 75	Average width of private roads described by Parliamentary enclosure awards.	179
FIGURE 76	Average number of connections of private roads described by Parliamentary enclosure awards.....	179
FIGURE 77	HALS 26874, Survey of Mr Robert Priors Estate at Weston, 1774.	181
FIGURE 78	HALS 26874, Survey of Mr Robert Priors Estate at Weston, 1774.	182
FIGURE 79	HALS QS/E73, Weston enclosure map, 1802.....	182
FIGURE 80	Sliding scale of changes made to the road network by Parliamentary enclosure Commissioners.	184
FIGURE 81	NHRO T/013, Shutlanger tithe map, 1844.....	185
FIGURE 82	HALS DSA4/102/2, Therfield tithe map, 1843.....	186
FIGURE 83	NHRO T/007, Towcester tithe map, 1844.....	186
FIGURE 84	NHRO T/050, Ringstead tithe map, 1840.	187
FIGURE 85	NHRO ML/1550, Ringstead enclosure map, 1841.	187
FIGURE 86	HALS QS/E75, Wigginton enclosure map, 1854.....	188

FIGURE 87	HALS DP/25/27/1, Buckland tithe map, 1844.	189
FIGURE 88	HALS DP/25/26/2A, Buckland enclosure map, 1853.	189
FIGURE 89	HALS DSA4/118/2, Wigginton tithe map, 1841.	190
FIGURE 90	HALS QS/E75, Wigginton enclosure map, 1854.	190
FIGURE 91	HALS DP/114/27/1, Walkern tithe map, 1841.	191
FIGURE 92	HALS DP/114/26/1, Walkern enclosure map, 1849.	191
FIGURE 93	HALS DSA4/120/2, Wormley tithe map, 1841.	193
FIGURE 94	HALS QS/E79, Wormley enclosure map, 1854.	193
FIGURE 95	HALS DSA4/117/2, Widford tithe map, 1839.	194
FIGURE 96	HALS DSA4/6/2, Ashwell tithe map, 1841.	195
FIGURE 97	HALS DSA4/6/2, Ashwell tithe map, 1841.	196
FIGURE 98	HALS DSA4/17/2, Benington tithe map, 1840.	198
FIGURE 99	HALS 43730, Survey of glebe lands in Great Brook Field, Benington, 1831.	198
FIGURE 100	HALS DSA4/120/2, Wormley tithe map, 1841.	199
FIGURE 101	HALS QS/E79, Wormley enclosure map, 1854.	199
FIGURE 102	HALS DSA4/52/2, Hexton tithe map, 1837.	200
FIGURE 103	HALS QS/E35, Hexton enclosure map, 1873.	200
FIGURE 104	HALS DSA4/25/2, Broxbourne tithe map, 1839.	201
FIGURE 105	HALS QS/E20, Broxbourne enclosure map, 1844.	201
FIGURE 106	How did the 11 enclosure award private roads with additional public rights appear on earlier tithe maps?	202
FIGURE 107	How did the 38 enclosure award private roads appear on earlier tithe maps?	203
FIGURE 108	NHRO T/182, Paulerspury tithe map, 1839.	206
FIGURE 109	NFRO C/Sca 2/300, Tibenham enclosure map, 1820.	207
FIGURE 110	NFRO DN/TA 479, Tibenham tithe map, 1840.	207
FIGURE 111	NFRO DN/TA 479, Tibenham tithe map, 1840, enclosures inaccessible from routes have been marked in yellow.	208
FIGURE 112	NHRO T182, Paulerspury tithe map, 1839.	210
FIGURE 113	NHRO T/226, Abthorpe parish tithe map, 1839.	211

FIGURE 114	How are numbered roads described in the tithe apportionments?	213
FIGURE 115	TNA IR 30/23/293, Hockwold-cum-Wilton tithe map, 1838.....	214
FIGURE 116	TNA IR 29/23/466, East Ruston tithe apportionment, 1841.....	215
FIGURE 117	TNA IR 29/23/482, Sedgford tithe apportionment, 1840.	217
FIGURE 118	NFRO MC 62/39, Hockwold-cum-Wilton tithe map, 1838.....	217
FIGURE 119	NHRO V2797, Abthorpe enclosure map, 1826.....	218
FIGURE 120	TNA IR 30/24/2, Abthorpe Commissioner tithe map, 1839.....	218
FIGURE 121	NHRO T/226, Abthorpe parochial tithe map, 1839.	218
FIGURE 122	NFRO DN/TA 80, Barney tithe apportionment, 1838.....	219
FIGURE 123	TNA IR 29/23/536, Surlingham tithe apportionment, 1843.....	219
FIGURE 124	NHRO DN/TA 622, Ringstead tithe map, 1841.....	223
FIGURE 125	NFRO DN/TA 883, Winterton tithe map, 1845.	223
FIGURE 126	NHRO Map/5914, Cottingham cum Middleton enclosure map, 1825.....	224
FIGURE 127	NHRO T/044, Cottingham cum Middleton tithe map, 1843.	224
FIGURE 128	NFRO DN/TA 327, Necton tithe map, 1839.	225
FIGURE 129	NFRO C/Sca 2/14, Barney enclosure map, 1814.....	226
FIGURE 130	NFRO DN/TA 80, Barney tithe map, 1838.....	226
FIGURE 131	How did the 43 enclosure award private roads with public rights appear on later tithe maps?	227
FIGURE 132	How did the 224 enclosure award private roads appear on later tithe maps?	228
FIGURE 133	TNA IR 126/4/19, Finance Act record sheet Hertfordshire IV 12, c. 1910.....	231
FIGURE 134	TNA IR 127/9/868 and IR 127/9/872, Finance Act record sheets Norfolk LX 5 and 9, c. 1910.	232
FIGURE 135	TNA IR 126/4/274, Finance Act record sheet Hertfordshire XXXVI 16, c. 1910.....	233
FIGURE 136	TNA IR 126/5/436, Finance Act record sheet Northamptonshire LVI 5, c. 1910.....	234

FIGURE 137	TNA IR 126/4/69 and IR 126/4/115, Finance Act record sheets Hertfordshire VIII 13 and XIII 1, c. 1910.....	235
FIGURE 138	HALS IR1/79a and IR1/94, Finance Act working sheets Hertfordshire VIII 3 and XIII 1, c. 1909–1910.	235
FIGURE 139	TNA IR 126/4/72 part 1, Finance Act record sheet Hertfordshire VIII 16, c. 1910.....	236
FIGURE 140	HALS IR1/468, Finance Act working sheets Hertfordshire XXXIX15, c. 1909–1910.....	237
FIGURE 141	TNA IR 127/6/623, Finance Act record sheet Norfolk LXXXIX 6, c. 1910.....	238
FIGURE 142	TNA IR 126/5/446, Finance Act record sheet Northamptonshire LVI 15, c. 1910.....	238
FIGURE 143	HALS QS/E9, Ashwell enclosure roads, 1862.	241
FIGURE 144	TNA IR 126/4/16, Finance Act record sheet Hertfordshire IV 9, c. 1910.....	241
FIGURE 145	TNA IR 126/5/437, Finance Act record sheet Northamptonshire LVI 6, c. 1910.....	242
FIGURE 146	TNA IR 126/5/435, Finance Act record sheet Northamptonshire LVI 4, c. 1910.....	242
FIGURE 147	TNA IR 127/8/381, Finance Act record sheet Norfolk LXXXII 7, c. 1910.....	243
FIGURE 148	TNA IR 126/10/8, Finance Act record sheet Hertfordshire XLIV 2, c. 1910.....	244
FIGURE 149	TNA IR 126/4/274 and IR 126/4/281, Finance Act record sheets Hertfordshire XXXVI 16 and XXXVII 13, c. 1910.....	244
FIGURE 150	TNA IR 126/10/13, Finance Act record sheet Hertfordshire XLIV 11, c. 1910.....	245
FIGURE 151	TNA IR 126/5/514, Finance Act record sheet Northamptonshire LXII 6, c. 1910.....	246
FIGURE 152	TNA IR 127/6/234 and IR 127/6/290, Finance Act record sheets Norfolk XXIX 16 and XL 4, c. 1910.	247

FIGURE 153	TNA IR 127/6/387, Finance Act record sheet Norfolk LIV 2, c. 1910.	248
FIGURE 154	TNA IR 127/7/4, Finance Act record sheet Northamptonshire I 15, c. 1910.....	249
FIGURE 155	TNA IR 126/4/143, Finance Act record sheet Hertfordshire XIV 13, c. 1910.....	251
FIGURE 156	TNA IR 127/8/342 and IR 127/8/377, Finance Act record sheet Norfolk LXX 14 and LXXXII 2, c. 1910.	252
FIGURE 157	TNA IR 127/6/230, Finance Act record sheet Norfolk XXIX 12, c. 1910.....	254
FIGURE 158	TNA IR 126/5/511, Finance Act record sheet Northamptonshire LXII 2, c. 1910.....	254
FIGURE 159	TNA IR 126/8/195, Finance Act record sheet Hertfordshire XLI 5, c. 1910.....	255
FIGURE 160	TNA IR 127/8/244, Finance Act record sheet Norfolk XLVI 10, c. 1910.....	255
FIGURE 161	TNA IR 127/9/823, Finance Act record sheet Norfolk XLIX 5, c. 1910.	256
FIGURE 162	TNA IR 127/8/244 and IR 127/8/248, Finance Act record sheets Norfolk XLVI 10 and 14, c. 1910.	257
FIGURE 163	TNA IR 126/10/11, Finance Act record sheet Hertfordshire XLIV 8, c. 1910.....	258
FIGURE 164	HALS QS/E61, Standon enclosure award, 1835.....	259
FIGURE 165	TNA IR 126/4/189 and IR 126/4/190, Finance Act record sheets Hertfordshire XXII 1 and 2, c. 1910.	260
FIGURE 166	TNA IR 127/8/248, Finance Act record sheet Norfolk XLVI 14, c. 1910.....	261
FIGURE 167	TNA IR 127/6/620, Finance Act record sheet Norfolk LXXXIX 3, c. 1910.....	261
FIGURE 168	NFRO C/Sca 2/209, Norton Subcourse enclosure map, 1817.....	261
FIGURE 169	How did the 60 enclosure award private roads with additional public rights appear on the Finance Act maps?	262

FIGURE 170	How did the 286 enclosure award private roads appear on the Finance Act maps?	263
FIGURE 171	Boughton House, Little Oakley estate map, 1727.	273
FIGURE 172	GIS map of Little Oakley reconstructed from Tom Williamson et al., <i>A GIS Aided Study of Agriculture and Landscape in Midland England</i> (Archaeology Data Service, 2011).	273
FIGURE 173	NHRO Map/2844, Little Oakley enclosure map, 1808.	274
FIGURE 174	NFRO LEST/EH 8, Field book Ringstead and Holme, c. 1723.....	275
FIGURE 175	Sliding scale of changes made to the road network by Parliamentary enclosure Commissioners	278
FIGURE 176	NHRO T/163, Stoke Bruern tithe map, 1843.	279
FIGURE 177	HALS DSA4/117/2, Widford tithe map, 1839.	280
FIGURE 178	HALS DP/114/27/1, Walkern tithe map, 1841.....	281
FIGURE 179	HALS DP/114/26/1, Walkern enclosure map, 1849.	281
FIGURE 180	HALS DSA4/55/2, Little Hornead tithe map, 1844.....	282
FIGURE 181	HALS DE/H/P28, Little Hornead enclosure map, 1864.	282
FIGURE 182	HALS DAcc 1154, Aston tithe map, 1840	283
FIGURE 183	HALS QS/E1, Albury enclosure map, 1869.	283
FIGURE 184	NFRO DN/TA 653, Elsing tithe map, 1841.	284
FIGURE 185	NFRO C/Sca 2/106, Elsing enclosure map, 1849.	284
FIGURE 186	NHRO T/050, Ringstead tithe map, 1840.	285
FIGURE 187	How did the 22 enclosure award bridleways appear on earlier tithe maps?	286
FIGURE 188	NHRO T/007, Towcester tithe map, 1844.....	287
FIGURE 189	NFRO T/204, Passenham tithe map, 1845.	288
FIGURE 190	HALS DSA4/16/2, Bengoe tithe map, 1843.....	289
FIGURE 191	HALS QS/E14, Bengoe enclosure map, 1852.	289
FIGURE 192	HALS DP/25/27/1, Buckland tithe map, 1844.	290
FIGURE 193	HALS DP/25/26/2A, Buckland enclosure map, 1853.	290
FIGURE 194	NHRO T/236, Castor tithe map, 1846.	291
FIGURE 195	HALS DSA4/55/2, Little Hornead tithe map, 1844.....	292
FIGURE 196	HALS DE/H/P28, Little Hornead enclosure map, 1864.	292

FIGURE 197	How did the 72 enclosure award footpaths appear on earlier tithe maps?	294
FIGURE 198	NHRO T/182, Paulerspury tithe map, 1839.....	295
FIGURE 199	NHRO T/174, Benefield tithe map, 1850.	296
FIGURE 200	HALS QS/E61, Standon enclosure map, 1835.....	297
FIGURE 201	HALS DSA4/96/2, Standon tithe map, 1839.	297
FIGURE 202	NHRO T/174, Benefield tithe map, 1850.	298
FIGURE 203	NFRO C/Sca 2/236, East Ruston enclosure map, 1806.....	299
FIGURE 204	NFRO DN/TA 525, East Ruston tithe map, 1841.....	299
FIGURE 205	How did the 26 enclosure award bridleways appear on later tithe maps?	300
FIGURE 206	TNA IR 30/24/94, Paulerspury Commissioner tithe map, 1839...	301
FIGURE 207	NHRO T/182, Paulerspury parochial tithe map, 1839.	301
FIGURE 208	NHRO T/044, Cottingham cum Middleton tithe map, 1843.	302
FIGURE 209	NHRO T/044, Cottingham cum Middleton tithe map, 1843.	302
FIGURE 210	NFRO C/Sca 2/112, Gresham enclosure map, 1828.	303
FIGURE 211	NFRO DN/TA 693, Gresham tithe map, 1842.	303
FIGURE 212	HALS QS/E61, Standon enclosure map, 1835.....	304
FIGURE 213	HALS DSA4/96/2, Standon tithe map, 1839.	304
FIGURE 214	How did the 129 enclosure award footpaths appear on later tithe maps?	306
FIGURE 215	TNA IR 126/4/241, Finance Act record sheet Hertfordshire XXX 7, c. 1910.....	311
FIGURE 216	HALS IR1/279, Finance Act working sheet Hertfordshire XXX 7, c. 1909–1910.	311
FIGURE 217	TNA IR 126/4/136, Finance Act record sheet Hertfordshire XIV 6, c. 1910.....	314
FIGURE 218	TNA IR 127/7/121, Finance Act record sheet Northamptonshire XVIII 7, c. 1910.	315
FIGURE 219	HALS DSA4/117/2, Widford tithe map, 1839.	316
FIGURE 220	HALS QS/E74, Widford enclosure map, 1856.....	316

FIGURE 221	Ordnance Survey first edition 1:2500 Hertfordshire XXX 7, c. 1880.	317
FIGURE 222	TNA IR 126/4/241, Finance Act record sheet Hertfordshire XXX 7, c. 1910.....	317
FIGURE 223	NHRO Map/2816, Aynho enclosure map, 1793.....	319
FIGURE 224	TNA IR 126/5/521, Finance Act record sheet Northamptonshire LXII 15, c. 1910.....	319
FIGURE 225	How did the 50 enclosure award bridleways appear on the Finance Act maps?	320
FIGURE 226	TNA IR 126/4/274 and IR 126/4/281, Finance Act record sheets Hertfordshire XXXVI 16 and XXXVII 13, c. 1910.....	321
FIGURE 227	HALS QS/E20, Broxbourne enclosure map, 1844.....	322
FIGURE 228	TNA IR 126/4/280, Finance Act record sheet Hertfordshire XXXVII 9, c. 1910.....	322
FIGURE 229	TNA IR 126/5/360, Finance Act record sheet Northamptonshire LI 2, c. 1910.....	323
FIGURE 230	TNA IR 126/4/72 part 1, Finance Act record sheet Hertfordshire VIII 16, c. 1910.....	324
FIGURE 231	Ordnance Survey first revision 1:2500 Northamptonshire XVII 15, c. 1900.....	324
FIGURE 232	HALS QS/E61, Standon enclosure award, 1835.....	326
FIGURE 233	Ordnance Survey first edition 1:2500 Hertfordshire XXII 1 and 5, c. 1878.....	326
FIGURE 234	Ordnance Survey first revision 1:2500 Hertfordshire XXII 1 and 5, c. 1898.....	327
FIGURE 235	Ordnance Survey second revision 1:2500 Hertfordshire XXII 1 and 5, c. 1923.....	327
FIGURE 236	HALS IR1/468, Finance Act working sheet Hertfordshire XXXIX 15, c. 1909–1910.....	329
FIGURE 237	HALS QS/E3, Aldenham enclosure map, 1803.	329
FIGURE 238	How did the 204 enclosure award footpath appear on the Finance Act maps?	330

FIGURE 239	B. Partridge, 'The Holiday Task', <i>Punch</i> , 24 August 1910, 137.....	333
FIGURE 240	TNA IR 126/4/31 Finance Act record sheet Hertfordshire V 14, c. 1910.....	335
FIGURE 241	TNA IR 126/4/136, Finance Act record sheet Hertfordshire XIV 6, c. 1910.....	336
FIGURE 242	TNA IR 126/4/31 Finance Act record sheet Hertfordshire V 14, c. 1910.....	337
FIGURE 243	TNA IR 126/4/189, Finance Act record sheet Hertfordshire XXII 1, c. 1910.....	339
FIGURE 244	How did the 22 enclosure award bridleways appear in the Finance Act documents?.....	340
FIGURE 245	TNA IR 126/10/11, Finance Act record sheet Hertfordshire XLIV 8, c. 1910.....	341
FIGURE 246	TNA IR 127/6/651, Finance Act record sheet Norfolk XCVI 15, c. 1910.....	342
FIGURE 247	Number of annotated paths within hereditaments which contain footpaths described by Parliamentary enclosure awards.	343
FIGURE 248	Average public right of way deduction for hereditaments based on number of <i>B.R.</i> and <i>F.P.</i> annotated paths.	343
FIGURE 249	TNA IR 126/4/274, Finance Act record sheet Hertfordshire XXXVI 16, c. 1910.....	344
FIGURE 250	TNA IR 127/6/234, Finance Act record sheet Norfolk XXIX 16, c. 1910.....	345
FIGURE 251	Of the 93 enclosure award footpaths in 124 hereditaments, what proportion contained deductions and annotated paths?	346

List of Tables

TABLE 1	Colour used by tithe map-makers to depict public roads established at enclosure.	142
TABLE 2	Lines used by tithe map-makers to depict public roads established at enclosure.	144

Abbreviations

HALS	Hertfordshire Archives and Local Studies
NFRO	Norfolk Record Office
NHRO	Northamptonshire Record Office
OS	Ordnance Survey
TNA	The National Archives

Legislation

Commons Act 2006.....	108
Commons Registration Act 1965	108
Countryside Act 1968	52
Countryside and Rights of Way Act 2000.....	3, 51, 60, 268, 349, 360
Deregulation Act 2015	60
Finance (1909–10) Act 1910, 10 Edw. VII c. 8	
.....	1, 42, 43, 44, 89, 90, 91, 93, 95, 156, 230, 331
Finance Act 1920, 10 & 11 Geo. V c. 18.....	45
Highway Act 1835, 5 & 6 Will. IV c. 50	55, 177
Highways Act 1773, 13 Geo. III c. 78	61, 67
Highways Act 1980	52, 56, 66
Natural Environment and Rural Communities Act 2006	60
Prescription Act 1832, 2 & 3 Will. IV c. 71	57
Statute of Winchester 1285, 13 Edw. I St. 2.....	7
Statutory Declarations Act 1835, 5 & 6 Will. IV c. 62.....	62
The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109	
.....	14, 27, 29, 72, 73, 103, 105, 141, 177
The Inclosure Act 1773, 13 Geo. III c. 81	27
The Inclosure Act 1836, 6 & 7 Will. IV c. 115.....	27, 28
The Inclosure Act 1845, 8 & 9 Vict. c. 118.....	27, 177
The Tithe Act 1832, 2 & 3 Will. IV c. 100	120
The Tithe Act 1836, 6 & 7 Will. IV c. 71	1, 34, 35, 39, 80
The Tithe Act 1837, 7 Will. IV & 1 Vict. c. 69.....	35, 83, 118
Wildlife and Countryside Act 1981.....	52, 59

Cases

<i>A-G v Antrobus</i> [1905] 2 Ch 188 (Ch).....	83, 84, 151, 165
<i>A-G v Beynon</i> [1970] Ch 1 (Ch).....	86, 129
<i>Bakewell Management Ltd v Brandwood</i> [2004] UKHL 14, [2004] 2 AC 519.....	243
<i>Buckland v Secretary of State for the Environment, Transport and the Regions</i> [2000] EWHC Admin 279, [2000] 1 WLR 1949.....	76, 77, 78, 356
<i>Commission for New Towns v Gallagher Ltd</i> [2002] EWHC 2668, [2003] 2 P & CR 3	18, 75, 76, 82, 105, 118, 164, 194, 197, 239
<i>Copestake v West Sussex CC</i> [1911] 2 Ch 331 (Ch)	86, 128
<i>Cubitt v Maxse</i> (1873) LR 8 CP 704.....	72
<i>DPP v Jones</i> [1999] 2 AC 240.....	6, 52
<i>Dunlop v Secretary of State for the Environment and Cambridgeshire CC</i> (1995) 70 P & CR 307, 94 LGR 427	75, 220, 265, 356
<i>Eyre v New Forest Highway Board</i> [1892] 56 JP 517	260
<i>Fairey v Southampton CC</i> [1956] 2 QB 439.....	66
<i>Fortune v Wiltshire Council</i> [2011] EWCA Civ 883, [2013] 1 WLR 80818, 91, 94, 95, 96, 161, 164, 253	
<i>Giffard v Williams</i> (1869) 38 LJ Ch 597 (Ch)	83
<i>Hale v Norfolk CC</i> [2001] Ch 717 (CA).....	129
<i>Hanning v Top Deck Travel Group Ltd</i> (1994) 68 P & CR 14	243
<i>Harber v Rand</i> (1821) 147 ER 20 (KB).....	72, 78
<i>Harrison v Duke of Rutland</i> [1893] 1 QB 142 (CA)	6
<i>Harvey v Truro Rural Council</i> [1903] 2 Ch 638 (Ch).....	112, 113
<i>Hickman v Maisey</i> [1900] 1 QB 752 (CA)	6
<i>Hollins v Oldham</i> (1995) C94/0206 (Ch).....	18, 91
<i>Kent CC v Loughlin</i> (1975) 234 EG 681 (CA)	83, 84, 86, 151
<i>Logan v Burton</i> (1826) 108 ER 191 (KB).....	72
<i>Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions</i> [1998] CO/540/98 (QB), EGCS 134 (QB)	
.....	63, 85, 87, 88, 90, 93, 96, 142, 151, 225, 364
<i>Merstham Manor Ltd v Coulsdon and Purley UDC</i> [1936] 2 All ER 422 (KB).....	83

<i>Moser v Ambleside UDC</i> (1925) 23 LGR 533 (CA)	165
<i>North London Railway Co v St Mary, Islington Vestry</i> (1872) 27 LT 672	55
<i>Parker v Nottinghamshire CC</i> [2009] EWHC 229 (Admin)	56
<i>Poole v Huskinson</i> (1843) 11 M&W 827	55
<i>R (Andrews) v Secretary of State for Environment, Food and Rural Affairs</i> [2014] EWHC 1435 (Admin), [2014] 4 All ER 718, [2014] ACD 128	73, 74
<i>R (Andrews) v Secretary of State for Environment, Food and Rural Affairs</i> [2015] EWCA Civ 669, [2016] 3 All ER 1022	71, 74, 75
<i>R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs</i> [2007] UKHL 28	6, 67
<i>R v Devon CC ex p Fowler</i> [1991] JPL 520	59
<i>R v Secretary of State for the Environment ex p Andrews</i> (1996) 71 P & CR 1	71, 73, 75
<i>R v Secretary of State for the Environment, Transport and the Regions ex p Billson</i> [1999] QB 374	67
<i>R v Secretary of State for the Environment, Transport and the Regions ex p Dorset CC</i> [2000] JPL 396	67
<i>R v Wright</i> (1832) 110 ER 248	72, 265
<i>Re Ellenborough Park</i> [1955] EWCA Civ 4	5, 53, 56
<i>Ridley v Secretary of State for the Environment, Food and Rural Affairs</i> [2009] EWHC 171 (Admin)	18, 82, 84, 91
<i>Roberts v Webster</i> (1967) 66 LGR 298	78
<i>Robinson v Adair</i> [1995] NPC 30	243
<i>Robinson Webster (Holdings) Ltd v Agombar</i> [2001] EWHC 510 (Ch), [2002] 1 P & CR 20	80, 93, 94, 96
<i>Rodgers v Ministry of Transport</i> [1952] 1 All ER 634	113
<i>Smith v Lister</i> (1895) 64 LJQB 154 (QB)	83
<i>Stoney v Eastbourne RDC</i> [1927] 1 Ch 367 (CA)	86, 87
<i>Todd v Secretary of State for the Environment, Food and Rural Affairs</i> [2004] EWHC 1450 (Admin), [2004] 1 WLR 2471	94, 95
<i>Webb v Eastleigh BC</i> (1958) 56 LGR 124 (QB)	86, 128, 129
<i>Williams-Ellis v Cobb</i> [1935] 1 KB 310 (CA)	55, 165

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1 Introduction

This thesis examines how historic sources are used to determine the legal status of rights of way and suggests novel ways to assess and weigh such evidence in legal disputes. It analyses cartographic and documentary sources in the context within which they were made to establish, on the balance of probabilities, the likelihood of one scenario over another. By providing such authority, this research will fundamentally alter how historical sources are used in inquiries which seek to determine the legal status of rights of way.

The existence of a right of way may be determined by both user and documentary evidence. User evidence includes statements by individuals and tends to provide proof of rights in living memory whereas documentary evidence offers much deeper insights into the past. Evidence obtained from archaeology or other fieldwork is little used and proof of *historic* rights relies more heavily on documentary evidence and therefore forms the focus of this research. This thesis analyses the three cartographic and documentary sources which provide the most detailed and widely available legal evidence: Parliamentary enclosure Acts, awards, and maps; Tithe Act 1836 apportionments and maps; and Finance (1909–10) Act 1910 documents and maps.¹ The courts regularly use these sources as evidence, yet their historical context is commonly neglected. The sources are only understood in terms of how they can aid or hinder a case and less concern is given to *why* the sources depict rights of way in the manner they do. This study seeks to rectify this by exploring the pitfalls of the legal interpretation of historic sources, as it is all too easy for such sources to be oversimplified and misrepresented if they are not analysed within their historical context. A unique approach is used which combines methodologies from landscape history, historical geography, and the history of cartography with case law and land law to examine the historical context of each source across a range of parishes from Hertfordshire, Norfolk, and Northamptonshire.

¹ The Tithe Act 1836, 6 & 7 Will. IV c. 71; Finance (1909–10) Act 1910, 10 Edw. VII c. 8, henceforth 'Finance Act 1910'.

This study addresses specific issues relating to the methods by which historic evidence is valued in rights of way cases. These matters are of interest to historians as part of wider questions concerning country estates, common land, designed landscapes, and enclosure, as well as broader social issues relating to access, restriction of movement, and public and private space. Such matters are addressed but do not form the focus of this research. Instead, greater weight is placed on *how* historic sources describe and depict rights of way and *why* this can aid legal inquiries. This is first and foremost a technical analysis of how rights of way are treated by specific forms of historic cartographic and documentary evidence.

While there are numerous guides and an extensive body of case law concerning historic evidence in right of way disputes, no attempt has been made to take a sample and compare how individual rights of way are described and depicted across the enclosure, tithe, and Finance Act documents. In fact, there has never been a systematic attempt to establish whether the sources treat rights of way consistently, nor to discover the extent to which the status of rights of way might change over time, through use and precedent rather than by definitive legal fiat. It is hoped that this thesis will provide some clarity for historians and lawyers on the legal application of these historic cartographic and documentary sources.

The right of way network is the principal way people navigate, interact, and perceive the world around them. The roads, byways, bridleways, and footpaths which cross the English countryside shape how the landscape is experienced. Such routes are so ubiquitous that they are often overlooked by landscape historians and form the basis of relatively few detailed historical studies, with Christopher Taylor, Brian Paul Hindle, and Sarah Harrison proving the exception rather than the rule.² This study redresses this and provides greater authority to historians and lawyers in making judgements which prove so pivotal to

² Christopher Taylor, *Roads and Tracks of Britain* (London: JM Dent, 1979); Brian Paul Hindle, *Roads, Tracks and Their Interpretation* (London: Batsford, 1993); Sarah Anne Harrison, 'A History of Evolution and Interaction: Man, Roads and the Landscape to c.1850' (PhD, University of East Anglia, 2005).

landowners and the general public alike. The COVID-19 pandemic and resulting 'lockdown' measures have put increased pressure on the network of public rights of way and raised awareness of issues relating to their status and maintenance. Such issues are all the more important amidst the impending legislative changes created by the Countryside and Rights of Way Act 2000 which will extinguish all unrecorded historic rights of way on 1 January 2026.³ It is critical that the historic context of rights of way are more accurately researched and understood. More broadly, this thesis questions how lawyers interpret historic sources and suggests novel ways for balancing such evidence to provide more accurate judgements in the future.

Two experiences encapsulate how the rights of way network has changed over the past century. The first dates from the 1900–1910s and was recorded when Colin Seymour, a 'prolific and successful litigant' in highway and rights of way law, interviewed the former chairman of Methley Urban District Council and the headmistress of the village school in 1979:⁴

They were both then in their 80s, but their recollection of village paths was sharp and accurate. They recalled how, in times past, the village bobby was instructed to take his measuring stick and make sure that the parish footpaths were of the correct width after the plough had turned the soil on either side. They summed up the importance of these paths to ordinary people when they said "The only way to get anywhere for 90% of Methley people was to walk."⁵

Such experiences pass beyond the bounds of living memory and illustrate the importance of footpaths for everyday use, a fact sometimes overlooked today in an era where motor vehicles are widespread. An autobiographical note in *Great*

³ Countryside and Rights of Way Act 2000, ss. 53–56.

⁴ 'The Seymour Papers', accessed 10 August 2020, <https://bywaysandbridlewaytrust.org.uk/archive/the-seymour-papers/>.

⁵ Colin Seymour, 'My Way to My Ways: Part 4: People and Places.', *Byway and Bridleway* 6 (2010): 104.

Debates in Property Law, from 2012, captures the modern value of public rights of way:

The paths we follow are ancient public rights of way. These days, the farm land is the edge of a conservation area, and the paths don't really 'go' anywhere, in the modern directive sense...The Landscape bears the remnants of the various uses which the land has had over centuries, and provides welcome amenities of fresh air, exercise and nature trail. Before we moved here, I didn't really appreciate the value of public rights of way other than for access to a destination...But it is the amenity value of these public footpaths — rather than their access function — that has turned out to have real value. Of course, while this amenity is free at the point of use, it forms part and parcel of the market value of neighbouring property, so that access to such spaces may not be random but can become a selling point for middle-class family homes in desirable locations.⁶

These recollections illuminate how much changed in the course of the twentieth century. The value of public rights of way now lies in their scenic and recreational value rather than, necessarily, the place they provide access to. In the past the agricultural and practical functions of rights of way was of greater importance, with *maintenance* rather than *use* forming the principal concern of contemporaries. Such analysis can easily slip into nostalgia, but it is crucial past experiences are understood if historical evidence is to be used today. The right of way network has experienced significant changes since the eighteenth century. For example, the road network was transformed in the turnpike era of the Georgian period, the 1820s with the invention of tarmacadam, the early twentieth century as widespread metalling occurred, and in the 1960s with mass vehicle ownership. As outlined by the experiences detailed above, public rights of way 'originally served a utilitarian purpose' but their recreational value has 'increasingly been recognised since the mid twentieth century'.⁷

⁶ David S. Cowan, Lorna Fox O'Mahony, and Neil Cobb, *Great Debates in Property Law* (Palgrave Macmillan, 2012), 136–37.

⁷ A. Speirs, 'The Classification of Highways', *Rights of Way Law Review*, June 2003, 11.

Determining the historic legal status of carriageways, bridleways, and footpaths is critical because the legal maxim *once a highway always a highway* means such evidence can be used to establish continuing rights to this day. Terms such as 'highway', 'carriageway', 'bridleway', and 'footpath' are often misunderstood by the general public but have clear legal definitions which will be briefly examined here ahead of a deeper analysis in Chapter 3. Rights of way are defined routes over which public and/or private rights may exist. *Private* rights of way are a type of 'easement' which is a right to use another's land for a specific purpose such as passage.⁸ Several individuals may be entitled to use a *private* right of way whereas *public* rights of way are open to the public at large. The general public have a right to pass and repass along all public rights of way.⁹ The terms 'highway' and 'public right of way' are interchangeable, although 'highway' is often used to denote the physical route rather than the right itself.¹⁰ Public and private rights of way are further distinguished by the level of right permitted, generally separated into carriageways, bridleways, and footpaths. Carriageways provide vehicular rights, bridleways provide rights on horseback, and footpaths provide rights on foot. As such public and private rights of way may co-exist in cases where the public have a right on foot or horseback, but where vehicular rights are reserved for specific individuals. Although the legal definition of 'public rights of way' includes carriageways, the former is generally used to describe only bridleways and footpaths, with carriageways more often being described as 'roads' both today and historically. This study follows such conventions and uses 'route' in preference to 'way' where the status is dubious. Bridleways and footpaths are so strongly associated with public rights that such rights are often inferred in the absence of a qualifying 'public' adjective. The strength of the connection is such that significant problems were caused by the addition of *B.R.* and *F.P.* annotations for 'bridle roads' and 'footpaths' on the Ordnance Survey (OS) maps. These

⁸ For a judicial treatment of easements see *Re Ellenborough Park* [1955] EWCA Civ 4; For an overview of easements see Stephen Bickford-Smith et al., *Private Rights of Way* (Bristol: Jordans, 2012), 2–18.

⁹ Angela Sydenham, *Public Rights of Way and Access to Land* (Bristol: Jordans, 2010), 1.2.1.

¹⁰ Angela Sydenham, *Public Rights of Way: The Essential Law* (London: Wildy, Simmonds & Hill Publishing, 2019), 1.1.

annotations were intended to distinguish the physical routes rather than any legal status but were, and still are, commonly associated with the existence of *public* bridleways and footpaths. This will be discussed in detail in Chapter 6.

The history of highway law is long, complex, and easily misunderstood by lawyers and historians alike. Historically, highways were occasionally recognised to be ‘part of the common land of the manor’, which muddies understanding by historians to this day.¹¹ As early as the eighteenth century, a view developed which sought to explain highways in terms of easements. Numerous judges applied the language of easements to public rights of way to claim trespass, notably in *Harrison* in which Lopes LJ stated: ‘The easement acquired by the public is a right to pass and repass at their pleasure for the purpose of legitimate travel’.¹² This resulted in the famous judgement in *Hickman* in which the defendant was found guilty of trespass for walking back and forth along a road to watch and take notes of the plaintiff’s racehorses.¹³ However, applying the concepts of easements to highways has been deemed inappropriate in more recent case law.¹⁴ The idea that highways represent a special form of easement has been similarly misapplied by historians. This passage from Sidney and Beatrice Webb is often quoted today as evidence of such:

What existed, in fact, was not a road, but what we might almost term an easement — a right of way, enjoyed by the public at large from village to village, along a certain customary course, which if much frequented, became a beaten track.¹⁵

Such notions are often connected with rights to deviate onto adjoining land:

If the road was obstructed or had become foundrous in wet weather, then the traveller had the right to diverge from the road, even if that

¹¹ Oliver Rackham, *The History of the Countryside* (London: Dent, 1986), 265.

¹² *Harrison v Duke of Rutland* [1893] 1 QB 142 (CA) 154.

¹³ *Hickman v Maisey* [1900] 1 QB 752 (CA).

¹⁴ *DPP v Jones* [1999] 2 AC 240; *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28.

¹⁵ Sidney Webb and Beatrice Webb, *English Local Government: The Story of the King’s Highway*, vol. 5 (London: Longmans, Green & Co., 1913), 5.

entailed trampling crops. Where the road had to climb a hill or bank then multiple tracks might develop, the traveller taking the easiest route available at the time.¹⁶

This concept has legal precedence as early as the Statute of Winchester 1285.¹⁷ 'Highways often became impassable and common law therefore recognised that a traveller might divert onto adjoining land.'¹⁸ In medieval open landscapes, many parallel routes exist which provided alternative means of travel.¹⁹ Likewise, in enclosed landscapes substantial widths were left so travellers could continue if the central portion of the road became impassable, and grass verges may have provided useful grazing for the livestock of travellers, locals, and the poor. Who was liable to maintain and repair routes, rather than who was entitled to use such routes, was of the utmost importance to contemporaries. At common law, some individuals may become liable to repair roads in cases where they enclosed adjoining land such that the public were no longer able to 'enjoy the right to deviate'.²⁰ This discussion illustrates the complexity of historic rights of way, particularly in how the legal and physical world intersect, which is an underlying feature of this thesis. The following section examines the historical context of the study area.

¹⁶ Brian Paul Hindle, 'Sources for the English Medieval Road System', in *Roadworks, Medieval Britain, Medieval Roads*, ed. Allen Valerie and Ruth Evans (Manchester University Press, 2016), 34.

¹⁷ Statute of Winchester 1285, 13 Edw. I St. 2.

¹⁸ Sydenham, *Public Rights of Way and Access to Land*, 8.2.5.

¹⁹ See Brian Paul Hindle, *Medieval Roads*, 2nd ed., Shire Archaeology (Aylesbury: Shire Publications, 1989), 6 and plates 1-6 for aerial photographs of such routes.

²⁰ *Encyclopedia of Highway Law and Practice*, vol. 1, Part II, para. 2-087.

1.1 Historical context

This research applies historical methodologies to a legal issue. It seeks to understand the historical context of documents relating to Parliamentary enclosure Acts, the Tithe Act 1836, and the Finance Act 1910 in order to better determine how such sources may be used as evidence for the legal status of rights of way. The enclosure movement has formed the subject of many seminal studies concerning its chronology and spatial distribution as well as its agricultural, economic, political, and social effects. It will be examined in greater detail in Chapter 2, but it is necessary to outline some concepts here. Broadly speaking, enclosure took place by either ‘piecemeal’ or ‘general’ means, to adopt the terms employed by J. A. Yelling.²¹ ‘Piecemeal’ enclosure usually occurred in open fields when landowners agreed to buy, sell, and exchange strips to form consolidated landholdings. ‘General’ enclosure involved groups of landowners agreeing to enclose. Both are considered ‘ancient’ forms of enclosure and distinguished from enclosure achieved by an Act of Parliament. ‘Parliamentary’ enclosure forms the focus of this study as it specifically created rights of way, leaves the best surviving documentary evidence, and is regularly relied upon in legal inquiries.

The counties of Hertfordshire, Norfolk, and Northamptonshire were selected because they contain good coverage of Parliamentary enclosure maps, tithe maps, and Finance Act maps. While the sample counties are in no way representative of England as a whole, the conclusions drawn from this study will provide useful evidence for legal disputes in other parts of the country. The value of this analysis lies in the comprehensive comparisons between the three sources rather than the discoveries made in any particular region. The patterns which will emerge in this analysis will help determine conventions which apply outside these counties, even in cases where the sources do not all exist or survive. This will be critical for both academic and legal studies which seek to use such sources to determine facts beyond their original intended remit.

²¹ J. A. Yelling, *Common Field and Enclosure in England, 1450-1850* (London: Macmillan, 1977), 6–10.

Although located within a relatively confined geographic area, the sample counties contain a variety of landscape types (FIGURE 1). The study of regional variation in England has long been a cornerstone of landscape history. Several researchers have attempted to classify the landscape based on the agricultural arrangements, field systems, and settlement patterns prevalent in different parts of the country.²² These studies outline an east-west agricultural divide between

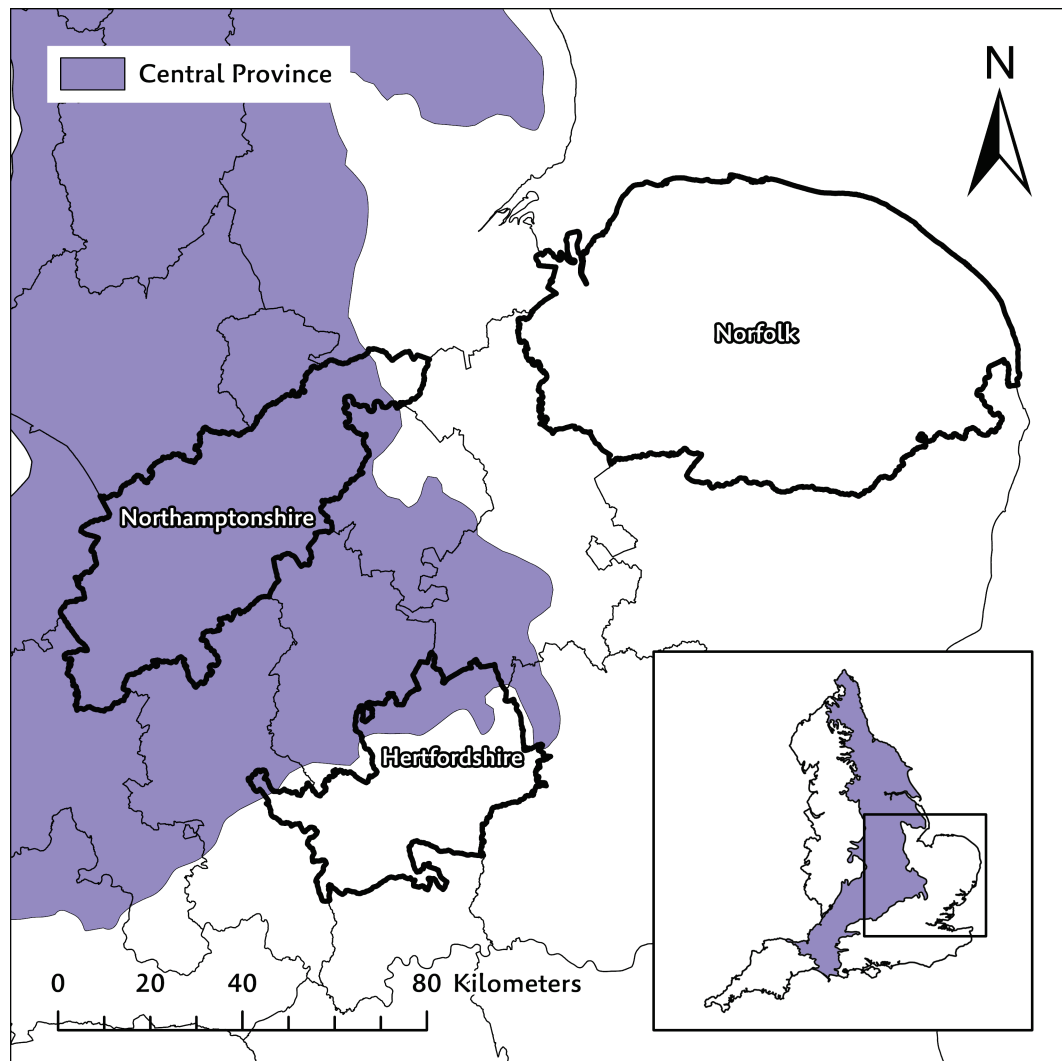


FIGURE 1 Map showing Roberts and Wrathmell's 'Central Province' alongside the sample counties.

²² H. L. Gray, *English Field Systems* (University of Harvard Press, 1915); Oliver Rackham, *The History of the Countryside* (London: Dent, 1986); Brian K. Roberts and Stuart Wrathmell, *An Atlas of Rural Settlement in England* (London: English Heritage, 2000); Brian K. Roberts and Stuart Wrathmell, *Region and Place: A Study of English Rural Settlement* (London: English Heritage, 2002).

the central ‘champion’ region and ‘woodland’ regions in the south-east and west. ‘Champion’ countryside consists of nucleated villages surrounded by open fields in which arable land was mixed in unhedged strips, whereas ‘woodland’ countryside contains more enclosed fields, greens, hamlets, and isolated farms. Oliver Rackham drew a similar distinction between the ‘planned countryside’, arising through the late enclosure of ‘champion’ regions in the post-medieval period, and the ‘ancient countryside’.²³ Likewise, Brian Roberts and Stuart Wrathmell, in a study of nineteenth century settlement patterns, defined a ‘Central Province’ which displays a similar pattern (FIGURE 1).²⁴ While ‘the idea of the ‘two countrysides’ is to an extent mythical’, it provides a useful method to contextualise regions and illustrate the diversity of landscapes found in England.²⁵ The historical backgrounds of each county are explored next.

1.1.1 Hertfordshire

Hertfordshire is one of the smallest counties; ‘only six of the forty ancient English counties were smaller’.²⁶ Its geology is principally characterised by chalk, overlain by Quaternary clays on higher ground to the north, and by London Clay to the south. The county is largely formed of ‘woodland’ countryside in which open fields were anciently enclosed. Parliamentary enclosure, the focus of this study, affected only 27 percent of the county and was chiefly confined to the north.²⁷ In the medieval period, dispersed settlement was common and often associated with greens.²⁸ East Hertfordshire contains a highly dispersed settlement pattern with many semi-natural woods, species-rich hedges, and an

²³ Rackham, *The History of the Countryside*, 1–7.

²⁴ Roberts and Wrathmell, *An Atlas of Rural Settlement in England*.

²⁵ Tom Williamson, *Environment, Society and Landscape in Early Medieval England: Time and Topography* (Boydell Press, 2013), 128.

²⁶ Lionel Maxwell Munby, *The Hertfordshire Landscape* (London: Hodder & Stoughton, 1977), 25.

²⁷ Roger J. P. Kain, John Chapman, and Richard R. Oliver, *The Enclosure Maps of England and Wales 1595-1918: A Cartographic Analysis and Electronic Catalogue* (Cambridge University Press, 2004), 78.

²⁸ David Hall, *The Open Fields of England*, *Medieval History and Archaeology* (Oxford University Press, 2014), 271.

intricate web of bridleways and footpaths.²⁹ The west of the county experienced piecemeal enclosure of the open fields in the seventeenth and eighteenth centuries, and only small areas were enclosed by Parliamentary Act.³⁰ North Hertfordshire, 'on or below the Chiltern escarpment', was characterised by open fields and formed typical 'champion' countryside.³¹ Such areas were enclosed by Parliamentary Acts in the early nineteenth century. Heaths in south Hertfordshire also tended to be enclosed at this time. As well as being limited to just 27 percent of the county, Parliamentary enclosure Acts occurred particularly late in national terms, with 56 percent taking place after the Tithe Act 1836.³² The Acts peaked following the Inclosure Act 1845 and removed residual commons and open fields, usually in the east.³³ Some parts of the county were never formally enclosed and continued to be farmed in open fields into the twentieth century. This was especially true of an area centred around Baldock in the north-east: Bygrave was 'ploughed in unfenced strips until...1922', and many open field strip lynchets can be found in early OS maps.³⁴ In 1910, remaining strips in Clothall can be seen on the cusp of the rapidly expanding town of Baldock (FIGURE 2).

No analysis of the landscape of Hertfordshire, however brief, can neglect to mention its proximity to London. Arguably, this was a driving force behind change in the county, even from the earliest of times. Trade with the capital, particularly in food and fuel, shaped the development of Hertfordshire to an enormous extent. The chalklands in north Hertfordshire and south Cambridgeshire provided ideal ground for barley production, which was turned into 'Hertfordshire Malt' in Ware and Royston, 'esteemed the best in England'.³⁵ Such malt was destined for London breweries via the Cheshunt and Wadesmill

²⁹ Anne Rowe and Tom Williamson, *Hertfordshire: A Landscape History* (University of Hertfordshire Press, 2013), 59.

³⁰ Rowe and Williamson, 112.

³¹ Rowe and Williamson, 7.

³² Roger J. P. Kain and Richard R. Oliver, *Enclosure, Rating, Drainage and Sanitary Maps of England and Wales in Public Archives, 1598-1936*, SN: 3820 (UK Data Service, 1999).

³³ Kain and Oliver.

³⁴ Hall, *The Open Fields of England*, 273.

³⁵ Daniel Defoe, *A Tour Thro' the Whole Island of Great Britain*, 6th ed., 1762, 86–87.



FIGURE 2 TNA IR 126/4/48, Finance Act record sheet Hertfordshire VII 8, c. 1910.

turnpikes and the Lea and Rib rivers.³⁶ Clay soils in the south were laid to grass in the late eighteenth and early nineteenth centuries by Parliamentary enclosure Acts. 'Farmers here fattened beef, lamb and mutton for the metropolis, and grew hay to feed the huge numbers of draft horses kept there: the clayland meadows and pastures were, in turn, fertilised with muck brought out in carts from the capital.'³⁷ This symbiotic relationship with London typified much of Hertfordshire's history. Equally, transport improvements through the eighteenth century brought Hertfordshire within reach of London for the elite. Wealthy 'politicians, administrators, lawyers, merchants and eventually industrialists' increasingly created estates, parks, and villas in the county.³⁸ In some ways this was a precursor to the urbanisation and suburbanisation in the nineteenth century. The population of the county increased from 102,000 in 1801 to 250,350 by 1901, four times the growth of England and Wales.³⁹ Today Hertfordshire is a county of 'remarkable contrasts', with much of the south forming 'a continuation of London' but the west and east 'still boast extensive stretches of 'unspoilt'

³⁶ Andrew Macnair, Anne Rowe, and Tom Williamson, *Dury and Andrews' Map of Hertfordshire: Society and Landscape in the Eighteenth Century* (Oxford: Windgather Press, 2016), 82.

³⁷ Macnair, Rowe, and Williamson, 82.

³⁸ Rowe and Williamson, *Hertfordshire*, 26.

³⁹ Munby, *Hertfordshire Landscape*, 28–29.

countryside'.⁴⁰ An examination of Dury and Andrews' 1766 county map illustrates how Hertfordshire has been transformed on an 'unprecedented scale' in the last 200 years.⁴¹ Such a county provides the ideal ground to examine how urbanisation and wider changes in the landscape affected the transport network.

1.1.2 Norfolk

Historically, Norfolk was the fourth largest county in England and Norwich was the 'second city' from the Middle Ages to the eighteenth century.⁴² Norfolk's soils vary from peat and silt fenlands in the west, to sandy Breaklands in the south-west, to loamy soils in the east. Before the agricultural revolution, contrasts in these landscapes were more pronounced. As Joan Thirsk and others have shown, Norfolk contained pastoral Fenlands in the west where cattle rearing and fattening took place, light heathlands in the north and west distinguished by corn and sheep farms, and claylands in the south renowned for dairying.⁴³ East Norfolk comprises 'some of the most fertile soils in the country' which meant land was expensive and small landowners dominated.⁴⁴ These holdings 'were small during the fourteenth century and dispersed irregularly over extensive arable fields'.⁴⁵ In contrast, larger estates began to emerge on the lighter soils in Breckland and the 'Good Sands' of north-west Norfolk in the late fourteenth and fifteenth centuries, often associated with engrossment.⁴⁶ Sheep farming dominated in these regions from the late Middle Ages, and the wool trade fuelled the growth of Norwich and surrounding towns.⁴⁷ Daniel Defoe, writing in the mid eighteenth century, draws a line from Brandon in the south to Walsingham

⁴⁰ Rowe and Williamson, *Hertfordshire*, 1–2.

⁴¹ Macnair, Rowe, and Williamson, *Dury and Andrews*, 214.

⁴² Penelope J. Corfield, 'From Second City to Regional Capital', in *Norwich Since 1550*, ed. Carole Rawcliffe and Richard Wilson (London: Hambledon & London, 2004), 142.

⁴³ Joan Thirsk, ed., *The Agrarian History of England and Wales: 1500-1640*, vol. 4 (Cambridge University Press, 1967).

⁴⁴ Nicola Whyte, *Inhabiting the Landscape: Place, Custom and Memory, 1500-1800* (Windgather Press, 2009), 16.

⁴⁵ Hall, *The Open Fields of England*, 65.

⁴⁶ Whyte, *Inhabiting the Landscape*, 15.

⁴⁷ Hall, *The Open Fields of England*, 290.

in the north, remarking how 'populous and large' the towns are to the east, and how the west was 'sandy and barren...[and]...feeds great Flocks of Sheep'.⁴⁸

Field systems and settlement patterns helped determine the chronology and spatial distribution of the enclosure movement. The heavy claylands in south Norfolk were principally enclosed by the seventeenth century, and remaining common land was subject to Parliamentary Acts later. The proliferation of larger estates in the north and west meant lands here were usually enclosed in the early to mid-eighteenth century.⁴⁹ This area was the basis of developments in Norfolk husbandry, particularly the introduction of clover and turnips in the four-course system.⁵⁰ Overall, between 30 and 40 percent of the county was enclosed by Parliamentary Acts.⁵¹ Lighter soils were the focus of Parliamentary enclosure as pasture was turned over to corn and fodder crops at the expense of dairying and sheep farming.⁵² Breckland was largely enclosed between 1796 and 1816, closely coinciding with the second peak identified by Michael Turner when sandy, marginal soils became profitable because of the Napoleonic Wars.⁵³ Such enclosure accelerated after the Inclosure (Consolidation) Act 1801 was passed, which simplified the process.⁵⁴ Between 1800 and 1829, enclosure map production in Norfolk 'was decidedly above the national average'.⁵⁵ In total, 63 percent of all Parliamentary enclosure in Norfolk took place between 1801 and 1825.⁵⁶ Drainage schemes in the fens of west Norfolk also occurred in this period.

⁴⁸ Defoe, *A Tour Thro' the Whole Island of Great Britain*, 55.

⁴⁹ Michael Edward Turner, *English Parliamentary Enclosure: Its Historical Geography and Economic History*, Studies in Historical Geography, 1980, 48.

⁵⁰ It has been suggested that clover and turnips could not be grown in open fields as enclosures were required to remove common grazing rights in Mark Overton, 'The Diffusion of Agricultural Innovations in Early Modern England: Turnips and Clover in Norfolk and Suffolk, 1580-1740', *Transactions of the Institute of British Geographers*, 1985, 215-16.

⁵¹ Turner, *English Parliamentary Enclosure*, 35.

⁵² G. E. Mingay, *Parliamentary Enclosure in England: An Introduction to Its Causes, Incidence and Impact, 1750-1850* (London: Longman, 1997), 90.

⁵³ Turner, *English Parliamentary Enclosure*, 49.

⁵⁴ The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109.

⁵⁵ Kain, Chapman, and Oliver, *The Enclosure Maps of England and Wales 1595-1918*, 96.

⁵⁶ Kain and Oliver, *Enclosure, Rating, Drainage and Sanitary Maps of England and Wales in Public Archives, 1598-1936*.

In terms of Parliamentary enclosure mapping, Norfolk is unique in three key respects. First, Norfolk enclosure maps cover whole parishes 75 percent of the time, an unparalleled attribute in the whole of England and Wales.⁵⁷ Second, Parliamentary enclosure Acts and awards are sometimes made for *groups* of parishes, a feature common only in Norfolk and Wales.⁵⁸ Third, these enclosure maps regularly employ colour to differentiate ownership boundaries and tenure status.⁵⁹ Parliamentary enclosure maps in Norfolk were typically produced by men ‘drawn from within or immediately outside the county’ and 85 percent ‘were produced by relatively few surveyors’.⁶⁰ This helps explain why enclosure mapping in the county is unique in many instances. Norfolk thus provides a good county to examine Parliamentary enclosure following the 1801 Act.

1.1.3 Northamptonshire

Northamptonshire is a middle-sized lowland county in the East Midlands which has been subject to extensive archaeological work and historical study.⁶¹ In part this is due to the ‘rich legacy of upstanding medieval and post-medieval earthworks’.⁶² For instance, much ridge and furrow survives in the clayland districts of Northamptonshire as the expansion of livestock farming in the post-medieval period fossilised the topography under grass.⁶³ As such, Northamptonshire is often regarded as a quintessentially ‘champion’ county. This was especially true in south and south-east where nucleated villages and intensively cultivated arable open fields were arranged in what H. L. Gray termed the ‘Midland system’.⁶⁴ Open fields consisted of narrow unhedged strips of

⁵⁷ Kain, Chapman, and Oliver, *The Enclosure Maps of England and Wales 1595-1918*, 96.

⁵⁸ Kain, Chapman, and Oliver, 97.

⁵⁹ Kain, Chapman, and Oliver, 97–98.

⁶⁰ Kain, Chapman, and Oliver, 101.

⁶¹ Particularly the Raunds Area Project in the 1970s and the Whittlewood Project in the 2000s.

⁶² Tom Williamson, Robert Liddiard, and Tracey Partida, *Champion: The Making and Unmaking of the English Midland Landscape* (Exeter University Press, 2013), 4.

⁶³ Tom Williamson, *Shaping Medieval Landscapes: Settlement, Society, Environment* (Windgather Press, 2003), 152–53.

⁶⁴ Gray, *English Field Systems*.

intermixed ownership and were usually made up of three fields.⁶⁵ Such arrangements dominated until the fifteenth century, when enclosure began. However, some areas did not conform to this pattern, particularly in the north and west where more woodland and pastoral landscapes could be found. Of note is the Soke of Peterborough, an area to the north-east which historically formed part of Northamptonshire and is included in this analysis.⁶⁶ The three royal forests of Rockingham, Salcey, and Whittlewood formed the largest areas of woodland in the county and contained extensive areas of common land which remained open until the mid-eighteenth century.⁶⁷ As J. M. Neeson pointed out, access to the royal forests was increasingly restricted through the eighteenth century as wardens sought to limit poachers and woodstealers while commoners attempted to exercise their rights to estovers as well as forage or pilfer what they could.⁶⁸ Arguments over whether a *right* or *privilege* existed, and the struggle to define these reflect a parallel development in laws related to rights of way and will be returned to later.

Through the post-medieval period, Northamptonshire 'passed from being a predominantly arable to a predominantly pastoral county'.⁶⁹ While open fields were steadily enclosed and laid to grass by piecemeal means, large-scale change was affected by Parliamentary enclosure Acts.⁷⁰ Turner and J. R. Wordie estimated that 53 percent of the county was enclosed by Parliamentary Act, representing one of the highest proportions in England.⁷¹ In most cases between 80 and 95 percent of the township was enclosed.⁷² The chronology of

⁶⁵ Hall, *The Open Fields of England*, 292.

⁶⁶ Tracey Partida, David Hall, and Glenn Foard, *An Atlas of Northamptonshire: The Medieval and Early-Modern Landscape* (Oxford: Oxbow Books, 2013), 93; David Hall, *The Open Fields of Northamptonshire*, vol. 38 (Northamptonshire Record Society, 1995), 98.

⁶⁷ J. M. Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700-1820* (Cambridge University Press, 1996), 58-59; For a map of the royal forests see Partida, Hall, and Foard, *An Atlas of Northamptonshire*, 23.

⁶⁸ Neeson, *Commoners*, 160-62.

⁶⁹ Williamson, Liddiard, and Partida, *Champion*, 169.

⁷⁰ Williamson, Liddiard, and Partida, 169.

⁷¹ Turner, *English Parliamentary Enclosure*, 34; J. R. Wordie, 'The Chronology of English Enclosure, 1500-1914', *The Economic History Review* 36, no. 4 (1983): 498.

⁷² Partida, Hall, and Foard, *An Atlas of Northamptonshire*, 66; See glossary for definitions.

Northamptonshire Parliamentary enclosure occurred in two main phases, conforming to the national pattern identified by Turner, with peaks between 1760–1780 and 1793–1815.⁷³ The first peak ‘led to an expansion of the area under grass’, in concert with much of the Midlands.⁷⁴ Almost two thirds of Parliamentary enclosure in Northamptonshire occurred before 1793, 61.7 percent of which enclosed open fields.⁷⁵ The second peak in the 1800s intensified arable land use and was more closely aligned with Parliamentary enclosure in East Anglia. There was also a spatial pattern to these peaks, with the first taking place on loamy and clayey soils to the north and west, on the border with Leicestershire and Warwickshire, as this land was ‘least suited to arable cultivation’.⁷⁶ The second peak included more land in the south and east. Like Norfolk, a third, smaller peak took place after the Inclosure Act 1845 which, in this case, concerned the ‘disafforestation of Whittlewood Forest in 1850s and 1860s’.⁷⁷ Roger Kain and Richard Oliver note that Northamptonshire Parliamentary enclosure maps typically record ‘foot and bridle paths, turnpike roads, quarries and pits, windmills, inhabited and uninhabited buildings, woodland, owners and acreages of old enclosures, field names, and owners and acreages of new enclosures’.⁷⁸ This will be especially useful in determining the extent to which Parliamentary enclosure sources can provide evidence for rights of way. Northamptonshire provides an excellent county to examine how the right of way network changed in an archetypal Parliamentary enclosure county. The diversity of landscapes within these three counties provides a rich and varied sample of parishes to analyse.

⁷³ Turner, *English Parliamentary Enclosure*.

⁷⁴ Mingay, *Parliamentary Enclosure in England*, 90.

⁷⁵ Turner, *English Parliamentary Enclosure*, 72.

⁷⁶ Williamson, Liddiard, and Partida, *Champion*, 169.

⁷⁷ Kain, Chapman, and Oliver, *The Enclosure Maps of England and Wales 1595-1918*, 101.

⁷⁸ Kain, Chapman, and Oliver, 102.

1.2 Methodology

Case law clearly demonstrates that a greater reliance is placed on documentary evidence rather than field evidence in determining the legal status of historic rights of way.⁷⁹ Topographical features obtained from field surveys, maps, aerial photography are ascribed little value or used only when the documentary evidence is lacking. As such, this research employs a unique approach which combines landscape history methodologies with historical geography and the history of cartography to provide a technical analysis of the three principal cartographic and documentary sources used by lawyers: Parliamentary enclosure, Tithe Act 1836, and Finance Act 1910 documents.

As outlined, Hertfordshire, Norfolk, and Northamptonshire contain an array of landscapes as well as good coverage of Parliamentary enclosure, tithe, and Finance Act documents. Likewise, the sample of parishes had to have been enclosed by Parliamentary Act. Naturally, this excludes those areas which were enclosed before or did not experience Parliamentary enclosure. Moreover, each area must have been commuted by the Tithe Act 1836. Some Parliamentary enclosure Acts removed tithe liabilities before 1836, meaning no tithe commutation was required, a practice common in Northamptonshire. Coverage of the Finance Act 1910 was almost universal and so did not present a problem, providing records survive. The sample is reflective of the chronology and regional distribution of the Parliamentary enclosure Acts in each county. As discussed above, most Parliamentary enclosure Acts in Hertfordshire took place rather late, peaked in Norfolk following the 1801 Act, and occurred in the first peak in 1760–1780 in Northamptonshire. Each county had regional specificities, and a balance was sought in selecting the sample. A total of 65 parishes were analysed as part of this research, 24 enclosed by Parliamentary Act after 1836, and 41 enclosed before 1836.

⁷⁹ Some examples include: *Hollins v Oldham* (1995) C94/0206 (Ch); *Commission for New Towns v Gallagher Ltd* [2002] EWHC 2668, [2003] 2 P & CR 3; *Ridley v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 171 (Admin); *Fortune v Wiltshire Council* [2011] EWCA Civ 883, [2013] 1 WLR 808.

This study begins by examining the three most commonly consulted sources used to determine the historic status of rights of way: the Parliamentary enclosure Acts, awards, and maps; the Tithe Act 1836 apportionments and maps; and the Finance Act 1910 documents and maps. The historic context of each is critical if they are to be used to make legal judgements today. Chapter 3 explores rights of way law, beginning by setting out general legal principles including how rights of way are defined, created, recorded, and changed. It goes on to discuss how each source has been used in court cases. Chapters 4, 5, and 6 explore the public roads, private roads, and bridleways and footpaths described and depicted by Parliamentary enclosure awards and maps. First, pre-enclosure maps are analysed to explore how cartographers depicted and distinguished these routes from one another.⁸⁰ Second, the origins of these routes are further examined on the tithe apportionments and maps created before Parliamentary enclosure. Third, the post-enclosure tithe apportionments and maps help establish how these routes appear in the years and decades following Parliamentary enclosure. Finally, the Finance Act 1910 documents and maps are used to determine what happened to these routes at the turn of the twentieth century. Methodologies from landscape history, historical geography, and cartographic history will be employed to help clarify how historic sources are weighed as evidence, which will be of enormous assistance to future legal inquiries which use these sources.

⁸⁰ This draws on 'map-consciousness' ideas in David Fletcher, *The Emergence of Estate Maps: Christ Church, Oxford, 1600 to 1840* (Clarendon Press, 1995).

2 Cartographic and documentary evidence

As already emphasised, three sources are regularly consulted in rights of way inquiries: the Parliamentary enclosure Acts, awards, and maps; the Tithe Act 1836 apportionments and maps; and the Finance Act 1910 documents and maps. Court cases and public inquiries regularly use these sources as evidence, yet their historical context is frequently not fully appreciated. The sources are only understood in terms of how they can aid or hinder such inquiries and less concern is given to why the sources depict rights of way in the manner they do. This chapter principally provides historical context to these three sources. Each will be examined in turn to establish the contemporary background of these pieces of legislation, why each was required, and what each sought to achieve. This chapter will also briefly examine how rights of way are described and depicted by each source in order to lay the foundation for discussions surrounding their use as legal evidence in Chapter 3.

2.1 Parliamentary enclosure Acts, awards, and maps

Parliamentary enclosure Acts, awards, and maps are most often consulted in inquiries which seek to determine the historic status of routes because they specifically *set out*, *diverted*, and *extinguished* rights of way. This section explores the chronology and objectives of the enclosure movement before examining how rights of way are described and depicted by Parliamentary enclosure.

2.1.1 Historical context

‘Enclosure’, or ‘inclosure’ in the past, can be understood as both a physical and legal term. Physically, it was the literal fencing, hedging, or walling in of land. As a legal process, it extinguished common rights and abolished the open fields, reallocating holdings in compact blocks held ‘in severalty’.⁸¹ Landowners would

⁸¹ Mingay, *Parliamentary Enclosure in England*, 7.

have their old rights 'terminated in exchange for the grant of new rights or compensation in lieu'.⁸² While enclosure undoubtedly transformed large areas of the English landscape, its chronology and spatial distribution are hotly debated. Many scholars disagree about the causes of enclosure as well as its economic, environmental, and social effects.⁸³ Although such debates are not of principal concern to this study, it is important to be aware of how scholars have interpreted enclosure. Early twentieth century historians, particularly John and Barbara Hammond, Wilhelm Hasbach, and Gilbert Slater, viewed enclosure as a negative process which disenfranchised the English peasantry.⁸⁴ Such arguments proved pervasive and formed a key tenet of E. P. Thompson's 1963 study.⁸⁵ Enclosure continued to be framed in terms of the decline of small landowners by some historians into the late twentieth century. K. D. M. Snell, in an analysis of Poor Law settlement examinations and removal orders, supported the conclusions of the Hammonds and characterised enclosure as a force of unemployment for agricultural labourers.⁸⁶ Likewise, Parliamentary enclosure was viewed as 'the final blow to peasants in common-field England' by Neeson who emphasised the continuity between commoners and the peasantry of the seventeenth century in an examination of land tax records.⁸⁷ Opposition to enclosure has come in many forms through the centuries, from reluctant consent to bitter resistance and full-scale revolt, but the extent and successfulness of such opposition is hotly debated. For instance, in the mid twentieth century, E. C. K. Gonner's 1912 study was re-evaluated and some began interpreting enclosure as a long-running process rather than a revolution.⁸⁸ Continuing into the 1960s and 1970s,

⁸² T. Hart, 'Inclosure Awards', *Rights of Way Law Review*, January 1994, 57.

⁸³ For a concise overview of enclosure see Tom Williamson, 'Understanding Enclosure', *Landscapes* 1, no. 1 (1 April 2000): 56–79.

⁸⁴ Gilbert Slater, *The English Peasantry and the Enclosure of Common Fields* (London: Constable, 1907); Wilhelm Hasbach, *A History of the English Agricultural Labourer* (PS King & Son, 1908); John Lawrence Hammond and Barbara Bradby Hammond, *The Village Labourer, 1760-1832: A Study in the Government of England before the Reform Bill* (London: Longmans, Green & Co., 1913).

⁸⁵ E. P. Thompson, *The Making of the English Working Class* (London: Gollancz, 1963).

⁸⁶ K. D. M. Snell, *Annals of the Labouring Poor: Social Change and Agrarian England, 1660-1900* (Cambridge University Press, 1987).

⁸⁷ Neeson, *Commoners*, 330.

⁸⁸ E. C. K. Gonner, *Common Land and Inclosure* (London: Macmillan, 1912).

historians such as J. D. Chambers, G. E. Mingay, Turner, and Yelling stressed the economic benefits of enclosure, reconsidering its impact in destabilising smaller landowners and the extent of opposition.⁸⁹ At the turn of the century, holistic and environmental approaches became more common.⁹⁰ Theoretical methodologies took hold in the late twentieth century, most notably in Christopher Tilley's landmark anthropological approach to archaeology which reassessed, among other matters, perceptions of space and place.⁹¹ Many landscape historians draw a link between enclosure and capitalism, most notably Matthew Johnson who interpreted such physical changes as part of a subconscious shift towards capitalism.⁹² While Tom Williamson and others argue this goes too far, most agree that there is a link between enclosure and capitalism.⁹³ The pre-enclosure landscape of commons and open fields was suitable for a landscape which included 'small farms, limited markets, and comparatively little market specialisation' but were ill suited 'when national markets and much larger holdings emerged'.⁹⁴ The extent to which such agricultural changes in England represented the origin of capitalism have been argued at length.⁹⁵ While such debates on primitive accumulation are not directly related to this thesis, they illustrate the divisive nature of enclosure, both in the past and today.

⁸⁹ J. D. Chambers and G. E. Mingay, *The Agricultural Revolution, 1750-1880* (New York: Schocken Books, 1966); G. E. Mingay, *Enclosure and the Small Farmer in the Age of the Industrial Revolution* (London: Macmillan, 1968); Michael Edward Turner, 'Parliamentary Enclosure and Landownership Change in Buckinghamshire', *The Economic History Review* 28, no. 4 (1975): 565–81; Yelling, *Common Field and Enclosure in England, 1450-1850*.

⁹⁰ Tom Williamson, *The Transformation of Rural England: Farming and the Landscape, 1700-1870* (University of Exeter Press, 2002); Shirley Wittering, *Ecology and Enclosure: The Effect of Enclosure on Society, Farming and the Environment in South Cambridgeshire, 1798-1850* (Windgather Press, 2013).

⁹¹ Christopher Tilley, *A Phenomenology of Landscape: Places, Paths, and Monuments* (Oxford: Berg, 1994).

⁹² Matthew Johnson, *Archaeology of Capitalism* (Wiley, 1996).

⁹³ Williamson, 'Understanding Enclosure'.

⁹⁴ Williamson, 57.

⁹⁵ Most notably in the Brenner debate, Robert Brenner, 'The Origins of Capitalist Development: A Critique of Neo-Smithian Marxism', *New Left Review*, no. 104 (1 August 1977): 25–92.

The enclosure movement took place over several centuries and was typified by two main forms identified by Yelling: 'piecemeal' and 'general', with 'Parliamentary' being a unique form of general enclosure.⁹⁶ These types of enclosure had peaks in certain periods but occurred concurrently such that various forms may have taken place in a single location. Piecemeal enclosure was the earliest form in which land was sporadically consolidated through private agreements and eventually amalgamated and enclosed. While such enclosure could occur in anciently enclosed lands such as Essex and Kent, it is more readily associated with strips in the open field farming system. Although one typically imagines landowners happily exchanging land, and this did occur, the piecemeal process was also associated with engrossment. Essentially, this occurred when large landowners bought out smaller landowners, but, as Yelling pointed out, can be difficult to identify.⁹⁷

In contrast, general enclosure occurred if a community actively decided to enclose. In its simplest form, general enclosure could occur through unity of possession, where, upon acquiring all common land, a single landowner could enclose at will. Gathering pace from the 1620s, enclosures would be agreed upon and then a collusive action would be brought in the Court of Chancery in which no defence would be given.⁹⁸ These mock challenges proved a cornerstone of early general enclosure and foreshadowed the growth of Parliament legitimising proceedings. General enclosure was straight-forward if all parishioners could agree, but independent Commissioners were soon required to separate overlapping rights into distinct land parcels, paving the way for Parliamentary enclosure.

Parliamentary enclosure grew out of a need for a more formal procedure which could arbitrate shared rights of custom. It differed from other forms of general enclosure in that it was sanctioned by an Act of Parliament, which formalised the

⁹⁶ Yelling, *Common Field and Enclosure in England, 1450-1850*, 6–10.

⁹⁷ Yelling, 109–19.

⁹⁸ David Brown and Frank Sharman, 'Enclosure: Agreements and Acts', *The Journal of Legal History* 15, no. 3 (1994): 270–71.

changes with strict procedures such as the obtaining of signatures and appointment of independent Commissioners. It was generally believed that Acts brought to Parliament required the support of three-quarters of the parish to succeed.⁹⁹ As many have emphasised, this was calculated by the quantity of land owned by individual proprietors, not the number of people assenting to or dissenting from the proposal to enclose; in the Hammonds oft-quoted words, 'the suffrages were not counted but weighed'.¹⁰⁰ Thus, Parliament could be used as a way to compel unwilling parishioners to enclose if an individual or small group of owners held the majority of land in a parish. Nonetheless, many Acts confirmed existing enclosures and were 'a trivial finale to what had been a continuous process', while others represented 'a major method of organisational change'.¹⁰¹ The Parliamentary enclosure process was varied in both its chronological and spatial extent. Turner identified two peak periods between 1760–1780 and 1793–1815.¹⁰² Fundamentally, this was a regional experience as even the most heavily enclosed counties had farmland which was unaffected by the Parliamentary enclosure experience.¹⁰³ Parliament became the primary method of legitimising enclosure through the seventeenth and eighteenth centuries and leaves the best surviving documentary evidence. As such, it is consistently relied upon in modern legal disputes concerning rights of way and will form the basis of this study.

Piecemeal and general enclosure had diverse objectives dependent on a range of factors. Nicola Whyte's study of Norfolk illustrates that depopulated areas were more easily enclosed compared to 'villages situated on the more fertile calcareous soils of the river-valleys' which had more diverse patterns of landownership.¹⁰⁴ Ultimately, the decision to enclose rested upon individual landowners'

⁹⁹ Mingay, *Parliamentary Enclosure in England*, 28–29.

¹⁰⁰ Hammond and Hammond, *The Village Labourer, 1760-1832*, 49.

¹⁰¹ Turner, *English Parliamentary Enclosure*, 53.

¹⁰² Turner, 66.

¹⁰³ Mingay, *Parliamentary Enclosure in England*, 158.

¹⁰⁴ Whyte, *Inhabiting the Landscape*, 15.

'judgements and perceptions'.¹⁰⁵ In many cases, enclosure was viewed as the most effective way to increase land value, with enclosed land fetching more than double the price of unenclosed land.¹⁰⁶ Enclosure also successfully changed forms of land use; converting arable open fields to pasture, predominantly in the Midlands, and pasture to arable elsewhere. One of the principal aims of enclosure was the improvement of farming methods. Open fields, in which arable land was cultivated in intermingled strips, were viewed as unproductive compared to consolidated holdings. Commons were regarded as untapped resources at best, and wasteful pits encouraging squatters and other undesirables at worst.¹⁰⁷ Hence, compact parcels of land were sought in both instances. In the early nineteenth century reforming the tithe proved a compelling motivation, especially in areas where the tax was exceptionally severe.

A significant and sometimes overlooked aim of Parliamentary enclosure was the improvements made to the transport network. Roads regularly represented the largest expense, especially when they were newly formed and construction materials had to be brought from afar. Turner noted how often parishioners in Buckinghamshire were required to pay additional costs as the initial road estimates fell short.¹⁰⁸ As rural roads were notoriously poorly maintained, the benefits of even minor improvements were manifold, and 'greatly reduced the time and cost involved in sending livestock and produce to market'.¹⁰⁹ Such

¹⁰⁵ John Chapman, 'The Extent and Nature of Parliamentary Enclosure', *The Agricultural History Review* 35, no. 1 (1987): 35.

¹⁰⁶ The 'double' figure has been used consistently, see Anthony Fitzherbert, *The Book of Husbandry* (London, 1534); Arthur Young, *General View of the Agriculture of Oxfordshire* (Sherwood, Neely, and Jones, 1813), 94; Chambers and Mingay, *The Agricultural Revolution, 1750-1880*, 85.

¹⁰⁷ For discussions on encroachment see James P. Bowen, 'Cottage and Squatter Settlement and Encroachment on Common Waste in the Sixteenth and Seventeenth Centuries: Some Evidence from Shropshire', *Local Population Studies* 93, no. 1 (Autumn 2014): 11–32; Carl J. Griffin, 'Squatting as Moral Ecology: Encroachment and "Abuse" in the New Forest, England', in *Moral Ecologies: Histories of Conservation, Dispossession and Resistance*, ed. Carl J. Griffin, Roy Jones, and Iain J. M. Robertson, Palgrave Studies in World Environmental History (Springer International Publishing, 2019), 235–63.

¹⁰⁸ Michael Edward Turner, 'The Cost of Parliamentary Enclosure in Buckinghamshire', *The Agricultural History Review* 21, no. 1 (1973): 40–41.

¹⁰⁹ Mingay, *Parliamentary Enclosure in England*, 49.

improvements fuelled economic growth as a greater number of markets could be accessed.¹¹⁰ Again, this indicates the extent to which enclosure varied locally, with the proximity to large settlements being an important factor. Since the parish was liable to repair all the roads within its boundaries until turnpikes were set up, a parish between two urban centres would experience a great deal more traffic and a disproportionate amount of expense. Thus, wholesale improvements reduced repair costs, as well as facilitating local growth. Undoubtedly, enclosure had a diverse range of objectives which may have affected the subsequent status and morphology of the road network.

2.1.2 Parliamentary enclosure Acts

Parliament sanctioned enclosure through various local Acts, beginning in 1604 with an Act in Radipole, Dorset.¹¹¹ These local Acts form the bulk of early Parliamentary enclosure and vary considerably. Each Act was concerned with one locality, most often a parish but hamlets, manors, townships, or vills could equally be represented.¹¹² Some enclosed huge expanses of land while others were concerned with 'only a small remaining rump of open field land which had survived piecemeal enclosure'.¹¹³ Most Acts began with a petition from locals, usually large landowners. A Bill would be introduced to Parliament, read twice in the Commons, referred to Committee, passed, approved by the Lords, and then receive Royal Assent. Of course, not all Bills were passed; any unusual clauses or inconsistencies might prompt amendment.¹¹⁴

Over time the local Acts became more formulaic and contained similar clauses, but each remained expensive to obtain. As such, general enclosure Acts were passed to reduce the cost and accelerate the enclosure process. The first of these was the Inclosure Act 1773, which provided for the improvement of commons

¹¹⁰ Mingay, 89.

¹¹¹ Wordie, 'The Chronology of English Enclosure, 1500-1914', 486.

¹¹² See glossary for definitions.

¹¹³ Mingay, *Parliamentary Enclosure in England*, 14.

¹¹⁴ Mingay, 65–66.

and open fields.¹¹⁵ It explicitly required the affixing of a notice on the principal church door to inform all inhabitants of meetings, a requirement which was regularly repeated thereafter.¹¹⁶ It also specified that balks used as public or private roads are not to be ploughed, illustrating the protection roads were afforded.¹¹⁷ Although the 1773 Act had little effect on the enclosure process as a whole, it represents the first step toward more general statutes. The Inclosure (Consolidation) Act 1801 followed, marking a turning point in enclosure legislation as it provided a standardised framework which local Acts could refer to.¹¹⁸ The majority of local Acts were created under the 1801 Act. Numerous other general enclosure Acts were passed in 1821, 1836, and between 1845–1859. Of note is the 1836 Act which empowered two-thirds of owners to begin the enclosure process, and the 1845 Act which protected village greens and other spaces for ‘exercise and recreation’.¹¹⁹ This Act in particular represents the first step towards public recreation and countryside access legislation, arguably culminating in the right to roam provisions included in the Countryside and Rights of Way Act 2000.

Following the successful passage of an enclosure Bill through Parliament, Commissioners would be appointed to create an enclosure award and map. Through the seventeenth century, three Commissioners became the norm, with the lord of the manor, the tithe-owner, and remaining parishioners each being represented by one Commissioner.¹²⁰ By the nineteenth century it became usual for individual Commissioners to be appointed as a body of experienced professionals developed.¹²¹ In addition to their other duties, each Commissioner had to have a knowledge of ‘land tenure and farming...law relating to land, tithes and related matters’.¹²² All enclosure Commissioners were to act according to the

¹¹⁵ The Inclosure Act 1773, 13 Geo. III c. 81.

¹¹⁶ The Inclosure Act 1773, 13 Geo. III c. 81, s. 1.

¹¹⁷ The Inclosure Act 1773, 13 Geo. III c. 81, s. 12.

¹¹⁸ The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109.

¹¹⁹ The Inclosure Act 1836, 6 & 7 Will. IV c. 115, s. 13; The Inclosure Act 1845, 8 & 9 Vict. c. 118, ss. 15, 30, 73, and 74.

¹²⁰ Mingay, *Parliamentary Enclosure in England*, 69–70.

¹²¹ Kain, Chapman, and Oliver, *The Enclosure Maps of England and Wales 1595-1918*, 32.

¹²² Mingay, *Parliamentary Enclosure in England*, 70.

powers conferred on them by the local Act and any general Act which applied. Each Act contained slightly different provisions, particularly in relation to rights of way, which has created numerous problems as will be discussed in Chapter 3.

2.1.3 Parliamentary enclosure awards and maps

Parliamentary enclosure Acts facilitated the enclosure of a particular area of land, the provisions for which were included within the award and depicted on the accompanying map. The maps always depict the areas to be enclosed, whether this was a few fields or several parishes, but may also depict additional areas unaffected by the Parliamentary enclosure. At least two maps were usually produced: the pre-Parliamentary enclosure map, and the proposed Parliamentary enclosure map. The pre-Parliamentary enclosure map does not always survive but can prove invaluable in determining the precise changes the Commissioners made to the rights of way network. The Parliamentary enclosure map generally provides an accurate depiction of the changes carried out and may illustrate additional areas not specifically dealt with by the Parliamentary Act. The communication network was nearly always depicted on all enclosure maps, including those routes set out *de novo* by enclosure and those 'ancient' routes which predate the award.

Commissioners were duly appointed to oversee the process and hold meetings in the parish 'or within seven miles'.¹²³ The archetypal Parliamentary enclosure process began with the Commissioners ascertaining the boundaries of the administrative area in question, usually a parish. It was customary to perambulate the boundaries, so these, like much else in rural life, were fixed in folk memory. Although old maps could be used, they were rarely of sufficient quality, so new ones were regularly commissioned. The land was then surveyed and valued, and all those with an interest in the land were to submit a statement of claims which were open to public inspection. The Commissioners would have

¹²³ The Inclosure Act 1836, 6 & 7 Will. IV c. 115, s. 7.

to weigh competing claims and private bargaining and agreements must have taken place to settle disputes as many matters were settled outside of the official meetings.¹²⁴ The Commissioners then reallocated land, ensuring it was conveniently located and of proportional value to previous property rights.¹²⁵ The 1801 Act and many local Acts stipulated that the road network was to be finalised before land was allocated, illustrating its importance. The surveyor would stake out the new roads and allotments, and the parishioners would exchange lands. This occurred very publicly, as did the regular meetings which were held by the Commissioners throughout the enclosure process. The 1801 Act, which standardised procedure already in place, contained several clauses which were overtly public. For instance, notice of changes were to be published in a local newspaper and affixed to the church door. Also, when the map was prepared, it was to be deposited with the Commissioners' clerk for public inspection.¹²⁶

Enclosure Commissioners sometimes received requests relating to public rights of way. Two such instances occurred in Hockwold-cum-Wilton, one following the second meeting outlined:

a claim of the Inhabitants of Hockwold-cum-Wilton signed by Joseph Cock Senior and others...for a Foot Road through the Toffs leading from Toffs Lane to the Twelve acres and to Wilton Ferry the same having been used as a Foot Road time out of Mind to the Moor Drove, the Bank and also a Church Road from the Ferry¹²⁷

Likewise, at the seventh meeting, Reverend Henry Tilney asked 'that a Footpath leaving from the Ferry to the Parsonage Houses across a certain Lammas Meadow may be discontinued which he stated to be a great nuisance and

¹²⁴ NFRO MC 2865/3/24, Hockwold-cum-Wilton enclosure Commissioner minutes, 1814–1816 detail numerous proprietors who withdrew their claims between the initial meeting on 18 June 1814 and 1 November 1814.

¹²⁵ J. Sugden, 'Inclosure Commissioners at Work', *Rights of Way Law Review*, May 1992, 44.

¹²⁶ The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109, s. 8.

¹²⁷ NFRO MC 2865/3/24, Hockwold-cum-Wilton enclosure Commissioner minutes, 31 August 1814.

altogether useless'.¹²⁸ Requests such as these were usually facilitated by the Commissioners, illuminating a more harmonious image than is sometimes portrayed in relation to the enclosure movement.

As emphasised, the improvement of roads was a substantial objective for many enclosures. Although parishioners occasionally complained about the cost, most were content with the improvements. Few failed to recognise the improvements produced by new roads, enabling local growth on a scale not seen again until the advent of the railways. The Commissioners were concerned with ensuring that public roads, whether new or 'in their present course', were constructed and maintained to a high standard and that there were adequate roads for all to access their land. With a more extensive network costing the parish more, the Commissioners would also have been under pressure to ensure the public network was not excessive. On average, it seems there was a 30 percent reduction in road length following Parliamentary enclosure.¹²⁹ Thus, the placement, construction, improvement, and maintenance of roads proved the focus in the documentary evidence. The usage of particular roads appears to be a secondary factor and cannot have concerned the Commissioners or locals to the extent that maintenance did.

While the Parliamentary enclosure was mandated by law, any change to the physical and legal landscape must be sanctioned and supported by the local community for the alterations to have any effect. It is therefore possible that changes wrought by the enclosure Commissioners were not adhered to. Some of the Commissioners' minutes for Hockwold-cum-Wilton betray this ignorance, wilful or not, as the Commissioners were forced to sign a second order detailing the rights of way previously stopped up as numerous people had continued to use them.¹³⁰ Moreover, analysis of the Parliamentary enclosure awards and maps must appreciate the subsequent history and recognise that the physical situation

¹²⁸ NFRO MC 2865/3/24, Hockwold-cum-Wilton enclosure Commissioner minutes, 8–9 February 1816.

¹²⁹ Harrison, 'A History of Evolution and Interaction', 224.

¹³⁰ NFRO MC 2865/3/25, Hockwold-cum-Wilton enclosure Commissioner minutes, 1816–1818.

on the ground may have changed. Chris Willmore outlines this, pointing out that 'over time the precise terms of the inclosure award might have been forgotten by the locals'.¹³¹ As the enclosure process illustrates, the physical landscape can change with remarkable speed, and it is easy to imagine the knowledge of whether a particular track formed a public bridleway or footpath falling out of communal memory.

To conclude, since public and private rights of way are outlined in the award, great weight has justly been placed on Parliamentary enclosure as evidence in rights of way disputes. Nonetheless, it is only when analysed in conjunction with other sources that enclosure awards prove most valuable.

¹³¹ Chris J. Willmore, 'What Is a "Private Carriage Road"?', *Rights of Way Law Review*, July 1995, 79.

2.2 Tithe apportionments and maps

This section provides a brief history of tithe reform in the 1830s. It examines the tithe apportionments and maps which were produced as a result of the Tithe Act 1836, with a particular focus on how rights of way appear.

2.2.1 Historical context

The tithe was, in effect, a tax paid to support the parish church and clergy. The tax was paid in kind and based on a tenth of all produce from the land, divided into great tithes and small tithes consisting of personal, predial, and mixed tithes. Personal tithes arose from 'man's personal labour', predial tithes were 'products of the earth', and mixed tithes arose from both.¹³² Generally, great tithes consisted of the largest predial profits of 'corn, grain, hay, and wood' and were commonly paid to the rector while small tithes encompassed the remaining tithes and were typically paid to the vicar.¹³³ Tithes existed in 'biblical times', originally in the form of voluntary contributions which, over time, acquired the force of law.¹³⁴ In England, Alfred's law code of c. 885–899 refers to tithe payments, but 'there is no evidence of compulsion either by clergy or landlord' until Athelstan's law code 'Ordinance on Church Dues', issued in 926–930.¹³⁵ As such, tithes varied considerably from place to place. In some areas, small but regular payments named 'moduses' were deemed to amount to the tithe.¹³⁶ Also, following the dissolution of the monasteries, many tithes became the personal property of lay persons as the ownership of tithes was a property right.¹³⁷ This lack of uniformity bred disputes.

¹³² James Barry Bird, *The Laws Respecting Tithes* (W. Clarke & Sons, 1801), 3.

¹³³ William Eagle, *A Treatise on the Law of Tithes* (Saunders and Benning, 1830), 42.

¹³⁴ Beryl Taylor, 'Continuity and Change: Anglo-Saxon and Norman Methods of Tithe-Payment before and after the Conquest', *Bulletin of the John Rylands Library* 83, no. 3 (1 September 2001): 27–29.

¹³⁵ Taylor, 31–32.

¹³⁶ Eric J. Evans, *Tithes: Maps, Apportionments and the 1836 Act: A Guide for Local Historians*, *Local Historian at Work* 6 (Salisbury: British Association for Local History, 1997), 8.

¹³⁷ Eagle, *A Treatise on the Law of Tithes*, 91.

A series of agricultural innovations through the seventeenth, eighteenth, and nineteenth centuries further exacerbated problems with the tithe. The introduction of fodder crops such as turnips, 'sainfoin, clover, ley grasses, kale, carrots and potatoes' prompted disputes as each was difficult to categorise.¹³⁸ For instance, some produce, like clover, represented small tithes if used as pasture, but great tithes when cut for hay.¹³⁹ Commercial crops like 'woad, hemp, flax, saffron, hops and tobacco were gradually subjected to tithes' but arrangements varied considerably across the country.¹⁴⁰ As the web of personal, predial, and mixed tithes became increasingly complex, many tithes were converted to monetary payments on an informal, ad hoc basis. This was partly for practical reasons: in order to limit fraud, farmers had to wait for the tithe agent to arrive, which sometimes meant crops would get damaged.¹⁴¹ Fraud was a perennial problem: William Jones, the vicar of Broxbourne and Hoddesdon, was 'confident that I am defrauded by many of my parishioners'.¹⁴² Moreover, few Georgian clergymen would relish having to deal, even indirectly, with the sale of grain and livestock. Assessing, collecting, and storing tithes in the form of perishable foodstuffs likewise put strain on tithe owners.¹⁴³ Nonetheless, the extent to which cash payments predominated should not be overplayed, many continued in kind and if disputes arose, many were converted back.¹⁴⁴ Complex disputes were commonplace and 'from which often only the lawyers profited', further incentivising change.¹⁴⁵

The Parliamentary enclosure movement, which gathered pace through the eighteenth and nineteenth centuries, was partly driven by a desire to remove

¹³⁸ Roger J. P. Kain and Hugh C. Prince, *The Tithe Surveys of England and Wales* (Cambridge University Press, 2006), 8.

¹³⁹ Eagle, *A Treatise on the Law of Tithes*, 44.

¹⁴⁰ Kain and Prince, *The Tithe Surveys of England and Wales*, 8.

¹⁴¹ Evans, *Tithes*, 7.

¹⁴² Evans, 7.

¹⁴³ Geraldine Beech and Rose Mitchell, *Maps for Family and Local History: Records of the Tithe, Valuation Office and National Farm Surveys of England and Wales, 1836-1943*, 2nd revised ed (National Archives, 2004), 13.

¹⁴⁴ Evans, *Tithes*, 7; Kain and Prince, *The Tithe Surveys of England and Wales*, 14–15.

¹⁴⁵ Evans, *Tithes*, 8.

tithe obligations. Over 60 percent of the 3,700 local enclosure Acts passed between 1757 and 1835 eliminated tithe payments, for which landowners were prepared to pay handsomely.¹⁴⁶ Land would be allotted to the church in lieu of tithes or a fixed annual payment would be made based on the prevailing price of grain. However, most tithes were still paid in kind. By the 1830s, it was widely recognised that the tithe system required reform. Agricultural change, intensified by enclosure, multiplied difficulties already inherent with the tithes. As Geraldine Beech and Rose Mitchell put it, 'against a background of industrialisation, religious dissent and agricultural depression, tithe was a very unpopular anachronism'.¹⁴⁷ The church finally acquiesced in 1836, which ironically helped to stabilise its economic and social position in the country.¹⁴⁸

2.2.2 The Tithe Act 1836

After three unsuccessful bills, the Tithe Act received royal assent on 13 August 1836.¹⁴⁹ It completed the move to a monetary system with tithe rent-charges varying according to the price of corn calculated on a septennial average. William Blamire, Thomas Wentworth Buller, and Richard Jones were appointed as the three Tithe Commissioners who would oversee the process. Lieutenant Robert Dawson was appointed Assistant Tithe Commissioner on 14 September 1836.¹⁵⁰ At the outset he recognised the opportunity for a cadastral survey. Dawson recognised the era as 'an age of cadastral surveys' and advised the Tithe Commissioners of similar surveys in Austria, Bavaria, France, Ireland, Piedmont, Savoy, and Sweden.¹⁵¹ In a letter to the Tithe Commissioners, Dawson said:

¹⁴⁶ Evans, 29.

¹⁴⁷ Beech and Mitchell, *Maps for Family and Local History*, 13.

¹⁴⁸ Evans, *Tithes*, 4.

¹⁴⁹ The Tithe Act 1836, 6 & 7 Will. IV c. 71.

¹⁵⁰ 'Tithe Commission-Office, London, September 15, 1836', *The London Gazette*, 16 September 1836, sec. 19420, 1618.

¹⁵¹ Roger J. P. Kain, 'R. K. Dawson's Proposal in 1836 for a Cadastral Survey of England and Wales', *The Cartographic Journal* 12, no. 2 (1975): 82.

The necessity which now exists, for Surveys of nearly the whole country...forming a General Survey, or Cadastre, at such a cheap rate, that the opportunity cannot be lost without exposing those who ought to represent its importance, to the certainty of future censure, if they fail to perform that imperative duty.¹⁵²

The tithe commutation was halted within its first year to discuss issues surrounding map accuracy and the acceptance of existing surveys. The Tithe Act 1836 entitled landowners to adopt a map of their choice, but also required the tithe Commissioners to certify the accuracy of each map.¹⁵³ As such, progress was slower than anticipated and by February 1837, 753 notices had been received but only 38 agreements had been completed.¹⁵⁴ A select committee was appointed to consider the tithe surveys on 16 March 1837 under Shaw Lefevre.¹⁵⁵ While there was support for a general cadastral survey, since the additional costs would have fallen on the landowners and voluntary commutations were to be encouraged, on 8 May 1837, the select committee recommended that accurate maps were not required for a successful tithe commutation.¹⁵⁶ With the opportunity for a cadastral survey lost, an amendment Act was passed on the 15 July 1837.

The Tithe Act 1837 introduced first and second class maps.¹⁵⁷ First class maps were signed and sealed by the Commissioners and were permissible as legal evidence in all matters whereas second class maps were only sanctioned in matters relating directly to the tithe commutation. Second class maps generally obtained their information from older surveys and often contain more topographical information than first class maps. By 1844, almost 25 percent of the 2,017 maps tested were rejected as first class because they were 'planimetrically

¹⁵² Robert Dawson, 'Report from Lieutenant Dawson', in *Survey of Lands (Tithe Act) Copy of Papers Respecting the Proposed Survey of Lands under the Tithe Act (103)*, XLI 383 (House of Commons Sessional Papers, 1836), 8.

¹⁵³ The Tithe Act 1836, 6 & 7 Will. IV c. 71, ss. 32, 35, 63, and 64.

¹⁵⁴ *Tithes Commutation. Return of the Number of Notices and Agreements for Commutation Received by the Tithe Commissioners for England and Wales, from the Date of Their Appointment to the 1st of March.*, XLI 411 (House of Commons Sessional Papers, 1837).

¹⁵⁵ Kain and Prince, *The Tithe Surveys of England and Wales*, 78.

¹⁵⁶ Kain and Prince, 79.

¹⁵⁷ The Tithe Act 1837, 7 Will. IV & 1 Vict. c. 69, s. 1.

untrustworthy'.¹⁵⁸ Dawson estimated the costs of producing an apportionment and map from an existing survey to average 'two-pence per acre' compared to 'nine-pence per acre' for a new survey.¹⁵⁹ Since the landowners paid for the tithe commutation, it was entirely at their discretion whether to pay more to produce a first class map. Hence, just 12 percent of maps covering 15 percent of titheable land were first class.¹⁶⁰ The distribution of first class maps depended to a large extent on the inclinations of the tithe map-makers and valuers, some of whom exclusively produced first class maps.¹⁶¹ Additionally, there is evidence that some surveyors objected to having their maps tested as this called their professional status into question.¹⁶² While the quality of tithe maps varied considerably, many second class maps 'are sufficiently accurate to have useful applications in providing quantitative planimetric information'.¹⁶³

Following the Tithe Act 1837, the commutation continued unabated and map production peaked in 1839–1840.¹⁶⁴ Voluntary agreements were most common from 1837 to 1841, with compulsory awards increasing thereafter 'as the tithe commissioners realized that in many parishes there was little likelihood of a voluntary agreement being reached'.¹⁶⁵ Assistant Commissioners invariably carried out the work, confirming voluntary agreements and enacting compulsory ones. They 'scurried from one parish to another, offering advice [and] settling

¹⁵⁸ Kain and Prince, *The Tithe Surveys of England and Wales*, 124–28.

¹⁵⁹ Robert Dawson, 'Report from Lieutenant Dawson, On the Nature, Scale, and Construction of the Plans Required for the Tithe Commutation Act', in *Survey of Lands (Tithe Act) Copy of Papers Respecting the Proposed Survey of Lands under the Tithe Act (103)*, XLI 383 (House of Commons Sessional Papers, 1836), 11.

¹⁶⁰ Roger J. P. Kain and Richard R. Oliver, *The Tithe Maps of England and Wales: A Cartographic Analysis and County-by-County Catalogue* (Cambridge University Press, 1995), 711.

¹⁶¹ Kain and Oliver, 711, for instance Richard Barnes of Lowestoft, Alexander Doull of Chatham, Frederick and Henry Drayson of Faversham, and Thomas Thurston of Ashford almost only produced first class maps.

¹⁶² Kain and Prince, *The Tithe Surveys of England and Wales*, 122.

¹⁶³ Janet Hooke and R. A. Perry, 'The Planimetric Accuracy of Tithe Maps', *The Cartographic Journal* 13, no. 2 (December 1976): 182.

¹⁶⁴ Between 1839 and 1840, 32 percent of tithe maps were produced, Kain and Oliver, *The Tithe Maps of England and Wales*, 742.

¹⁶⁵ H. M. E. Holt, 'Assistant Commissioners and Local Agents: Their Role in Tithe Commutation, 1836-1854', *The Agricultural History Review* 32, no. 2 (1984): 193.

disputes'.¹⁶⁶ These assistants were often land agents and their decisions were regularly accepted as they were prepared to be flexible, often taking the view that the locals 'knew their own business better than...a stranger to a parish'.¹⁶⁷ Thus, although the Tithe Commission could impose compulsory awards, 62.7 percent were made by voluntary agreements.¹⁶⁸ 'Given the rancour which tithe had traditionally generated, the speed and success of commutations were little short of remarkable.'¹⁶⁹ By the late 1840s the commutation was all but complete, and just five parishes remained by 1863.¹⁷⁰ The process produced 11,785 tithe surveys in total, accounting for three-quarters of the land area of England and Wales.¹⁷¹

2.2.3 Tithe apportionments, files, and maps

The Tithe Act 1836 created three forms of documents: the tithe apportionments, files, and maps. The tithe files contain the miscellaneous papers created by the tithe map-makers and valuers and are not generally admitted as evidence but 'can help to explain the legal documents'.¹⁷² Foremost among these is the tithe file for Mynyddyslwyn, Monmouthshire, which is regularly referenced by Kain and others as it includes the instructions given to surveyors.¹⁷³ These instructions originate from Dawson's report to the Tithe Commissioners and although they have no statutory authority, many tithe apportionments and maps appear to follow them.¹⁷⁴

¹⁶⁶ Evans, *Tithes*, 14.

¹⁶⁷ Evans, 18–19.

¹⁶⁸ Evans, 19.

¹⁶⁹ Evans, 17.

¹⁷⁰ Kain and Oliver, *The Tithe Maps of England and Wales*, 742.

¹⁷¹ Roger J. P. Kain, 'Interpreting Tithe Map Evidence', *Rights of Way Law Review*, June 1998, 106.

¹⁷² Christopher Padley, 'Tithe Records', *Rights of Way Law Review*, March 1991, 26.

¹⁷³ TNA IR 18/14586, Tithe file for Mynyddyslwyn, Monmouthshire, c. 1836 includes 'The following Instructions are required by the Tithe Commissioners to be strictly followed in the Preparation of Plans for the purposes of the Tithe Commutation Act' which are reproduced in Kain, 'Interpreting Tithe Map Evidence', 105–6; Kain and Prince, *The Tithe Surveys of England and Wales*, 83–84.

¹⁷⁴ Dawson, 'Report from Lieutenant Dawson on Plans Required for the Tithe'.

The tithe apportionments, sometimes known as schedules or books of reference, are statutory documents which are ‘conclusive evidence of matters relating to the tithes’.¹⁷⁵ Each apportionment details the owner, occupier, name, land use, acreage, and titheable rent-charge (if any) of the numbered parcels on the tithe map. Such information is a treasure trove for genealogists and economic, landscape, and social historians, to name a few. All apportionments are printed to a standard structure by ‘Shaw and Sons of Fetter Lane, London’ and average 23 pages, although 100 to 200 pages is not uncommon.¹⁷⁶ Tithe apportionments can be especially informative where a route is numbered on the associated tithe map. In total, numbered routes may be listed in four ways in the corresponding tithe apportionment (FIGURE 3). Numbered routes are either listed in the main body of the tithe apportionment or in a separate section which lists additional lands which are not titheable or owned by any single individual. Those listed in the main body of the apportionment with an owner either have an individual owner or multiple owners. Those listed without an owner, usually at the back of the apportionment, sometimes include ‘private’ in their name. Such patterns will be examined in detail in Chapters 4, 5, and 6, and it is hoped they will assist future legal cases. Altered apportionments record changes such as ‘the building of

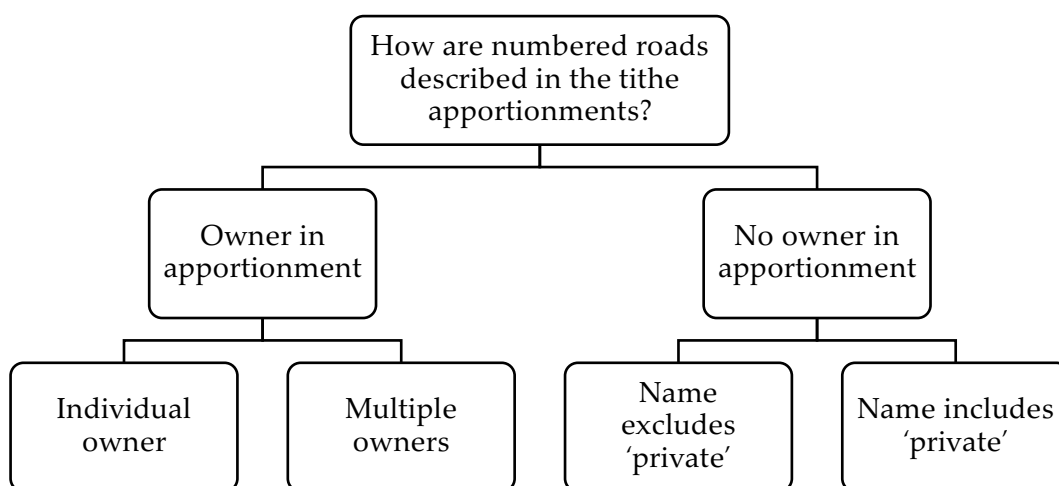


FIGURE 3 How are roads established by Parliamentary enclosure described by tithe apportionments and maps?

¹⁷⁵ Padley, ‘Tithe Records’, 27.

¹⁷⁶ Kain and Prince, *The Tithe Surveys of England and Wales*, 91.

railways, construction of new roads, re-allocation of land under an enclosure award, and other public works' but have not formed part of this study.¹⁷⁷

As discussed, there were prolonged disputes over the suitability of surveys for the tithe commutation, culminating in the Tithe Act 1837 which permitted significant variation. Maps were only certified as first class if they met strict tests such as being surveyed at a scale of at least three chains to the inch for rural parishes or two chains for towns.¹⁷⁸ Overall, 53 percent of tithe maps were of a smaller scale and so were likely never intended to be first class.¹⁷⁹ Moreover, if three-quarters of landowners assented, a map of any specification could be used as the tithe map. This means first class tithe maps are 'very unevenly distributed across the country' as it was unfeasible to survey some areas at such large scales and some landowners preferred to save on the additional expense of producing a first class survey.¹⁸⁰ Thus, while each map stemmed from the tithe commutation, they are extremely varied. 'Some are very accurate plans, others are little more than crude sketches.'¹⁸¹

At least three copies of each tithe map were created. The Commissioners kept the original copy, and the Tithe Act 1836 s. 64 required two statutory copies were 'deposited in the registry of the diocese within which the parish is situated...[and] with the incumbent and church or chapel wardens of the parish'.¹⁸² Provision for additional copies or extracts was also given, but generally three were produced: the Commissioner, diocese, and parish tithe maps.¹⁸³ Differences between tithe maps were either a result of 'poor copying' or a 'deliberate choice on the part of local landowners and surveyors to produce a map for local retention at a different scale and degree of detail from that

¹⁷⁷ Kain and Prince, 103.

¹⁷⁸ TNA IR 18/14586, Tithe file for Mynyddyslwyn, Monmouthshire, c. 1836.

¹⁷⁹ Kain and Oliver, *The Tithe Maps of England and Wales*, 717.

¹⁸⁰ Kain, 'Interpreting Tithe Map Evidence', 99.

¹⁸¹ Kain, 'R. K. Dawson's Proposal in 1836 for a Cadastral Survey of England and Wales', 86.

¹⁸² The Tithe Act 1836, 6 & 7 Will. IV c. 71, s. 64

¹⁸³ The Tithe Act 1836, 6 & 7 Will. IV c. 71, s. 64

submitted to the London office of the Tithe Commutation'.¹⁸⁴ The absence or inclusion of features 'reflects individual landowners' and map-makers' perceptions of what a tithe survey should contain' with the 'local tradition of estate cartography' strongly influencing the final map.¹⁸⁵ Dawson recommended sienna for roads, red or grey for buildings, and blue for bodies of water.¹⁸⁶ As stated, there was no obligation to follow these recommendations and map-makers depicted rights of way in a plethora of manners. Roads are often coloured sienna, ochre, or some variation of brown, much like the enclosure maps. It was conventional to colour public highways sienna and leave private and occupation roads uncoloured, but this was not consistently applied.¹⁸⁷ As will be seen in Chapters 4, 5, and 6, most tithe maps examined in this study either depict the entire road network sienna or leave it uncoloured. Also, the idea that the tithe Commissioners used colour as a means to differentiate the legal status of routes is far from fully supported. It is more likely that the tithe map-makers used colour to distinguish the physical status of routes as such features which were more firmly within the map-makers' purview to ascertain.

Beyond the colouring of the road network, there are several other indications of status on the tithe maps. For example, the use of the phrase 'to' or 'from' a settlement is usually indicative of public status.¹⁸⁸ This implies a degree of public usage which would be unlikely in a private way. Also, 12 percent of maps name some or most roads.¹⁸⁹ This can be extremely valuable as a name may indicate the likely use of the road, such as Mill Lane, Gravelpit Way, or Church Road. Turnpikes were displayed on eight percent of tithe maps and were most often indicated by name or the presence of toll gates, only rarely was colour used to distinguish them from public highways.¹⁹⁰ The same was true for bridleways and

¹⁸⁴ Kain and Oliver, *The Tithe Maps of England and Wales*, 804.

¹⁸⁵ Kain and Oliver, 809.

¹⁸⁶ Dawson, 'Report from Lieutenant Dawson on Plans Required for the Tithe', Plate II.

¹⁸⁷ Kain and Oliver, *The Tithe Maps of England and Wales*, 751.

¹⁸⁸ Roger J. P. Kain and Hugh C. Prince, *Tithe Surveys for Historians* (Chichester, UK: Phillimore, 2000), 92.

¹⁸⁹ Kain and Oliver, *The Tithe Maps of England and Wales*, 751.

¹⁹⁰ Kain and Oliver, 746–47.

footpaths, which were usually indicated by single or double pecked lines. About 37 percent of maps 'distinguish footpaths or bridleways from other roads and highways'.¹⁹¹ However, the use of single or double pecked lines is problematic as it could equally represent an unfenced route, which may have held public or private rights. The individual details of each right of way may have been informed by the status of routes, but must be compared with the rest of the network on the same map, and, if possible, other maps from the same surveyor or in the same region. A comparison on this scale has not yet been completed but will greatly aid understanding of the depiction of rights of way on tithe maps.

To summarise, establishing the status of rights of way was incidental to the principal purpose of the tithe commutation. The Commissioners were tasked with assessing titheable land and were not concerned with the specific status of particular rights of way. As modern court cases can attest to, the status of a way is difficult to ascertain, and with the Commissioners having neither the luxury nor the inclination to determine status, it is unsurprising that their maps do not depict rights of way in any consistent fashion.¹⁹² The tithe apportionments and maps are difficult to interpret in large part because they are an extremely varied source. The maps were commissioned locally and were invariably drawn up by a local surveyor who may or may not have adhered to Dawson's attempts to prescribe standard conventions. 'Each tithe map is a unique creation. Though tithe surveys cover three-quarters of England and Wales, tithe maps are individual and should not be dubbed components of a 'national survey'.'¹⁹³ Nonetheless, although it is difficult to create any universal guide and each tithe apportionment and map must be analysed separately, they are still of monumental significance to rights of way research.

¹⁹¹ Kain and Oliver, 751.

¹⁹² A list of court cases related to the Tithe Act 1836 can be found in Planning Inspectorate, *Definitive Map Orders: Consistency Guidelines*, Section 8, 2nd revision, July 2013, 1–2.

¹⁹³ Kain and Oliver, *The Tithe Maps of England and Wales*, 810.

2.3 Finance Act 1910 documents and maps

The final source regularly consulted in cases seeking to determine the historic legal status of routes is documents relating to the Finance Act 1910.¹⁹⁴ This section explores the contemporary context of the Finance Act in order to clarify what the source sought to show. It also details the various documents and maps which survive today, with a focus on how each offer evidence of rights of way.

2.3.1 Historical context

The Edwardian era is commonly viewed as an 'age of political upheaval and reform'.¹⁹⁵ Conflict between old and new ideas can be found in many aspects of society as attempts to modernise the Army and Navy floundered and Home Rule, suffragette, and trade union movements struggled against conservative ideas.¹⁹⁶ A prelude to this conflict was arguably the 'People's Budget' introduced by David Lloyd George on 29 April 1909. The Liberals won a landslide election in 1906, ending a decade of Conservative and Unionist hegemony. A 'sequence of social legislation' followed, the money for which was 'found by increased taxation of that class which could most easily bear it — the landed elite'.¹⁹⁷ As Chancellor of the Exchequer, Lloyd George proposed a tax on 'the increment of value accruing to land from the enterprise of the community or the landowner's neighbours'.¹⁹⁸ This was born of the idea that land nearer concentrations of people increased in value despite no capital investment from the landowner, but rather due to the State's expenditure on roads, drainage, and other 'public' improvements. The bill was heavily resisted and, in an unprecedented move, rejected by the Lords on 30 November 1909, initiating the constitutional crisis of 1909–1910. It was unsurprising that the bill met fierce resistance when those in power held such

¹⁹⁴ Finance (1909–10) Act 1910, 10 Edw. VII c. 8.

¹⁹⁵ David Brooks, *The Age of Upheaval: Edwardian Politics, 1899–1914* (Manchester University Press, 1995), 5.

¹⁹⁶ Samuel Hynes, *Edwardian Turn of Mind* (Random House, 2011), 7–8.

¹⁹⁷ Brian Short, *Land and Society in Edwardian Britain*, vol. 25, Cambridge Studies in Historical Geography (Cambridge University Press, 1997), 11.

¹⁹⁸ Short, 25:20.

large landed interests; about two-thirds of those voting to reject the bill owned 'at least 5,000 acres of land'.¹⁹⁹ The knowledge that relatively few individuals owned a disproportionately large portion of the country was widespread following the publication of the *Return of Owners of Land* in 1875.²⁰⁰ This quickly acquired the name 'New' or 'Modern' Domesday as the first comprehensive cadastral survey since the Domesday Book in 1086.²⁰¹ The widespread interest in the *Return of Owners* was succeeded by John Bateman's *The Great Landowners of Great Britain and Ireland*, published in four editions between 1876–1883.²⁰² Such publications played a large part in the 'increased momentum built up against the Lords' from the 1870s.²⁰³ Lloyd George typified this radical view, describing the Lords as '500 men, ordinary men, chosen accidentally from among the unemployed'.²⁰⁴ The bill was reintroduced on 20 April 1910, and with the power of the Lord's veto lost, was signed into law by Edward VII on 29 April 1910.²⁰⁵

2.3.2 Finance Act 1910

The Finance Act 1910 provided for the 'Increment Value Duty', a 20 percent tax on any increase in the value of land between the initial valuation (30 April 1909) and when the land was later sold, transferred, or inherited. The Act was the first to introduce a 'super-tax', a surtax on those with annual incomes over £5,000, c. £500,000 today.²⁰⁶ It also gave landowners the opportunity to claim an array of abatements or deductions if land was subject to 'any public rights of way or any

¹⁹⁹ Short, 25:25.

²⁰⁰ John Lambert, ed., *Return of Owners of Land, 1873. Presented to Both Houses of Parliament by Command of Her Majesty* (London: Her Majesty's Stationery Office, 1875).

²⁰¹ David Spring, *The Great Landowners of Great Britain and Ireland*, ed. John Bateman, 4th ed. (Leicester University Press, 1971), 8.

²⁰² John Bateman, *The Great Landowners of Great Britain and Ireland. A List of All Owners of Three Thousand Acres and Upwards...Culled from the Modern Domesday Book*, 4th ed. (London: Harrison, 1883).

²⁰³ A. Taylor, *Lords of Misrule: Hostility to Aristocracy in Late Nineteenth and Early Twentieth Century Britain* (Springer, 2004), 104.

²⁰⁴ David Lloyd George, *Better Times: Speeches* (London: Hodder & Stoughton, 1910), 151, 174.

²⁰⁵ Short, *Land and Society in Edwardian Britain*, 25:26.

²⁰⁶ Finance (1909–10) Act 1910, 10 Edw. VII c. 8, s. 66.

public rights of user, and to any right of common and to any easements affecting the land, and to any covenant or agreement restricting the use of the land'.²⁰⁷ The public right of way deductions render the Finance Act especially important for rights of way research. It was anticipated that the valuation survey would be of future use for the 'business of central government, helping with a reform of the rating system and in cases of compulsory purchase'.²⁰⁸ The valuation process began in the summer of 1910 and was the 'most comprehensive record of land ever undertaken'.²⁰⁹ In fact, it is sometimes referred to as a modern or second Domesday like the *Return of Owners*. The Board of Inland Revenue was required to determine the value of all land in the United Kingdom as of 30 April 1909. As a result the Valuation Office expanded from a staff of 61 to 600, with 4,500 temporary employees.²¹⁰ The country was divided into 14 divisions with 118 districts and some 7,000 Land Valuation Officers were appointed to take charge of each income tax parish.²¹¹ These valuers were almost always the existing assessors of income tax, and thus it was 'people with the necessary local knowledge undertaking the crucial task of identifying each hereditament'.²¹² Information was collected across 13 million hereditaments for up to forty million items of information in England and Wales.²¹³

The entire valuation was completed by the autumn of 1915, taking five years and running just six months over schedule despite the onset of World War.²¹⁴ Inquiries which rely on the Finance Act documents often neglect to appreciate the extraordinary speed with which they were produced. The process was as fallible as any human endeavour, and while a remarkable achievement, should be examined in context. For instance, a clerk hired in June 1910 in the Dorchester District Valuation Office 'recalled working frequently until midnight to cope with

²⁰⁷ Finance (1909–10) Act 1910, 10 Edw. VII c. 8, s. 25(3).

²⁰⁸ Beech and Mitchell, *Maps for Family and Local History*, 37.

²⁰⁹ Zara Bowles, 'Rights of Way & the 1910 Finance Act', *Rights of Way Law Review*, September 1990, 17.

²¹⁰ Beech and Mitchell, *Maps for Family and Local History*, 38.

²¹¹ Short, *Land and Society in Edwardian Britain*, 25:45.

²¹² Short, 25:45.

²¹³ Short, 25:3–4.

²¹⁴ Beech and Mitchell, *Maps for Family and Local History*, 38.

the enormous workload, and not receiving the official instruction book as to procedures until December 1910. No typewriter arrived until October!²¹⁵ Issues of inadequate training, staff overworking, high turnover, and understaffing, although not rife, must be considered in the weighing of such evidence in the kinds of legal cases under consideration here.

The cost of the valuation was estimated at two million pounds, in excess of 200 million today, and it quickly became a 'fiscal white elephant'.²¹⁶ Full valuations were required even if land would fall short of the agricultural value needed to claim the 'Increment Value Duty'. With the cost of administering and collecting these property taxes exceeding the amounts actually collected, the 1910 Act was repealed by the Finance Act 1920.²¹⁷ Fortunately for scholars, the valuation was complete by this stage and provides vital historical evidence of the early twentieth century.

2.3.3 Finance Act 1910 documents and maps

The Finance Act valuation facilitated the production of three principal documents which typically survive: Field Books, Finance Act maps, and Valuation Books. 'The process also engendered a large and disparate group of documents.'²¹⁸ Numerous circulars, forms, and memos were employed by the valuers, although survival rates vary significantly. The Valuation Books, sometimes known as Domesday Books, were created by the Finance Act valuers at the outset. Each contains ownership, occupation, descriptions, and land use of properties copied from the parish 'Rate Book or 1910–11 'Schedule A' registers'.²¹⁹ The valuers then assigned each property a hereditament number, which was recorded in the Valuation Books. It should be noted that 'hereditament' is used in this context, and throughout this study, to refer to a 'unit of land ownership' rather than an

²¹⁵ Short, *Land and Society in Edwardian Britain*, 25:44.

²¹⁶ Beech and Mitchell, *Maps for Family and Local History*, 37.

²¹⁷ Finance Act 1920, 10 & 11 Geo. V c. 18.

²¹⁸ Short, *Land and Society in Edwardian Britain*, 25:89.

²¹⁹ Short, 25:54.

inheritable right of property as it is used in modern law.²²⁰ After the valuation, the final itemised valuation information was added.

Various forms were also produced, including forms detailing information about the valuation, and 'Forms of Return' which were survey forms sent to landowners. The most common was 'Form 4-Land' which was sent to ten and a half million landowners in August 1910.²²¹ Each landowner was expected to fill out detailed information concerning each hereditament they owned under penalty of £50, approximately £4,500 today. This included any deductions they wished to claim, such as those for commons, easements, or public rights of way. 'Form 4' quickly became 'notorious amongst landowners as an imposition upon their individual rights and freedoms'.²²² Various complaints were printed by the press ranging from the practical to the political. As outlined, Parliamentary opposition amongst the landowning elite was endemic. Many also complained of the 'complexity and difficulty of the forms themselves'.²²³ Particular concerns were raised about landowners being 'uncertain of the precise meaning of words, and afraid of making a mistake', especially as 'not one man in 500 has the remotest idea what [easement] means'.²²⁴ An article in *The Times* contains an apt summary of such difficulties:

But to ask a company of lawyers and surveyors if the terms are intelligible is absurd. You might as well send out a form full of chemical symbols and then call together the University professors of chemistry to say how simple they are.²²⁵

However, the extent to which such newspaper articles reflect the attitudes of the general populace is debatable. The response to 'Form 4-Land' will be explored in greater detail in Chapter 6, specifically within the context of deductions for public

²²⁰ Planning Inspectorate, *Consistency Guidelines*, Section 11, 5th revision, July 2013, para. 11.4.

²²¹ Beech and Mitchell, *Maps for Family and Local History*, 38.

²²² Short, *Land and Society in Edwardian Britain*, 25:57.

²²³ David Lloyd George, 'Land Valuation: The Chancellor's Reply to Complaints Forms and the Filling Up', *The Manchester Guardian*, 20 August 1910, 7.

²²⁴ 'Mr. Lloyd George and the Land Valuation Forms', *The Times*, 15 September 1910.

²²⁵ 'Mr. Lloyd George and the Land Valuation Forms'.

rights of way. Numerous other forms survive to varying degrees, such as 'Form 36-Land' which were sent to landowners following the provisional valuation giving them 'the opportunity to appeal'.²²⁶ This illustrates how central landowners were to the valuation process and the extent to which the Finance Act documents represent how landowners viewed their property. The office copy of this form, 'Form 37-Land', survive in larger numbers and, together with the Valuation Books, were 'offered to local repositories in 1979'.²²⁷ Provided they were accepted, both can offer valuable evidence of public rights of way.

Information collected by the valuers in the Valuation Books and Forms of Return was collated into Field Books which recorded the names of owner and occupier, owner's interest, tenancy, area, and the market value of each hereditament. As such, these documents contain more information than the Valuation Books, and may also include details concerning public rights of way. As Zara Bowles outlines:

The Field Book tax deduction claims, though not specifying the route of a right of way, can prove its existence across a recorded land holding or in some cases across an individual OS plot where the OS surveyors recorded (because of the disclaimer) that a track or path physically if not legally existed.²²⁸

With sufficient analysis it may therefore be possible to establish a link between Finance Act right of way abatements and the physical routes depicted on the OS maps. The Field Books can provide invaluable additional information to rights of way inquiries and it is important they are analysed together with the cartographic evidence.

Alongside this documentary evidence, Finance Act maps were produced by colouring OS maps based on the assigned hereditaments. These maps are

²²⁶ Bowles, 'Rights of Way & the 1910 Finance Act', 18.

²²⁷ Short, *Land and Society in Edwardian Britain*, 25:91.

²²⁸ Bowles, 'Rights of Way & the 1910 Finance Act', 19.

sometimes referred to as 1910 maps, Inland Revenue maps, or Valuation maps.²²⁹ The maps are also known as 'plans' or 'sheets' because the Valuation Office used various large-scale OS sheets for the valuation, including:

1. 1:500 late nineteenth century, not subsequently revised
2. 1:528 late nineteenth century, not subsequently revised
3. 1:1056 late nineteenth century
4. 1:2500 ordinary sales copies, unrevised
5. 1:2500 advance copies, prior to publication
6. 1:2500 partial revisions, the special edition 1912
7. 1:2500 partial revisions, printed, and with note in upper margin
8. 1:2500 ordinary sales copies with manuscript additions and alterations in dark blue
9. 1:2500 ordinary sales copies with manuscript revisions, probably Valuation Office copies of OS manuscript mapping
10. 1:2500 post-1912
11. 1:10560 ordinary sales copies, unrevised.²³⁰

The Finance Act maps were principally created from first revision 1:2500 OS maps and coloured according to the hereditaments identified and recorded in the documents. Revisions were necessary for urban areas which had experienced substantial change at the turn of the twentieth century, sometimes titled 'special edition 1912'. Manuscript revisions, either by OS surveyors or Finance Act valuers, are usually found in areas with less widespread change. The OS and Finance Act maps are inextricably linked, and an appreciation of the history of

²²⁹ Sarah Bucks and Phil Wadey, *Rights of Way: Restoring the Record*, 2nd ed. (Bucks & Wadey Publishing, 2017), 184.

²³⁰ All these examples were taken from Short, *Land and Society in Edwardian Britain*, 25:72 which were partly based on Oliver's addendum to Geoff Armitage, 'Ordnance Survey Land Valuation Plans', *Sheetlines*, Charles Close Society, 35 (January 1993): 8–9.

the OS surveys is necessary to understand the Finance Act maps.²³¹ Although sufficient space cannot be afforded to the history of the OS, two facts pertinent to rights of way emerge. First, historic OS sheets were based on local county projections which divided the country into sheets drawn at six inches to the mile (1:10,560). In 1857, a larger scale of 25 inches to the mile (1:2500) was introduced, 16 of which fit within a single 1:10,560 sheet. Landholdings of all sizes are thus sometimes arbitrary split across several sheets as each 1:2500 sheet depicts an area of 1.5 square miles. This also means rights of way occasionally extend across multiple sheets and may be treated differently by the Finance Act valuers. Second, the OS maps reflect topographical features present at the time of surveying and the *physical* depiction of rights of way was solely a result of decisions by the OS surveyors. The Finance Act valuers simply coloured land based on the hereditaments identified. Therefore, the particular lines, form, and shape of routes, including any *B.R.* and *F.P.* annotations, can be attributed to the attitudes of the OS surveyors rather than the Finance Act valuers.

The valuers produced two types of Finance Act map: working sheets and record sheets. Working sheets were taken into the field during the initial surveys whereas record sheets form the official record of the Finance Act 1910. The survival of the working sheets is sporadic, although large numbers 'were offered to local repositories in 1968', the size of the collection offered and acceptance varies greatly.²³² As an archivist in Hertfordshire noted; 'painfully aware, as I have within the past few days become, of the complications involved in the distribution of records of offices whose areas do not coincide with county and county borough boundaries'.²³³ The valuers coloured each map in two distinct fashions: either the whole hereditament would be coloured in a watercolour wash or only the boundaries of the land would be coloured. While making little difference to the valuation, the colouring has implications for rights of way

²³¹ For an overview of OS maps see Richard R. Oliver, *Ordnance Survey Maps: A Concise Guide for Historians*, 3rd ed. (London: Charles Close Society, 2013).

²³² Short, *Land and Society in Edwardian Britain*, 25:98.

²³³ HALS Public Record Acts H-Z, Internal archival records related to Finance Act 1910, 1968–1992.

research as it is sometimes difficult to ascertain whether a particular route is included as part of a hereditament. Recourse to the working sheets will occasionally bring clarity. Also, attention must be paid to the braces drawn by the valuers as these were used to connect separate parcels of land which formed part of the same hereditament.

In summary, since the Inland Revenue kept documents until 1968, and it was not until 1978 that they made the record sheets available for public inspection, the value of the Finance Act documents was not recognised until rather late.²³⁴ Moreover, the 'splitting of the documents connected with the survey has undoubtedly hindered the full appreciation of the worth of the material'.²³⁵ Today the record sheets and Field Books are held at The National Archives (TNA) while the working sheets and forms are typically preserved in local record offices. Nonetheless, today the Finance Act documents and maps regularly aid rights of way inquiries, chiefly when combined with other evidence.

2.4 Conclusions

This chapter has provided a brief overview of the three most commonly consulted sources in rights of way inquiries. Understanding the historic context of each source is vitally important if any conclusions are to be drawn. This is particularly the case in relation to rights of way, features which, at least for the tithe and Finance Act evidence, were not of principal concern to those creating these documents. It is important that the Parliamentary enclosure, tithe apportionments, and Finance Act documents are understood within this wider scope. Landscape history and cartographic history methodologies can greatly enhance the understanding of these sources, especially in interpreting how and why the sources depict rights of way. This has laid an important foundation for the following chapter, which explores how each source has been used in court.

²³⁴ Bowles, 'Rights of Way & the 1910 Finance Act', 18.

²³⁵ Short, *Land and Society in Edwardian Britain*, 25:92.

3 Rights of way law

This chapter will examine how the legal status of rights of way are determined in England and Wales. It begins by examining some general legal principals relating to rights of way, including how such rights are defined and how this has changed over time. It proceeds to explore the legal mechanisms which are used to create, record, and change public rights of way, although private rights of way will also be briefly examined. This research focuses on the evidence for rights of way and the interpretation of historic documents, a subject which is all the more important as the deadline to add historic public rights of way to the definitive map approaches.²³⁶ This chapter principally analyses how documents relating to Parliamentary enclosure, the Tithe Act 1836, and the Finance Act 1910 have been used to identify the legal status of rights of way. Each source will be examined in turn to establish how current case law has weighed such evidence. It is hoped this research will help place these sources within their historic context so that more accurate judgements can be reached.

3.1 Legal principles

British law is governed by a combination of common law and statute law. Common law, also known as case law, is ‘the body of principles inherent in the judgements of the courts’, while statute law is produced by ‘Acts of Parliament or legislation made under the authority of an Act’.²³⁷ The law relating to rights of way is complicated as it is governed by highway law, land law, property law, and planning law. Issues relating to public rights of way principally concern civil law, but may include criminal law, for instance, a highway authority can bring criminal proceedings against a ‘wrongdoer by indictment to abate nuisance’.²³⁸

²³⁶ Countryside and Rights of Way Act 2000, s. 53.

²³⁷ J. G. Riddall and John Trevelyan, *Rights of Way: A Guide to Law and Practice*, 4th ed. (London: Ramblers’ Association and Open Spaces Society, 2007), 13.1.1.

²³⁸ Stephen J. Sauvain, *Highway Law*, 5th ed. (London: Sweet & Maxwell, 2013), 7.02.

3.1.1 Defining rights of way

First, some terminology relating to rights of way will be examined. No comprehensive definition for 'highway' exists in the statute and the term is instead defined in common law.²³⁹ Two characteristics have been consistently identified: a highway is open to the public at large, 'all the King's subjects', and should be used for passage rather than solely for access.²⁴⁰ It may also be lawful to use highways for purposes other than the right of passage, most famously 'peaceful assembly' in the *Jones Stonehenge* case.²⁴¹ It is important to note that the public *at large* must have a right to use a road for it to be a highway. If a 'defined section of the public' or 'occupiers of adjoining land, together with their invitees' use the way, it is not a highway.²⁴² Similarly, church ways and other routes will not amount to highways if only parishioners have obtained the right to pass through immemorial custom.²⁴³

Public highways are divided into three legal categories: carriageways, bridleways, and footpaths. 'Carriageways' are byways open to all traffic which 'give the public a right of passage with vehicles'.²⁴⁴ According to the general principle of law, the greater includes the lesser right, which means the public have the right to use carriageways on horse and on foot, except in the case of statutory exceptions like motorways.²⁴⁵ 'Bridleways' are highways over which the public have a right of way on horseback or leading a horse, a right to ride bicycles, and a right on foot.²⁴⁶ Finally, 'footpaths' are self-explanatory: the public have a right of way on foot, carrying all the things it is usual for walkers to carry.²⁴⁷ Each

²³⁹ Stephen J. Sauvain, *Highway Law* (London: Sweet & Maxwell, 1989), vii.

²⁴⁰ Sauvain, *Highway Law*, 2013, 1–02.

²⁴¹ *DPP v Jones* [1999] 2 AC 240.

²⁴² Sauvain, *Highway Law*, 2013, 1–08.

²⁴³ Sauvain, 1–08.

²⁴⁴ Sydenham, *Public Rights of Way and Access to Land*, 1.3.2.

²⁴⁵ Sydenham, 1.3.2.

²⁴⁶ The Wildlife and Countryside Act 1981 s. 66(1) and Highways Act 1980 s. 329(1) define what a bridleway is, with the Countryside Act 1968 s. 30 extending the rights to include bicycles (which must give way to pedestrians and horse riders) which may be subsequently forbidden by local orders or bylaws.

²⁴⁷ Sydenham, *Public Rights of Way and Access to Land*, 1.3.5.

category may be additionally defined by statute, although the legislation can sometimes be contradictory. For instance, ‘footpath’ and ‘footway’ are distinct categories, with ‘footway’ defined as the way set aside for pedestrians alongside carriageways, but both terms are often used interchangeably in statute.²⁴⁸ Legislation has created novel terms for rights of way which further complicate matters. Of note are ‘byway open to all traffic’, ‘restricted byway’, and ‘road used as public path’ which are discussed in Section 3.1.3.²⁴⁹ On the other hand, terms such as ‘green lane’ have no legal definition but have entered common parlance.

Private rights of way are distinct and separate from public rights of way, although both may co-exist over a particular route.²⁵⁰ Private rights of way are easements which are defined as:

a right annexed to land to use other land in different ownership to do something on that land (not involving the taking of any part of the natural produce of that land or of any part of its soil) or to prevent the owner of the other land from using his land in one of a limited number of ways²⁵¹

This means private rights of way are not available to the general public and are instead usually reserved for adjoining landowners in the form of accommodation or occupation roads. Likewise, ‘to get to your (or someone else’s) house, flat, garage, office, field, or yard...invariably requires a private right of way to be present for lawful access’.²⁵²

To summarise, a ‘highway is essentially a public right to pass over a defined route’.²⁵³ While the terms ‘highway’ and ‘public right of way’ are synonymous, ‘road’ commonly refers to routes used by mechanically propelled vehicles and are seldom described as public rights of way.²⁵⁴ This study follows such conventions

²⁴⁸ Riddall and Trevelyan, *Rights of Way: A Guide to Law and Practice*, 1.2.1.

²⁴⁹ See glossary for a full list of terms.

²⁵⁰ Bickford-Smith et al., *Private Rights of Way*, 1.1 and 1.3.

²⁵¹ *Halsbury’s Laws of England*, 2017, 5th ed., vol. 87, 731; For a judicial treatment of easements see *Re Ellenborough Park* [1955] EWCA Civ 4.

²⁵² Bickford-Smith et al., *Private Rights of Way*, v.

²⁵³ Sauvain, *Highway Law*, 2013, 1–03.

²⁵⁴ Sydenham, *Public Rights of Way and Access to Land*, 1.2.

and uses 'road' for vehicular routes, and 'rights of way' for bridleways and footpaths, qualified by 'public' or 'private' where necessary. 'Route' is used where physical and legal status is unclear.

3.1.2 Creating rights of way

It is vital to understand how rights of way are created to fully appreciate how historic sources can aid decisions. 'Highways may be created by statute or by dedication and acceptance, either at common law or by statutory presumption.'²⁵⁵ Highways created by statute will not require dedication and acceptance and can instead be created upon construction, by declaration, by agreement, or by order.²⁵⁶ The Highways Act 1980 is used most often to create public rights of way in the form of creation agreements or orders under ss. 25 and 26. Today, highways are usually created under such statutory provisions, but 'recourse to the common law rules is necessary to establish whether disputed rights of way were dedicated in the past'.²⁵⁷ For a highway to be created by dedication and acceptance, five key elements are required.

First, the landowner must have an *intention* to dedicate a right of way over their land, this intention can be inferred from public use, but use does not create the highway.²⁵⁸ Second, the dedication must be for the *public at large* rather than 'limited to particular groups or classes of people — a right of way restricted to residents of a given parish, for example, does not amount to a public highway'.²⁵⁹ Third, the dedication must be in *perpetuity*, anything shorter merely constitutes permission.²⁶⁰ For example, landowners may grant the public permission to use a route in the form of a 'permissive path', preventing public rights from being acquired. Fourth, the landowner must have the legal *capacity* to dedicate. Thus,

²⁵⁵ Sydenham, 3.1.

²⁵⁶ Sydenham, 3.1.

²⁵⁷ Sydenham, 3.5.1.

²⁵⁸ Sydenham, 3.5.7.

²⁵⁹ *Encyclopedia of Highway Law and Practice*, vol. 1, Part II, para. 2-056.4.

²⁶⁰ Riddall and Trevelyan, *Rights of Way: A Guide to Law and Practice*, 3.1.

in *Williams-Ellis*, although ‘evidence was given of public user by five different classes of persons, extending over the whole period of living memory’, the judge held that since there was ‘no owner capable of dedication during the period of proved public user, he was not entitled to infer dedication from such user’.²⁶¹ Fifth, a highway must be *accepted* by the public. The creation of a highway imposes a burden on the local authority so ‘one would not expect the law to impose that burden’ unless the number of people was sufficient to provide value to the public at large.²⁶² This was especially important before the Highways Act 1835, when the local community were responsible for road maintenance.²⁶³

Although the dedication of a public right of way may be expressed by the landowner, it is more often implied ‘where the acts of the owner conclusively point to an intention to dedicate’.²⁶⁴ A dedication can either be inferred at common law or inferred by statute. Both require use to be ‘as of right’, which means without force, secrecy, or permission.²⁶⁵ To draw inference of a dedication at common law, the use of the route must be of sufficient length and quality such that it ‘should be obvious to the landowner that a route was being used by the public’.²⁶⁶ In one case 18 months of use was deemed sufficient.²⁶⁷ A landowner may successfully rebut a dedication by: putting up physical barriers, erecting notices, turning people away, and/or lodging statements and declarations with the highway authority.²⁶⁸ Parke B famously stated that ‘a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment’.²⁶⁹ A statutory deemed dedication, on the other hand, was first introduced by the Rights of Way Act 1932 and was updated in 1980:

²⁶¹ *Williams-Ellis v Cobb* [1935] 1 KB 310 (CA).

²⁶² Andrew Barsby, *Private Roads: The Legal Framework*, Fifth edition. (Bicester: Barsby, 2013), 3.19.

²⁶³ Highway Act 1835, 5 & 6 Will. IV c. 50.

²⁶⁴ *Encyclopedia of Highway Law and Practice*, vol. 1, Part II, para. 2-056.2.

²⁶⁵ The Latin forms, *nec vi, nec clam, nec precario*, are often used.

²⁶⁶ Sydenham, *Public Rights of Way and Access to Land*, 3.5.7.

²⁶⁷ *North London Railway Co v St Mary, Islington Vestry* (1872) 27 LT 672.

²⁶⁸ Sydenham, *Public Rights of Way and Access to Land*, 3.5.7.

²⁶⁹ *Poole v Huskinson* (1843) 11 M&W 827, 830.

Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.²⁷⁰

In *Parker*, Parliamentary enclosure evidence enabled the addition of a restricted byway to the definitive map even though the route had not been used by the public for a substantial period. The case also commented on the historic creation of highways: ‘where a highway is created by statutory powers, no user by the public or any act of any party is necessary to complete the creation’.²⁷¹ Whereas:

where the statute merely authorizes the setting out or making of a public road, then, in the absence of user amounting to adoption by the public of the road in an unfinished condition, no highway comes into existence until the road has been set out and made in substantial conformity with the statutory requirements²⁷²

Thus, it is possible for a highway set out by statute to not actually come into legal existence if the conditions of the statute were not satisfied. Of course, a highway may subsequently be created by dedication and acceptance, provided the five key elements discussed above are satisfied. Nonetheless, the fact that conditions can be attached to the creation of highways by statute will be particularly relevant for Parliamentary enclosure, discussed in Section 3.2.

Though private rights of way do not form the focus of this study, it is important to have a general understanding of how they too are created. As outlined, private rights of way are examples of easements, which are well-defined in law.²⁷³

²⁷⁰ Highways Act 1980, s. 31.

²⁷¹ *Parker v Nottinghamshire CC* [2009] EWHC 229 (Admin), 37.

²⁷² *Parker v Nottinghamshire CC* [2009] EWHC 229 (Admin), 38.

²⁷³ For a judicial treatment of easements see *Re Ellenborough Park* [1955] EWCA Civ 4; For a summary of easements as they relate to private rights of way see Bickford-Smith et al., *Private Rights of Way*.

Easements can be created by statute, prescription, express grant, implied grant, or in equity.²⁷⁴ Of interest here is ‘prescription’, informally referred to as ‘rights obtained by long use’.²⁷⁵ Much like public rights of way, the length of use and the legal capacity of the landowner to dedicate will be especially relevant. Private rights can be acquired at common law by continuous enjoyment since time immemorial. Since rights are unlikely to be proven since 1189, the courts introduced the doctrine of the ‘lost modern grant’, a legal fiction in which 20 years of use is sufficient evidence that a right was granted but since lost. A third method is by the Prescription Act 1832 which stipulates 20 years of uninterrupted enjoyment, rebuttable by oral consent, or 40 years, rebuttable only by written consent.²⁷⁶ It is important to be aware of the methods by which law seeks to rationalise and control the physical landscape.

3.1.3 Recording rights of way

For millennia, rights of way existed only in the physical world and in the memory of the local community. Meaning was ascribed in the landscape in the fences erected, trees and hedges planted, and stones placed to represent boundaries and ‘people clearly saw correspondences between the well-established physical footpath and the conceptual right of way’.²⁷⁷ Collective action, custom, disputes, and the environment could change the physical landscape. As Tom Johnson has outlined:

The legal landscape required constant labour, whether in the physical digging or hauling or building that brought the physical world back into line with the conceptual one, or in the ideational work of perambulations, views, and depositions that affirmed and reinforced its legal meanings.

²⁷⁴ Colin Sara and Daniel Doavar, *Boundaries and Easements*, 7th ed. (London: Sweet & Maxwell, 2019), 12.001.

²⁷⁵ Bickford-Smith et al., *Private Rights of Way*, 6.1.

²⁷⁶ Prescription Act 1832, 2 & 3 Will. IV c. 71, s. 2.

²⁷⁷ Tom Johnson, *Law in Common: Legal Cultures in Late-Medieval England* (Oxford University Press, 2019), 182.

Gradually from the medieval period to the twentieth century, written records superseded memory as the primary method of legitimising legal change.²⁷⁸ Recording rights of way became increasingly important as populations grew and economies expanded. Increased trade, improvements in wheeled vehicles, and increased mobility of the middle and upper classes brought a greater need for certainty in the transport network.²⁷⁹ Change was increasingly formalised in the eighteenth century, as will be explored below. Thus, more documentary evidence for rights of way exists from this point onwards, although 'there was never any centralised recording process'.²⁸⁰ The twentieth century witnessed unprecedented urbanisation and a corresponding increase in the use of public rights of way. The formation of organisations such as the Open Spaces Society and Ramblers' Association illustrate the growing appreciation of public rights of way, commons, and the countryside in general. Laws relating to rights of way have been radically amended and improved since 1938, largely because of these organisations.²⁸¹ The 1947 'Footpaths and Access to the Countryside' report recommended a survey be completed as 'an authoritative record of rights of way in this country'.²⁸² These recommendations were implemented in the National Parks and Access to the Countryside Act 1949 which created the definitive map and statement.

Definitive map and statement

The 'definitive map and statement' constitute a record kept by local authorities of the existing public rights of way within an area to ensure they 'do not disappear through neglect'.²⁸³ Surveying authorities are under a duty to keep their definitive

²⁷⁸ See M. T. Clanchy, *From Memory to Written Record: England 1066-1307*, 3rd ed. (Chichester: John Wiley & Sons, 2013); Johnson, *Law in Common*.

²⁷⁹ Harrison, 'A History of Evolution and Interaction', 211.

²⁸⁰ Bucks and Wadey, *Rights of Way*, 7.

²⁸¹ Riddall and Trevelyan, *Rights of Way: A Guide to Law and Practice*, 1.1.

²⁸² 'Footpaths and Access to the Countryside: Report of the Special Committee', Committee on Footpaths and Access to the Countryside, September 1947, para. 21.

²⁸³ Sydenham, *Public Rights of Way and Access to Land*, 5.1.1.

maps under 'continuous review'.²⁸⁴ The public rights of way are recorded on an OS map of 1:10,000 or smaller scale and the accompanying statement may detail 'the position or width of a right of way' and include 'any limitation or condition attached to the public rights'.²⁸⁵ Although this seems incontrovertible evidence, the language in the statement can be ambiguous. For example, the statement may record additional physical features and it can be unclear if the right of way was dedicated subject to these particular obstructions.²⁸⁶ Statutes introduced in the late twentieth century have altered the implementation of the definitive map and statement.²⁸⁷ Such legislation typically modify the terminology relating to rights of way, which is important to understand as older court cases may now use outdated terms. For instance, the Wildlife and Countryside Act 1981 s. 54 required that all routes classified as 'road used as public path' be reclassified as 'byways open to all traffic', bridleways, or footpaths. This sporadically occurred and so the Countryside and Rights of Way Act 2000 ss. 47–51 converted the remaining roads used as public paths to 'restricted byways' on 2 May 2006 in England (11 May in Wales).

The definitive map and statement 'provides conclusive evidence of the existence of public rights over a particular right of way' without prejudice to any additional higher rights existing.²⁸⁸ For instance, it was held in *Fowler* that a footpath recorded on the definitive map, under National Parks and Access to the Countryside Act 1949 s. 32(4)(a), did not preclude bridleway rights existing.²⁸⁹ It may be subsequently proven that rights were incorrectly recorded or omitted from the definitive map and statement. Equally, it will be necessary to update the definitive map where the status of a route has changed through agreements,

²⁸⁴ Wildlife and Countryside Act 1981, s. 53(2)(b).

²⁸⁵ Natural England, 'A Guide to Definitive Maps and Changes to Public Rights of Way - 2008 Revision', 2008, 4.

²⁸⁶ Sydenham, *Public Rights of Way and Access to Land*, 5.1.3.

²⁸⁷ Sydenham, 5.2.1, Acts include the Countryside Act 1968, Local Government Act 1972, Wildlife and Countryside Act 1981, and Countryside and Rights of Way Act 2000.

²⁸⁸ Natural England, 'Definitive Maps of Public Rights of Way', 34.

²⁸⁹ *R v Devon CC ex p Fowler* [1991] JPL 520.

enactments, or orders. Such changes are made through definitive map modification orders, discussed below.

As many historic public rights of way were subsequently uncovered, the definitive map and statement was amended by the Countryside and Rights of Way Act 2000. In order to provide landowners and the public with greater certainty, a cut-off date of 1 January 2026 was set for recording historic rights of way. Bridleways and footpaths which are not shown in the definitive map and which existed before 1 January 1949 (and are not exempted highways) will be immediately extinguished on the cut-off date.²⁹⁰ This means there is a greater need to identify historic rights of way which are still unrecorded, or incorrectly recorded, and amend the definitive map and statement. Campaigns such as the 'Don't Lose Your Way' project by the Ramblers' aim to record such rights before the cut-off date. The Countryside and Rights of Way Act 2000 only applies to bridleways and footpaths because the Natural Environment and Rural Communities Act 2006 changed the law so that since 2 May 2006 the use of mechanically propelled vehicles can no longer give rise to a public right of way of any kind.²⁹¹

The Deregulation Act 2015 'provides for the removal or reduction of burdens on businesses, civil society, individuals, public sector bodies and the taxpayer'.²⁹² It contains several amendments to the Highways Act 1980, the Wildlife and Countryside Act 1981, and the Countryside and Rights of Way Act 2000. In short, the Deregulation Act 2015 will introduce 'in England new streamlined and simplified procedures for updating the definitive map where applications are made for modification orders'.²⁹³ Although such provisions were due to be implemented in 2016, this has not happened.²⁹⁴

²⁹⁰ Countryside and Rights of Way Act 2000, s. 53.

²⁹¹ Natural Environment and Rural Communities Act 2006, s. 66(2).

²⁹² Deregulation Act 2015, s. 3.

²⁹³ Sydenham, *Public Rights of Way and Access to Land*, 8.1.

²⁹⁴ Sydenham, *Public Rights of Way*, 1.2.8.

3.1.4 Changing rights of way

Public rights of way, once established, continue to legally exist even if they are not physically apparent or have not been used for a number of years. Public rights of way can only be terminated by use of a statutory provision.²⁹⁵ This concept is popularly expressed by the maxim *once a highway always a highway*. Historical sources are therefore critically important as the identification of public rights, excepting any statutory provision to the contrary, will constitute evidence of continuing rights to this day.

Historically, there were limited ways in which a right of way could be diverted, extinguished, or stopped up. Before the Highways Act 1773, processes to extinguish highways were 'expensive and time-consuming'.²⁹⁶ Two principal methods existed: an Act could be obtained in Parliament, or a writ of *ad quod damnum* could be made. These Chancery writs instructed the sheriff to determine 'to what damage' a proposed act would cause and were used for a wide range of purposes since the medieval period, including proposed diversions or extinguishments of highways. A jury would be appointed to decide, and anyone aggrieved by the process was entitled to have their appeal heard in the Quarter Sessions. The Highways Act 1773 empowered justices in Special Sessions of the Quarter Sessions to make orders for diverting or stopping-up highways.²⁹⁷ The proposed changes would be inspected and an order made by at least two justices, after which notices were erected and the changes were circulated in local newspapers.²⁹⁸ These road orders streamlined the process and made it easier for the local elite to divert and stop-up disadvantageous highways. Harrison's study of Cambridgeshire, Norfolk, and Suffolk found that appeals against road orders were 'extremely rare', although it is unclear if this represents approval or acquiesce on the part of the public.²⁹⁹ By the nineteenth century, many rights of

²⁹⁵ Riddall and Trevelyan, *Rights of Way: A Guide to Law and Practice*, 2.2.

²⁹⁶ Highways Act 1773, 13 Geo. III c. 78; Harrison, 'A History of Evolution and Interaction', 214.

²⁹⁷ Highways Act 1773, 13 Geo. III c. 78, ss 19 and 20.

²⁹⁸ Harrison, 'A History of Evolution and Interaction', 255.

²⁹⁹ Harrison, 255.

way were diverted or extinguished by Parliamentary enclosure Acts. These proved a more convenient method to change large areas of the landscape at a stroke, and many rights of way can trace their origins back to Parliamentary enclosure awards. As such they are regularly used in legal cases which seek to determine the historic status of rights of way and were analysed in detail in Section 2.1.

Today, most highways are diverted or stopped up by public Acts of Parliament. Statutory provision exists across a multitude of Acts.³⁰⁰ The Highways Act 1980 is the principal method by which changes are now made. Public rights of way are updated by definitive map modification orders. The modification will be suggested, and notice will be given in the local press and directly to owners and occupiers of land affected. If no objections are received, the local authority can confirm the order. Orders must go to the Department of the Environment, Food and Rural Affairs (DEFRA) if objections are not withdrawn. An Inspector is then appointed who will consider the case before any changes are made. Written evidence may be received, and a formal hearing may take place. The Inspector will then make a decision based on all the evidence.

3.1.5 Evidence for rights of way

Having established how highways are defined, created, recorded, and changed, it is necessary to explore how evidence for rights of way is weighed and judged. Applications to record a public right of way or change how a public right of way is recorded on the definitive map require evidence which comes in two forms: documentary evidence and user evidence. User evidence is usually represented by evidence forms in which a set of questions are asked of the public, or statutory declarations made under the Statutory Declarations Act 1835.³⁰¹ It illustrates the continuing importance of memory to this day. This research concerns the

³⁰⁰ For a full list of statutes consult Riddall and Trevelyan, *Rights of Way: A Guide to Law and Practice*, 7.1.2.

³⁰¹ Statutory Declarations Act 1835, 5 & 6 Will. IV c. 62.

interpretation of documentary evidence which is a record indicating the legal status of a particular route. This evidence 'is sometimes open to more than one interpretation, and the interpretation claimed and the strength of the evidence may be contested'.³⁰² The standard of proof required is based on the 'balance of probabilities' used in civil cases rather than the 'beyond reasonable doubt' used in criminal cases. The test essentially compares the likelihood of one scenario over another to determine whether a possibility is likely to be true. The Inspector explained it as such in *Maltbridge*:

I accept that the Tithe and Finance Act data is not conclusive, and that it can be assessed only on a balance of probabilities. This means that the most likely explanation for what is shown on these maps should be preferred over less likely alternatives.³⁰³

As will become apparent, this research will be vital in helping to balance the evidence and provide authority that one possibility is more likely than another.

Documentary evidence created from statute needs to be carefully considered. Three legal rules determine statutory interpretation: the golden rule, literal rule, and the mischief rule. These have developed from the decisions of courts and can more accurately be described as 'approaches to interpretation' rather than rules.³⁰⁴ Nonetheless, the literal rule, otherwise known as the plain meaning rule, interprets the language of the statute according to its ordinary meaning. The mischief rule accounts for the reason the Act was created, reading it in a way which best affects this purpose. The golden rule is a weaker version of the mischief rule and allows statutes to be read in terms that best effect justice, minimally modifying so as to prevent absurdity. Also of note is the purposive approach, which considers the purpose of the statute by consulting additional materials such as Hansards, reports by government bodies, statute drafts, and white papers. Purposive interpretation was recommended by the Law

³⁰² Riddall and Trevelyan, *Rights of Way: A Guide to Law and Practice*, 6.3.1.

³⁰³ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] CO/540/98 (QB) [30].

³⁰⁴ Law Commission, 'The Interpretation of Statutes', 9 June 1969, para. 22.

Commission in 1969 and has since been regularly employed by the courts.³⁰⁵ Understanding these different approaches to statutory interpretation can help explain why specific judgements were made.

Consistency Guidelines

The Planning Inspectorate published *Definitive Map Orders: Consistency Guidelines* in April 2003 to assist in the interpretation and weighing of evidence for definitive map modification orders.³⁰⁶ Until April 2016, the guidelines were updated as new judgements were given. This is perhaps the clearest example of a legal document establishing 'rules' to determine the admissibility of evidence for rights of way. The guidelines provide advice on the admissibility of different forms of evidence, notably, documents relating to Parliamentary enclosure Acts, the Tithe Act 1836, and Finance Act 1910. This is a contextual area of law that Parliament and the judiciary are reluctant to define. As such, it is important to note from the outset, as the document does, that the guidelines 'are neither definitive nor exhaustive and...are subject to change, whether by the application of new case law, or as a result of new understanding following academic research'.³⁰⁷ This is precisely the place of this academic research.

The *Consistency Guidelines* highlight the difference between 'cumulative' and 'synergistic' approaches and that co-ordination rather than repetition increase the collective impact of the sources.³⁰⁸ For example, the enclosure and tithe maps for Collyweston were both created in 1842 and appear almost identical (FIGURES 4 and 5). As a result, the sources are less valuable than enclosure and tithe maps produced at different times. As noted in the Highways Act 1980: 'the status of the person by whom and the purpose for which it was made' need to be considered

³⁰⁵ Law Commission, para. 81(b).

³⁰⁶ Planning Inspectorate, *Consistency Guidelines*, April 2003.

³⁰⁷ Planning Inspectorate, *Consistency Guidelines*, Section 1, 2nd revision, July 2013, para. 1.8.

³⁰⁸ Planning Inspectorate, *Consistency Guidelines*, Section 2, 5th revision, July 2013, para. 2.17.

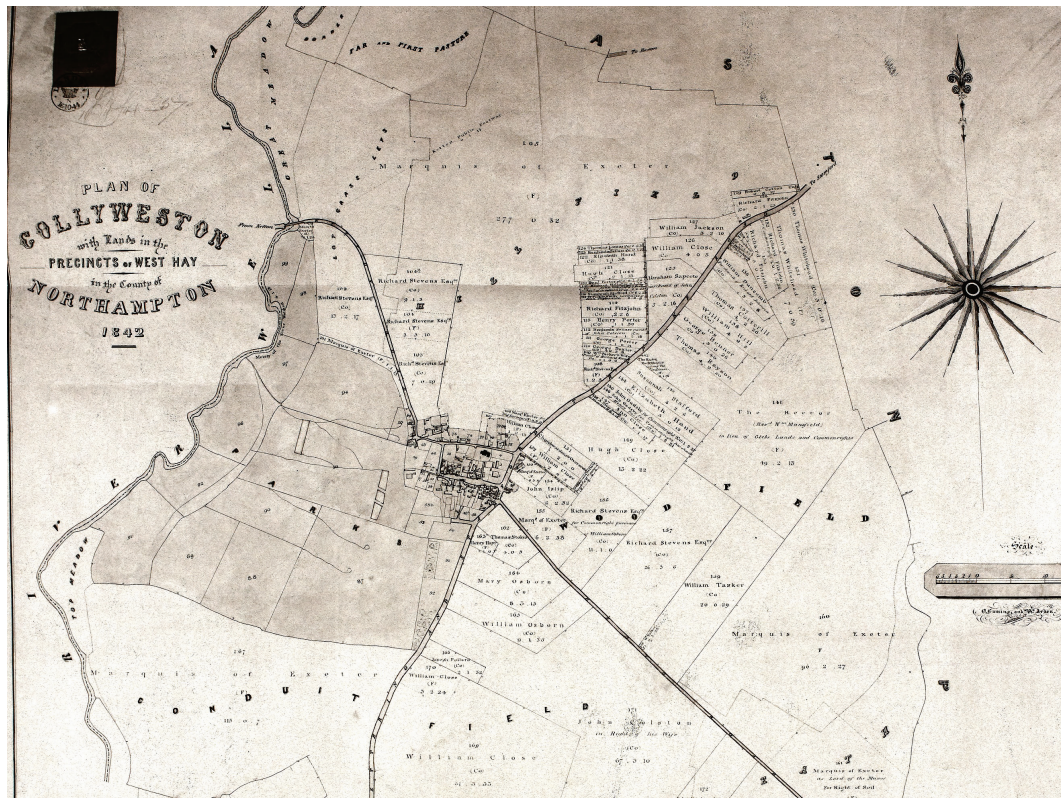


FIGURE 4 NHRO Map/3009, Collyweston enclosure map, 1842.

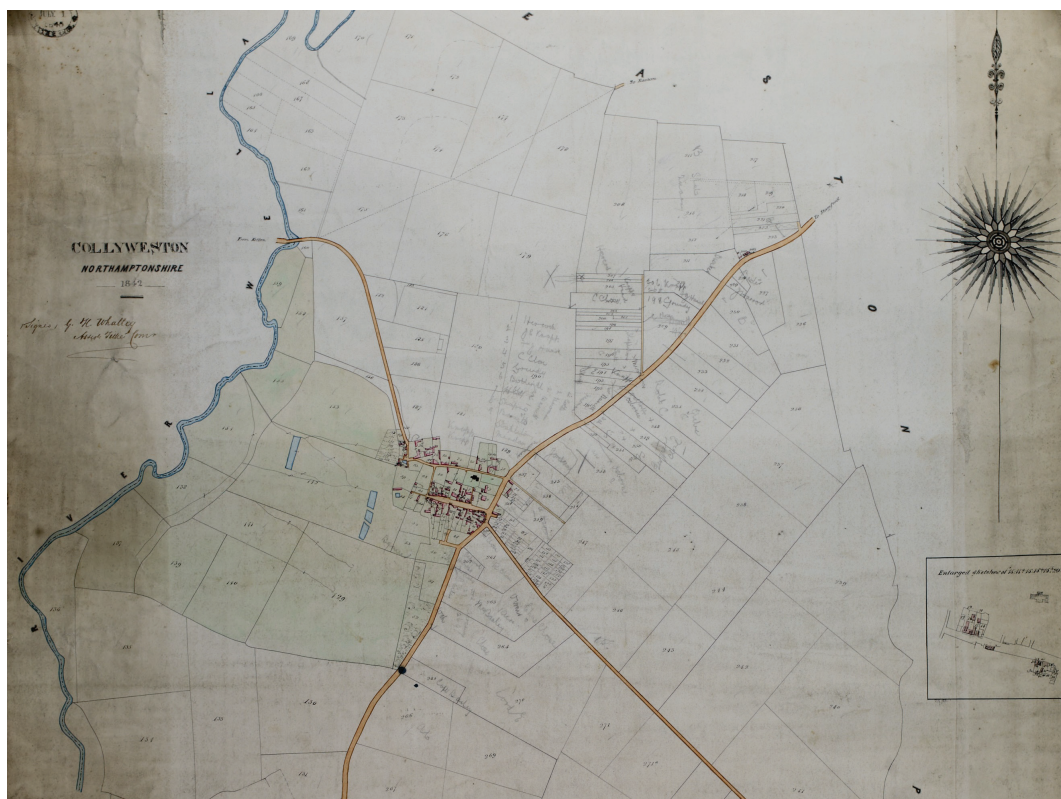


FIGURE 5 NHRO T/169, Collyweston tithe map, 1842.

to accurately judge each source.³⁰⁹ Moreover, the ‘facts surrounding its creation and its provenance’ and whether the procedures for producing the source ‘involved external checks or public participation’ should be examined.³¹⁰ Such information is critical if the validity of the sources is to be accurately judged. For example, the Finance Act was a private process in which landowners received and returned forms individually while the Parliamentary enclosure process involved public meetings in a local venue. Such facts are particularly relevant where public rights of way are concerned. Next, some key themes arising from this research will be explored before the principal historical sources used in rights of way inquiries are examined.

Notoriety

‘Notoriety of use’ may be defined as how widely known the use of a particular route is. The greater the notoriety of use, the more readily a dedication can be inferred at common law since it will be difficult for the owner to claim that there was no intention to dedicate.³¹¹ Conversely, notoriety of the owner’s lack of intention to dedicate will also be critical. *Fairey* was the leading authority on this very issue for over forty years.³¹² Denning LJ stated:

We ought to assume that in 1931 when the landowner turned back strangers, he did it in so open and notorious a fashion that it was made clear, not only to strangers, that they had no right to use the path, but also to local residents, that they only used it by tolerance of the owner.³¹³

Denning LJ’s position was subsequently judged too extreme by Sullivan J in which ‘evidence of the landowner’s intention must be overt and

³⁰⁹ Highways Act 1980, s. 32.

³¹⁰ Planning Inspectorate, *Consistency Guidelines*, Section 2, 5th revision, July 2013, paras. 2.19–2.20.

³¹¹ Planning Inspectorate, *Consistency Guidelines*, Section 5, 9th revision, February 2016, para. 5.49.

³¹² *Fairey v Southampton CC* [1956] 2 QB 439.

³¹³ *Fairey v Southampton CC* [1956] 2 QB 439, 457–458.

contemporaneous...but he is not required to publicise his intention to users of the way'.³¹⁴ A year later, Dyson J concluded that it would be rare to find 'sufficient evidence of a lack of intention to dedicate in the absence of overt and contemporaneous acts on the part of the owner'.³¹⁵ *Godmanchester* pointed out that this made no sense: who better to give evidence on the landowner's state of mind than the landowner.³¹⁶ Establishing historic notoriety is similarly difficult. Cartographic evidence may indicate public usage where routes are annotated 'to' or 'from' named places. There is a persistent idea that any named route is indicative of public status, likely because the Highways Act 1773 s. 69 required common highways to be 'named before indictment for obstruction or disrepair could take place'.³¹⁷ However private roads can equally be named and thus caution should be applied when using the name of a route to establish notoriety of use, and such evidence should be balanced with other factors.³¹⁸

Language

Research into the legal status of rights of way is further complicated by the fact that language evolves over time. As already seen, terminology is not consistently applied in statute, and is particularly inconsistent in historic statutes and records. For instance, it was not unusual for Parliamentary enclosure awards to use two or three words to describe a single route. 'A certain Field Road, Carriage and Driftway' was used to describe a single route in Aston, Hertfordshire.³¹⁹ In Greens Norton, Northamptonshire, the enclosure Commissioners specified a number of uses, describing some roads as 'Private Carriage and Drift Road Bridle Road and

³¹⁴ *R v Secretary of State for the Environment, Transport and the Regions ex p Billson* [1999] QB 374, 395.

³¹⁵ *R v Secretary of State for the Environment, Transport and the Regions ex p Dorset CC* [2000] JPL 396.

³¹⁶ *R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs* [2007] UKHL 28.

³¹⁷ Highways Act 1773, 13 Geo. III c. 78; Planning Inspectorate, *Consistency Guidelines*, Section 2, 5th revision, July 2013, para. 2.31.

³¹⁸ Planning Inspectorate, *Consistency Guidelines*, Section 2, 5th revision, July 2013, para. 2.32.

³¹⁹ HALS QS/E10, Aston enclosure award, 1860.

Foot Path[s]'.³²⁰ It is common for roads to appear as 'road *or* highway' or 'road *and* highway' in the Parliamentary enclosure awards, which casts doubt on their precise definitions. It seems definitions were more fluid and may have varied by region, or perhaps dialect, as will be examined in Chapters 4 and 5.

As the world develops, definitions evolve. This is especially true for terminology relating to rights of way as maintenance and use change over the decades and centuries. Some terms like 'trunk roads' or 'motorway' were newly coined for new routes made possible with the advent of cheap motor vehicles. Most terms have been reused and acquired new meanings over time. This makes deciphering historic terminology and applying it to the physical environment a difficult task. Defining terminology has proven a perennial problem into the modern era. Terms such as 'road' and 'street' are haphazardly defined across the legislation, with different Acts providing different definitions and 'the same word in different contexts may bear different meanings'.³²¹ It is hoped this study will shed some light on these issues but more work remains to be done, particularly into the semantics of Parliamentary enclosure awards.

Public vs private

Although there is considerable disagreement over the precise meaning of 'highway', 'carriage road', 'driftway' and the like, by far the most divisive terms are 'public' and 'private'. Much like the terminology related to rights of way, these concepts have evolved over time. It is all too easy to apply our modern-day definitions to concepts which would not have been applied contemporarily. 'Public' has today acquired a different meaning from its eighteenth, nineteenth, and twentieth century definitions. It may have been used in a more restrictive sense to refer to a specific body of people such as the inhabitants of a particular parish. For example, some roads were deemed 'public' in the Parliamentary enclosure awards but were reserved for the use of the parishioners, technically

³²⁰ NHRO Enclosure 55, Greens Norton enclosure award, 1799.

³²¹ Barsby, *Private Roads*, 1.21.

making them 'private' by any modern definition. Seymour expressed this, but it will be necessary to consider the contemporary context as it is easy to draw erroneous conclusions.³²² Concepts of 'privacy' have also evolved over time. The idea of a 'private' road is today more nuanced than it was in the past. Practical concerns would have been paramount from the earliest of times with maintenance liability being foremost in the minds of contemporaries. Parliamentary enclosure awards thus regularly specify who was to maintain private roads, and who they were set out for. Something like 'for use and convenience of William Elkington and the said Thomas Higgs' was commonplace.³²³ This itself is part of the wider narrative of exclusion in which roads were stopped up, diverted, and use was limited. Of course, such concepts should not be pushed too far as practical access to new allotments was the principal concern. Some enclosure awards also emphasised that all who needed to use the roads could do so. For instance, the 'private roads shall be for the use and convenience of *all* the Owners and Occupiers of land and estates in the said parish' (emphasis added), further blurring the line between 'private' and 'public'.³²⁴ Moreover, many roads identified as 'private' at Parliamentary enclosure may have been subsequently adopted as public highways. It is equally possible for private vehicular rights to co-exist with lesser public rights, further complicating interpretations of 'private' routes.

There is undoubtedly a friction between the historic and modern definitions of 'public' and 'private', but this extends to much of the terminology related to right of way networks. In a more rural society, routes were primarily agricultural with public and private usage being far less important than maintenance. Over time, this has shifted as routes have become more recreational and usage has become increasingly important. The change from 'agriculture' to 'recreation' represents a fundamental shift in how particular routes are used and conceptualised. This is a key concept which will be returned to later in the thesis. While 'public' and

³²² Colin Seymour, 'Public of the Locality' (The Byways and Bridleways Trust, 2004).

³²³ NHRO ZA3766, Barby enclosure award, 1779.

³²⁴ HALS CP107/26/1, Westmill enclosure award, 1819.

'private' are often contrasted with one another, this may not be the most suitable approach as the definitions and connotations of the terms today may not have applied in the past. Also, the binary distinction between 'public' and 'private' may not be appropriate for certain routes. Perhaps historic routes should instead be viewed as part of a continuum of possible statuses.

It is hoped this research will help clarify how much reliance should be placed upon the Parliamentary enclosure, Tithe Act 1836, and Finance Act 1910 documents in differing circumstances. It must be understood that there are a range of factors upon which the courts may place weight and the sources discussed here, in isolation, are rarely conclusive. Historic sources must be used in conjunction with one another to provide the most compelling evidence. The findings of this thesis can help aid these legal disputes by placing the sources within their wider historic context.

3.2 Parliamentary enclosure Acts, awards, and maps

In contrast to other commonly consulted sources, Parliamentary enclosure awards created rights *de novo* and thus offer unrivalled historical evidence of routes at their inception. Parliamentary enclosure Commissioners had powers to ‘stop up and divert existing roads and to create replacement roads’, which means some roads described and depicted were not necessarily created *de novo*.³²⁵ Likewise, Parliamentary enclosure may ‘provide evidence of the existence of public rights over a way which was not itself changed by the Award’.³²⁶ As such, it will be necessary to carefully analyse the relevant Parliamentary enclosure evidence to ascertain what changes were made. This section analyses how the Parliamentary enclosure Acts, awards, and maps have been used in court cases which seek to determine the historic status of routes.

3.2.1 Parliamentary enclosure Acts and awards

Documents relating to Parliamentary enclosure survive in abundance but the evidence they provide is extremely complex, with numerous general and local Acts which vary in the precise powers they gave to Commissioners. It is important to check that the award is within the powers conferred by the enabling Act.³²⁷ The interpretation of antique statutes and awards is difficult, and judges have applied variations of the golden, literal, and mischief rules. As discussed below, the *Andrews* cases illustrate different approaches to the enclosure Acts.³²⁸

Since each Act and award prescribed slightly different procedures, some Commissioners may subsequently be deemed to have acted *ultra vires*. This means correct procedure was not complied with and certain changes could be considered invalid. *Cubitt* found that, although the enclosure Commissioner

³²⁵ Sydenham, *Public Rights of Way and Access to Land*, 7.4.2.

³²⁶ Riddall and Trevelyan, *Rights of Way: A Guide to Law and Practice*, 6.3.2.

³²⁷ Sydenham, *Public Rights of Way and Access to Land*, 160.

³²⁸ *R v Secretary of State for the Environment ex p Andrews* (1996) 71 P & CR 1; *R (Andrews) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWCA Civ 669, [2016] 3 All ER 1022.

awarded a 40-foot public road which was detailed in the award and map in 1808, it was never formed and completed.³²⁹ This meant that it did not satisfy the requirements of ss. 8 and 9 of the Inclosure (Consolidation) Act 1801 and was accordingly never made a highway.³³⁰ Similar disagreements followed the 1801 Act, most notably *Harber* and *Logan*.³³¹ Both cases concerned ss. 8 and 11 of the 1801 Act which required the 'Concurrence and Order of Two Justices of the Peace' to 'stop up any old or accustomed Road', and stipulated that 'all Roads, Ways, and Paths, over, through, and upon such Lands and Grounds which shall not be set out as aforesaid, shall for ever be stopped up and extinguished'.³³² The failure to obtain a Justice's order ensured that, in both cases, footpaths continued to legally exist following enclosure, notwithstanding the stipulation in s. 11. This demonstrates the importance of ascertaining whether the enclosure award was properly implemented and 'whether the stated roads were actually laid out'.³³³ Of course, decades or centuries may have passed before the actions of the enclosure Commissioners are called into question, and the situation may well have changed since. Robert Wright was indicted for encroaching on a road described as private by a 1771 enclosure award.³³⁴ While the Commissioners specified a 24-foot private road, 60 foot had been left and, by 1832, the township had been repairing the central portion for 18 years. As Lord Tenterden CJ said:

when I see a space of [50 or 60 foot] through which a road passes, between inclosures set out under an Act of Parliament...the public are entitled to the whole of that space, although perhaps on economy the whole may not have been kept in repair.³³⁵

Thus, although originally intended to be private, the road had been subsequently dedicated and adopted by the public. In all these examples, there was a fundamental difference between the Commissioners' intentions and the actual

³²⁹ *Cubitt v Maxse* (1873) LR 8 CP 704.

³³⁰ The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109, ss. 8 and 9.

³³¹ *Harber v Rand* (1821) 147 ER 20 (KB); *Logan v Burton* (1826) 108 ER 191 (KB).

³³² The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109, ss. 8 and 11.

³³³ *Encyclopedia of Highway Law and Practice*, vol. 1, Part II, para. 2-068.

³³⁴ *R v Wright* (1832) 110 ER 248.

³³⁵ *R v Wright* (1832) 110 ER 248 [683].

outcome. Either correct procedure was not complied with, or the physical or legal status of the route had subsequently changed. This emphasises that the characteristics of the road, both contemporary and subsequently, need to be considered to accurately judge legal status.

The Inclosure (Consolidation) Act 1801, which standardised existing procedures, has proved particularly divisive in several court cases, partly because of the antiquated construction of language. *Andrews* illustrates how judges' views can differ.³³⁶ It began in 1993 when a definitive map modification order to add a footpath was rejected. The footpath in question was described by the enclosure Commissioners but it was successfully argued that the 1801 Act did not give the Commissioners the requisite powers to create this new public footpath.³³⁷ The 1801 Act s. 10 stipulated that the Commissioners may:

set out and appoint such Private Roads, Bridleways, Footways, Ditches, Drains, Watercourses, Watering Places, Quarries, Bridges, Gates, Stiles, Mounds, Fences, Banks, Bounds and Land Marks, in, over, upon, and through, or by the Sides of the Allotments³³⁸

It was judged that the natural grammatical construction of s. 10 meant 'private' applied to all subsequent nouns and that the enclosure Commissioners had therefore acted *ultra vires*. The case was re-examined in 2014 and s. 35 of the 1801 Act was considered.³³⁹ This stated that the enclosure award was to be enrolled at Westminster or with the Clerk of Peace and 'Award and Copies shall be legal Evidence, and Award shall be binding on all Parties interested'.³⁴⁰ It was argued that this prevented any challenges to the Commissioners' decisions. The court did not consider this appropriate, as it had no desire 'to validate for all time something the Commissioner had had no right to do because no-one had

³³⁶ *R v Secretary of State for the Environment ex p Andrews* (1996) 71 P & CR 1.

³³⁷ *R v Secretary of State for the Environment ex p Andrews* (1996) 71 P & CR 1.

³³⁸ The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109, s. 10.

³³⁹ *R (Andrews) v Secretary of State for Environment, Food and Rural Affairs* [2014] EWHC 1435 (Admin), [2014] 4 All ER 718.

³⁴⁰ The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109, s. 35.

objected at the time'.³⁴¹ Thus the original decision was upheld and was subsequently appealed in 2015.³⁴² The Court of Appeal took a purposive interpretation and considered s. 10 of the 1801 Act within the context of the time. It is easy for semantics to rule when interpreting statutes but the construction of individual words in an Act should not prove more important than the contemporary intentions of that Act. If the enclosure Commissioners interpreted an Act as giving them specific powers and they acted accordingly, their decisions should not be reversed, especially when the nature of the process is considered.

Parliamentary enclosure was a public process in which an appointed official discussed and made arrangements with a local group of people to reconfigure their landholdings. The Commissioners' powers should not be removed in retrospect if the community was content with the changes. Also, earlier local Acts regularly permitted Commissioners to set out public bridleways, and it is unlikely that they were not given similar powers in the 1801 Act. As Yolande Hodson emphasised, the Commissioners continued to interpret the 1801 Act 'as giving them the authority to set out public bridleways and public footpaths'.³⁴³ It is apt to see the court consider the atmosphere in which the general Acts, local Acts, and awards were created. The Parliamentary enclosure process enclosed vast areas of land, altering the physical landscape such that it was often necessary to redraw the network of roads, bridleways, and footpaths. Bridleways and footpaths were regularly noted since they remained an important means of travel before the twentieth century. It would have made little sense for the Commissioners to have been denied powers to alter pre-existing or create new bridleways and footpaths. As such, the original *Andrews* case was overruled and it was deemed that the Inclosure (Consolidation) Act 1801 s. 10 authorised

³⁴¹ *R (Andrews) v Secretary of State for Environment, Food and Rural Affairs* [2014] EWHC 1435 (Admin), [2014] ACD 128 [8].

³⁴² *R (Andrews) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWCA Civ 669, [2016] 3 All ER 1022.

³⁴³ Yolande Hodson, 'Footpaths and Bridleways in Inclosure Acts 1801-1845', *Rights of Way Law Review*, September 2011, 183.

Commissioners to set out public bridleways and footpaths.³⁴⁴ This case demonstrates the importance of specific wording in the enclosure Acts. After overturning the initial decision, the courts have now applied a purposive rather than a literal interpretation to these statutes. This is more appropriate for historic statutes which were intended as general guides for Commissioners at the time.

Significant semantic debate has taken place in relation to enclosure awards as well. In particular, the *Dunlop* case concerned the precise definition of 'private carriage road'.³⁴⁵ Mr Dunlop appealed against a definitive map modification order reclassifying a track as a byway open to all traffic. It was countered that 'private carriage road' in a Parliamentary enclosure award meant a road for private carriages and that, since the road ran between a village and hamlet, 'private carriage road' referred to the 'local' aspect of the road, and 'private' was used to avoid maintenance duties. Both arguments were rejected since there was nothing to suggest any distinction was made between public and private carriages, and there was 'little or no lexicographical support' for interpreting 'private' as 'local'.³⁴⁶ *Dunlop* concluded that 'private carriage road' meant a limited if unspecified class of user and was distinct from 'public carriage road' which gave unrestricted use to the public.³⁴⁷

The term 'private carriage road' was also debated in *Gallagher*, a case which balanced numerous forms of historic cartographic evidence to decide if Beoley Lane was a public carriageway.³⁴⁸ The 1824 Studley enclosure award described the south eastern end of Beoley Lane as a 'private carriage road and driftway'. Following *Dunlop*, it was decided that 'private' did apply to 'driftway'. The evaluations of this thesis confirm that no Parliamentary enclosure awards employ

³⁴⁴ *R v Secretary of State for the Environment ex p Andrews* (1996) 71 P & CR 1; *R (Andrews) v Secretary of State for Environment, Food and Rural Affairs* [2015] EWCA Civ 669, [2016] 3 All ER 1022.

³⁴⁵ *Dunlop v Secretary of State for the Environment and Cambridgeshire CC* (1995) 94 LGR 427.

³⁴⁶ Planning Inspectorate, 'Rights of Way Advice Note 11: The Meaning of "Private Carriage Road"', 1 March 2001, para. 10.

³⁴⁷ *Dunlop v Secretary of State for the Environment and Cambridgeshire CC* (1995) 70 P & CR 307, 319.

³⁴⁸ *Commission for New Towns v Gallagher Ltd* [2002] EWHC 2668, [2003] 2 P & CR 3.

the term 'private carriage road and *private* driftway' or any variation thereof. This supports the semantic conclusions of *Gallagher* that 'private', when used in this context, applies to all subsequent nouns. The enclosure map also contained the annotation 'from Beoley', which was held to be an indication of public highway status.³⁴⁹ When combined with all other evidence, Neuberger J concluded that, on the balance of probabilities, the lane was a public carriageway. He emphasised that this was not a case of counting the sum pieces of evidence but weighing their collective value.³⁵⁰ This illustrates that Parliamentary enclosure is not unequivocal and can be overturned by other forms of evidence.

A common issue concerning Parliamentary enclosure awards is whether the Commissioners intended to make a public highway or a private route for a number of individuals.³⁵¹ Some of the private roads identified by the enclosure awards were, as in Westmill, Hertfordshire: 'for the use and convenience of all the Owners and Occupiers of land and estates in the said parish having occasion to use the same'.³⁵² Thus, it can be difficult to disassociate private ways which were used and maintained by local parishioners from public highways for the general public. Many 'private' roads which were set out for numerous individuals eventually acquired public rights, a point which will be discussed in Chapter 5. Enclosure awards make frequent mention of private roads being available for *general* use. It appears 'private' in this sense 'could sometimes refer to a way which was to be a highway but repairable not by the public (that is the parish) but by the residents of a hamlet or even by an identified landowner'.³⁵³ This precise situation arose in *Buckland*.³⁵⁴ The 1797 enclosure award in question stated:

that the several Private Roads or Ways...[were]...for the use and benefit of all and every the Owners, Tenants and Occupiers of the several and

³⁴⁹ J. Andrews, 'Tithe Map Case Studies', *Rights of Way Law Review*, February 1994, 69.

³⁵⁰ *Commission for New Towns v Gallagher Ltd* [2002] EWHC 2668, [2003] 2 P & CR 3 [123].

³⁵¹ Bickford-Smith et al., *Private Rights of Way*, 7.12.

³⁵² HALS CP107/26/1, Westmill enclosure award, 1819.

³⁵³ Bickford-Smith et al., *Private Rights of Way*, 7.16.

³⁵⁴ *Buckland v Secretary of State for the Environment, Transport and the Regions* [2000] EWHC Admin 279, [2000] 1 WLR 1949.

respective Divisions and allotments...and all and every other person or persons whomsoever having any occasion whatsoever to go travel, pass and repass through, upon and over the same Roads and Ways and every or any or either of them on foot or on Horseback with Horses, Cattle, Carts and other Carriages Loaded or unloaded.³⁵⁵

It was thus argued that, since these private roads were for the use of all, they were effectively public highways, with 'private' referring only to the maintenance duties. Such an argument was not upheld, as Kay J stated: 'the Commissioners did not have power under the Act of 1797 to create a public highway otherwise than in accordance with the precise powers given under the statute'.³⁵⁶ Creating a private road but making it 'open to the public at large' did not create a public highway as this would allow the Commissioners 'to circumvent the conditions necessary'.³⁵⁷ These conditions were detailed in the Shiphams and Winscombe Inclosure Act 1797, which, although proceeding the 1801 Act, contained similar provisions.³⁵⁸ For one, the surveyor was to form the public roads to a set standard whereafter they were to be certified by Justices of Peace at the Quarter Sessions within three years. The 1797 Act also prescribed that public roads were to be a breadth of 40 feet but Barton Road, the road in question, was set out at 24 feet. Thus, Kay J felt the Inspector had made a decision based on a 'fundamentally flawed position' as the statute had not given the Commissioners the 'power to create a public highway in the guise of a private road' and the decision was quashed.³⁵⁹ Nonetheless, Kay J did not make a specific judgement on the status of the road in question. It was conceded that a road described as 'private' may

³⁵⁵ Somerset Archives and Local Studies Q/RDE/13, Shiphams and Winscombe Inclosure Act 1797, 37 Geo. III, c. 95 and Shiphams and Winscombe Inclosure award and map, 1799.

³⁵⁶ *Buckland v Secretary of State for the Environment, Transport and the Regions* [2000] EWHC Admin 279, [2000] 1 WLR 1949, 1960.

³⁵⁷ *Buckland v Secretary of State for the Environment, Transport and the Regions* [2000] EWHC Admin 279, [2000] 1 WLR 1949, 1960.

³⁵⁸ Somerset Archives and Local Studies Q/RDE/13, Shiphams and Winscombe Inclosure Act 1797, 37 Geo. III, c. 95 and Shiphams and Winscombe Inclosure award and map, 1799.

³⁵⁹ *Buckland v Secretary of State for the Environment, Transport and the Regions* [2000] EWHC Admin 279, [2000] 1 WLR 1949, 1961.

subsequently become a public highway 'if the evidence establishes either express dedication or user such as to give rise to the presumption of dedication'.³⁶⁰ This research seeks to identify whether roads identified as private by Parliamentary enclosure appear in a consistent fashion on other historical documents.

3.2.2 Parliamentary enclosure maps

While many documents provide evidence for the existence of rights of way, those relating to Parliamentary enclosure are unique in that Commissioners created, confirmed, and extinguished rights of way.³⁶¹ The process of enclosure was sanctioned by an Act of Parliament, which followed a statutory process including rights of complaint by the public.³⁶² The extent to which such objections were suppressed and do not survive in the historical record is an open question, although any suggestion of impropriety on the part of the Commissioners holds little weight. Both public and private rights of way are depicted on a map with accompanying descriptions in the award. This source thus offers highly conclusive evidence of status and forms some of the strongest evidence in legal inquiries. Consider *Roberts* in which an enclosure map of 1859 was used to infer that a public highway existed before 1835.³⁶³ It also established that a public highway may be a cul-de-sac leading to a 'beauty spot', with Widgery J stating there must be 'some kind of attraction at the far end which might cause the public to wish to use the road'.³⁶⁴ However, Parliamentary enclosure evidence will not always amount to evidence for the non-existence of such rights. In *Harber*, the omission of a path from an enclosure map was not evidence that such a path did not exist and carry public rights.³⁶⁵ This mirrors the definitive map evidence,

³⁶⁰ *Buckland v Secretary of State for the Environment, Transport and the Regions* [2000] EWHC Admin 279, [2000] 1 WLR 1949, 1960.

³⁶¹ Chris J. Willmore, 'Inclosure Awards: Public Rights of Way', *Rights of Way Law Review*, July 1990, 1.

³⁶² Bucks and Wadey, *Rights of Way*, 36.

³⁶³ *Roberts v Webster* (1967) 66 LGR 298.

³⁶⁴ *Roberts v Webster* (1967) 66 LGR 298.

³⁶⁵ *Harber v Rand* (1821) 147 ER 20 (KB).

which can only be used to identify rights of way and the absence of a route cannot be used as evidence of its non-existence. Enclosure maps can also provide evidence of 'ancient' pre-existing routes in cases where an entire parish is surveyed but only part of it is enclosed. These routes are depicted on the map but are rarely described in the accompanying awards. Although these 'ancient' routes were not set out officially by the enclosure awards, they deserve to be treated with some weight as they were compiled within the statutory and legal framework of a Parliamentary Act.

Each Parliamentary enclosure map is different, and each case must be 'examined individually in the context of all the local circumstances'.³⁶⁶ This research has uncovered some general patterns. For one, public rights of way are often coloured sienna or some variation of light brown on the enclosure maps and are typically annotated 'First Public Road' or simply 'No. 1'. Private rights of way are similarly annotated and occasionally differentiated from the public roads by colour. Stopped up ways, if included, are often in another colour. The award describes the location of rights of way and sometimes describes their length, width, and, in the case of private ways, who held usage and maintenance rights. Such information can offer evidence of a route's legal status. For instance, s. 8 of the 1801 Act required that all 'Roads and Highways shall be, and remain Thirty Feet wide at the least', so such widths may give an inference of public status.

The Parliamentary enclosure Acts, awards, and maps are thus valuable sources for rights of way cases. Not only do they offer reasonably early large-scale mapping for a large portion of the country, but they are the only early source which specifically set out and engaged with carriageways, bridleways, and footpaths. The display of routes is incidental to many other sources and so the Parliamentary enclosure forms an invaluable body of evidence in determining the historic legal status of rights of way.

³⁶⁶ Planning Inspectorate, *Consistency Guidelines*, Section 7, 3rd revision, February 2016, para. 7.40

3.3 Tithe apportionments and maps

This section will examine how documents relating to the Tithe Act 1836 have been used in court cases to establish the existence of rights of way. The tithes represented a tax paid to the church as a tenth of agricultural produce. The Tithe Act 1836 abolished these payments in kind and enabled the creation of tithe apportionments and maps.³⁶⁷ Unlike Parliamentary enclosure, the tithe commutation did not set out or record rights of way, rather, it was concerned with identifying titheable land for tax purposes. On its own, the tithe commutation 'is no evidence of a public right of way...[but] may lend support to other evidence'.³⁶⁸ As such, the tithe apportionments and maps regularly appear in judgements relating to rights of way.³⁶⁹

3.3.1 Tithe apportionments

The tithe apportionments are statutory documents. Each is standardised and lists the owner, occupier, name, acreage, and land use of parcels of land numbered on the tithe maps. The landowner of each parcel will be especially relevant to rights of way inquiries. In *Agombar*, the 1875 tithe apportionment for Colerne, Wiltshire, listed a route in the occupation of 'Parish Officers' and this was considered strong evidence that the route was 'a public highway within the responsibility of the parish officers'.³⁷⁰ This will similarly be the case for routes in the occupation of 'surveyor of highways' or other public officials.³⁷¹ Parcels with apportionment numbers were not necessarily titheable, as determined by the 'Amount of Rent-Charge apportioned' column which included the amount payable to the tithe owner. This may be relevant to status inquiries since land which was not titheable may raise the presumption of public rights existing. 'It

³⁶⁷ The Tithe Act 1836, 6 & 7 Will. IV c. 71.

³⁶⁸ Sydenham, *Public Rights of Way and Access to Land*, 7.4.4.

³⁶⁹ A list of court cases can be found in Planning Inspectorate, *Consistency Guidelines*, Section 8, 2nd revision, July 2013, 1–2

³⁷⁰ *Robinson Webster (Holdings) Ltd v Agombar* [2001] EWHC 510 (Ch), [2002] 1 P & CR 20 [44].

³⁷¹ Bucks and Wadey, *Rights of Way*, 76.

should be remembered that some routes, such as wide droves, were titheable, if a crop could be taken from them.³⁷² The importance of grass and herbage is illustrated by the frequency with which such rights were allotted to individuals at Parliamentary enclosure.

Some routes are numbered and listed in a separate section of the tithe apportionment. These have been interpreted in different ways by historians and lawyers alike. Christopher Padley intimates that there are two lists titled 'roads' and 'private roads' respectively.³⁷³ Three years later John Andrews stated that the 'weightiest evidence comes from verbal descriptions...there may be a list of public roads at the end of the apportionment which refers by name or by number to the routes shown on the map'.³⁷⁴ Kain's opinion is worth detailing in full:

It is commonly held that if tithe rentcharge is not apportioned to roads which are, therefore, not referenced to the schedule of apportionment with tithe area numbers but are entered as a global acreage of 'roads and waste' in the final, summary section of the tithe apportionment, then this is evidence that these roads are the public roads of the tithe district. These may well be the public roads, but the reason why tithe rentcharge was not apportioned on these roads was not because of their public status, but because like waterbodies, beaches, cliffs and other 'barren' land defined as such by the 1836 Tithe Commutation Act, they generated no tithable produce. Private roads could be equally barren and thus not liable to tithe.³⁷⁵

Erica Eden, formerly an Inspector with the Planning Inspectorate, argued that the tithe documents may be used as evidence for the existence of public rights if 'the order route is numbered and the description for the matching number in the apportionment is "Public Road"'.³⁷⁶ This situation occurred in *Ridley* where the

³⁷² Bucks and Wadey, 79.

³⁷³ Padley, 'Tithe Records', 28.

³⁷⁴ Andrews, 'Tithe Map Case Studies', 68.

³⁷⁵ Kain, 'Interpreting Tithe Map Evidence', 100.

³⁷⁶ Erica Eden, 'Maps in Evidence of Public Rights of Way', *Rights of Way Law Review*, October 2011, 200.

1841 tithe map for Cleeve in Somerset gave the route in question an apportionment number and named the route 'Lane' in a separate section of the apportionment titled 'Roads Rivers & Waste'.³⁷⁷ On the basis of this, and evidence from the Finance Act 1910, it was concluded that the route was a bridleway rather than a footpath.³⁷⁸ This study has found further instances of routes listed in a separate section of the tithe apportionment and each will be examined in order to clarify the legal status of such routes.

Numerous routes were not given an apportionment number, either because they were not titheable or had no individual owner. As will be explored in Chapter 4, tithe map-makers and valuers approached the numbering of roads in different ways. In *Gallagher*, the route in question appears without a number on the tithe map for Beoley, Worcestershire, but is numbered on the adjoining tithe map for Studley, Warwickshire.³⁷⁹ While each tithe map was created for the same purpose, each was an original creation made in a different place for a different group of people. The design of each tithe apportionment and map was shaped by the landowners, local customs, and cartographic traditions.

3.3.2 Tithe maps

Tithe maps are frequently used as evidence in inquiries which seek to determine the physical and legal status of routes. The 'tithe maps are an extremely heterogeneous class of map' and in no way constitute a national cadastral survey, so it is unsurprising that they have not been uniformly accepted by the courts.³⁸⁰ 'Some are quite beautiful examples of the cartographer's art employing the system of conventional signs recommended by Dawson...But many plans show

³⁷⁷ *Ridley v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 171 (Admin), [2009] CO/610/2008 and CO/4063/2008 [42].

³⁷⁸ *Ridley v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 171 (Admin).

³⁷⁹ *Commission for New Towns v Gallagher Ltd* [2002] EWHC 2668, [2003] 2 P & CR 3.

³⁸⁰ Kain and Oliver, *The Tithe Maps of England and Wales*, 23.

little more than the boundaries of tithe areas and the position of buildings.³⁸¹ This was especially true following the Tithe Act 1837 which established two classes of map: first class, which were signed and sealed by the Commissioners; and second class, of more varied quality.³⁸² Before the twentieth century, only sealed first class maps had been admitted as evidence.³⁸³ *Antrobus* proved that second class tithe maps could be admissible in cases relating to whether or not a public road existed.³⁸⁴ It was argued that lands which were 'not titheable are matters which concern all the parish'.³⁸⁵ This public aspect of the tithe commutation is vitally important, as Stuart V-C stated: 'the Act of Parliament requires these things to be done, not in a corner, but upon notice in all the most public places; so that it is impossible to treat this document otherwise than as a public one'.³⁸⁶ The depiction of roads on tithe maps was therefore a public matter intimately linked to the identification of titheable land. The depiction of routes on tithe maps was thus a material matter related to the productivity of the parcel of land and its titheable produce. No distinction was necessarily made between public and private roads as both could diminish the titheable produce of land. *Mertsham* added: 'their object is to show what is titheable, and the roadways are marked upon them as untitheable parts of the land whether they are public or private'.³⁸⁷

While tithe maps will not offer evidence of the legal status of a road, they have long been held admissible for its physical existence.³⁸⁸ In *Loughlin*, the omission of a road on an 1846 tithe map was used as evidence that it did not exist in 1835.³⁸⁹ However, Lord Denning acknowledged that a footpath may have existed, which means the tithe maps offer evidence of the physical *existence* of roads or footpaths,

³⁸¹ Kain, 'R. K. Dawson's Proposal in 1836 for a Cadastral Survey of England and Wales', 86.

³⁸² The Tithe Act 1837, 7 Will. IV & 1 Vict. c. 69, s. 1

³⁸³ *Smith v Lister* (1895) 64 LJQB 154 (QB).

³⁸⁴ *A-G v Antrobus* [1905] 2 Ch 188 (Ch).

³⁸⁵ *A-G v Antrobus* [1905] 2 Ch 188 (Ch) 194.

³⁸⁶ *Giffard v Williams* (1869) 38 LJ Ch 597 (Ch) 604.

³⁸⁷ *Mertsham Manor Ltd v Coulsdon and Purley UDC* [1936] 2 All ER 422 (KB) 439.

³⁸⁸ *Encyclopedia of Highway Law and Practice*, vol. 1, Part II, para. 2-068.

³⁸⁹ *Kent CC v Loughlin* (1975) 234 EG 681 (CA).

but only the physical *non-existence* of roads.³⁹⁰ Detailed depiction of physical features can nonetheless be especially useful in determining the historic status of a route. For instance, in *Ridley*, the tithe evidence was vital in establishing that the route in question appeared in two distinct sections, one enclosed and one partly open to adjoining land, suggesting lower status.³⁹¹ 'The assertion by the landowner of the existence of a road—which would have exempted the part of his land from tithe—would be strong evidence of his acceptance of the existence of a defined way across his land.'³⁹² While acceptance of a defined way may signal some level of public rights, this was not necessarily the case since sustained private use, especially industrial, would likewise be sufficient to limit the titheable produce of a defined route. As Farwell J argued:

It is certainly to the interest of any one who has land part of which is not tithable to put forward his claim and establish it if he can...If it was a road it would not be tithable, and if it is not a road then it would be tithable as part of the land...it is obvious that it was material to him, if he could, to say that there was a road there in order to escape the tithe.³⁹³

It is important to place the social actors at the centre of any inquiry. The idea of 'escaping' the tithe is important as it highlights possible motivations of contemporary landowners, but the proclivities of the tithe map-makers and valuers must also be considered.

Following the Tithe Act 1837, tithe map-makers were increasingly free to dictate the design and style of their maps. Some employed Dawson's recommendations of sienna for roads, red or grey for buildings, and blue for bodies of water, but many left roads uncoloured.³⁹⁴ Andrews argued that if a road was exempt from tithe liability and identical to confirmed public highways, this may be a sufficient

³⁹⁰ *Kent CC v Loughlin* (1975) 234 EG 681 (CA).

³⁹¹ *Ridley v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 171 (Admin).

³⁹² *Encyclopedia of Highway Law and Practice*, vol. 1, Part II, para. 2-068.

³⁹³ *A-G v Antrobus* [1905] 2 Ch 188 (Ch) 194.

³⁹⁴ Dawson, 'Report from Lieutenant Dawson on Plans Required for the Tithe', Plate II.

indication of public status.³⁹⁵ However, this is difficult to apply in practice, especially in relation to the colouring of roads which have proven particularly divisive. For instance, in *Maltbridge*, the Inspector's original decision letter stated:

On the Sawbridgeworth [in Hertfordshire] tithe map of 1839 the route was shown, in common with other local highways, coloured ochre and without a plot number. It was not identified individually in the tithe map apportionment as a private road, although other private roads in the area were. These facts suggested that it was considered at the time to be a public vehicular highway.³⁹⁶

However, the definitive map officer for Hertfordshire countered:

Most roads are shown in ochre, although some, those crossing open fields, are not. It is unlikely that the colouring of a road is used to distinguish public from private, since some road which may have been private roads running thorough parks, for example at Hyde Hall, are coloured ochre.³⁹⁷

These contrasting arguments emphasise how difficult it is to determine legal status from the colouring of routes on the tithe map. The weight of such evidence will depend upon the circumstances.

The degree to which the tithe, or indeed any map, can be used as evidence of the width of a route has been much debated. Most historic maps are not detailed enough to show the precise dimensions of a particular road, and even large-scale OS maps prove insubstantial when dealing with the ever-increasing minutiae of features on the ground. In *Copestake*, Parker J said it was 'the business of the persons responsible for the making of this map to ascertain what land in the parish was, and what was not, titheable. It was not their business to define the

³⁹⁵ Andrews, 'Tithe Map Case Studies', 68.

³⁹⁶ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] CO/540/98 (QB) [10].

³⁹⁷ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] CO/540/98 (QB) [5.26].

extent of public rights of way.³⁹⁸ Likewise, Salmon J interpreted the tithe evidence as determining the existence of a highway, but not its width in *Webb*:

These maps, although they are evidence of the existence of a highway, are not evidence of the boundaries of the highway...The cartographer merely records the physical features which he considers of importance, and which he observes on the ground. He is not a lawyer, and does not purport to interpret, or even to consider, the legal significance of what he sees.³⁹⁹

However, since then, cases which considered the 'hedge to hedge presumption' have used historic maps as evidence for the physical boundaries of highways. For instance, in *Beynon*, Goff J:

[Admitted the tithe map as evidence] for the purpose of showing that there was non-titheable land on the non-metalled roadside and that there was a physical boundary to the highway. [Emphasising that] The map will not be direct evidence that there was any right of way over non-titheable land.⁴⁰⁰

It follows that the tithe map evidence can, in certain situations, help determine the physical boundary of public highways. In contrast, the tithe maps cannot be used as evidence for the non-existence of narrower routes like bridleways and footpaths.⁴⁰¹ Such routes rarely appear on the tithe maps principally because the tithe Commissioners were concerned with the titheable produce of the land rather than specific rights of way. Equally, the absence of some routes from the tithe maps may reflect their seasonal or customary nature, as it would have been impractical or impossible for the tithe map-makers to depict all unenclosed routes which crossed the landscape. In *Stoney*, the tithe map was not admitted as evidence for a public footpath.⁴⁰² While roads prevented titheable produce

³⁹⁸ *Copestake v West Sussex CC* [1911] 2 Ch 331 (Ch) 341.

³⁹⁹ *Webb v Eastleigh BC* (1958) 56 LGR 124 (QB) 127.

⁴⁰⁰ *A-G v Beynon* [1970] Ch 1 (Ch).

⁴⁰¹ See earlier discussion on *Kent CC v Loughlin* (1975) 234 EG 681 (CA).

⁴⁰² *Stoney v Eastbourne RDC* [1927] 1 Ch 367 (CA).

growing and were thus excluded from the tithe survey, the same was not deemed the case for footpaths. As Sargant LJ stated:

I can quite understand that in the case of definite roads, where the cultivation of the soil is prevented, those roads would not be titheable; but to say that an ordinary pasture or arable field, over which a right of public footpath exists, has its titheability confined to the 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.⁴⁰³

Thus, 'no deduction is made from any field where a public right of way is shown in respect of the area of the strip of path in question'.⁴⁰⁴ The tithe Commissioners were not expected to make, nor do they appear to have made, deductions in their commutation to allow for such public rights of way. It was probably felt that ascertaining the legal status of narrow rights of way would have been unnecessarily onerous on the tithe Commissioners considering their negligible impact on the titheable produce of parcels of land.

As we have seen, the tithe apportionments and maps were 'undoubtedly relevant as to both the existence, and physical extent, of a way at the relevant time'.⁴⁰⁵ However, as consistently emphasised in cases such as *Merstham*, *Loughlin*, *Gallagher*, and *Maltbridge*: 'because both public and private roads were not titheable, the mere fact that a road is shown on, or mentioned in, a tithe map or apportionment, is no indication as to whether it is public or private'.⁴⁰⁶ Sullivan J also added:

if detailed analysis shows that even though he was not required to do so, the cartographer, or the compiler of this particular map and

⁴⁰³ *Stoney v Eastbourne RDC* [1927] 1 Ch 367 (CA) 407.

⁴⁰⁴ *Stoney v Eastbourne RDC* [1927] 1 Ch 367 (CA) 407.

⁴⁰⁵ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] CO/540/98 (QB).

⁴⁰⁶ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] CO/540/98 (QB).

apportionment, did in fact treat public and private roads differently, whether by the use of different colours, the use or non-use of plot numbers, or other symbols, or in schedules or listings, I do not see why evidence based upon such analysis should not be admissible as to the existence, or non-existence of public rights of way. Whether the analysis does lead to such a conclusion, and if so, what weight should be attributed to the conclusion is a matter for the Inspector. Since it was not one of the purposes of the 1836 Act to distinguish between public and private roads, such information as can be derived from the tithe map and apportionment cannot be conclusive, and must by its very nature be tentative.⁴⁰⁷

Plainly, the identity and proclivities of the social actors who helped create these sources is of paramount importance. This was discussed in the Chapter 2, but it is important to note that specific cases will require vigorous analysis of the individuals involved. A detailed examination of these social actors is beyond the scope of this thesis but would be extremely valuable for both the historic understanding of these sources as well as their use in court.

The tithe apportionments and maps have been found most valuable when supporting other forms of evidence. Each is a 'unique creation' and their evidential weight will vary accordingly.⁴⁰⁸ The motivations of the social actors who created them must be interrogated if the sources are to aid legal disputes. For instance, although most tithe apportionments and maps do not display bridleways and footpaths, some map-makers depicted them. Particular attention must also be paid to whether the tithe map was certified as first or second class, but second class maps can be equally valuable in corroborating other forms of evidence. Although it has taken a significant period of time for the tithe apportionments and maps to be recognised as beneficial evidence in rights of way cases, they have now been firmly established as an important source in their own right.

⁴⁰⁷ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] CO/540/98 (QB).

⁴⁰⁸ Kain and Oliver, *The Tithe Maps of England and Wales*, 810.

3.4 Finance Act 1910 documents and maps

The Finance Act 1910 documents are regularly consulted in rights of way disputes today.⁴⁰⁹ Like the Tithe Act 1836, the Finance Act 1910 assessed land for taxation purposes and did not establish rights of way. The display of rights of way was thus incidental to the primary purpose of the Finance Act. It has nonetheless proved vitally important in several rights of way cases.⁴¹⁰ The Finance Act holds evidential value of the legal existence of public rights of way where:

- documents specifically refer to a public right of way; or
- maps exclude a route from surrounding hereditaments.

Each will be examined separately to determine how the courts have weighed the Finance Act evidence. This will aid future inquiries which seek to determine the historic status of rights of way. The contemporary background of the Finance Act was examined in Section 2.3, but some facts bear repeating. The Finance Act was the ‘most comprehensive record of land ever undertaken and became known as the Second Domesday’.⁴¹¹ As Short highlighted: ‘local people with local knowledge undertook the valuation and conducted the detailed consultation with the owner of the land’ and the 1910 Act ‘contained criminal sanctions for falsification of evidence’.⁴¹² The Finance Act is doubtless an incredibly important source, but its scale and significance can sometimes disguise its limitations. The valuation was carried out with remarkable speed and there was no public consultation process, so local people were not given the opportunity to review or object to any parts of the valuation. Each hereditament was insular and concerned only the landowner (or agents acting on behalf of large landowners) and the valuers tasked with creating the Finance Act. As a result, those interpreting the Finance Act should be extremely careful when judging features which are inherently public in nature, such as public rights of way. The following

⁴⁰⁹ Finance (1909–10) Act 1910, 10 Edw. VII c. 8.

⁴¹⁰ A list of court cases can be found in Planning Inspectorate, *Consistency Guidelines*, Section 11, 5th revision, July 2013, 1.

⁴¹¹ Bowles, ‘Rights of Way & the 1910 Finance Act’, 17.

⁴¹² Short, *Land and Society in Edwardian Britain*, 25:45.

section explores how the Finance Act documents and maps have been used in a legal setting to determine the historic legal status of rights of way.

3.4.1 Finance Act documents

Documents relating to the Finance Act valuation can provide compelling evidence of public rights of way. While the cartographic evidence generally attracts greater attention, the importance of the documentary evidence should not be overlooked. This befell the Inspector in *Maltbridge*, who failed to note particular deductions in the Field Book when examining the evidence.⁴¹³ The Finance Act s. 25(3) provided for deductions in the 'Increment Value Duty' since:

the total value of land means the gross value after deducting...any public right of way or any public rights of user, and to any right of common and to any easements affecting the land, and to any covenant or agreement restricting the use of the land⁴¹⁴

If any land was subject to such rights it was eligible for an abatement and corresponding deduction in the valuation. Landowners could claim these deductions in the initial 'Form 4-Land' they completed. It was 'in the landowner's interest to declare such rights' as deductions for carriageways or bridleways may be significant.⁴¹⁵ Since many 'Form 4's were destroyed after their transcription, the evidence for such is often found in the other documents.⁴¹⁶ Both 'Form 36-Land', the statement of provisional valuation sent to the landowners, and 'Form 37-Land', the office copy, include any landowner 'public rights of way or user' claims. These deductions also appear in the Field Books and Valuation Books, although the Field Books may include additional information. As Howarth J

⁴¹³ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] EGCS 134 (QB).

⁴¹⁴ Finance (1909–10) Act 1910, 10 Edw. VII c. 8, s. 25(3).

⁴¹⁵ Beech and Mitchell, *Maps for Family and Local History*, 63; Short, *Land and Society in Edwardian Britain*, 25:127.

⁴¹⁶ Planning Inspectorate, *Consistency Guidelines*, Section 11, 5th revision, July 2013, para. 11.5.

outlined in *Hollins*, the 'whole of the documents have to be examined to assess their reliability'.⁴¹⁷

'Public right of way or user' deductions have been accepted as corroborative evidence in court. Such deductions are rarely conclusive for two main reasons. First, there was no obligation for landowners to claim any deductions.⁴¹⁸ Landowners may have chosen, on balance, to stay silent on the matter, accepting the potential greater tax rather than disclosing a public right of way. It is equally possible that landowners were apathetic towards the process, signified by the fact that one million of the 10.5 million 'Form 4-Land' forms were not returned.⁴¹⁹ As such, the Finance Act documents can only be used to determine that a right existed in a hereditament and cannot be used as evidence for the non-existence of a public right of way. Where a route crossed land in different ownership, it is sometimes possible to identify where one landowner claimed tax relief but where another chose 'not to acknowledge the existence of a right of way'.⁴²⁰ However, such evidence is circumstantial, as emphasised by *Ridley*, since failure to claim a deduction does not necessarily indicate the absence of any public right of way.⁴²¹

Second, Finance Act 'public right of way' deductions are not conclusive because no reference is necessarily made to their location. Deductions appear in the Valuation Books as a single value and thus, beyond confirming that a right exists, cannot provide evidence for the specific location of these rights. No link has yet been established between the deduction amount and the precise number and length of the corresponding public rights of way, although this study seeks to rectify this. As stated, the Field Books may contain additional information but this is rare. In the *Fortune* case, Brigadier Palmer received a £125 deduction on his lands.⁴²² As the owner of a large portion of land, including the eastern portion of Rowden Lane, it is unclear if this deduction referred to one or more rights of way,

⁴¹⁷ *Hollins v Oldham* (1995) C94/0206 (Ch).

⁴¹⁸ Finance (1909–10) Act 1910, 10 Edw. VII c. 8, s. 12.

⁴¹⁹ Beech and Mitchell, *Maps for Family and Local History*, 38.

⁴²⁰ Bowles, 'Rights of Way & the 1910 Finance Act', 19.

⁴²¹ *Ridley v Secretary of State for the Environment, Food and Rural Affairs* [2009] EWHC 171 (Admin).

⁴²² *Fortune v Wiltshire Council* [2011] EWCA Civ 883, [2013] 1 WLR 808 [74].

or whether such rights were bridleways or footpaths. Although in this case the court decided that the deduction did refer to the eastern section of Rowden Lane, it illustrates the need for further research. 'Public right of way or user' deductions have divided opinion, with no overall consensus being reached because no comprehensive analysis has yet taken place. This study aims to rectify this and Chapter 6 will examine 'public right of way or user' deductions in detail.

3.4.2 Finance Act maps

The Finance Act 1910 and OS maps are closely intertwined. As outlined in Section 2.3, the Finance Act valuers used various OS maps to create their Finance Act maps. OS surveyors marked routes on their maps and annotated some with *B.R.* or *F.P.*, however, such annotations denote the physical status of a route rather than its legal status. This is expressed by the notorious OS disclaimer: 'the representation on this map of any other road, track or path is no evidence of the existence of a right of way'. As such, there is no guarantee that the route(s) for which a 'public right of way' deduction was claimed would be depicted within the corresponding hereditament on the Finance Act map. Even for relatively small hereditaments with single *F.P.* annotated routes, there is no guarantee that the deduction refers to this particular route, although this may, on the balance of probabilities, be very likely. This problem is exacerbated for larger hereditaments, especially those with multiple routes. Examining adjoining hereditaments may be necessary to identify whether other landowners claimed deductions for 'public rights of way' as well. On occasion the Finance Act maps may contain additional information, particularly the working sheets which were used by the valuers in the field and contain particulars from the initial survey. This is especially useful where deductions were claimed as the working sheets sometimes include 'public bridleway' or 'public footpath' annotations which indicate the precise route of a right of way. This was the case for *Maltbridge* where

a £10 deduction referred to a 'right of way' marked on hereditament 196.⁴²³ Thus, it will be necessary to consult both the record and working sheets. Chapter 6 will also explore whether there is any correlation between 'public right of way or user' deductions made in the Finance Act and the *B.R.* or *F.P.* annotations on the OS map. Such research will prove vitally important for disputes concerning non-vehicular rights of way.

The Finance Act is likewise often used as evidence for the existence of public vehicular highways where routes are excluded from surrounding hereditaments: the so-called 'white' road rule. The Finance Act held that no duty was to be charged on land 'held by or on behalf of a rating authority'.⁴²⁴ Since highways were vested in the District Council as the highway authority at the time, they were exempt from the valuation. Also, 'valuing the uncoloured highways, which obviously had no potential as a building site or redevelopment site, was judged to be a massive waste of time'.⁴²⁵ As such, there is a strong indication that routes which were excluded from the taxable landholdings represent public highways. Such routes are more likely to represent public *vehicular* highways because bridleways and footpaths were invariably handled by the deductions discussed above.

The Finance Act has regularly been employed in conjunction with other forms of evidence. In fact, much like the tithe, its value is very much derived from its comparison with other evidence. For instance, the *Agombar* case concerned a rural cul-de-sac which was believed to be private in more modern documentation but the Finance Act map displayed the road as 'white' with adjoining hereditaments occupied by different individuals and owned by 'John Walmesley of Lucknam'.⁴²⁶ 'The fact that the Blue Land was not shown as falling within the hereditament of any private individual, but is shown as part of the general road

⁴²³ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] EGCS 134 (QB).

⁴²⁴ Finance (1909–10) Act 1910, 10 Edw. VII c. 8, s. 35(1).

⁴²⁵ D. Braham, 'Uncoloured Roads on 1910 Finance Act Maps', *Rights of Way Law Review*, May 2002, 155.

⁴²⁶ *Robinson Webster (Holdings) Ltd v Agombar* [2001] EWHC 510 (Ch), [2002] 1 P & CR 20 [7].

network...is a most powerful indication that the Blue Land was at that time thought to be in public ownership'.⁴²⁷ Thus, the Finance Act supported the inference of a public highway through dedication and acceptance. It was also supported by user evidence as the existence of a telephone box, post box, and parish notice board were noted by Mr Plank, a resident of Thickwood all his life, and the fact that these facilities were accessed by the public without challenge was strong evidence of public status.

Three years later, *Todd* examined Sandy Lane, a road which was similarly excluded from surrounding taxable hereditaments, all owned by Sir Anthony Cope, on the Finance Act map. The Inspector did not initially interpret this as evidence of a public carriageway. He later re-evaluated, not because of new evidence, but 'as a result of fresh submissions as to how the existing evidence before him should be treated'.⁴²⁸ Thus, contrary to his initial opinion, the Inspector decided that the Finance Act evidence did amount to a dedication of a public carriageway by Sir Anthony Cope. This judgement was found to be a 'fundamental mistake of law', as the acquiescence of Sir Anthony Cope did not constitute a dedication of Sandy Lane.⁴²⁹

A decade later, the Finance Act evidence proved vital in the *Fortune* case concerning Rowden Lane in Wiltshire.⁴³⁰ This case weighed enclosure, tithe, and Finance Act evidence, finding that public rights had not been extinguished by the Natural Environment and Rural Communities Act 2006, and Rowden Lane was accordingly a vehicular public highway dedicated at common law.⁴³¹ Rowden Lane appears 'white' to the west and coloured to the east on the Finance Act map. The case highlighted several types of evidence which helped form the consensus that an uncoloured road on the Finance Act 'points strongly towards the

⁴²⁷ *Robinson Webster (Holdings) Ltd v Agombar* [2001] EWHC 510 (Ch), [2002] 1 P & CR 20 [47].

⁴²⁸ *Todd v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin), [2004] 1 WLR 2471, 2497.

⁴²⁹ *Todd v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin), [2004] 1 WLR 2471, 2499.

⁴³⁰ *Fortune v Wiltshire Council* [2011] EWCA Civ 883, [2013] 1 WLR 808.

⁴³¹ *Fortune v Wiltshire Council* [2011] EWCA Civ 883, [2013] 1 WLR 808.

conclusion that the road in question was viewed as a public highway'.⁴³² The exclusion of land was 'in itself powerful evidence of previous dedication' at common law by Mr Rich.⁴³³ This did not prove a 'fundamental mistake of law' like *Todd* because the Finance Act was not used in isolation but combined with other evidence.⁴³⁴ It was proved that Mr Rich owned the soil of the western portion of the lane which had been 'expressly conveyed to him some years before'.⁴³⁵ Thus, the Finance Act, combined with other evidence, can be used to infer an express dedication at common law.

Although there is a strong possibility that 'white' roads held public carriageway rights, they could equally have been excluded for other reasons. As Braham outlines, while the evidence of 'white' roads usually indicates highway status, 'it may be seen to point to nothing more than a public bridleway along an otherwise private road'.⁴³⁶ The ownership of highways is a complex legal area, but the *ad medium filum* presumption will typically apply, which dictates that the adjoining landowners own up to the centre of the highway.⁴³⁷ Despite this, no Finance Act maps colour routes in such a fashion in any of the sample analysed. It can be inferred that the valuers, and landowners alike, felt it unnecessary to identify the ownership of routes for which no 'Increment Value Duty' would have applied. Since the Finance Act 1910 instructed that 'each piece of land...shall be separately valued', it overlooked instances when the use of a road, and the costs of its upkeep, were known to be shared.⁴³⁸ There was simply no allowance for shared ownership in the Finance Act; land was either owned by a single individual or excluded from the valuation. This was recognised in *Maltbridge*, which said if a road held 'multiple ownership' it would 'appear superficially that

⁴³² *Fortune v Wiltshire Council* [2011] EWCA Civ 883, [2013] 1 WLR 808 [71].

⁴³³ *Fortune v Wiltshire Council* [2011] EWCA Civ 883, [2013] 1 WLR 808 [80].

⁴³⁴ *Todd v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 1450 (Admin), [2004] 1 WLR 2471, 2499.

⁴³⁵ *Fortune v Wiltshire Council* [2011] EWCA Civ 883, [2013] 1 WLR 808 [73].

⁴³⁶ Braham, 'Uncoloured Roads on 1910 Finance Act Maps', 158.

⁴³⁷ For an overview of the *ad medium filum* presumption see Sydenham, *Public Rights of Way and Access to Land*, 2.3.4; Bickford-Smith et al., *Private Rights of Way*, 7.14.

⁴³⁸ Finance (1909–10) Act 1910, 10 Edw. VII c. 8, s. 26(1).

the road was public'.⁴³⁹ As ownership and use rights changed over the years, it may become unclear who actually owned a particular road. If several adjoining landowners made use of a road and maintained it on an ad hoc basis, they may consider the ownership shared. Equally, the landowners may be unconcerned with the road's legal status, being naturally more concerned with its physical upkeep. If a road was sufficiently maintained, it is unlikely that the question of its ownership and precise legal status would arise. Although this may seem like a fanciful scenario, it was a reality in many parts of the country, especially in those more rural areas.

The Finance Act valuers were intent on valuing all land in the United Kingdom within a limited period and so no time or energy could be expended on ascertaining any extraneous rights, particularly on routes which held limited future development value. Examples have been found in which adjacent map sheets depict the same route differently, with one colouring the route and the other leaving it 'white'. This has not yet been dealt with by the courts, and seems rare, but raises far-reaching questions about the motivations of the valuers and the application of this source in rights of way inquiries. Such discrepancies will be examined in Chapter 4, 5, and 6 but highlight an important point here: land is either coloured or 'white' on the Finance Act maps. This binary distinction limits the application of the Finance Act in rights of way cases and provides a stark reminder that this process concerned the valuation of land first and foremost.

Overall, the Finance Act has proved itself invaluable for rights of way disputes. Its corroborative value has consistently been highlighted, with Lewison LJ considering it as 'simply one part of the jigsaw puzzle' in *Fortune*.⁴⁴⁰ Etherton J went one step further and claimed the Finance Act documents formed the 'most material evidence in relation to the status of the Blue Land at that time', outweighing more modern private documents.⁴⁴¹ Of course, its limitations need

⁴³⁹ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] EGCS 134 (QB).

⁴⁴⁰ *Fortune v Wiltshire Council* [2011] EWCA Civ 883, [2013] 1 WLR 808 [78].

⁴⁴¹ *Robinson Webster (Holdings) Ltd v Agombar* [2001] EWHC 510 (Ch), [2002] 1 P & CR 20 [47].

to be appreciated. The deductions for public rights of way, although constituting good evidence on occasion, are imprecise and would benefit from more systematic analysis. Also, the 'white' road rule needs to be carefully applied as there may be several factors influencing the decision to exclude land from surrounding hereditaments. These limitations must be understood if accurate judgements are to be reached. It is paramount that the source is seen within the context of its time. The Finance Act documents 'were prepared for reasons of political policy, and in the heat of political and social change'.⁴⁴² Like the tithe, the Finance Act was created to assess land for taxation rather than to ascertain the legal status of rights of way. Nonetheless, the Finance Act provides unrivalled evidence of early twentieth century landownership and has regularly been consulted, together with other sources, as evidence in inquiries relating to rights of way.

3.5 Conclusions

This chapter has provided an overview of the three most commonly consulted sources in right of way inquiries: the Parliamentary enclosure Acts, awards, and maps; the Tithe Act 1836 apportionments and maps; and the Finance Act 1910 documents and maps. It also examined some general principles relating to the law governing rights of way. As emphasised in Chapter 2, it is vital that these sources are appreciated within their historical context. This thesis shall now proceed to engage with such issues by analysing how routes described by Parliamentary enclosure awards are described and depicted on the Tithe Act 1836 apportionments and maps and Finance Act 1910 documents and maps.

⁴⁴² Short, *Land and Society in Edwardian Britain*, 25:152.

4 Public roads

This chapter will analyse how public roads described by Parliamentary enclosure awards appear in the Tithe Act 1836 apportionments and maps, and in the Finance Act 1910 document and maps. This will enable a broad chronology to be established, identifying when such public roads originated, and what happened to them in the years and decades following Parliamentary enclosure. It will also, more fundamentally, establish how contemporaries described, depicted, and viewed public roads, which is vital for inquiries which seek to determine the legal status of particular routes.

The sample parishes were selected on the basis that they possessed both Parliamentary enclosure awards and tithe apportionments and maps. Naturally, this excluded a large portion of parishes, for many had had their tithe duties commuted before the Tithe Act 1836, sometimes as part of a Parliamentary enclosure Act. Likewise, some parishes had simply not experienced enclosure by Parliamentary Act and thus could not be included. Nonetheless, a balance was sought both chronologically and regionally, ensuring that a fair representation of the counties was achieved (FIGURE 6). While nine of the sample 65 Parliamentary enclosure awards did not set out any public roads, the remaining 56 awards established 339 public roads between them. Each is examined based on how they appear on the tithe apportionments and maps and Finance Act documents and maps below.

Public roads, or carriageways, ‘give the public a right of passage with vehicles’ and form one of the three main classes of highway alongside bridleways and footpaths, which will be examined in Chapter 6.⁴⁴³ This chapter is divided into four parts. First, the origins of enclosure award public roads will be explored with comparisons to pre-enclosure maps. Second, pre-enclosure tithe maps will be examined in order to ascertain the extent to which enclosure Commissioners modified the existing public road network. Third, the subsequent history of

⁴⁴³ Sydenham, *Public Rights of Way and Access to Land*, 1.3.2.

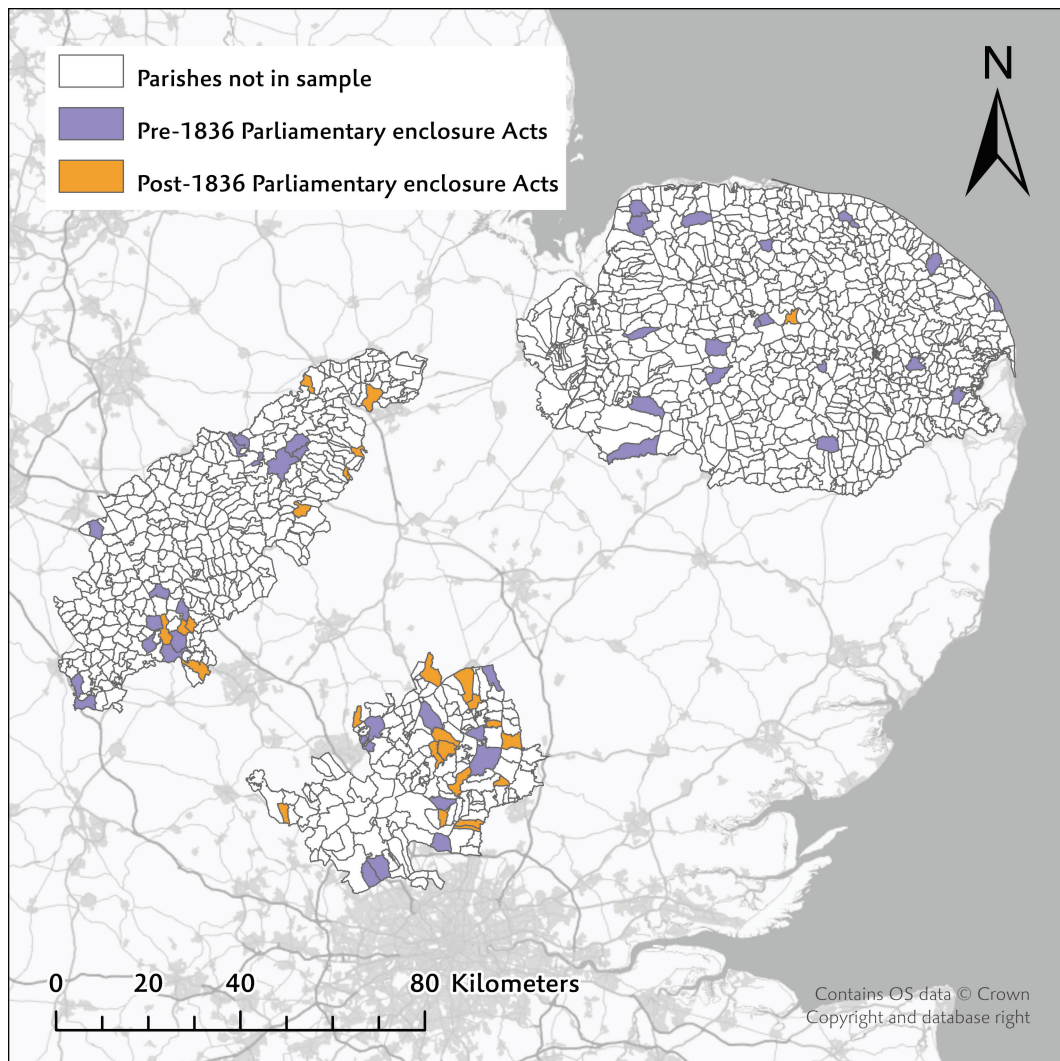


FIGURE 6 Map showing the sample parishes coloured based on Parliamentary enclosure Act date.

public roads established by enclosure awards will be uncovered through an analysis of post-Parliamentary enclosure tithe maps. This will provide unparalleled evidence of how the tithe Commissioners described and depicted such public roads, still relatively young, in their apportionments and maps. Lastly, the manner in which public roads set out at enclosure are depicted on the Finance Act 1910 maps will be examined, in order to throw light on the reliability of this source for establishing public rights of way, especially through the so-called 'white' road rule. This analysis will help determine how public roads are treated by documents relating to Parliamentary enclosure, the Tithe Act 1836,

and Finance Act 1910, all of which are regularly consulted in legal inquiries which seek to determine the historic status of rights of way.

The contemporary context of the Parliamentary enclosure process must be understood if it is to be accurately employed in legal inquiries. After a local enclosure Act was passed in Parliament, Commissioners were appointed to carry out the process and produce an enclosure award and map. The award detailed the new land ownership allocations and described any routes which were set out. Public roads are described in a plethora of ways but 'Public Carriage Road and Highway' and 'Public Carriage Road or Highway' are common, appearing in 30 of the 65 enclosure awards in the sample. These descriptions were regularly used in Hertfordshire and Northamptonshire, with Commissioners in Norfolk opting to use 'Public Road' or 'Public Carriage Road' more often. Minor differences in descriptions were rarely anything other than syntactic. However, major differences or differences within individual awards may indicate a physical or legal change in the status of specific routes and will be explored later. Some enclosure Commissioners created an entirely new network of public roads while others made changes to the existing network by upgrading routes of lower status and/or diverting the course of routes. Some Commissioners simply confirmed the status of existing roads, making no discernible changes. Sometimes pre-existing or 'ancient' roads are depicted on the enclosure map but not described in the accompanying award. The status of these routes is often unclear. Each award is different and must be carefully analysed to establish its precise meaning.

Parliamentary enclosure Acts varied significantly depending on when and where they were passed, both in the extent and the character of the land they enclosed. The counties in the study exemplify this diversity. Northamptonshire formed the 'archetypal enclosure county' with a typical Midland pattern.⁴⁴⁴ Acts generally dealt with extensive open fields as well as commons, embracing much or most of the parish area; and 51 percent of Parliamentary Acts in this county occurred in the 1760–1780 and 1793–1815 enclosure peaks.⁴⁴⁵ Norfolk, in contrast,

⁴⁴⁴ Kain, Chapman, and Oliver, *The Enclosure Maps of England and Wales 1595-1918*, 101.

⁴⁴⁵ These peaks were identified by Turner, *English Parliamentary Enclosure*.

experienced most Parliamentary enclosure in the second peak, with 50.7 percent falling between 1793 and 1815, and with Acts in many cases affecting only limited areas of common land.⁴⁴⁶ The majority of Hertfordshire was enclosed before Parliamentary enclosure, with the Acts peaking following the Inclosure Act 1845, and often affecting only common land.⁴⁴⁷ The sample of 65 Parliamentary enclosure awards reflects this chronological and regional diversity and includes 41 occurring before, and 24 after, the passing of the Tithe Act 1836. Only nine of these 65 enclosure awards did not describe any public roads, eight of which were in Hertfordshire. This illustrates the extent to which Commissioners in this county were removing limited areas of commons and open fields rather than making significant changes to the wider landscape, including the local road network. As the enclosure Commissioner stated in the award for Little Berkhamstead:

It did not appear to me to be necessary to set out and I have accordingly not set out any new public roads or ways or any private road or way through or over any of the lands or grounds so...inclosed.⁴⁴⁸

Of the nine Parliamentary enclosure awards which did not describe any public roads, only one, that for Hertingfordbury, took place before 1842. This reflects the general pattern of Parliamentary enclosure, in that the earliest awards tended to make more substantial changes to the landscape than the later examples. This can clearly be seen in the number of public roads set out in the sample awards as the average trend, shown as a dotted line, dropped from nine in 1779 to two by 1898 (FIGURE 7). Earlier Parliamentary enclosure awards generally established the longest public roads as well. While dependent to an extent upon the size of the parish and the number of public roads established, there is a notable downward trend over time (FIGURE 8). Pre-1836 enclosure awards describe public roads which average 1266 metres while those in post-1836 average just 931

⁴⁴⁶ Data acquired from Kain and Oliver, *Enclosure, Rating, Drainage and Sanitary Maps of England and Wales in Public Archives, 1598-1936*.

⁴⁴⁷ Kain, Chapman, and Oliver, *The Enclosure Maps of England and Wales 1595-1918*, 78.

⁴⁴⁸ HALS QS/E16A, Little Berkhamsted enclosure award, 1842.

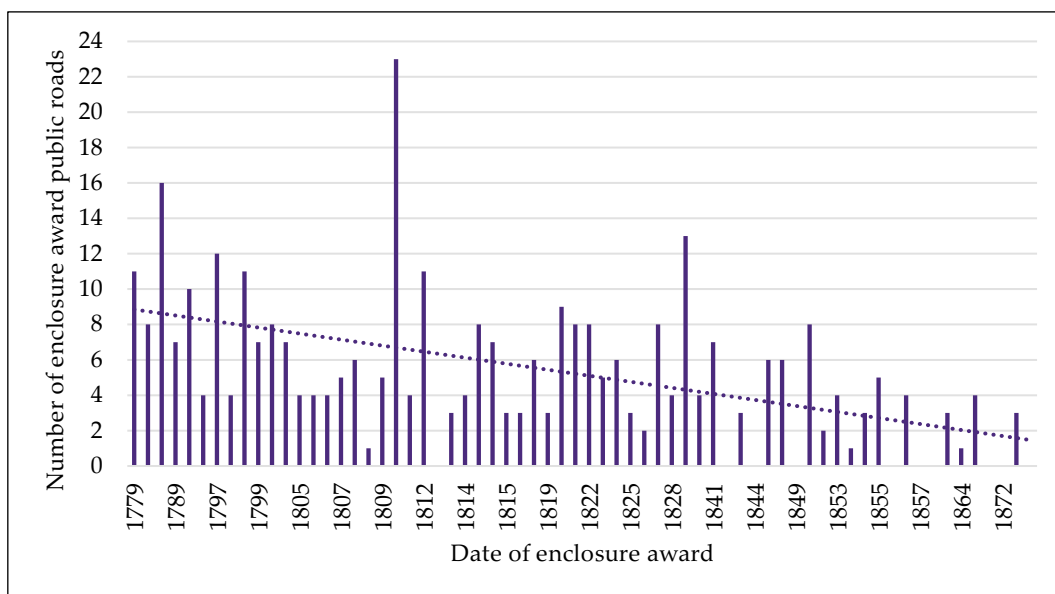


FIGURE 7 Number of public roads described by Parliamentary enclosure awards.

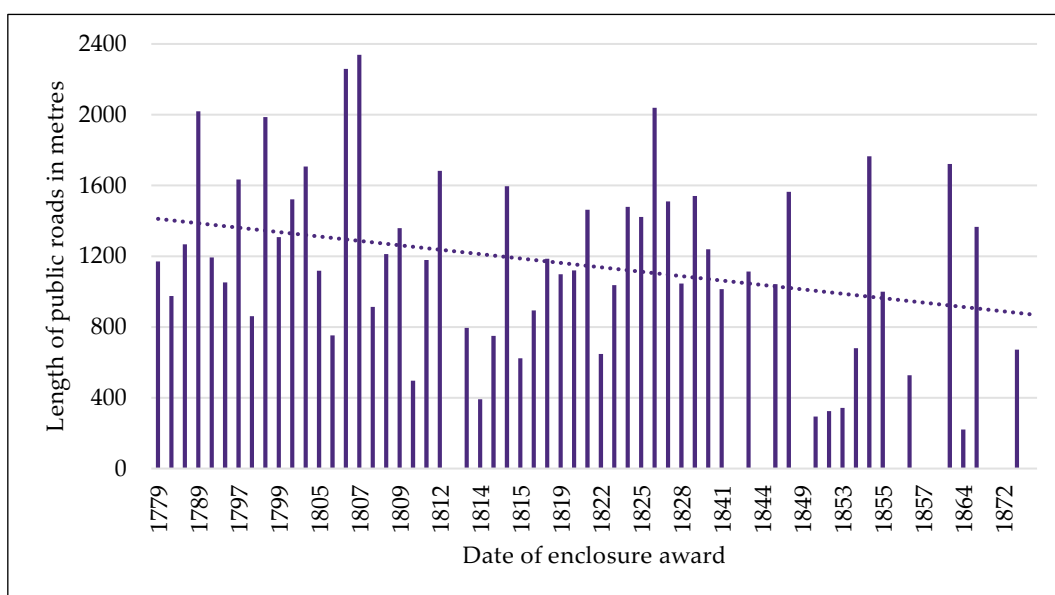


FIGURE 8 Average length of public roads described by Parliamentary enclosure awards.

metres. Persistent myths surround public roads made by Parliamentary enclosure awards. For instance, there is an enduring idea that pre-1790 Parliamentary enclosure public roads are 60 feet wide and post-1790 public roads are 40 feet, which seems to have originated with Turner.⁴⁴⁹ Although this has some basis in truth, the idea that one can accurately date a road simply from its width is a myth.

⁴⁴⁹ Turner, *English Parliamentary Enclosure*, 18.

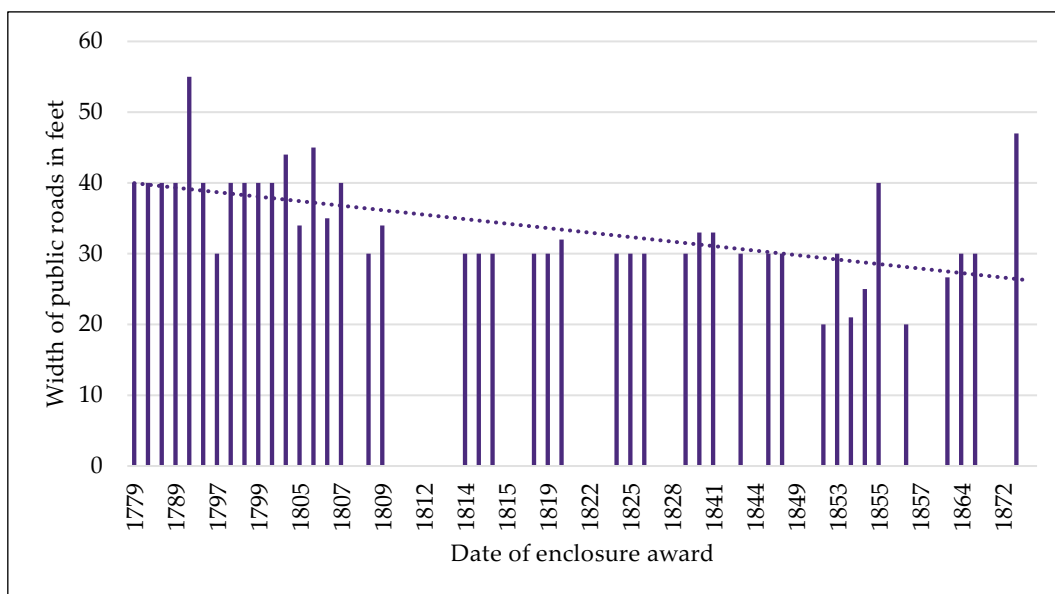


FIGURE 9 Average width of public roads described by Parliamentary enclosure awards.

While this sample of 65 Parliamentary enclosure awards does indicate a downward trend in the width assigned to public roads, this occurs gradually over the 119-year sample period (FIGURE 9). Most enclosure awards in this sample specify widths of 30 feet for public roads. While 13 enclosure awards, all in Norfolk, did not expressly specify any width, each was made under the Inclosure (Consolidation) Act 1801 which explicitly states that the width of ‘publick Carriage Roads and Highways’ was to be ‘thirty Feet wide at the least’.⁴⁵⁰ Nearly all of the enclosure awards which specify a width of 40 feet for public roads took place before 1807. Likewise, all five enclosure awards which specified a width narrower than 30 feet took place after 1852. The reason behind this narrowing of Parliamentary enclosure public road width are manifold, although Turner’s suggestion that this may have been an attempt to discourage the homeless from settling on the grass verges holds some weight.⁴⁵¹ Another important factor may have been the improvements in the construction and surfacing of roads which occurred during the nineteenth century which meant wide grass verges, used when the main thoroughfare was impassable, were no longer required. The number of routes each road connected to also declined, albeit nominally, from

⁴⁵⁰ The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109, s. 8.

⁴⁵¹ Turner, *English Parliamentary Enclosure*, 18.

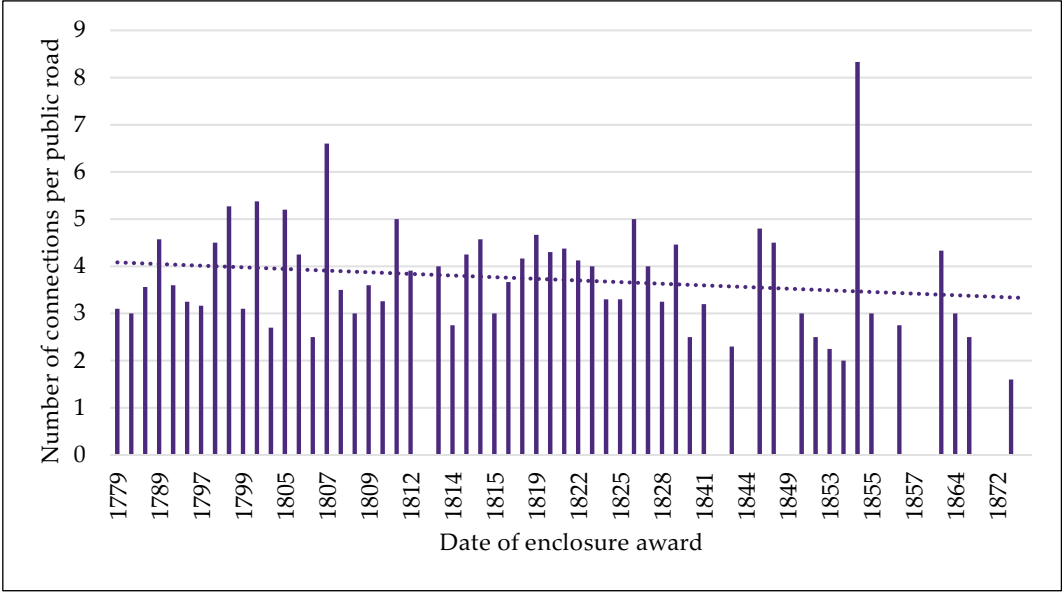


FIGURE 10 Average number of connections of public roads described by Parliamentary enclosure awards.

4.1 to 3.4 (FIGURE 10). Thus, the average length, width, and number of connections trended down through the nineteenth century. This is symptomatic of wider trends in Parliamentary enclosure, as later awards tended to make fewer changes to the landscape as they usually 'tidied up' remaining areas.

4.1 Public roads in the pre-enclosure landscape

The legal origin of many routes can be traced back to Parliamentary enclosure awards, but the contemporary context of these awards must be understood if they are to be accurately interpreted. Identifying what existed before Parliamentary enclosure is fundamental to understanding not only the actions of the Commissioners, but also the status of these routes immediately before enclosure occurred. This is especially important because of the legal principal of *once a highway always a highway* which means that public highways can only be stopped up and extinguished by a specific legal statute. While Parliamentary enclosure Acts and corresponding awards constitute such legal statutes, it is necessary to check whether proper procedure has been adhered to. For instance, in *Gallagher* a Parliamentary enclosure award identified a route as a private carriageway, but earlier evidence was deemed to show, on the balance of probabilities, that the route had been a public carriageway.⁴⁵² Setting out a private carriage road was not sufficient to extinguish earlier public rights since the 1801 Act required the Commissioners to explicitly extinguish roads with the 'Concurrence and Order of Two Justices of the Peace'.⁴⁵³ Also, as the road did not form part of the lands 'to be divided, allotted, and inclosed' it was not automatically extinguished.⁴⁵⁴ It was thus concluded that the Commissioners had acted *ultra vires* since a Parliamentary enclosure award created under the 1801 Act could not deprive a way of its public status by setting out a private carriage road. It will therefore be necessary to check earlier records to ascertain whether public rights existed over a particular route.

As discussed in Section 2.1.1, the enclosure movement has formed the subject of numerous historic debates, many of which are not of direct relevance to this thesis. Of special interest is whether enclosure, in Thompson's words, amounted to 'class robbery', impoverished smaller landowners, and restricted the free

⁴⁵² *Commission for New Towns v Gallagher Ltd* [2002] EWHC 2668, [2003] 2 P & CR 3.

⁴⁵³ The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109, s. 8.

⁴⁵⁴ The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109, s. 11.

movement of people.⁴⁵⁵ Such arguments naturally lead to the impression that pre-enclosure environs, and in particular the open fields, were open to all who wished to wander the landscape. This is arguably an overly idyllic and nostalgic notion of the pre-enclosure landscape which has its origins in contemporary commentators and critics, most notably the poet John Clare. This idea was cemented in place in the early twentieth century by Hasbach, Slater, and, most significantly, the Hammonds.⁴⁵⁶ As Barrell argued, this one-sided economic account of Parliamentary enclosure was 'endorsed by critics who stress that side of English rural literature which seems to be a continuous lament for the passing of the 'organic' rural community'.⁴⁵⁷ Enclosure continued to be viewed as synonymous with the decline of small landowners in the late twentieth century by Snell, Neeson, and Jane Humphries.⁴⁵⁸ The idea that enclosure restricted movement is prevalent in Johnson's 1996 work which interpreted enclosure as part of a wider process of 'closure' and privatisation.⁴⁵⁹ Likewise, Nicholas Blomley outlined how hedges restricted movement and 'gleaning and grazing over common land became construed as theft and trespass'.⁴⁶⁰ In 2013, Williamson, Rob Liddiard, and Tracey Partida examined the Northamptonshire landscape, exploring the origins of open fields and medieval nucleated settlement through GIS mapping of archaeological and historical evidence.⁴⁶¹ They note that 'we must also be careful not to exaggerate or romanticise the freedom offered by the pre-enclosure landscape'.⁴⁶² Movement was always

⁴⁵⁵ Thompson, *The Making of the English Working Class*, 218.

⁴⁵⁶ Slater, *The English Peasantry and the Enclosure of Common Fields*; Hasbach, *A History of the English Agricultural Labourer*; Hammond and Hammond, *The Village Labourer, 1760-1832*.

⁴⁵⁷ John Barrell, *The Idea of Landscape and the Sense of Place 1730-1840: An Approach to the Poetry of John Clare* (Cambridge University Press, 1972), 189.

⁴⁵⁸ Snell, *Annals of the Labouring Poor: Social Change and Agrarian England, 1660-1900*; Neeson, *Commoners*; Jane Humphries, 'Enclosures, Common Rights, and Women: The Proletarianization of Families in the Late Eighteenth and Early Nineteenth Centuries', *The Journal of Economic History* 50, no. 1 (1990): 17-42.

⁴⁵⁹ Johnson, *Archaeology of Capitalism*; Matthew Johnson, *Ideas of Landscape* (Oxford: Blackwell Publishing, 2007).

⁴⁶⁰ Nicholas Blomley, 'Making Private Property: Enclosure, Common Right and the Work of Hedges', *Rural History* 18, no. 1 (April 2007): 8-9.

⁴⁶¹ Williamson, Liddiard, and Partida, *Champion*.

⁴⁶² Williamson, Liddiard, and Partida, 160.

restricted to specific routes, Parliamentary enclosure merely consolidated these. Enclosure continues to be painted by some as an exploitative movement which destabilised the poor, particularly in an oft-cited article by Simon Fairlie which classifies Parliamentary enclosure as 'downright theft'.⁴⁶³ Such ideas have lingered in the popular consciousness to such a degree that 'enclosure' now forms a shorthand for modern day privatisation. This usage of 'enclosure' is regularly associated with myths that commons were open to the public, particularly in protests concerning public space. As Briony McDonagh and Carl Griffin point out in a discussion of the historical context of the Occupy movement, the exercise of common rights is distinct from acts of occupation.⁴⁶⁴ Nonetheless, the notion that Parliamentary enclosure destabilised small landowners and restricted movement is a powerful idea which continues to capture attention.

Analysis of pre-Parliamentary enclosure cartographic sources can shed some light on the patterns of movement in the landscape, although it is often difficult to identify precise physical routes, especially footpaths, and thus legal status can rarely be determined from these sources alone. Many pre-enclosure maps were made for financial and managerial purposes and thus the depiction of rights of way was often incidental. Some are extremely simple and illustrate individual or small groups of enclosures. They may include additional details such as the acreage, land use, tenant names, and value of land. An early-eighteenth-century survey of property in Foscoate, a hamlet in Abthorpe, Northamptonshire, is typical. This survey depicts various enclosures complete with gates at each boundary and single dashed lines indicating the physical existence of routes (FIGURE 11). It is difficult to determine what these routes would have been suitable for, how many people would have used them, or whether usage was restricted to occupiers of adjoining land. In short, it is wholly unclear if these routes were public or private. As will be discussed in subsequent chapters, it is

⁴⁶³ Simon Fairlie, 'A Short History of Enclosure in Britain', *The Land* 7 (2009): 16–31.

⁴⁶⁴ Briony McDonagh and Carl J. Griffin, 'Occupy! Historical Geographies of Property, Protest and the Commons, 1500–1850', *Journal of Historical Geography* 53 (1 July 2016): 1–10.

Local customs gave authority to the claims of the inhabitants of a particular place to utilise the landscape in a number of ways: to graze their livestock on the commons and fallow open fields; to glean for ears of corn after harvest; to gather fuel and wood, and to dig for clay on the commons.⁴⁶⁷

Common rights evolved through custom. While nominally fixed, customs could change over time as all social ranks sought advantage. 'The rich employed their riches...the middling farmers...influenced local courts...[and]...defended their rights against the rich and powerful at law. The peasantry and the poor employed stealth, a knowledge of every bush and by-way, and the force of numbers.'⁴⁶⁸ No cartographic or documentary source can hope to capture the diversity of customs which dictated both the specific rights and boundaries of common land.

The physical and legal boundary between commons and highways continues to produce disputes today despite legislation in 1965 and 2006.⁴⁶⁹ Part of this confusion arises from the difficulty of distinguishing commons, greens, highways, verges, and wastes from one another. For example, a 1725 map of Paulerspury, Northamptonshire, depicts a common lying at the junction of two roads (Figure 12). While other parts of the road network were enclosed, the section adjoining the common remained open and the precise legal boundaries between the two, if indeed there were any, were unlikely to be fixed unless a dispute arose.

A map of Therfield in north Hertfordshire, surveyed in 1724, includes several greens which fade seamlessly into the network of sienna-

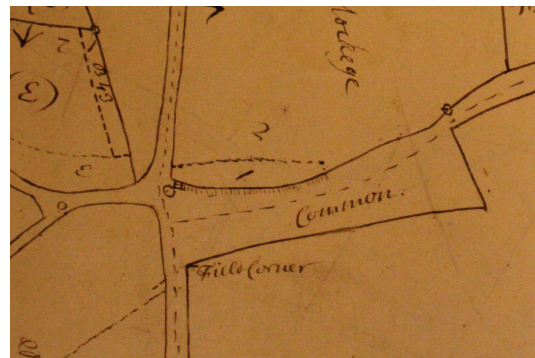


FIGURE 12 NPL/1084, Paulerspury estate map, c. 1725.

⁴⁶⁷ Whyte, *Inhabiting the Landscape*, 6.

⁴⁶⁸ E. P. Thompson, *Customs in Common*, Studies in Traditional Popular Culture (New York: The New Press, 1993), 102–3.

⁴⁶⁹ Commons Registration Act 1965; Commons Act 2006.

coloured roads. Comparisons with the 1843 tithe and 1848 enclosure maps demonstrate how quickly these greens might be eroded in the course of the eighteenth century (FIGURES 13, 14, and 15). Houses were erected in small enclosures taken from 'Broad Green', 'Chapel Green', and 'Ducks Green'. While these evoke ideas of *tŷ unnos*—the Welsh folklore tradition of the 'one night house', a belief that if a squatter erected a house on the common and smoke rose from the chimney at daybreak, the owner had established a freehold right to the property—most were probably permitted by the manorial lord to secure rents and fees.⁴⁷⁰

Nearly all the greens coloured as such on the 1724 map survive and appear on the 1843 tithe and 1848 enclosure maps, although these maps only colour the central portions sienna, leaving the verges uncoloured. Again, the extent of the highway is difficult to determine, and all these examples illustrate the blurry line between commons, greens, verges, and highways.



FIGURE 13 HALS DP/107/29/1a, Map of the Enclosed Part of the Parish of Therfield, 1724.

⁴⁷⁰ R. U. Sayce, 'The One-Night House, and Its Distribution', *Folklore* 53, no. 3 (1942): 161–63; W. G. Hoskins and L. D. Stamp, *The Common Lands of England and Wales* (London: Collins, 1963), 52.

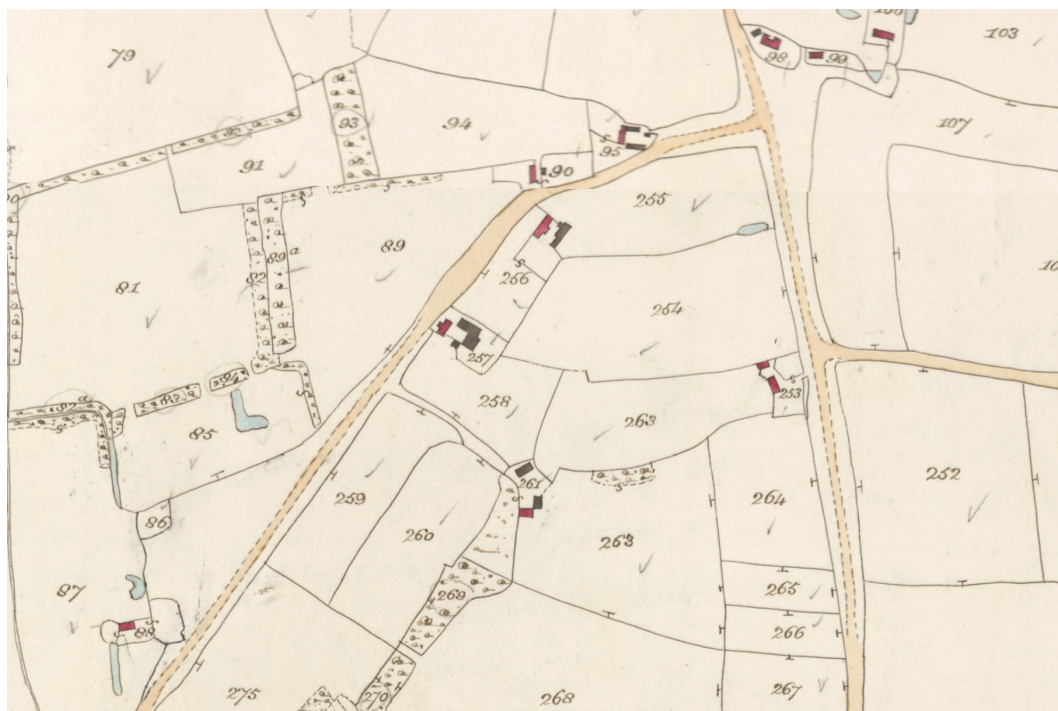


FIGURE 15 HALS DSA4/102/2, Therfield tithe map, 1843.



FIGURE 14 HALS DP/107/26/1, Therfield enclosure map, 1848.

A 1727 map of Little Oakley, Northamptonshire, illustrates a similar situation. Routes passing through the village are coloured entirely sienna but widen as they continue north and include green-coloured verges (FIGURE 16). The eastern route is annotated 'Common' before it reaches 'Broad Green Comon' and the western route is annotated 'field lane road to Corby'. Both routes join 'How Green' before continuing north as an entirely sienna-coloured route. 'Greens' are generally smaller areas of common land and can prove especially challenging to separate from adjoining highways. It is difficult to ascertain the width of highways in these cases because the fence to fence presumption, that a highway extends to the entire width between the boundary fences, will not apply when the highway reaches a wide parcel of common land.



FIGURE 16 Boughton House, Little Oakley estate map, 1727.

Land alongside public highways was frequently used: travellers may have been entitled to rest and water their horses and livestock, especially on droves, and locals may have socialised, grazed animals, and gathered fruits and nuts.⁴⁷¹ Equally, adjoining land may have proved a convenient place to store road construction materials, as discussed in *Harvey* where 'the road authority had used a portion of the strip in question for the purpose of depositing stone for the repair of the roads'.⁴⁷² The use of land immediately adjoining the surfaced highway has long been recognised by the courts. Where there is a fence to fence presumption, 'the public are not confined to the metalled portion' of the highway.⁴⁷³ This was reaffirmed in *Rodgers* in the context of lorries using the roadside verge, demonstrating that the public are entitled to use the full extent of the highway, including the grass verges.⁴⁷⁴ While the public are legally entitled to use verges, it seems the precise boundaries of highways and adjoining commons, greens, and wastes could change over time through custom as well as definitive legal fiat.

4.1.2 Open fields

Open fields formed another major element of the pre-enclosure landscape transformed by Parliamentary enclosure Acts. This aspect of the medieval and post-medieval landscape is often over-simplified and misunderstood by historians and lawyers alike. Open fields were areas in which the lands of many different proprietors lay intermingled in narrow, strip-like parcels of land, across which varying degrees of communal management were enforced. This agricultural system differed significantly from place to place and did not exist in large parts of the country which were anciently enclosed such as Essex and Kent. The most studied form is the 'Midland system' in which the strips were grouped into two or three large fields subject to common rotations and cropping

⁴⁷¹ Nicola Whyte, 'Senses of Place, Senses of Time: Landscape History from a British Perspective', *Landscape Research* 40, no. 8 (17 November 2015): 933.

⁴⁷² *Harvey v Truro Rural Council* [1903] 2 Ch 638 (Ch) 639.

⁴⁷³ *Harvey v Truro Rural Council* [1903] 2 Ch 638 (Ch) 638.

⁴⁷⁴ *Rodgers v Ministry of Transport* [1952] 1 All ER 634.

regimes.⁴⁷⁵ Since all agricultural activity took place in a broadly simultaneous and co-ordinated manner, it would not have been necessary for owners to have access to their individual strips. Such patterns will be explored in more detail in Chapter 5.

A 1767 map for Greens Norton, Northamptonshire, depicted the complex pattern of ownership before Parliamentary enclosure (FIGURE 17). Some of the open field strips had been enclosed and consolidated but several survived. The surveyor illustrated an abundance of routes across this area with a combination of solid and dashed lines. Those routes which are described and depicted by



FIGURE 17 NHRO Map/4219, Duke of Grafton's lands in Greens Norton, 1767.

⁴⁷⁵ First introduced by Gray, *English Field Systems*.

Parliamentary enclosure are often depicted in some fashion on these earlier maps. It is therefore possible, on occasion, to determine what changes the enclosure Commissioners made. For instance, comparisons between a 1778 estate map and an 1835 enclosure map of Standon in east Hertfordshire illustrate that three routes identified as 'Public Carriage Road and Highway[s]' previously followed more circuitous routes, indicating that the enclosure Commissioners straightened existing public roads (FIGURES 18 and 19).⁴⁷⁶

The road network was increasingly rationalised over time as the open fields were enclosed by piecemeal or general means. The right of way network was continually realigned and reaffirmed as locals created shortcuts or deviated onto adjoining land when roads were impassable. In this manner, 'a common way might quickly become difficult to dislodge from the landscape'.⁴⁷⁷ Changing traffic, weather, and topography may similarly affect the day-to-day movements of the local community. Over time, it is easy to imagine routes being used more



FIGURE 18 HALS A/2832, Standon estate map, 1778.

⁴⁷⁶ HALS A/2832, Standon estate map, 1778; HALS A/2833, Standon estate map, 1778; HALS QS/E61, Standon enclosure award, 1835.

⁴⁷⁷ Johnson, *Law in Common*, 165.



FIGURE 19 HALS QS/E61, Standon enclosure map, 1835.

often until public use becomes accepted, especially in periods of population growth. By the early nineteenth century, most of these changes had been fixed in place by the Parliamentary enclosure process. This pre-enclosure evidence illustrates the extent to which public roads described and depicted by Parliamentary enclosure awards and maps were created from existing routes. It also highlights how attitudes to highways have changed over time. In the eighteenth century, custom continued to dictate rights of way in a manner similar to the late-medieval period:

Even small-scale, one-off movements opened up space for future transgressions. But if impassable roads or circuitous routes sometimes swayed people to venture new ways and face the consequences, so established rights of way must have exerted a gravity over movement—silent in the court rolls—which kept most people, most of the time, on the straight and narrow.⁴⁷⁸

⁴⁷⁸ Johnson, 165.

4.2 Public roads in pre-enclosure tithe apportionments and maps

This section uses tithe apportionments and maps pre-dating Parliamentary enclosure to examine the origins of public roads set out by the enclosure Commissioners. Of the 24 parishes in the sample, only 16 awards describe public roads, the other eight are almost all in Hertfordshire in places where enclosure Acts removed the last remnants of commons and open fields but did not reform the right of way network. These 16 enclosure awards describe a total of 64 public roads, averaging four in each. As already discussed, it is often unclear whether the enclosure Commissioners were newly creating roads or confirming existing ones. Yelling identified three options for the Commissioners: ‘they had the choice of retaining the existing routes, of adapting them by straightening sections, or of completely replacing them by new straight cuts’.⁴⁷⁹ This is overly simplistic and fails to include other changes the Commissioners made, as shown by this notional sliding scale (FIGURE 20):

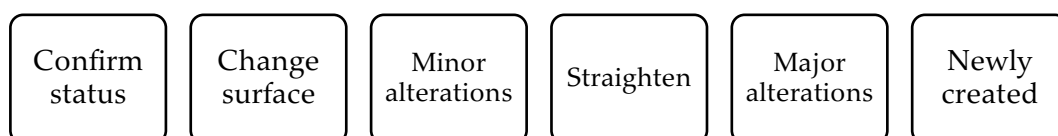


FIGURE 20 Sliding scale of changes made to the road network by Parliamentary enclosure Commissioners.

This analysis will help clarify what changes the enclosure Commissioners made and whether they created public roads *de novo*. Although estate maps are regularly the earliest large-scale map for an area, tithe maps cover most of the country in a far more consistent style. Thus, the tithe apportionments and maps can offer particularly good insights into the pre-enclosure landscape. How the tithe apportionments and maps describe and depict routes which were later to become the public roads set out at enclosure will be especially helpful for inquiries which employ the tithe documents as evidence in court cases.

⁴⁷⁹ Yelling, *Common Field and Enclosure in England, 1450-1850*, 137.

4.2.1 The depiction of Parliamentary enclosure roads on tithe apportionments and maps

Before discussing specific examples, it is first necessary to explain the range of ways used to describe and depict roads established by Parliamentary enclosure on tithe apportionments and maps. While 'both general and specific advice on the nature and content of tithe maps were given to surveyors by the centralised, London-based Tithe Commission...the tithe maps are an extremely heterogeneous class of map'.⁴⁸⁰ Each 'was made by a private map-maker commissioned by local landowners', who tended to be from the same county, and thus local traditions of cartography predominated in particular regions.⁴⁸¹ This is part of the reason Dawson's recommendations, including the colouring and numbering of roads, were not always followed.⁴⁸²

The primary purpose of the Tithe Act 1836 was to assess the titheable value of the land, it was not directly concerned with the legal status of roads. As such, the roads identified by Parliamentary enclosure awards were described and depicted in various ways across the tithe apportionments and maps (FIGURE 21). This diversity in approach reflects the creative control the map-makers were given, especially following the Tithe Act 1837.⁴⁸³ Roads established at Parliamentary enclosure did not necessarily align directly with those routes depicted on the tithe maps, some roads were only partly depicted or numbered by the tithe map-makers. Equally, as seen in *Gallagher*, roads which extended across parochial boundaries may be depicted in different ways on different tithe maps.⁴⁸⁴ Omission of a route on a tithe map will not always be evidence that the route did not exist as the land may not have formed part of the tithe commutation, particularly if a Parliamentary enclosure Act had already removed tithe duties. Aside from lands which had already had their tithes commuted or extinguished

⁴⁸⁰ Kain and Oliver, *The Tithe Maps of England and Wales*, 23.

⁴⁸¹ Kain and Oliver, 810.

⁴⁸² *Survey of Lands (Tithe Act) Copy of Papers Respecting the Proposed Survey of Lands under the Tithe Act (103)*, XLI 383 (House of Commons Sessional Papers, 1837).

⁴⁸³ The Tithe Act 1837, 7 Will. IV & 1 Vict. c. 69.

⁴⁸⁴ *Commission for New Towns v Gallagher Ltd* [2002] EWHC 2668, [2003] 2 P & CR 3.

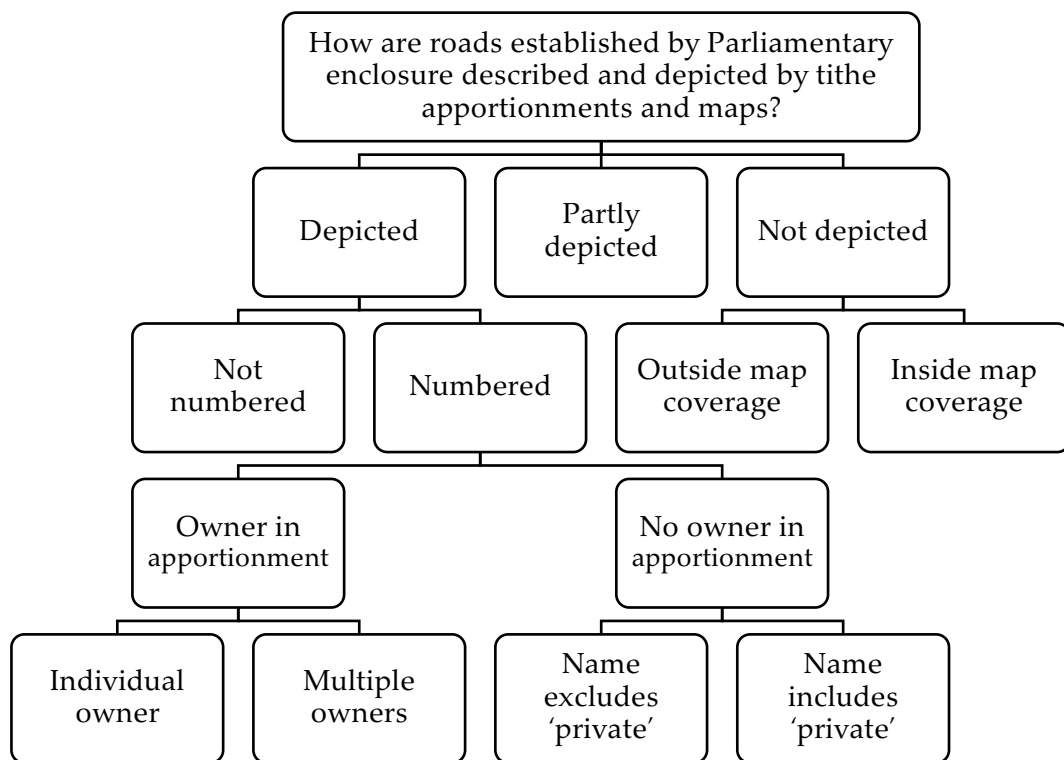


FIGURE 21 How are roads established by Parliamentary enclosure described by tithe apportionments and maps?

by Parliamentary enclosure, Hugh Prince identified nine categories of land which were exempt from tithes:

1. Lands naturally barren;
2. Barren heath or waste converted to arable or meadow was exempt for seven years;
3. Forest lands in the occupation of the Crown;
4. Glebe lands;
5. Lands owned before 1215 by privileged religious orders such as the Cistercians, Hospitallers, or Templars;
6. Lands formerly belonging to a monastery which had not paid tithes at the time of the dissolution;

7. Lands which had not paid tithes from time immemorial;
8. Lands specified as exempt by the Tithe Act 1832;⁴⁸⁵
9. Lands in which a modus or composition was payable.⁴⁸⁶

These nine categories broadly fall into three not mutually exclusive groups: land which did not produce titheable income; land which was exempt through custom; and land which belonged or had belonged to particular organisations. It is these factors rather than the legal status of routes which were of principal concern to the tithe Commissioners.

Some roads established at Parliamentary enclosure are numbered and listed in the apportionment with owners, occupiers, and an 'Amount of Rent-Charge apportioned', indicating that they were titheable. Some roads are owned or occupied by multiple owners, or by the 'surveyor of highways' or some other public officials which is considered 'very good evidence of public highway status'.⁴⁸⁷ Other roads are listed in a separate section of the apportionment without owners and occupiers. This section is most often titled 'Public Roads', and inclusion is generally held as evidence of public highway status. However, analysis of 65 parishes across three counties has highlighted several roads named 'Private Road' in this section, making it more difficult to assess status. This will be explored in greater detail later, for now it serves to illustrate the plethora of ways roads could be described and depicted on the tithe apportionments and maps. Between 1839 and 1840, tithe map production reached its peak with 32 percent of all maps produced in these two years.⁴⁸⁸ Numerous areas had their tithes commuted and were subsequently enclosed by Parliamentary Act and it is these areas which will be explored first.

⁴⁸⁵ The Tithe Act 1832, 2 & 3 Will. IV c. 100.

⁴⁸⁶ List based upon Hugh C. Prince, 'The Tithe Surveys of the Mid-Nineteenth Century', *The Agricultural History Review* 7, no. 1 (1959): 20.

⁴⁸⁷ Bucks and Wadey, *Rights of Way*, 76.

⁴⁸⁸ Kain and Oliver, *The Tithe Maps of England and Wales*, 742.

4.2.2 The sample of pre-enclosure tithe apportionments and maps

As noted earlier, the sample parishes were selected because they were affected to some extent by Parliamentary enclosure *and* possessed tithe apportionments and maps. Naturally, this excludes a large portion of the parishes within the counties studied, particularly those which had been enclosed by earlier piecemeal or general enclosure. For instance, most of Hertfordshire, aside from the north, was unaffected by Parliamentary enclosure and was not included within this study.⁴⁸⁹ While Parliamentary enclosure encompassed a period of three centuries from 1604 to 1914, it was by no means consistent in chronology or spatial extent.⁴⁹⁰ Parishes enclosed after the Tithe Act 1836 therefore represent some of the latest Parliamentary enclosure Acts since 80 percent occurred in two peaks identified by Turner between 1760–1780 and 1793–1815.⁴⁹¹ Post-1836 Parliamentary enclosure was markedly different from earlier enclosure in both its extent and the changes it made to the right of way network, and is worthy of closer examination.

Most of the tithe apportionments and maps which predate Parliamentary enclosure depict the pre-enclosure landscape complete with commons and open fields yet to be enclosed. An excellent example can be found in the 1841 tithe map of Ashwell in north Hertfordshire which depicts the open fields before they were enclosed by Parliamentary Act in 1862 (FIGURES 22 and 23). However, six of the 16 tithe apportionments and maps in the sample are dated before Parliamentary enclosure took place but do not depict the pre-Parliamentary enclosure landscape. There are two possible reasons for this. First, in some instances the Parliamentary enclosure process was already underway as the tithe maps were produced only a few months before the enclosure maps. Since it would have been meaningless to depict the pre-enclosure landscape which was on the cusp of being transformed, the tithe maps instead depict the landscape in its proposed, post-enclosure form. As the tithe process predated the passing of

⁴⁸⁹ Williamson, 'Understanding Enclosure', 61.

⁴⁹⁰ Wordie, 'The Chronology of English Enclosure, 1500-1914', 486.

⁴⁹¹ Turner, *English Parliamentary Enclosure*.

within the same calendar year and some were even produced by the same surveyor. Enclosure minutes for Ringstead indicate that the same surveyor was responsible for both maps, and emphasise that both processes occurred simultaneously: 'Mr Rupert produced a calculation of the Tithe Apportionment ordered that he immediately propose a fair copy hereof and forward the same to the Commissioner' and 'Mr Day produced a map of the Tithe Apportionment which the Commissioner approved'.⁴⁹² This was almost certainly the same Charles Day of St Neots who produced the enclosure map with Robert Russel of Brackley a mere eight months after the tithe map.

The second reason identified is that some Parliamentary enclosure Acts confirmed existing arrangements which means the tithe maps differ little from the enclosure maps. The fact that some Parliamentary enclosure Acts made few changes was initially overlooked by Slater and Gonner, particularly in Norfolk where corresponding estimations of common land enclosed were inflated, and later corrected by Gray.⁴⁹³ Each enclosure Act, award, and map must therefore be closely examined to ascertain which areas were being enclosed. The 1848 enclosure map for Therfield in north Hertfordshire is annotated 'old Inclosures are coloured Green', illustrating those enclosures which were being confirmed rather than set out by the Commissioners.⁴⁹⁴ Comparisons with the 1843 tithe map suggest that piecemeal and general enclosure preceded the passing of the Parliamentary enclosure Act (FIGURES 24 and 25).

The strength of the enclosure and tithe documents as evidence of legal status will depend upon the approach taken to weighing that evidence. As outlined in the *Consistency Guidelines*, there are two approaches: cumulative and synergistic.⁴⁹⁵ A cumulative approach may regard the enclosure and tithe maps as repetition,

⁴⁹² NHRO ML/779, Ringstead enclosure minutes, 1839-1841.

⁴⁹³ Slater, *The English Peasantry and the Enclosure of Common Fields*; Gonner, *Common Land and Inclosure*; Gray, *English Field Systems*, 305-8; Yelling, *Common Field and Enclosure in England, 1450-1850*, 12-13; Chapman, 'The Extent and Nature of Parliamentary Enclosure', 28-29.

⁴⁹⁴ HALS DP/107/26/1, Therfield enclosure map, 1848.

⁴⁹⁵ Planning Inspectorate, *Consistency Guidelines*, Section 2, 5th revision, July 2013, para. 2.17.



FIGURE 24 HALS DSA4/102/2, Therfield tithe map, 1843.



FIGURE 25 HALS DP/107/26/1, Therfield enclosure map, 1848.

especially if they were produced within a narrow time frame by the same cartographer. A synergistic approach, in contrast, would regard this as coordination rather than repetition, since the two are distinct forms of evidence

created for different purposes. All 31 public roads appear in the same course on these enclosure and tithe maps. In Towcester, two are even annotated 'Public Road', a rare instance of the tithe map-makers noting status (Figure 26).

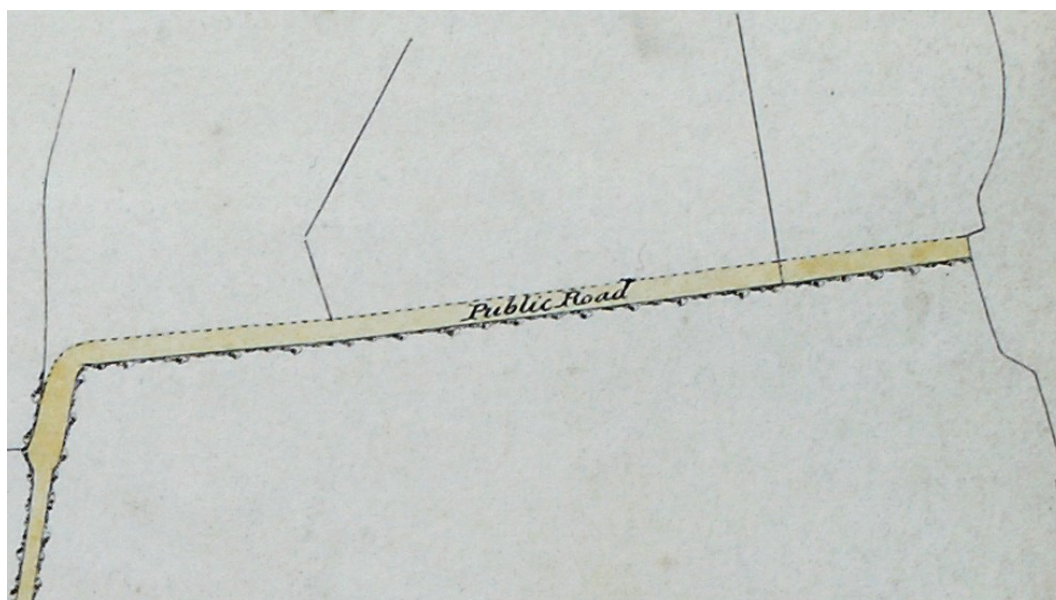


FIGURE 26 NHRO T/007, Towcester tithe map, 1844.

Examination of the documentary evidence reveals that these 31 public roads did not necessarily exist in the same form before Parliamentary enclosure. For instance, the first 'Public Carriage Road' in Ringstead, Northamptonshire, is described as '*nearly* in its present track' (emphasis added).⁴⁹⁶ Moreover, while most of the public roads are described as being 'in its present track', three contained no such description.⁴⁹⁷ Curiously, all three are in the same area of Ringstead and are straighter than the other public roads, which suggests they are of Parliamentary enclosure origin. Thus, while few changes can be seen in comparisons between these six tithe and enclosure maps, documentary analysis shines light on the changes made by the enclosure Commissioners to the public road network. The ten tithe apportionments and maps which illustrate the pre-enclosure landscape will be analysed next.

⁴⁹⁶ NHRO ML/1394, Ringstead enclosure award, 1841.

⁴⁹⁷ NHRO ML/1394, Ringstead enclosure award, 1841.

4.2.3 Public roads which are depicted on the pre-enclosure tithe maps

Only four public roads described by enclosure awards are depicted in their entirety on the earlier tithe maps which depict the pre-enclosure landscape. It seems the enclosure Commissioners were either upgrading or confirming their public status and were likely improving the physical surface at the same time, ensuring the roads would be repaired to a set standard in the future. Road improvement was a principal goal of the enclosure process and frequently formed the main expense.⁴⁹⁸ While changes could be major, they equally included enclosing and metalling the roads, improvements which are less readily apparent on small-scale maps. Analysis of the Parliamentary enclosure awards in these instances suggest the Commissioners made minor changes to each road.

Despite being created 13 years before the enclosure map, the tithe map for Wormley depicts 'Wormley Wharf Road' in the same course (FIGURES 27 and 28). The Northern and Eastern Railway crossing fixed the road in place, as diverting a railway crossing would have been disruptive and expensive. The fact that a railway crossing was deemed necessary, combined with the fact that the road led to 'Mill Green' and a public wharf, raises the likelihood that it was public before the Parliamentary enclosure Act. In this case, the enclosure presumably



FIGURE 27 HALS DSA4/120/2, Wormley tithe map, 1841.



FIGURE 28 HALS QS/E79, Wormley enclosure map, 1854.

⁴⁹⁸ Mingay, *Parliamentary Enclosure in England*, 49.

represented a convenient way to confirm the public status of the road. Finally, one 'Public carriage road or Highway' in Buckland, Hertfordshire, appears as a dashed route on the Commissioner copy of the tithe map held at TNA but is not depicted on the parochial copy held at HALS (FIGURES 29 and 30). This is a rare instance in which certified copies contradict one another, serving as a useful reminder that all copies of the tithe map must be consulted. The fact that few enclosure award public roads are depicted on the pre-enclosure tithe maps in the same course exemplifies the extent to which the enclosure Commissioners altered the road network. In this regard post-1836 Parliamentary enclosure made changes akin to earlier Acts.

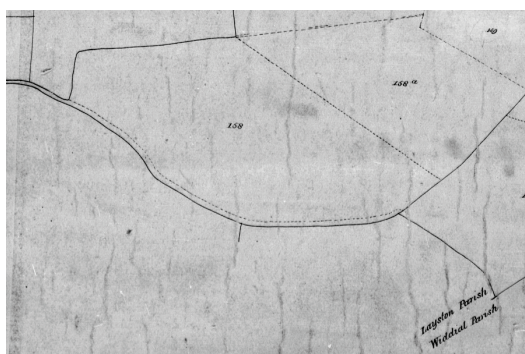


FIGURE 29 TNA IR 30/15/29, Buckland Commissioner tithe map, 1844.



FIGURE 30 HALS DP/25/27/1, Buckland parochial tithe map, 1844.

4.2.4 Public roads which are partly depicted on the pre-enclosure tithe maps

In contrast to the small number of roads which are depicted in their entirety on pre-enclosure tithe maps, over a third—22 out of 64—are partially shown. Some boundaries and routes do not align precisely on the enclosure and tithe maps because of inaccuracies resulting from pre-modern surveying and drafting techniques. It should be noted that 'the legal effect of the Award was not impaired by any deficiencies in the cartography'.⁴⁹⁹ Some discrepancies between enclosure and tithe maps are more substantial, and it is reasonable to infer that the enclosure Commissioners widened, narrowed, and straightened routes. As

⁴⁹⁹ D. Braham, 'Inclosure Awards: Law and Practice', *Rights of Way Law Review*, October 2001, 144.

already seen, some changes like enclosing or improving the surfacing of roads left little cartographic evidence. This must have taken place in numerous parishes considering road building was usually the largest cost of Parliamentary enclosure. Four of the eight 'public carriage road[s]' in Elsing, Norfolk, previously existed across the commons of 'Elsing Heath' and 'Fusty weed Common' and are indicated with dashed lines on the 1841 tithe map (FIGURE 31).⁵⁰⁰ The 1849 Parliamentary enclosure confirmed each road in its 'present course' and instructed that they should be enclosed and metalled.⁵⁰¹



FIGURE 31 NFRO DN/TA 653, Elsing tithe map, 1841.

One particular area of focus in rights of way cases is the width of routes. Both *Copestake* and *Webb* held that tithe maps are not admissible as evidence of the physical extent of a highway.⁵⁰² In *Webb* Salmon J said:

These maps, although they are evidence of the existence of a highway, are not evidence of the boundaries of the highway...The cartographer merely records the physical features which he considers of importance, and which he observes on the ground. He is not a lawyer, and does not

⁵⁰⁰ NFRO C/Sca 2/106, Elsing enclosure award, 1849.

⁵⁰¹ NFRO C/Sca 2/106, Elsing enclosure award, 1849.

⁵⁰² *Copestake v West Sussex CC* [1911] 2 Ch 331 (Ch); *Webb v Eastleigh BC* (1958) 56 LGR 124 (QB).

purport to interpret, or even to consider, the legal significance of what he sees.⁵⁰³

However, there is 'no reason under present evidential rules why map evidence should not, in appropriate cases, be evidence of the extent of a way'.⁵⁰⁴ *Beynon* and *Hale* both used tithe maps as evidence where there was a fence to fence (or hedge to hedge) presumption.⁵⁰⁵ Although circumstances vary, maps can sometimes provide evidence of the location and width of routes. In Castor, Northamptonshire, the first and second public roads, 'Clay Lane' and 'Cow Lane', are depicted as wide, enclosed routes and are coloured sienna on the 1846 tithe map (FIGURE 32). The enclosure map, based on the 1886 first edition OS map, depicts the same wide routes with a narrow, double dashed line running along the centre (FIGURE 33). The enclosure Commissioners clarified the extent of the



FIGURE 32 NHRO T/236, Castor tithe map, 1846.



FIGURE 33 NHRO 060p 504, Castor and Ailsworth enclosure map, 1898.

⁵⁰³ *Webb v Eastleigh BC* (1958) 56 LGR 124 (QB) 127.

⁵⁰⁴ *Encyclopedia of Highway Law and Practice*, vol. 1, Part II, para. 2-068.

⁵⁰⁵ *A-G v Beynon* [1970] Ch 1 (Ch); *Hale v Norfolk CC* [2001] Ch 717 (CA).

highways in 1898, identifying both as 40 feet wide.⁵⁰⁶ Remarkably, the Castor enclosure award included a stipulation which negated the need for all the public roads to be surfaced: 'it is not necessary for the public convenience that the same should be made of hard materials...the said Roads are sufficiently formed having reference to the nature and situation thereof'.⁵⁰⁷ This stipulation was only found in this Parliamentary enclosure award and implies other public roads were regularly metalled.

Other Parliamentary Commissioners frequently made significant alterations to public roads when they enclosed the open fields. Two 'Public Carriage Road or Highway[s]' in Aston, Hertfordshire, were formed from narrow dashed routes across 'Great Brook Field' (FIGURES 34 and 35).⁵⁰⁸ FIGURE 36 shows the tithe map for Ashwell, Hertfordshire, with the 4461-metre public road overlaid. Such



FIGURE 34 HALS DAcc 1154, Aston tithe map, 1840.



FIGURE 35 HALS QS/E10, Aston enclosure map, 1860.

⁵⁰⁶ TNA MAF 1/1087, Castor enclosure award, 1898.

⁵⁰⁷ TNA MAF 1/1087, Castor enclosure award, 1898

⁵⁰⁸ HALS QS/E10, Aston enclosure award, 1860.



FIGURE 36 HALS DSA4/6/2, Ashwell tithe map, 1841, overlaid with the first and third public roads set out by HALS QS/E9, Ashwell enclosure map, 1862.

changes improved transport links by straightening and widening the roads and made it easier to allot adjoining land. While the tithe map does not offer conclusive evidence of status, it is likely these earlier routes held some public rights as they connected to existing roads outside the parish. As discussed, some tithe map-makers indicated the existence of routes even where land was not titheable. In Elsing, Norfolk, the 1841 tithe map-makers marked a route with a dashed line along the north-east boundary of 'Pesnall Green'. When the parish was enclosed in 1849, the Commissioners realigned and resurfaced this route to create two straight 'Public Carriage Road[s]' (FIGURES 37 and 38).⁵⁰⁹



FIGURE 37 NFRO DN/TA 653, Elsing tithe map, 1841.



FIGURE 38 NFRO C/Sca 2/106, Elsing enclosure map, 1849.

The Parliamentary enclosure Commissioners occasionally formalised changes to the public road network in the form of diversions. Seven such diversions were identified in the sample, all in Hertfordshire, and each appeared on the earlier tithe map as longer, more sinuous routes. The 1853 enclosure map of Buckland depicts the old and new course of three public roads which made adjoining land easier to allot (FIGURE 39). Some diversions illustrate the influence of the local elite as they moved routes further from country houses. In Aston, the Reverend Hudson diverted roads to expand the grounds surrounding his house with a road closure order in 1854 for a public carriageway which crossed 'in front of the dwelling house of...Hudson, called Frogmore Lodge'.⁵¹⁰ Chancery writs under *ad*

⁵⁰⁹ NFRO C/Sca 2/106, Elsing enclosure award, 1849.

⁵¹⁰ HALS QSR/79, Stopping up of a carriageway at Frogmore, 1854.



FIGURE 39 HALS DP/25/26/2A, Buckland enclosure map, 1853.

quod damnum, and, after 1773, road closure orders, were used to stop up roads which were disadvantageous to the local elite, but both methods were 'cumbersome and expensive'.⁵¹¹ Parliamentary enclosure provided another, more convenient way to facilitate the diversion of public roads. In Aston, Hudson used both a road closure order in 1854 and the 1860 Parliamentary enclosure to divert routes. Similarly, a public road in Ashwell was straightened and moved further from Ashwell Bury house which was rebuilt by Edward Fordham in 1855.⁵¹² The 1862 Parliamentary enclosure also extinguished three nearby public footpaths (FIGURES 40 and 41). All seven diversions were more convenient for the public, even if they happened to be moved further from estates.

Comparisons with earlier tithe maps demonstrate the spectrum of changes the enclosure Commissioners made to the right of way network. Some changes were relatively minor, but no less important, such as alterations to the width or surfacing of roads. Other changes represented more major alterations such as widening and straightening narrow tracks in the open fields and commons, or wholesale diversions of earlier routes.

⁵¹¹ Williamson, Liddiard, and Partida, *Champion*, 205.

⁵¹² Jackie Embury, 'Ashwell Bury', Ashwell Museum, 29 August 2011, http://www.ashwellmuseum.org.uk/page_id__174.aspx.



FIGURE 40 HALS DSA4/6/2, Ashwell tithe map, 1841.



FIGURE 41 HALS QS/E9, Ashwell enclosure award, 1862.

4.2.5 Public roads which are not depicted on the pre-enclosure tithe maps

Finally, five public roads described in the enclosure awards, totalling 15 percent, do not appear on the earlier tithe maps which depict the pre-enclosure landscape. It is likely that most of these existed in some form but were omitted by the tithe map-makers and valuers. For instance, a 'Public Carriage Road or Highway' was set out between 'L' and 'N' across Wigginton common in Hertfordshire but does not appear on the earlier tithe map despite the fact that a route is shown continuing east between ancient enclosures (FIGURES 42 and 43).⁵¹³ This was

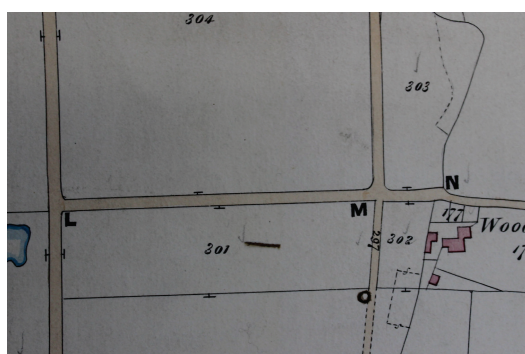


FIGURE 42 HALS QS/E75, Wigginton enclosure award, 1854.



FIGURE 43 HALS DSA4/118/2, Wigginton tithe map, 1841.

almost certainly because the land was common land which was not titheable, and there was no impetus for the map-makers to include the multiplicity of routes which may have criss-crossed the common. On the balance of probabilities, only one public road in Lutton, Northamptonshire, was likely newly created by the Parliamentary enclosure Commissioners as it dissected the earlier open fields depicted on the tithe map such that it could not have existed before. This road was especially straight and replaced an earlier route to Gidding (FIGURES 44 and 45).

On the whole, it is clear that the enclosure Commissioners almost always used the contemporary road network as the basis for setting out their public roads,

⁵¹³ HALS QS/E75, Wigginton enclosure award, 1854.

rather than creating an entirely new network. Since the Parliamentary enclosure process usually occurred at the parochial level, the public road network had to link to the existing extra-parochial network, limiting the changes which could be made. This analysis has indicated that routes which were omitted may have existed, especially where land was associated with common land or was not titheable.



FIGURE 44 NHRO T/241, Lutton tithe map, 1842.



FIGURE 45 NHRO Map/2111, Lutton enclosure map, 1867.

4.2.6 Conclusions

This section examined tithe maps dated before Parliamentary enclosure. Six tithe maps depicted a landscape almost identical to the Parliamentary enclosure maps. Documentary analysis revealed that the enclosure Commissioners did make changes of some kind when setting out their public roads. The other ten tithe maps actually depict the pre-Parliamentary enclosure landscape. Analysis of the 33 private roads in these tithe maps illustrates how often the Parliamentary enclosure Commissioners utilised pre-existing routes to create public roads, with 24 appearing at least in part on these maps, four being depicted in the same course, and five not explicitly being distinguished (FIGURE 46).

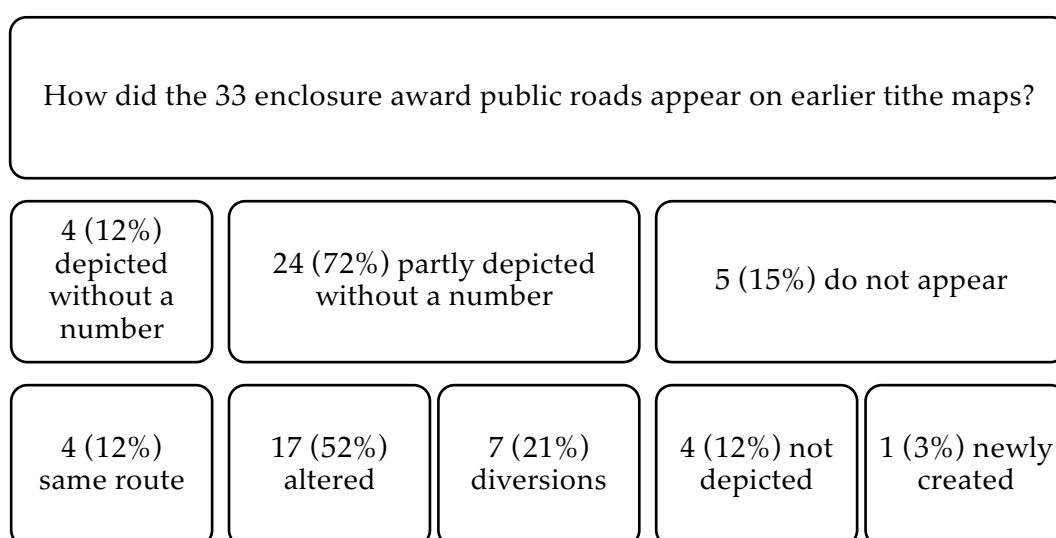


FIGURE 46 How did the 33 enclosure award public roads appear on earlier tithe maps?

Pre-enclosure tithe maps reveal that the Parliamentary enclosure Commissioners often made changes to the road network. Road improvement could be a major motivation for Parliamentary enclosure and this seems to be true even for late Parliamentary enclosure. Mingay highlights that 'later enclosures were more likely to include provisions for the commutation of the tithes and schemes for road improvements in the parish'.⁵¹⁴ While referring to post-1790s Parliamentary

⁵¹⁴ Mingay, *Parliamentary Enclosure in England*, 21.

enclosure, this analysis proves that this continued to be the case after 1836. Comparisons between pre-Parliamentary enclosure tithe maps and Parliamentary enclosure maps consistently show existing roads being straightened, widened, and narrowed. In seven cases, the enclosure Commissioners explicitly diverted existing roads to more commodious alignments. In some instances, this demonstrated the power of the local elites who employed the Parliamentary enclosure process to divert public roads further from estates. Nonetheless, these diversions and alterations made enclosures easier to allot, improved traffic in the local area, and minimised maintenance duties, perhaps the principal goal since parishioners paid for the upkeep of public roads. This supports the conclusions of Harrison, who found that Parliamentary enclosure reduced road length by an average of 30 percent.⁵¹⁵

A total of five enclosure award public roads did not appear on the earlier tithe maps. Further analysis illuminates the complexity of identifying routes across common land and open field landscapes, especially with tithe apportionments and maps, which did not purport to depict routes. Nonetheless, only one public road dissected the earlier open fields such that it could not have existed before and must have been newly created by the enclosure Commissioners. Thus, most post-1836 Parliamentary enclosure awards improved the road network. It is hoped this analysis has clarified how public roads described by enclosure awards were depicted on earlier tithe maps. While the status of routes depicted on pre-enclosure tithe maps is unclear, those which connected to existing public roads or extended outside the parish regularly became public roads at Parliamentary enclosure. This is surely an indication that these routes previously held public rights. It is clear that the Parliamentary enclosure process physically and legally clarified the status of many routes and improved the public roads in the parish.

⁵¹⁵ Harrison, 'A History of Evolution and Interaction', 224.

4.3 Public roads in post-enclosure tithe apportionments and maps

Having established some of the origins of Parliamentary enclosure public roads, this section examines what happened to such roads following Parliamentary enclosure by analysing post-enclosure tithe apportionments and maps. This examination will help establish how the tithe surveyors, map-makers, and valuers described and depicted public roads in their tithe apportionments and maps. This will offer valuable insights for rights of way inquiries which seek to determine the status of routes by using the tithe commutation documents as historic evidence.

As discussed, Parliamentary enclosure was not evenly distributed chronologically or spatially. In fact, two peaks between 1760–1780 and 1793–1815 account for 80 percent of all enclosure.⁵¹⁶ The study reflects this, with a larger sample of enclosure awards occurring before the Tithe Act 1836. Earlier Parliamentary enclosure also tended to make more widespread changes, particularly to the transport network. In total, this sample of 41 enclosure awards occurring before the Tithe Act 1836 describe 275 public roads, averaging 6.9 in each. This contrasts with post-1836 enclosure awards discussed above which average four public roads per parish.

4.3.1 Public roads which are depicted on the post-enclosure tithe maps

Of the 275 public roads established by earlier enclosure awards, 217, or 79 percent, are depicted in the same course on the tithe maps. This is a significant portion and signifies that roads identified as ‘public’ by enclosure Commissioners remained in place in the years and decades following Parliamentary enclosure. These public roads were almost always the longest, widest, and most well-connected roads in the parish. In this context, it is important to note that because the tithe Commissioners ‘were anxious to avoid uniform decisions which rode roughshod over local interests and knowledge’, each tithe surveyor and valuer

⁵¹⁶ Turner, *English Parliamentary Enclosure*, 66.

was free to depict public roads as they saw fit.⁵¹⁷ While this flexibility made the tithe commutation process a success, it renders analysis of the tithe documents more difficult. Broadly speaking, roads are depicted with or without apportionment numbers on tithe maps. In this study, 160 enclosure award public roads are unnumbered while 57 are numbered. Each will be analysed separately.

Public roads which are not numbered on the post-enclosure tithe maps

By far the largest proportion of the sample, 160 of the 275 public roads established at enclosure, are depicted on the later tithe maps without a corresponding apportionment number. Parcels without apportionment numbers indicate either: the tithes had already been commuted; the tithes had been extinguished by a Parliamentary enclosure Act; or the land was exempt from the tithes. Land could be exempt for nine principal reasons, detailed on page 119, but the most applicable here is barren land. Public roads regularly fell into this category because they were frequently metalled or used such that they produced no titheable income. While titheable income may have been produced on the verges of particularly wide roads, there is no evidence that this was claimed. As a result, most public roads established at enclosure were excluded from the commutation and left without apportionment numbers.

The 160 public roads without numbers are among the longest, widest, and most-well-connected on the tithe maps. Such roads average 1322 metres; only three are shorter than 100 metres, and 81 percent are longer than 500 metres. Most public roads were assigned a width in the Parliamentary Acts or awards. Usually this was standardised across all public roads in a parish, but the Commissioners sometimes stipulated specific widths for each road. A 1796 Parliamentary Act from Sedgeford, Norfolk, represents a typical pre-1801 Act arrangement:

All old public carriage roads which are not inclosed shall be the breadth of thirty feet and that all such roads which are inclosed (except the road

⁵¹⁷ Evans, *Tithes*, 25.

near Mr Glovers house, certain parts of which are to be enlarged) shall be and remain their present dimensions and that all new public carriage roads shall be made according to the direction of the Act.⁵¹⁸

An additional note stipulates 'Mr Glover to enlarge or widen the present road leading from the Blacksmiths Shop to the corner of the garden wall near his dwelling house.'⁵¹⁹ This offers some contemporary context to the mass of road-building which occurred through the Parliamentary enclosure period. While entirely new roads were constructed, the Commissioners more often improved and standardised the width and quality of existing roads. This was especially true following the 1801 Act which stipulated 'Roads and Highways shall be and remain Thirty Feet wide at the least'.⁵²⁰ All 160 unnumbered public roads were at least 30 feet wide, with half specified as 30 feet and 40 percent specified as 40 feet by the enclosure awards, for an average of 34.5 feet.

Unnumbered public roads are also well-connected with 75 percent connecting to three or more routes and 30 percent connecting to five or more. Only one is a cul-de-sac: 'Church Road' in Barney, Norfolk.⁵²¹ On average, each unnumbered public road connects to four other routes, and 74 percent extend outside the parish, demonstrating the extent to which these roads provided internal parochial routes and connected to settlements and resources outside the neighbourhood. Since these roads are long, wide, and well-connected, they were unlikely to be excluded by the tithe map-makers.

Most tithe map-makers distinguished the unnumbered public roads from titheable land with the use of colour. In fact, 80 percent followed Dawson's recommended colour scheme of sienna for roads, red or grey for buildings, and blue for bodies of water.⁵²² Occasionally, the tithe map-makers used colour to

⁵¹⁸ NFRO HAY 204, Stiffkey and Morston, Little Dunham, and Sedgeford Proceedings and award of Little Dunham, 1796.

⁵¹⁹ NFRO HAY 204, Stiffkey and Morston, Little Dunham, and Sedgeford Proceedings and award of Little Dunham, 1796.

⁵²⁰ The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109, s. 8.

⁵²¹ NFRO C/Sca 2/14, Barney enclosure award, 1814.

⁵²² Dawson, 'Report from Lieutenant Dawson on Plans Required for the Tithe'.

distinguish between different types of road as well. For instance, Norton Subcourse and Ringstead in Norfolk, and Whittlebury in Northamptonshire, all employ sienna to colour the public roads while leaving the private roads uncoloured. While 80 percent of unnumbered public roads are coloured sienna on the tithe maps, there is some noticeable regional variation across the sample counties (TABLE 1).

TABLE 1 Colour used by tithe map-makers to depict public roads established at enclosure.

County	Number of public roads coloured sienna	Number of public roads not coloured	Percentage of public roads coloured sienna
Hertfordshire	35	4	90%
Norfolk	63	28	69%
Northamptonshire	30	0	100%
Overall	128	32	80%

The tithe map-makers working in Northamptonshire coloured all public roads sienna, whereas only 69 percent were coloured in Norfolk. Tithe map-makers in Northaw in Hertfordshire, and Ashill, Dillington, Necton, Pentney, and Surlingham in Norfolk, employed Dawson's recommendations for buildings and bodies of water yet failed to colour roads. Some map-makers exclusively produced maps which did not colour roads, like Pratt and Son, while others produced tithe maps which coloured all roads sienna. The approach of map-makers was not always consistent, but it may be possible to establish a pattern for how public roads were treated by particular map-makers. This synergistic approach would represent the 'detailed analysis' Sullivan J discussed which could be 'admissible as to the existence, or non-existence of public rights of way'.⁵²³

This study has uncovered a notable pattern: tithe map-makers either coloured all public roads sienna or left all without colour. The tithe map for Barney, Norfolk,

⁵²³ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] EGCS 134 (QB).

is the only exception as it colours two public roads sienna but leaves one uncoloured. With a length of only 23 metres, this public road is one of the shortest in the sample; named 'Church Road', it provided the sole means of access to St Mary's Church (FIGURES 47 and 48).⁵²⁴ The status of 'church ways' has



FIGURE 47 NFRO C/Sca 2/14, Barney enclosure map, 1814.



FIGURE 48 NFRO DN/TA 80, Barney tithe map, 1838.

been clarified through the twentieth century such that they 'do not amount to highways unless available to the general public'.⁵²⁵ However, it is not obvious if this was always the case, and contemporaries may have viewed church ways differently. While the church way in Barney was identified as a public road in 1814 by the enclosure Commissioners, it was not coloured sienna like the other public roads by the tithe map-makers 24 years later. This implies it did not have the same physical appearance as the other public roads and signifies a possible change in legal status, or perhaps, an acknowledgement that it was not available to the general public. While the tithe map-makers were not concerned with the status of routes, it is significant that the only unnumbered public road which was coloured differently on a tithe map has a dubious status in the future.

⁵²⁴ NFRO C/Sca 2/14, Barney enclosure award, 1814.

⁵²⁵ Sydenham, *Public Rights of Way and Access to Land*, 1.4.4.

The defining characteristic of public roads established at enclosure which are unnumbered on tithe maps is not their colour, but the lines they are depicted with. In each county, over 90 percent are depicted with solid lines (TABLE 2).

TABLE 2 Lines used by tithe map-makers to depict public roads established at enclosure.

County	Number of public roads with solid lines	Number of public roads with dashed lines	Percentage of public roads with solid lines
Hertfordshire	35	4	90%
Norfolk	89	2	98%
Northamptonshire	29	1	97%
Overall	153	7	96%

Only seven of the 160 unnumbered public roads described and depicted by Parliamentary enclosure awards and maps appear with dashed lines on the later tithe maps. In all cases such dashed lines appear to represent those areas which are open to adjoining land. For instance, a public road in Westmill, Hertfordshire, appears with dashed lines near the River Rib (FIGURE 49). It can be surmised that erecting barriers was ill-advised in such low-lying ground. 'Glapthorne Lower Road' in Benefield, Northamptonshire, also appears near a river and is indicated with double dashed lines on both the 1824 enclosure and 1844 tithe maps. Again, this illustrates that the route was open to adjoining land. A further two examples can be found in Sedgeford, Norfolk and appear with one solid line and one dashed line, indicating that only one side was open to adjoining land. While this does not affect their legal status, it is pertinent to mention that these represented two of the very few public roads set out by Parliamentary enclosure which were not 'white' on the Finance Act. It appears the tithe map-makers captured an important part of the history of these roads. Dashed lines on tithe maps should thus be carefully examined as they may provide important clues as to the subsequent status of these roads.



FIGURE 49 HALS DSA4/114/2, Westmill tithe map, 1841.

The 160 unnumbered public roads established at enclosure are depicted with remarkable consistency on the later tithe maps. The majority, 78 percent, are coloured sienna with solid lines on the later tithe maps. While 32 of the 160 unnumbered public roads are not coloured, only one tithe map had both sienna-coloured and uncoloured public roads as most map-makers coloured all public roads sienna or left all uncoloured. This is a significant finding which may aid legal inquiries. Also, the public roads which appear differently to other public roads on the same tithe map typically appear unlike other public roads on the Finance Act maps as well. It seems the exceptions and outliers are usually those which experienced legal change in the future, as will become apparent in the Finance Act analysis.

Public roads which are numbered on the post-enclosure tithe maps

Remarkably, all 57 public roads established at enclosure which are numbered on the later tithe maps are in a single county, Norfolk. This highlights that there was considerable regional variation in the tithe commutation, echoing the findings of Kain and Oliver, that 'each tithe map is a unique creation...and should not be dubbed components of a 'national survey''.⁵²⁶ To understand this regional variation, the contemporary politics surrounding the Tithe Act 1836 must be examined. Dawson's recommendations specified that 'each separate parcel of land should be numbered upon the plan' and 'Roads, rivers, lakes, ponds and canals should be numbered upon the Plans in the same manner as inclosures, and their contents given separately in the Schedule'.⁵²⁷ Despite these clear instructions, only 21 percent of the sample public roads described by enclosure awards are numbered.

The Tithe Commission Office faced several challenges in implementing the Tithe Act 1836. For one, landowners were expected to pay for the tithe maps but could 'adopt any plan of their choice' to avoid unnecessary expense if a suitable map existed or had recently been produced.⁵²⁸ However, the tithe Commissioners 'were required to certify the accuracy of every map before confirming an apportionment', and by February 1837, only 38 agreements had been reached.⁵²⁹ Hence, while Dawson, among others, favoured a cadastral survey, progress was too slow and a compromise had to be reached. It was resolved that two classes of map would be created: first class, 'legal evidence of all matters which they portray'; and second class, sanctioned 'as evidence of only those facts of direct relevance to the tithe commutation'.⁵³⁰ The Tithe Act 1837 was passed in July 'to relieve the tithe commissioners of the duty to sanction map accuracy and to enable landowners to present maps at scales and to specifications different from

⁵²⁶ Kain and Oliver, *The Tithe Maps of England and Wales*, 810.

⁵²⁷ Dawson, 'Report from Lieutenant Dawson on Plans Required for the Tithe', 12.

⁵²⁸ Kain and Prince, *The Tithe Surveys of England and Wales*, 76.

⁵²⁹ Kain and Prince, 76; *Return of Number of Notices and Agreements for Commutation of Tithes Received by Tithe Coms., to March 1837*.

⁵³⁰ Kain and Oliver, *The Tithe Maps of England and Wales*, 708.

those contained in Dawson's printed instructions'.⁵³¹ Thus, the political impetus to expedite the production of tithe surveys released the map-makers from the requirement to number roads and meant that Dawson's recommendations were followed less stringently. Decisions increasingly fell to individual map-makers and surveyors, and corresponding variations mirror this.

The tithe Commissioners were 'prepared to be flexible in order to achieve harmony' and felt locals knew their business better than assistant Commissioners who were strangers to the parish.⁵³² Tithe valuers ranged from local farmers, to parish schoolmasters, to London-based specialists, but were principally drawn from the local community.⁵³³ The same was true of the surveyors and map-makers, as only a few hundred of the 11,785 tithe maps were produced by 'outsiders'.⁵³⁴ As such, particular mapping practices were localised as map-makers tended to work in confined geographic regions. In this case, the 57 numbered public roads set out at enclosure are contained within six Norfolk tithe maps created by just three map-makers: James Wright, John Deyns, and Lenny and Croft. Each map-maker followed Dawson's recommendations and numbered each parcel of land. In fact, these map-makers exclusively produced maps which number roads. Map-makers evidently had a significant degree of creative control, especially in those matters which did not directly affect the tithe commutation. While numbered enclosure award public roads were only found in the Norfolk sample, they undoubtedly exist elsewhere, the distribution of which will reflect the areas map-makers worked.

The tithe map-makers and valuers described and depicted numbered public roads set out at enclosure in a consistent fashion. These 57 numbered public roads differed little in a physical sense from the 160 public roads which were unnumbered on the later tithe maps. This supports the interpretation that the decision to number public roads was stylistic rather than attributable to any

⁵³¹ Kain and Prince, *The Tithe Surveys of England and Wales*, 66.

⁵³² Evans, *Tithes*, 18–19.

⁵³³ Kain and Oliver, *The Tithe Maps of England and Wales*, 14.

⁵³⁴ Kain and Oliver, 808.

physical or legal differences in the roads. Both numbered and unnumbered roads are long, wide, and connect to many other routes. Numbered public roads average 1148 metres and 36.1 feet in width, compared to an average of 1322 metres and 34.5 feet for the unnumbered public roads. Numbered and unnumbered roads differ in only one distinct way on the tithe maps: colour. While 80 percent of unnumbered public roads are coloured sienna, only 21 percent of numbered public roads are. This reflects the different approaches to distinguishing titheable and non-titheable land. Certain map-makers number each parcel of land and identify titheable land by using the 'Amount of Rent-Charge apportioned' column in the apportionment, while other map-makers employ colour to differentiate titheable and non-titheable land. This is why so few numbered public roads are coloured, because they were already distinguished from titheable land by means of apportionment numbers. Moreover, each individual tithe map depicts the public roads on the map in the same fashion, for example, all numbered public roads in East Ruston, Hockwold-cum-Wilton, Northwold, and Sustead were left uncoloured, while all numbered public roads in Gresham and Winterton were coloured sienna (FIGURE 50). This analysis is extremely useful for rights of way cases as it illustrates that numbered public roads were always coloured consistently on each individual tithe map.



FIGURE 50 NFRO DN/TA 525, East Ruston tithe map, 1841.

All 57 numbered public roads set out at enclosure are listed in a separate section of the tithe apportionment, usually entitled 'Public Roads'. Thus, while the roads are numbered, they were not owned or occupied by any single individual in the manner of other numbered parcels of land. Such numbered public roads typically extended outside the parish and form 'settlement-linking' routes.⁵³⁵ This is supported by the names they were given in the apportionment which featured the destinations of the roads in question 63 percent of the time. Examples include: 'Bessingham Road', 'Feltwell and Brandon Road', 'Honing and Happisborough Road', 'Sheringham Road', and 'Winterton and Yarmouth Road'. Equally, some roads were associated with specific local landmarks like 'Fox and Hounds Road' named after a local public house, or 'Fox Green Road' and 'Littlemoor Green Road', which both ran alongside greens. 'Boundary Road', 'Church Lane', 'Brick-Kiln Lane', 'Mill Lane', and 'Staithe Road' are self-explanatory examples. Other names indicate the surveyors' desire to number, and therefore name, each parcel of land. For instance, 'Road within the Village', 'Roads and Lanes in the Village', and 'Roads from Low Bridge to Stoke Bridge' are more descriptive than representative of what a road would have been called. These names can be a significant factor in their perceived contemporary status and provide helpful information to modern status inquiries.

In summary, a fifth of the 275 public roads established at enclosure are numbered on the tithe maps, by the hands of just three map-makers. These numbered public roads are very similar to the unnumbered examples, except they are rarely coloured. With an understanding of the political context of the tithe commutation, it is clear that the tithe map-makers and valuers were responsible for deciding how roads would be described and depicted, especially following the Tithe Act 1837. As these social actors were typically drawn from the local community, specific cartographic practices were concentrated in particular regions, hence numbered public roads appear only in the Norfolk sample.

⁵³⁵ Harrison, 'A History of Evolution and Interaction', 168.

4.3.2 Public roads which are partly depicted on the post-enclosure tithe maps

A total of 16 of the 275 roads described as public by Parliamentary enclosure awards appear only in part on the later tithe maps. Often this is because the tithe commutation did not survey these specific areas and the public roads may have continued to physically and legally exist. For instance, two public roads in Barby are partly indicated on the tithe map but both likely extended beyond as they are annotated 'To Kilsby' and 'From Daventry'. Likewise, in Bugbrooke the tithe commutation concerned lands to the north of the village, and so public roads described by enclosure awards did not appear entirely on the tithe map (FIGURES 51 and 52). Nearly all roads contain 'to' or 'from' annotations to named settlements which has been used as evidence of public status.⁵³⁶ Although it is sometimes claimed that such annotations serve instead to better orientate the map reader.⁵³⁷



FIGURE 51 NHRO T/022, Bugbrooke tithe map, 1849.



FIGURE 52 NHRO Enclosure 50, Bugbrooke enclosure map, 1779.

Only two public roads were not depicted on the tithe maps despite forming part of the survey. As discussed in Section 3.3.2, the tithe apportionments and maps

⁵³⁶ Kain and Prince, *Tithe Surveys for Historians*, 92.

⁵³⁷ Andrews, 'Tithe Map Case Studies', 69.

have long been held as evidence for the existence and non-existence of highways, notably in *Antrobus*, *Loughlin*, and *Maltbridge*.⁵³⁸ *Loughlin* noted that one would expect a landowner to insist a road was depicted and excluded since it was not titheable.⁵³⁹ However, in cases where adjoining land was not titheable, there was no impetus for any adjoining landowner to insist the road was depicted. Thus, it can be surmised that a public road in Greens Norton was not entirely depicted because adjoining lands were not titheable (FIGURE 53). The other partly depicted public road appears in North Creake, Norfolk, on a different alignment on the tithe map. Although legal records do not survive, the tithe maps seem to capture the physical re-aligning of this public road. This was the only instance of such found in the entire sample of 275



FIGURE 53 NHRO T/129, Greens Norton tithe map, 1848.

enclosure award public roads, illustrating their permanence in the years and decades following Parliamentary enclosure

In most cases, the limits of the tithe map constrained how much of any given enclosure award public road was depicted. While 16 public roads described at Parliamentary enclosure appear only in part on the later tithe maps, nearly all were a result of the maps depicting different areas. Only in two cases were public roads not depicted despite forming part of the tithe commutation; one of these partly appears because the land was not titheable, the other appears on a different alignment.

⁵³⁸ *A-G v Antrobus* [1905] 2 Ch 188 (Ch) [194]; *Kent CC v Loughlin* (1975) 234 EG 681 (CA); *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] EGCS 134 (QB).

⁵³⁹ *Kent CC v Loughlin* (1975) 234 EG 681 (CA).

4.3.3 Public roads which are not depicted on the post-enclosure tithe maps

A total of 42 public roads, representing 15 percent, do not appear on the post-enclosure tithe maps. Almost all were not depicted because of differences in the survey areas of the enclosure and tithe maps. These are principally located in Northamptonshire as 35 of its 77 public roads were not depicted, compared to five out of 47 in Hertfordshire, and two out of 151 in Norfolk. All 35 public roads in Northamptonshire existed outside the tithe commutation survey. For instance, the Aynho enclosure Commissioners' specified that they 'finished their valuation of the Old Inclosures to be exchanged and Exonerated from Tithes' in 1793.⁵⁴⁰ Likewise, the tithe map for Weston, Hertfordshire, concerned a relatively small portion of the overall parish, and only roads which adjoin titheable land are depicted, with some pencilled in later (FIGURE 54). This provides a stark reminder that the tithe was not directly concerned with roads and their depiction on the maps was incidental to the primary purpose of the tithe: to assess the titheable value of the land. Of course, the tithe maps can still assist legal inquiries as annotations like 'to Clothall' or 'from Baldock' on the Weston tithe map can be an informative signal of public status.



FIGURE 54 HALS 26875, Weston tithe map, 1847.

⁵⁴⁰ NHRO YZ8840, Aynho enclosure minutes, 1792–1793.

Of all the public roads analysed, only one does not appear on the tithe map despite being located within the bounds of the tithe survey and is thus worthy of further examination. This public road was located in Ringstead, Norfolk, named 'Church Road', and described as 'proceeding in a west direction to the north-west corner of the Church yard of Saint Andrew'.⁵⁴¹ This makes it unique among the public roads described by Parliamentary enclosure awards as the only cul-de-sac and the shortest at 103 metres compared to the 1345-metre average. It also displays similar characteristics to the 'Church Road' in Barney, discussed above. It is notable that Parliamentary enclosure Commissioners identified both as *public* roads considering that church ways are today held as examples of private roads because they do not provide access to the general public. Such evidence exposes that nineteenth- and eighteenth-century attitudes to public roads do not always align with modern day law. By 1841, the 'Church Road' in Ringstead was not depicted on the tithe map (FIGURE 55). It is possible it was legally stopped up, although no record has survived. A nearby highway and footpath were both diverted from Henry Styleman Le Strange's estate in 1836–1837 but the corresponding map gives no indication of Church Road.⁵⁴² As St Andrew's Church could be accessed by 'Town Street Road', it seems 'Church Road' became increasingly unnecessary following the 1781 Parliamentary enclosure.



FIGURE 55 NFRO PD 696/2, Ringstead tithe map, 1841.

Taken together, this means 41 of the 42 roads described as 'public' by enclosure awards were not depicted on the tithe maps because they did not form part of the commutation, highlighting how often such roads continued to exist.

⁵⁴¹ NFRO PD 691/1, Ringstead enclosure award, 1781.

⁵⁴² NFRO C/Sc 2/15/9, Stoppage and diversion of ways in Ringstead, 1837.

4.3.4 Conclusions

Post-enclosure tithe maps are undoubtedly a valuable source for evaluating the legal status of public highways but require careful and considered examination. The sample of 40 post-enclosure tithe maps contains 275 public roads described by enclosure awards. Of these 217, or 79 percent, are depicted in their entirety on the later tithe maps. A further 42 public roads, or 15 percent, are not depicted on the tithe maps, leaving 16, or six percent, which only partly appear (FIGURE 56).

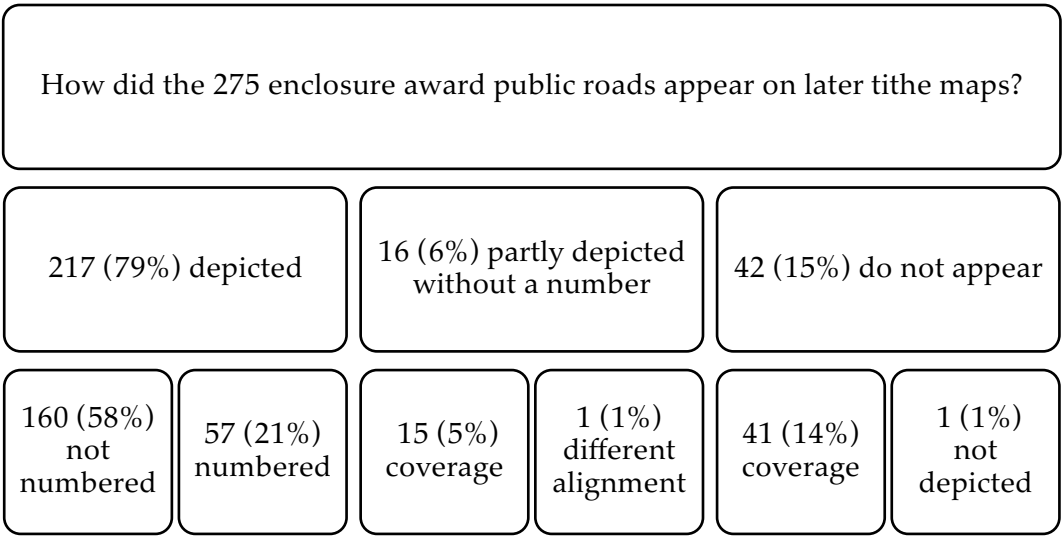


FIGURE 56 How did the 275 enclosure award public roads appear on later tithe maps?

This study has shown that 21 percent of public roads described by Parliamentary enclosure awards are not depicted in their entirety on the post-enclosure tithe maps. While a high proportion, many of these roads almost certainly continued to exist and were not depicted simply because they did not intersect with titheable land. This means, of the 275 public roads analysed, only two were omitted despite being within the coverage of the tithe survey. One of these, a public road in North Creake, Norfolk, appears on a different alignment on the 1839 tithe map. The other, in Ringstead, Norfolk, is not depicted and was possibly extinguished. Comparisons with the Finance Act 1910 maps and other subsequent sources corroborate the evidence of the tithe maps. This is a

significant finding as it confirms that, despite not being directly concerned with public roads, the tithe map-makers and valuers accurately depict public roads which adjoin titheable land. Provided they are within the coverage of the tithe survey, all other public roads appear in the same course on later tithe maps, as prescribed by Parliamentary enclosure. To clarify, based on the findings of this research, omission of a public road described by Parliamentary enclosure on a later tithe map is proof of its non-existence.

The tithe map-makers and valuers were afforded considerable creative control over the design and style of the tithe apportionments and maps which meant public roads were not always consistently described and depicted. The success of the tithe commutation can partly be attributed to the flexible approach employed, although the absence or inclusion of features 'reflects individual landowners' and map-makers' perceptions of what a tithe survey should contain. Local tradition of estate cartography was a powerful influence on the nature and content of tithe maps'.⁵⁴³ The fact that the tithe map-makers and valuers were principally drawn from local society gives the apportionments and maps a distinctive regional pattern. For instance, three map-makers in Norfolk were the only to number public roads. Likewise, particular map-makers always depicted public roads in the same manner across multiple maps. With thorough analysis, it may be possible to establish how specific map-makers depict roads of differing status.

Moreover, this research has uncovered that each individual tithe apportionment and map describes and depicts all public roads in the same fashion. Public roads are either numbered or not numbered, never both. They are nearly always depicted with the same lines and in the same colour as one another with the exceptions tending to appear differently on the Finance Act maps as well, discussed in Section 4.4. In summary, the tithe apportionments and maps offer a depiction of the physical landscape in the 1830s, which is immeasurably useful ascertaining the historic legal status of routes in modern day inquiries.

⁵⁴³ Kain and Oliver, *The Tithe Maps of England and Wales*, 809.

4.4 Public roads in Finance Act documents and maps

This section employs the Finance Act 1910 documents and maps to analyse the 339 public roads described by Parliamentary enclosure awards, encompassing all those discussed in Sections 4.2 and 4.3. The Finance Act, as already seen, is regularly used in court cases concerning rights of way. This analysis will help assess how public roads changed in the century or so following Parliamentary enclosure as well as enabling a broader understanding of how the Finance Act valuers depicted public roads. A systematic study of this nature has not been completed before and will be useful in legal inquiries which use the Finance Act documents to determine the status of rights of way.

The Finance Act maps were created using a variety of OS maps which were coloured according to ownership in 'hereditaments', the valuers' term for parcels of land. As any cursory viewer will surmise, not all land is coloured. Roads are typically excluded from hereditaments and shown as 'white' roads.⁵⁴⁴ The 'white' road rule, a presumption that these roads are public vehicular highways, applies for two key reasons. First, the surface of public vehicular highways is vested in the highway authority which was excluded from the valuation: 'No duty under this Part of this Act shall be charged in respect of any land or interest in land held by or on behalf of a rating authority.'⁵⁴⁵ Second, 'white' roads are presumed to be public vehicular highways rather than bridleways or footpaths because the latter are usually dealt with by public right of way deductions.⁵⁴⁶ This analysis will test whether 'white' roads offer strong evidence of public vehicular rights by assessing roads known to be public at Parliamentary enclosure.

⁵⁴⁴ Bucks and Wadey, *Rights of Way*, 189.

⁵⁴⁵ Finance (1909–10) Act 1910, 10 Edw. VII c. 8, s. 35(1).

⁵⁴⁶ Planning Inspectorate, *Consistency Guidelines*, Section 11, 5th revision, July 2013, para. 11.7.

4.4.1 Public roads which are 'white' on the Finance Act maps

The vast majority of public roads established at enclosure appear 'white' on the Finance Act maps. Of the 339 public roads in the three-county sample, 326 were left 'white' in their entirety, representing 98 percent. At this point the purpose and process of the Finance Act valuation should be noted as it is intimately linked to the manner in which public roads were depicted by the Finance Act valuers. Landowners were at the heart of the valuation: it was they who filled out 'Form 4-Land' which formed the basis for the survey; they who signalled the boundaries of their land; and they who established whether public rights of way existed. In other words, landowner input determined which roads were left 'white'.⁵⁴⁷ While a 'white' road may represent a public vehicular highway, Brian Short identified three alternatives, as adjoining landowners were either:

1. ignorant of its status and thus failed to claim it as being within their boundaries (which legally extended to the centre part of the routeway);
2. did not wish to acknowledge its status which was known to them as a public road, thus forfeiting any rights to deductions from their Site values; or
3. simply not interested in the status of the route, since it crossed nobody's land.⁵⁴⁸

A further alternative, overlooked by Short, is that some 'white' roads may have held *shared* rights and duties of upkeep. Since no provision was made for joint ownership, roads with multiple owners would necessarily appear 'white'. It is probable that a mixture of these reasons motivated different landowners to leave routes unclaimed. However, it was the Finance Act valuers who surveyed the land, confirmed the public rights of way, coloured the maps, and who ultimately had the final say. As there was no public consultation, the valuers' decisions were decisive.⁵⁴⁹ The valuers worked within the constraints of the OS maps which

⁵⁴⁷ Short, *Land and Society in Edwardian Britain*, 25:128–29.

⁵⁴⁸ Short, 25:128.

⁵⁴⁹ Short, 25:129.

were used as base maps for the Finance Act maps. Thus, while technically the boundaries of adjoining landowners may have extended to the centre of the highway, following the *ad medium filum* presumption, no evidence has been found of any road being coloured in such a fashion.⁵⁵⁰ It seems practical concerns took precedence over the infeasibility of determining the precise legal boundaries of all landholdings. Consider for instance that the soil of a road may belong to the lord of the manor, or be vested with those persons entitled to use the ways, or the *ad medium filum* presumption may apply.⁵⁵¹

In the case of roads laid out under an inclosure award the general rule came to be that if the lord of the manor shared in the general allotment under the Act (which was the usual case) then the roadway would be regarded as belonging to the owners of the land to either side up to the *medium filum*.⁵⁵²

This illustrates the intricacies of highway law but also, more fundamentally, the extent to which rights of access matter more than ownership. It was far beyond the scope of the Finance Act to disentangle such rights and, in almost all cases, the valuers utilised the physical boundaries employed by the OS surveyors.

The Finance Act valuers updated physical boundaries where necessary: special edition 1912 OS maps were commissioned in those districts which had experienced recent changes to the landscape; and the valuers were prepared to make their own revisions where required. This is best illustrated with an example from Hexton, Hertfordshire, which indicates that the Finance Act valuers were actively surveying the land. They altered 'Hexton House', renovated by George Hodgson from 1901–1919, noted the expansion of 'Church Wood', and added several properties and associated routes (FIGURE 57).⁵⁵³ More detail can sometimes be found in the working sheets, which were compiled during the

⁵⁵⁰ For an overview of the *ad medium filum* presumption see Sydenham, *Public Rights of Way and Access to Land*, 2.3.4; Bickford-Smith et al., *Private Rights of Way*, 7.14.

⁵⁵¹ Bickford-Smith et al., *Private Rights of Way*, 7.14.

⁵⁵² Bickford-Smith et al., 2.15.

⁵⁵³ Historic England, 'Hexton Manor', The National Heritage List for England, 11 June 1987, <https://historicengland.org.uk/listing/the-list/list-entry/1000910>.

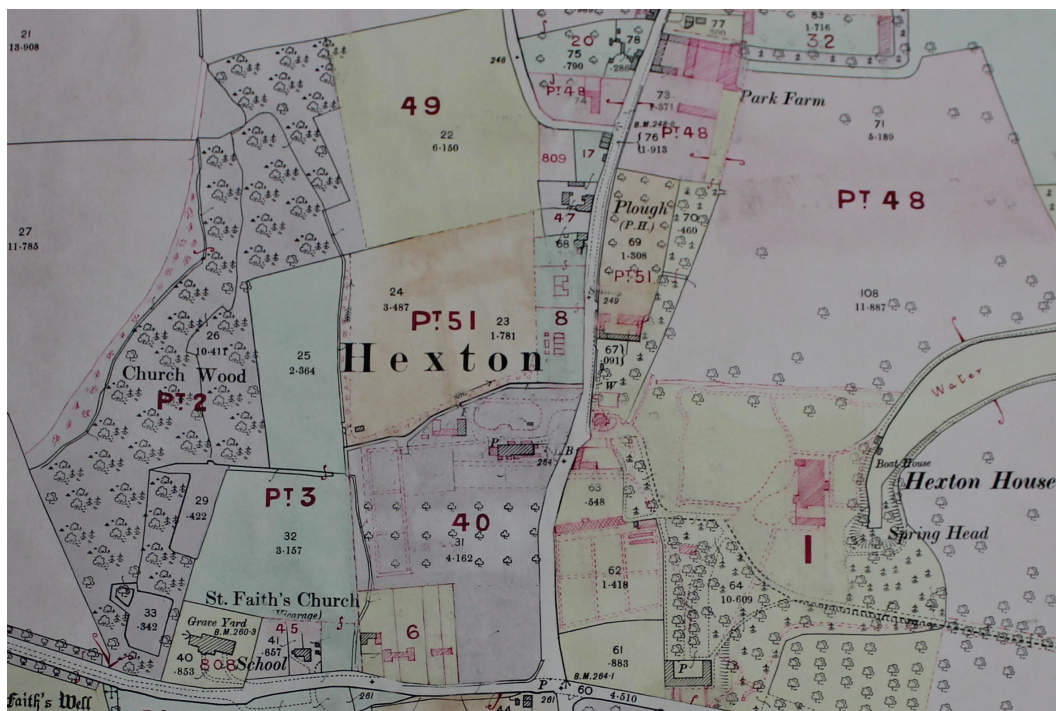


FIGURE 57 TNA IR 126/4/38, Finance Act record sheet Hertfordshire VI 14, c. 1910.



FIGURE 58 HALS IR1/72, Finance Act working sheet Hertfordshire VI 14, c. 1909–1910.

actual survey (FIGURE 58). In Hexton, some hereditaments were named, including 'Cricket Ground', 'Clay Close', and 'Hall Close', some additional buildings were detailed, and some field boundaries and routes were removed.

Working sheets can thus offer useful additional evidence to legal inquiries which seek to determine the historic status of routes but are utilised far too infrequently. It is notable that across all the record sheets and working sheets, no public road established by enclosure was altered by the valuers. In fact, all the public roads described by Parliamentary enclosure awards follow the same course on the Parliamentary enclosure maps and Finance Act maps.

Over half of the 326 'white' public roads, 165 instances, are bounded by solid lines on the OS maps used by the Finance Act valuation. A further 155 roads contain two dashed lines within these solid lines, a convention employed by the OS surveyors to distinguish the surfaced portion of a road from its unsurfaced verges. FIGURE 59 shows both methods in Brigstock, Northamptonshire, as well as the valuers annotating a route 'Farming Woods Road' to the north-east. It has been asserted that 'all the omitted roads were either stretches of road which ran

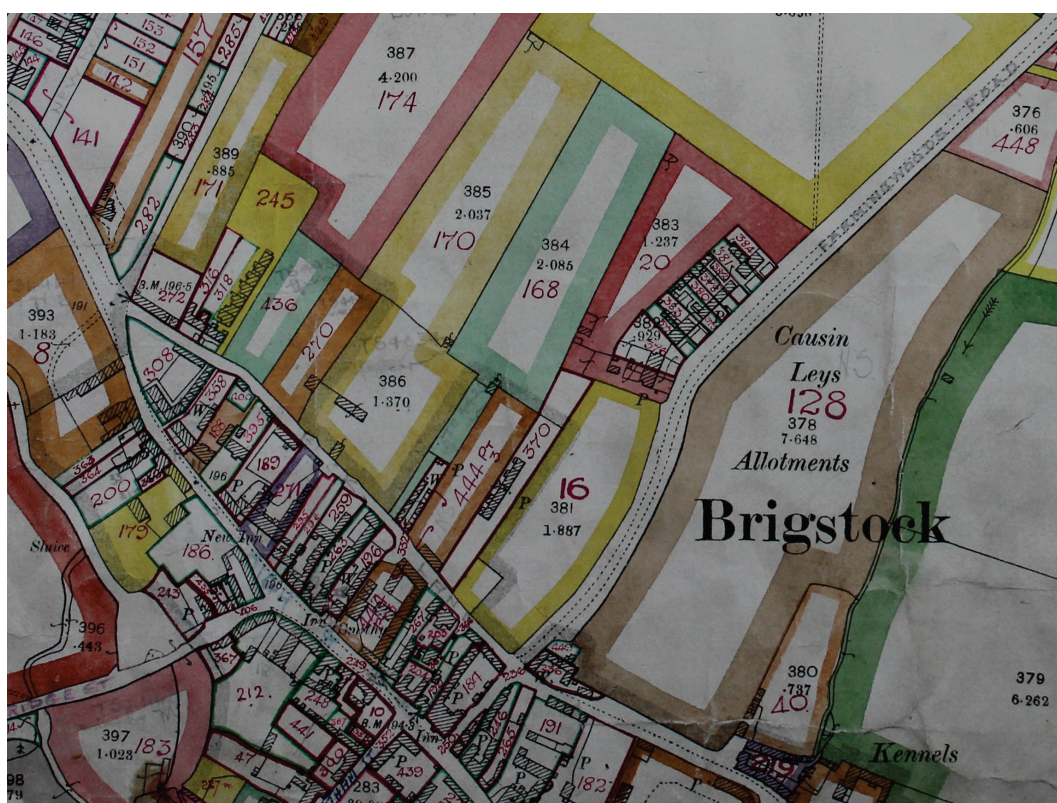


FIGURE 59 TNA IR 127/7/123, Finance Act record sheet Northamptonshire XVIII 9, c. 1910.

between inclosures, 'fenced roads', or roads in built-up areas'.⁵⁵⁴ While this was commonly the case, it is entirely possible for open, unfenced roads to be omitted from the valuation and appear as 'white' roads as well. In such cases the land either side is typically owned by the same individual and it is reasonable to infer that public rights exist since the 'valuers would have been extremely reluctant to show any land as a public road if it could be assessed for duty'.⁵⁵⁵

In this sample of 326 'white' public roads, only six are partly open to adjoining land. Portions of two 'Public Carriage Road and Highway[s]' in Standon are depicted with double dashed lines.⁵⁵⁶ Both roads are wider than paths annotated *F.P.* and include braces where land on either side forms part of the same hereditament, a clear indication that the valuers intended to omit them from the survey (FIGURE 60). The other four public roads are entirely open to adjoining land and are bounded by dashed lines. One appears in Weston as a wide dashed route extending across two 1:2500 sheets, both parts include a brace, separating



FIGURE 60 TNA IR 126/4/197, Finance Act record sheet Hertfordshire XXII 9, c. 1910.

⁵⁵⁴ Braham, 'Uncoloured Roads on 1910 Finance Act Maps', 153.

⁵⁵⁵ *Fortune v Wiltshire Council* [2011] EWCA Civ 883, [2013] 1 WLR 808, 828.

⁵⁵⁶ HALS QS/E61, Standon enclosure award, 1835.

the road from hereditament '92' (FIGURE 61). Interestingly, this road is described uniquely in the enclosure award as a 'Public Carriage and Drift Road', while all others are described as 'Public Carriage and Drift Road *and Highway*' (emphasis added). This may be a signal of differing physical status on the part of the enclosure Commissioners and is important to note since very few public roads are described uniquely in individual enclosure awards. Another example in

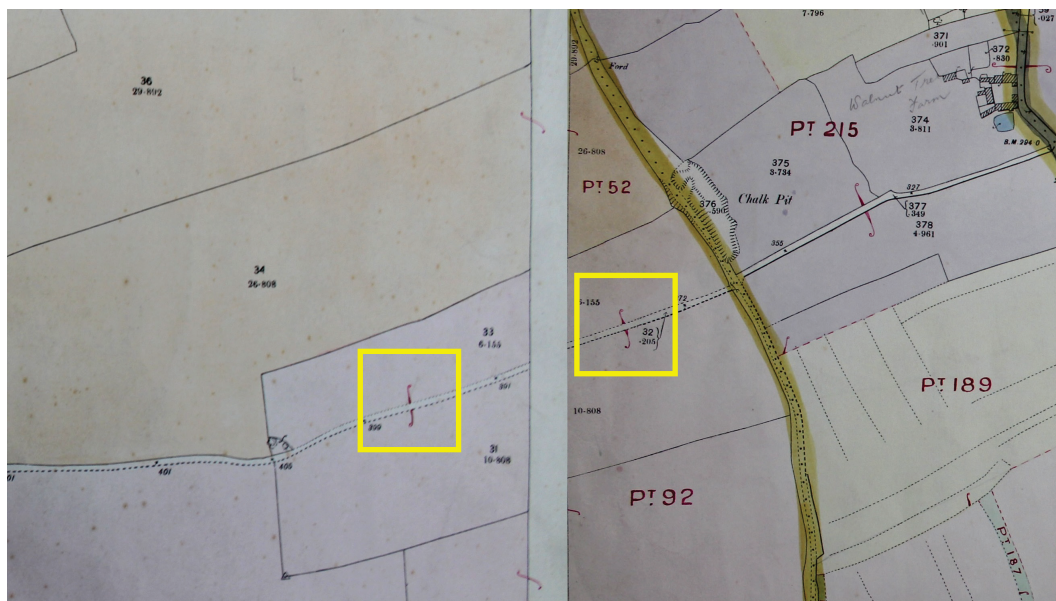


FIGURE 61 TNA IR 126/4/119 and IR 126/4/120, Finance Act record sheets Hertfordshire XIII 5 and 6, c. 1910.

Westmill, Hertfordshire, illustrates the potential application of the working sheets in legal inquiries. A public road here is separated from hereditament '1100' with a brace to the west but appears coloured to the east (FIGURE 62). The working sheets clarify this indiscretion with multiple braces (FIGURE 63).

All in all, only 1.5 percent of the sample public roads were open to adjoining land. This is a significant finding which demonstrates the extent to which the Finance Act valuers relied upon the physical bounds laid out by the OS surveyors. Where such routes corresponded with public roads described by Parliamentary enclosure awards, it is very likely public vehicular rights existed.

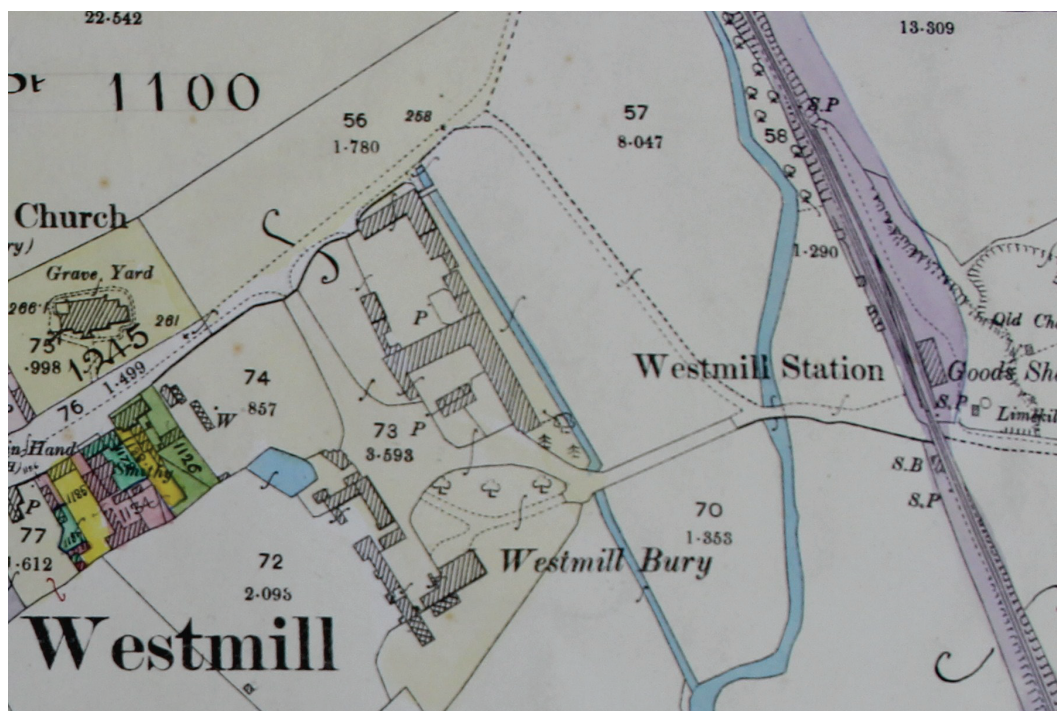


FIGURE 62 TNA IR 126/4/139, Finance Act record sheet Hertfordshire XIV 9, c. 1910.



FIGURE 63 HALS IR1/129, Finance Act working sheet Hertfordshire XIV 9, c. 1909–1910.

4.4.2 Public roads which are partly 'white' and partly coloured on the Finance Act maps

Several court cases, including *Gallagher* and *Fortune*, concerned routes which include sections which appear 'white' and sections which appear coloured on the Finance Act maps.⁵⁵⁷ It was especially rare for public roads described by Parliamentary enclosure awards to appear like this, totalling just eight out of 339. All eight roads are depicted partly with solid lines and partly with dashed lines. There is a conspicuous pattern that only those dashed parts which are open to adjoining land are coloured. This is an important discovery which confirms that, aside from the isolated examples discussed above, the Finance Act valuers always included roads within hereditaments they were open to. For instance, two public roads in Barby, Northamptonshire, are 'white' where they are enclosed and coloured where they are open to adjoining land. FIGURE 64 shows 'Rugby Road' which was principally 'white', aside from a 235-metre section which is open to, and coloured as part of, hereditament '95'. This can be contrasted with a road to

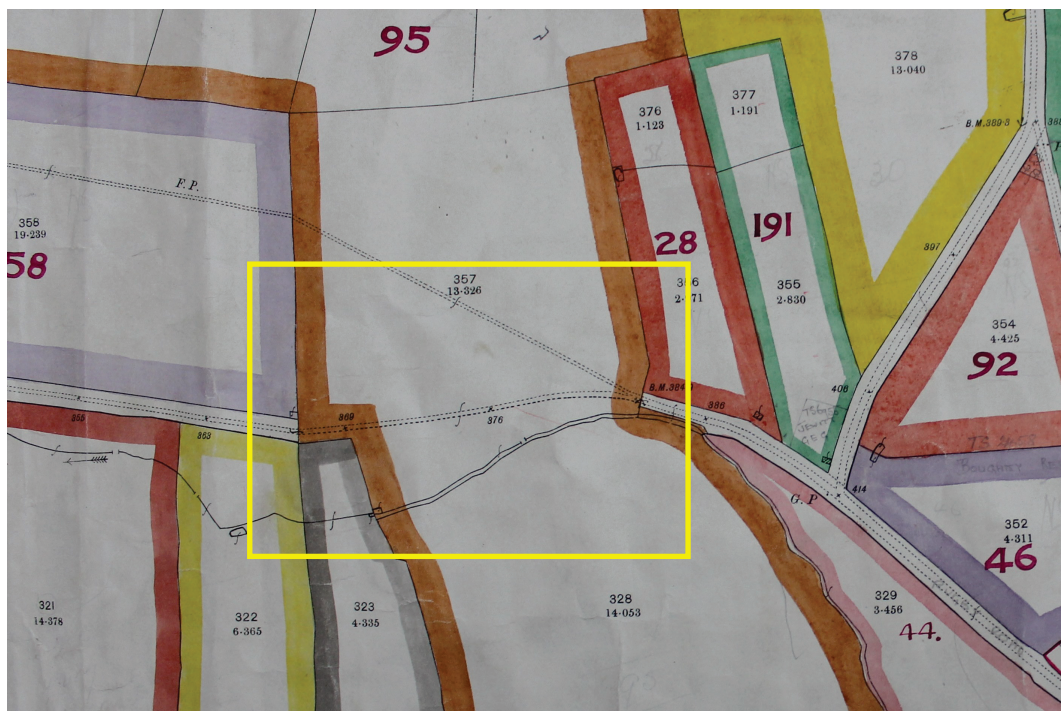


FIGURE 64 TNA IR 126/5/125, Finance Act record sheet Northamptonshire XXVIII 16, c. 1910.

⁵⁵⁷ *Commission for New Towns v Gallagher Ltd* [2002] EWHC 2668, [2003] 2 P & CR 3; *Fortune v Wiltshire Council* [2011] EWCA Civ 883, [2013] 1 WLR 808.

the north-east which passed through hereditament '268' but is 'white' because it was enclosed (FIGURE 65). Had this road been open to hereditament '268' it would likely have been coloured by the valuers. For example, the tenth 'public carriage road and drift way' in Aynho was partly open to hereditament '43' and this section was coloured (FIGURE 66).⁵⁵⁸

The area surrounding a public road is also important in determining its status. In Winterton, Norfolk, a public road continued east 'to the sea' and was coloured as part of hereditament '3'.⁵⁵⁹ While rare, there is 'nothing to prevent a highway ending in a cul-de-sac'.⁵⁶⁰ For instance, Stonehenge in *Antrobus*, a local beauty spot in *Moser*, and the foreshore and sea in *Cobb* each provided sufficient evidence of public status.⁵⁶¹ Sometimes it is unclear whether the Finance Act valuers intended to colour a road or leave it 'white'. For example, the third public road in Benefield, Northamptonshire,

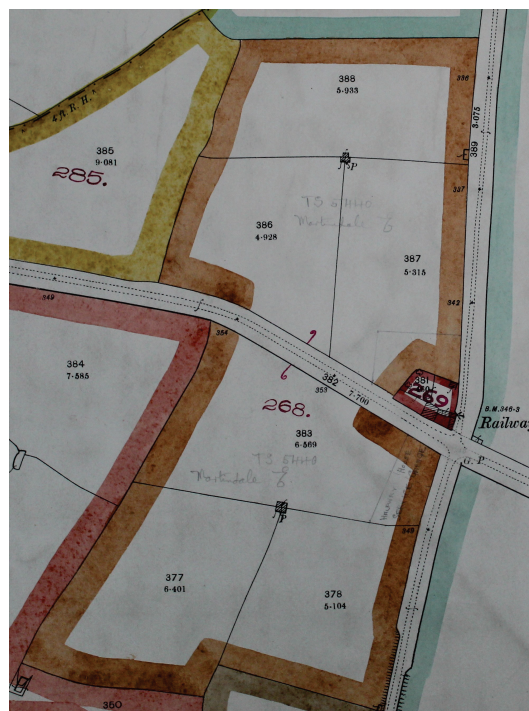


FIGURE 65 TNA IR 126/5/134, Finance Act record sheet Northamptonshire XXIX 9, c. 1910.



FIGURE 66 TNA IR 126/5/519, Finance Act record sheet Northamptonshire LXII 12, c. 1910.

⁵⁵⁸ NHRO Enclosure vol. I, Aynho enclosure award, 1793.

⁵⁵⁹ NFRO EAW 3/1, Winterton enclosure Act and award, 1805.

⁵⁶⁰ Sydenham, *Public Rights of Way and Access to Land*, 7.6.

⁵⁶¹ *A-G v Antrobus* [1905] 2 Ch 188 (Ch); *Moser v Ambleside UDC* (1925) 23 LGR 533 (CA); *Williams-Ellis v Cobb* [1935] 1 KB 310 (CA).

adjoins an enclosed 'white' road to the west but is coloured where it connects to the parish of Glapthorn (FIGURE 67). Since these valuers only coloured the boundaries rather than the entire hereditament, it is unclear which portion of the public road was omitted.



FIGURE 67 TNA IR 127/7/118, Finance Act record sheet Northamptonshire XVII 3, c. 1910.

In one instance the Finance Act map provides evidence of a public road being diverted in the late nineteenth century in Offley, Hertfordshire. The public road led from Offley Cross to the village in the 1819 enclosure award. By 1910, most of this public road was 'white' except those parts which were coloured as part of

the 'Offley Place' estate and named 'Oldroad Plantation' on the OS map (FIGURE 68). Although no documentary evidence for this diversion survives, the cartographic evidence leaves no doubt that this particular public road was diverted 200 metres to the north between 1850 and 1881. This highlights how few enclosure award public roads were diverted before 1910.

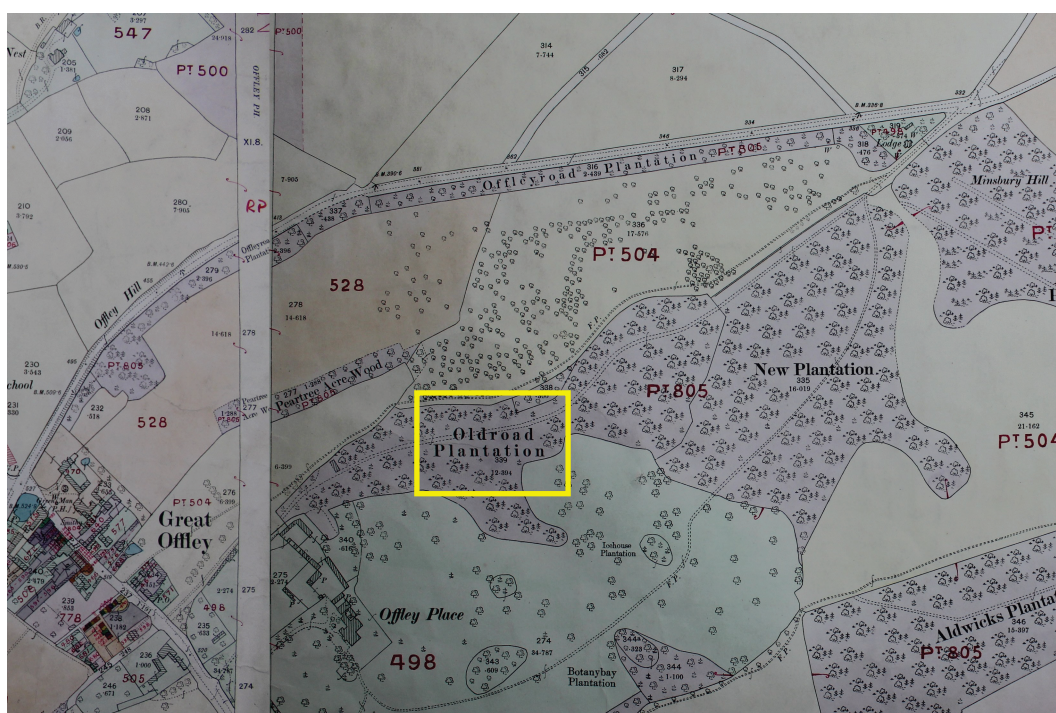


FIGURE 68 TNA IR 126/4/91 and IR 126/4/92, Finance Act record sheets Hertfordshire XI 7 and 8, c. 1910.

Such examples highlight two important facts about the Finance Act process. First, the Finance Act valuers were tasked with ascertaining the value of all land so a new tax could be levied and were thus concerned with ascertaining the ownership of roads rather than their legal status. This has left some roads appearing inconsistently coloured on the Finance Act maps. Secondly, the valuers were constrained by the character of the OS maps. It is curious that landowners did not object to the inclusion of sections of public roads within their lands, especially when deductions for public rights of way were not made. Those public roads which are open to hereditaments but left 'white', detailed above,

may represent the few instances in which landowners objected to the inclusion of public roads in their hereditaments. In the instances discussed here, the landowners, either through apathy, or feeling the effect would be negligible, did not object to the inclusion of particular sections of public roads within their hereditaments. To summarise, while the valuation was governed by the decisions of the landowners and valuers, it was constrained by the physical boundaries depicted on the OS maps. These examples illustrate that public vehicular highways may have existed over areas of land which were coloured by the valuers, especially those parts which adjoined enclosed 'white' roads.

4.4.3 Public roads which are coloured on the Finance Act maps

Only four public roads established by Parliamentary enclosure are wholly coloured as part of hereditaments on the Finance Act, all of which are located in Norfolk. The purpose of the Finance Act 1910 was to value all land in England and Wales in order to facilitate a new tax and it therefore stands to reason that the valuers would determine the ownership of *all* parcels of land. As discussed, landowners were at the heart of the Finance Act 1910 process, both in the forms they were expected to return and the 'consultation between valuer and landowner (or, in the case of large estates, their agents)' as the detail of the valuation was finalised.⁵⁶² Thus, the extent of each hereditament, and whether or not a road would be included within it, was determined in the first instance by landowners, with arbitration and the ultimate decision resting with the valuers. However, these social actors cannot be divorced from the practicalities of the process they were tasked with. Detailed analysis of the public roads described by enclosure awards which have both 'white' and coloured sections has already shown that the valuers were constrained by the character of the OS maps, together with the fact that the colouring of roads was determined to a significant degree by the physical boundaries depicted by the OS surveyors.

⁵⁶² Short, *Land and Society in Edwardian Britain*, 25:129.

The surrounding environment had changed for three of the four public roads which were coloured on the Finance Act maps. One instance in North Creake, discussed in Section 4.3.2, appeared on the same alignment on the tithe and Finance Act maps and was probably diverted shortly after the Parliamentary enclosure Act. Only one public road appears in the same course on the enclosure, tithe, and Finance Act maps and was coloured by the valuers: 'Church Road' in Barney.⁵⁶³ This road was discussed in Section 4.3.1 as it was the only public road not coloured on a post-enclosure tithe map in which other public roads were coloured. This confirms that the route was considered unique by the tithe map-makers in 1838. By 1910, it is coloured as part of hereditament '37', the Vicarage, despite being bounded by solid lines on the OS map (FIGURE 69). As discussed, leading to a church is no guarantee of public status since church ways were not necessarily available to the general public. To conclude, public roads described by Parliamentary enclosure awards were very rarely coloured on the Finance Act maps, confirming the validity of the 'white' road rule.

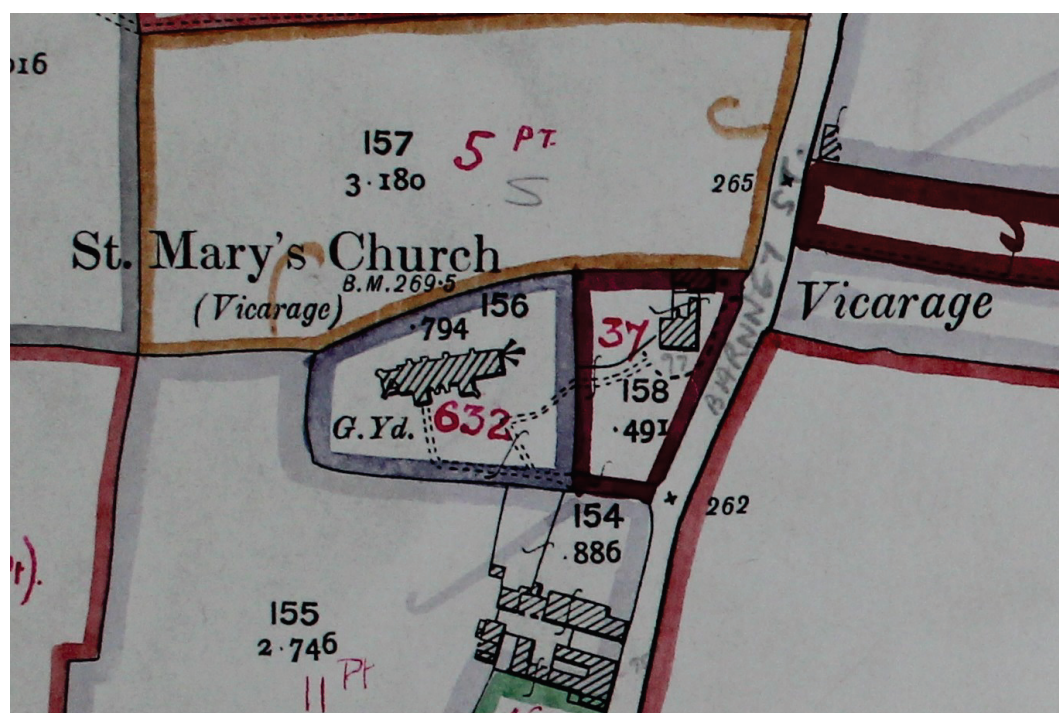


FIGURE 69 TNA IR 127/6/98, Finance Act record sheet Norfolk XVII 14, c. 1910.

⁵⁶³ NFRO C/Sca 2/14, Barney enclosure award, 1814.

4.4.4 Public roads which are not depicted on the Finance Act maps

Of the 339 public roads set out by Parliamentary enclosure, only one did not appear at all on the Finance Act maps: 'Church Road' in Ringstead, Norfolk.⁵⁶⁴ This is also the only public road described by a Parliamentary enclosure award which did not appear on the post-enclosure tithe maps despite the surrounding land being titheable (FIGURE 70). The Finance Act corroborates the earlier tithe evidence, indicating 'Church Road' was probably extinguished (FIGURE 71).⁵⁶⁵ Today the legal position is reasonably clear: 'Church-ways and other roads, over which only the parishioners of a particular parish or manor have, through immemorial custom, obtained the right to pass, are not highways.'⁵⁶⁶ Nonetheless, Parliamentary enclosure awards in Barney and Ringstead, Norfolk, identified church ways as public roads. Both are named 'Church Road' and are cul-de-sacs leading solely to a parish church.⁵⁶⁷ Both are unique on the later tithe and Finance Act maps, either not appearing at all, or appearing distinct from other enclosure award public roads. This may well indicate a shift in attitudes towards church ways through the eighteenth and nineteenth centuries. Either



FIGURE 70 NFRO PD 696/2, Ringstead tithe map, 1841.

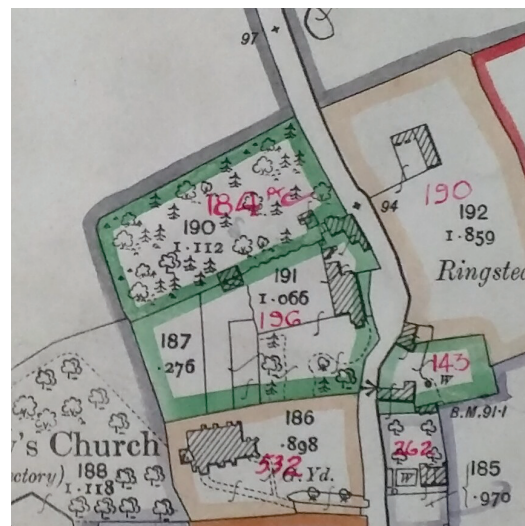


FIGURE 71 TNA IR 127/8/21, Finance Act record sheet Norfolk VI 6, c. 1910.

⁵⁶⁴ NFRO PD 691/1, Ringstead enclosure award, 1781.

⁵⁶⁵ NFRO PD 691/1, Ringstead enclosure award, 1781.

⁵⁶⁶ Sauvain, *Highway Law*, 2013, paras 1–08.

⁵⁶⁷ NFRO C/Sca 2/14, Barney enclosure award, 1814; NFRO PD 691/1, Ringstead enclosure award, 1781.

way, of all the Parliamentary enclosure public roads analysed, only one is not shown on the later Finance Act maps, a clear sign that these roads were permanent features in the landscape.

4.4.5 Conclusions

The Finance Act maps provide invaluable evidence for determining if public vehicular highways existed in 1910. Analysis of 339 public roads across 57 parishes in three counties has solidified received wisdom: public roads set out at enclosure are nearly always ‘white’ on the Finance Act maps. An overwhelming 96 percent of the sample are entirely ‘white’, and the remaining four percent are either ‘white’ and coloured, entirely coloured, or omitted (FIGURE 72).

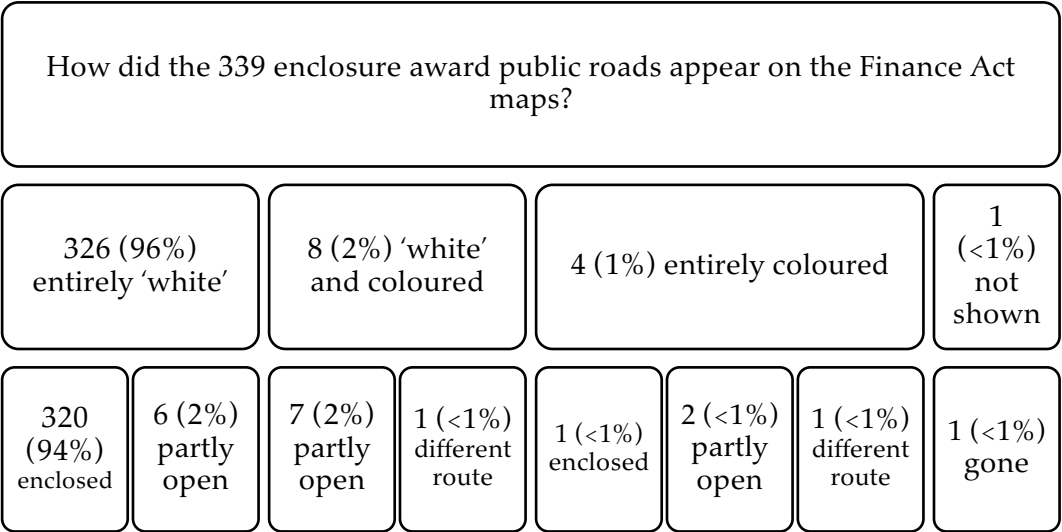


FIGURE 72 How did the 339 enclosure award public roads appear on the Finance Act maps?

The Finance Act maps cannot be divorced from the OS maps as these formed the basis for the valuation. The OS surveyors depicted and omitted routes according to a set of principles and directions, some of which are contained within the vast array of instructions given to surveyors, which varied depending upon the particular survey being completed. Roughly 11 types of OS map, revised to

various degrees by the valuers, were used by the Valuation Office to create the Finance Act maps.⁵⁶⁸ In most cases, early twentieth century first revision OS maps were sufficient, but if recent changes had taken place partial revisions were made or special edition 1912 maps were produced. The Finance Act maps can therefore be viewed as up to date physical depictions of the landscape created within the style of the OS maps. This means routes appear within the conventions and practices established by the OS. Almost all public roads established by the enclosure awards appear enclosed and are either part of built-up areas or enclosed with solid lines in more rural areas, each may include a narrower route distinguished by dashed lines within the boundaries of the road. In total only 1.5 percent of 'white' enclosure award public roads are depicted with dashed lines on the OS maps used by the Finance Act valuers.

The manner in which enclosure award public roads are depicted determines to an enormous degree their colour on the Finance Act maps. Thus, 320 of the 326 enclosure award public roads which are 'white' on the Finance Act maps are enclosed. The six exceptions prove that 'white' roads are not only 'enclosed' or 'in built-up areas' but could also, in rare circumstances, be open to adjoining land.⁵⁶⁹ However, these are exceptional cases, and analysis of the enclosure award public roads which are partly coloured confirms that these sections were nearly always open to the adjoining hereditaments. All eight enclosure award public roads which appear partly 'white' and coloured conform to this rule, with those enclosed sections left 'white', and those open sections being coloured as part of adjoining hereditaments. Overall, this study has confirmed the validity of the 'white' road rule as well as drawing an important link between whether a road was enclosed or open to adjoining land and the colouring employed by the Finance Act valuers.

⁵⁶⁸ These 11 examples are detailed on page 48.

⁵⁶⁹ This assertion was made in Braham, 'Uncoloured Roads on 1910 Finance Act Maps', 153, however, it should be noted that Braham later refers to 'cases where the uncoloured road continues as an unfenced road', 158.

4.5 Public roads: conclusions

Public roads nearly always represent the longest, widest, and most well-connected routes in the parish. An analysis of pre-enclosure tithe maps demonstrate that the enclosure Commissioners regularly improved the surfacing, widened, narrowed, and straightened existing routes to create their public roads. Only one of the 33 public roads was almost certainly created *de novo* by the enclosure Commissioners as it dissected the open field landscape such that it could not have existed before.

The tithe apportionments and maps produced after Parliamentary enclosure reveal that the 275 public roads nearly always survive in the first years and decades following the Act. In fact, only two did not appear in the same course on the later tithe map; one was on a different alignment and the other was likely extinguished. This study has revealed that tithe map-makers and valuers *always* describe and depict public roads in the same fashion. In other words, no individual tithe map contains numbered *and* unnumbered public roads. Public roads are either all coloured sienna or all left uncoloured, with one exception discussed below. This represents a significant finding which will aid legal inquiries.

Nearly all 339 public roads described by Parliamentary enclosure awards are 'white' and appear in the same course on the Finance Act 1910 maps. Eight are 'white' and coloured, with the coloured portion always open to the adjoining hereditaments. A further four are coloured and a single public road was not shown on the Finance Act maps. The evidence therefore strongly supports the 'white' road rule.

This analysis has found some overarching parallels between the depiction of public roads on the tithe and Finance Act maps which offer important lessons for lawyers interpreting historic sources. Such comparisons can help uncover underlying patterns which would otherwise be missed. For instance, the only two public roads which are 'white' and open to adjoining land on the Finance Act maps appear on the pre-enclosure tithe maps as tracks across open fields. This

illustrates that the Finance Act maps and corresponding OS maps may betray the origins of particular routes in the choice of lines each route is bounded by. Likewise, as discussed in Section 4.3, those public roads which appear unique on the post-enclosure tithe maps also appear unique on the Finance Act maps. Public roads which are indicated with dashed lines on the tithe maps appear open to adjoining land or coloured on the Finance Act maps, unlike the majority of public roads which are enclosed 'white' roads. The two 'Church Road[s]' in Barney and Ringstead, Norfolk, appear physically unique on the tithe and Finance Act maps and illustrate potential changes to the legal status of both routes.⁵⁷⁰ The 'Church Road' in Barney is the only public road which appears in a different colour to the other public roads on the same tithe map.⁵⁷¹ By 1910, it is the only public road which appears enclosed and coloured on the Finance Act map as well. Similarly, 'Church Road' in Ringstead is the only public road which does not appear on the post-enclosure tithe map. It is also the only public road which is not depicted on the OS map used by the Finance Act.⁵⁷² These instances demonstrate that public roads depicted uniquely on the tithe and Finance Act maps tend to have changed legal status.

The Tithe Act 1836 and Finance Act 1910 were both created to assess land for tax purposes. Unlike the Parliamentary enclosure awards, which altered or created rights, this information was incidental to their principal purpose. While not offering conclusive evidence of public highway status, both can aid legal disputes. This study has demonstrated that public roads established at enclosure appear with remarkable consistency on post-enclosure tithe apportionments and maps and Finance Act documents and maps. This research will prove useful for inquiries which seek to use these historic sources to determine the status of public highways.

⁵⁷⁰ NFRO C/Sca 2/14, Barney enclosure award, 1814; NFRO PD 691/1, Ringstead enclosure award, 1781.

⁵⁷¹ NFRO C/Sca 2/14, Barney enclosure award, 1814.

⁵⁷² NFRO PD 691/1, Ringstead enclosure award, 1781.

5 Private roads

This chapter examines the roads set out as ‘private’ by the Parliamentary enclosure awards with a focus on how they are described and depicted in the Tithe Act 1836 apportionments and maps, and in the Finance Act 1910 documents and maps. The term ‘private’ is used throughout this study in the same manner in which it was intended by the enclosure Commissioners, to refer to a route which held private carriage rights for a specific individual or group. Private rights of way are examples of easements which are defined as:

a right annexed to land to use other land in different ownership to do something on that land (not involving the taking of any part of the natural produce of that land or of any part of its soil) or to prevent the owner of the other land from using his land in one of a limited number of ways⁵⁷³

As such the law relating to private rights of way is distinct and separate from public rights of way.⁵⁷⁴ Of course, ‘it is possible for private and public rights to exist over the same route’.⁵⁷⁵ In the Parliamentary enclosure awards, some private roads held additional public bridleway or footpath rights and these will be examined separately to ascertain whether they appear differently on the tithe and Finance Act maps. It is critical that these roads are understood within the context of their making if these sources are to be accurately interpreted today.

This chapter is divided into four parts, following the same structure as Chapter 4. First, pre-enclosure maps will be examined to uncover the origins of private roads described by Parliamentary enclosure awards. Second, pre-Parliamentary enclosure tithe maps will be analysed to see if private roads were treated differently. Third, post-enclosure tithe maps will be examined to elucidate what happened to private roads in the years and decades following Parliamentary enclosure. This will provide important data on how the tithe map-makers and valuers describe and depict private roads and whether such individuals

⁵⁷³ *Halsbury's Laws of England*, 2017, 5th ed., vol. 87, 731.

⁵⁷⁴ Bickford-Smith et al., *Private Rights of Way*, 1.1.

⁵⁷⁵ Sydenham, *Public Rights of Way and Access to Land*, 3.7.

distinguished the physical or legal status of routes. Finally, the private roads will be examined based on how they appear on the Finance Act maps chiefly to determine the validity of the 'white' road rule, but also to investigate the use of *B.R.* and *F.P.* annotations on the OS maps. All of this will help establish how private roads described by Parliamentary enclosure awards change over time, a significant step in understanding how these sources describe and depict routes of differing status. As such, this analysis will aid future legal inquiries which use these sources as evidence of historic status.

Unlike public roads, the Parliamentary enclosure Commissioners employ different terminology for private roads in different regions. Thus, 'private carriage and occupation road' is used almost exclusively in Hertfordshire, 'Private Carriage Road' is usually found in Northamptonshire, and 'Private Road' is almost always limited to Norfolk.⁵⁷⁶ In fact, nearly all enclosure awards in the Norfolk sample use 'Private Road', with Ashill forming the only exception with its use of 'Private Way or Road'.⁵⁷⁷ Individual Parliamentary enclosure awards almost always describe all private roads in one manner unless particular roads held additional public rights. Only three of the 68 enclosure awards describe private roads in different ways. Standon, Hertfordshire, describes 11 'private Carriage Road and Driftway[s]' as well as a single 'private occupation road'.⁵⁷⁸ The enclosure award for Stoke Bruern and Shutlanger, Northamptonshire, uses 'Private Carriage Road' and 'Private Carriage Road and Driftway'.⁵⁷⁹ Finally, the enclosure Commissioners in Abthorpe, Northamptonshire, describes a 'Private Carriage Road', two 'Private Carriage Road or Woodway[s]', and a 'Private Carriage Road (but not a driftway)'.⁵⁸⁰ Aside from those with bridle or foot rights, these are the only examples of Commissioners describing private roads in different terms. Evidently, private roads were recognised as a homogenised group with a common definition by individual enclosure Commissioners. The

⁵⁷⁶ In each case there is only one exception.

⁵⁷⁷ NFRO PD 548/86, Ashill enclosure award, 1786.

⁵⁷⁸ HALS QS/E61, Standon enclosure award, 1835.

⁵⁷⁹ NHRO V2796, Stoke Bruern and Shutlanger enclosure award, 1844.

⁵⁸⁰ NHRO V2797, Abthorpe enclosure award, 1826.

fact that private roads were uniquely described in separate regions reflects the different approaches of the surveyors and map-makers as well as the contemporary era in which terminology was not systematically defined.

An analysis of statutes relating to rights of way indicates that terms were rarely standardised. The Highway Act 1835 was the first to provide a comprehensive definition of terminology.⁵⁸¹ Likewise, the Inclosure (Consolidation) Act 1801 was the first to provide standardised procedures and terminology to enclosure Acts, before which local private Acts varied considerably.⁵⁸² Plainly, local naming traditions caused significant regional variation in the terminology applied to private roads. This casts doubt over legal judgements which seek to ascribe particular meanings to particular terminology. Perhaps it will be more appropriate to examine how specific Commissioners usually describe private roads and how such roads commonly appear within geographic regions and then ascertain if a road deviates from the norm.

As discussed in Chapter 4, the character of Parliamentary enclosure varied considerably across space and time. Northamptonshire displayed a classic Midland pattern, with significant Parliamentary enclosure in 1760–1780 and 1793–1815 which transformed open fields to pasture. Most Parliamentary enclosure in Norfolk took place in the second peak associated with the Napoleonic Wars.⁵⁸³ Hertfordshire, in contrast, was predominantly anciently enclosed and thus Parliamentary enclosure Acts were limited to specific areas and peak after the Inclosure Act 1845.⁵⁸⁴ Such patterns influenced the road network as those earlier Parliamentary enclosure awards tended to make more widespread changes and deal with parishes wholesale while later Parliamentary Acts enclosed the remaining rump of commons and open fields and made fewer changes to the transport network. Such patterns have already been discussed in the public roads chapter, and generally apply to the private roads as well. For

⁵⁸¹ Highway Act 1835, 5 & 6 Will. IV c. 50.

⁵⁸² The Inclosure (Consolidation) Act 1801, 41 Geo. III c. 109.

⁵⁸³ Kain and Oliver, *Enclosure, Rating, Drainage and Sanitary Maps of England and Wales in Public Archives, 1598-1936*.

⁵⁸⁴ The Inclosure Act 1845, 8 & 9 Vict. c. 118.

instance, like the public roads, more private roads are described by earlier enclosure awards, averaging seven in 1779 compared to under four by 1898 (FIGURE 73). Likewise, private roads tend to get shorter through the nineteenth century, averaging 600 to 300 metres across the period examined (FIGURE 74). Although this reduction in length may result from the comparatively smaller areas enclosed by later Parliamentary enclosure, it is still a notable decline. The shortening in private road length is more pronounced than that for the public

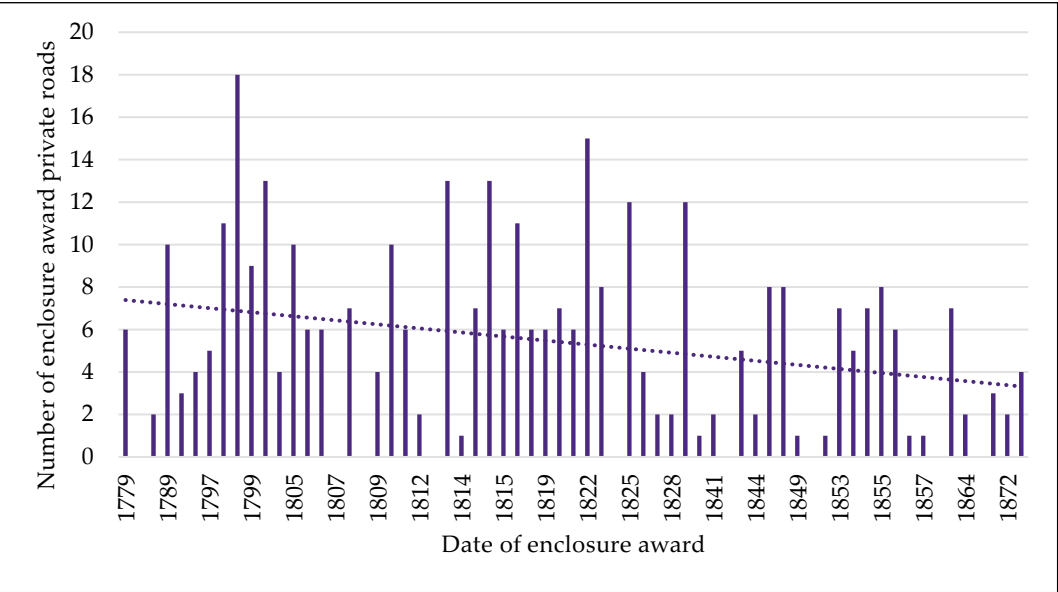


FIGURE 73 Number of private roads described by Parliamentary enclosure awards.

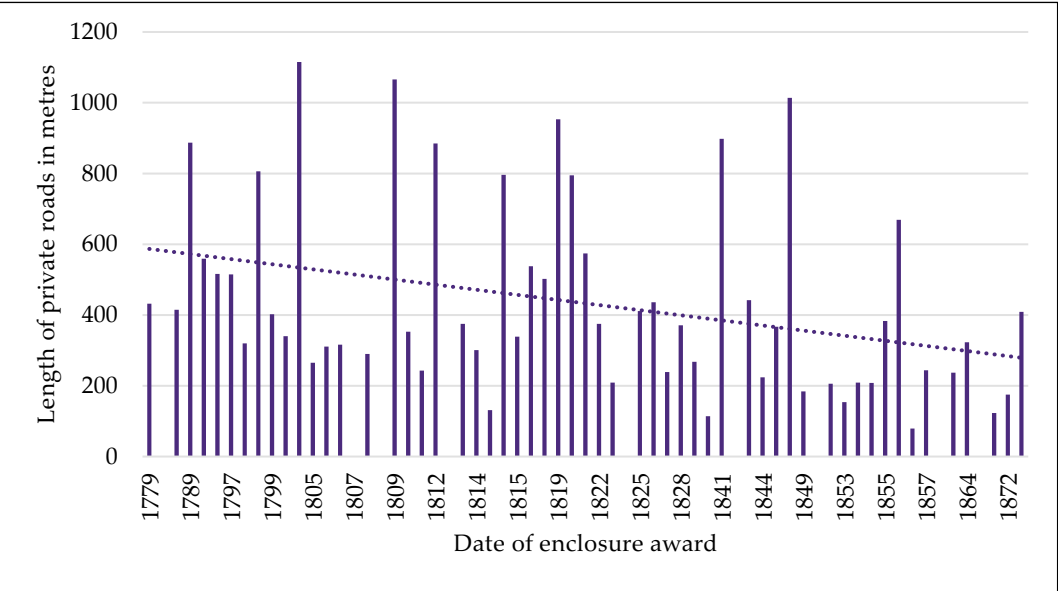


FIGURE 74 Average length of private roads described by Parliamentary enclosure awards.

roads. The width ascribed to private roads by enclosure awards displays a slight decline over the century analysed but consistently averages 20 feet (Figure 75). In contrast, public roads are set out at widths of 40 feet early in the period, most are 30 feet wide, with a few narrower instances in the late nineteenth century. Finally, the number of routes each private roads connects to remains entirely stable throughout the 119-year period, averaging 1.6 (FIGURE 76). Public roads described by Parliamentary enclosure connect to an average of 3.7 other routes.

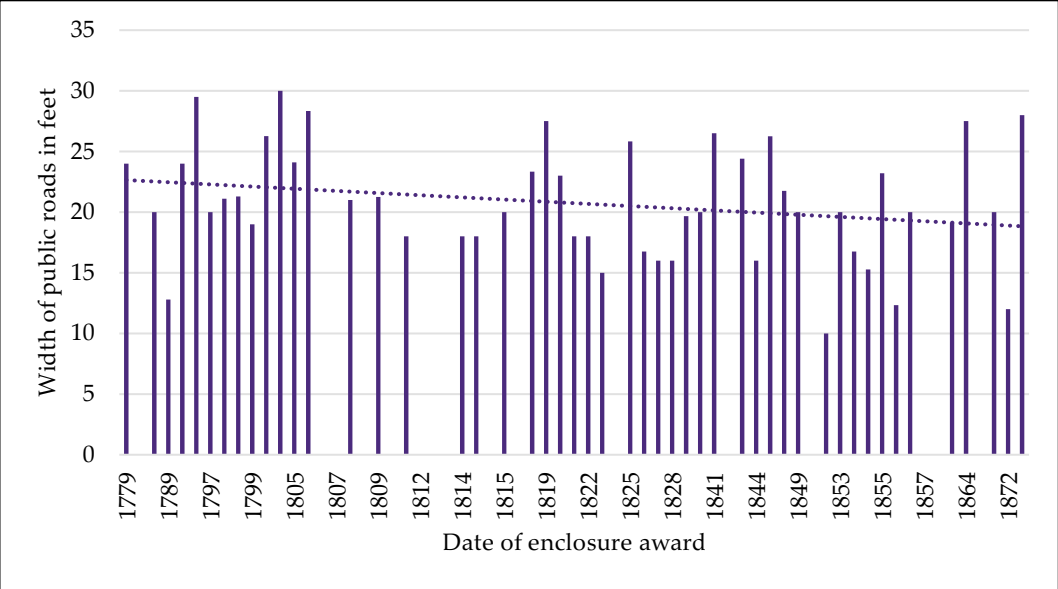


FIGURE 75 Average width of private roads described by Parliamentary enclosure awards.

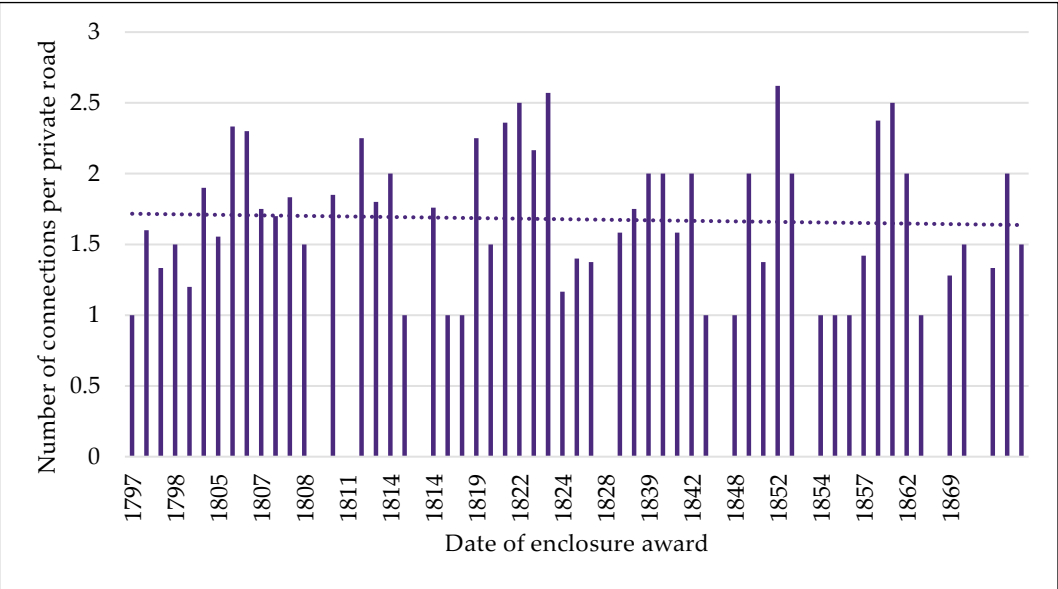


FIGURE 76 Average number of connections of private roads described by Parliamentary enclosure awards.

5.1 Private roads in the pre-enclosure landscape

The pre-enclosure landscape was diverse and complicated. Before Parliamentary enclosure, custom reigned supreme as the physical and legal status of routes changed over the years, decades, and centuries. Such change is evoked by John Clare's poetry, in which he 'records his sense of unrestricted freedom in the open expanse of the landscape before draining and enclosure'.⁵⁸⁵ In this context, Parliamentary enclosure is viewed as a process of privatisation, often in conjunction with the growth of 'polite society' and the expansion of parkland which increasingly secluded the elite by means of road diversions and tree planting.⁵⁸⁶ This section will examine the extent to which the enclosure movement privatised the landscape.

As outlined in Chapter 4, there was considerable regional variation in the pre-enclosure landscape. For instance, the two- or three-field Midland system was tightly controlled and communally managed, with one field each year being 'set aside as common fallow grazing for the animals of all cultivators'.⁵⁸⁷ With such a structure, it would not have been necessary for individuals to access land separately as all agricultural activities took place simultaneously. Compare this to the eastern and western regions which were less communal. For instance, north-east Norfolk had similar intermingled strips but no common controls beyond those regulating fallow grazing.⁵⁸⁸ Also, individual strips in the silt fens of East Anglia were always enclosed and 'seldom had anything other than very limited common rights of pasturage imposed across them'.⁵⁸⁹ Such landscapes

⁵⁸⁵ John Steane, *The Northamptonshire Landscape: Northamptonshire and the Soke of Peterborough* (London: Hodder & Stoughton, 1974), 226.

⁵⁸⁶ Tom Williamson, 'Gardens, Legitimation, and Resistance', *International Journal of Historical Archaeology* 3, no. 1 (1999): 44.

⁵⁸⁷ H. S. A Fox, 'Approaches to the Adoption of the Midland System', in *The Origins of Open Field Agriculture*, by Trevor Rowley, 1981, 65.

⁵⁸⁸ Bruce M. S. Campbell, 'Population Change and the Genesis of Commonfields on a Norfolk Manor', *The Economic History Review* 33, no. 2 (1980): 175.

⁵⁸⁹ David Hall, 'The Drainage of Arable Land in Medieval England', in *Water Management in the English Landscape: Field, Marsh and Meadow*, ed. Hadrian F. Cook and Tom Williamson, 1999, 28–40; Tom Williamson, 'Mapping Field Patterns: A Case Study from Eastern England', *Landscapes*, 18 July 2013, 60.

would no doubt necessitate different forms of access, possibly in the form of more defined tracks and paths.

Some late eighteenth-century estate maps have been examined and all highlight the difficulty in identifying the physical and legal status of routes. Their existence is unevenly distributed across time and space, since, as David Fletcher outlined, estate mapping and 'map-consciousness' developed rather haphazardly.⁵⁹⁰ Such early maps 'were commissioned by wealthy landowners for a range of purposes that changed over time, but were basically designed to represent a simplified, often idealised version of the world'.⁵⁹¹ 'A Survey of Robert Priors Estate at Weston', made in 1774, depicts an abundance of routes running through the anciently enclosed lands near 'Tilekiln Farm'. Some route cross fields while others run between enclosures, all are coloured sienna and bounded by dotted lines. While verges can thus be distinguished from surfaced routes, this illustrates the imperceptible boundaries between highways, commons, and greens. Note how several routes coalesce into the linear 'Friends Green' (FIGURE 77). Interestingly, the map key specifies that sienna routes are 'Roads and Foot paths', demonstrating the similarities between such routes, especially before widespread metalling. Major improvements to road construction were made in the 1820s and 30s by Thomas Telford and John Loudon MacAdam.⁵⁹² Before this road quality was variable and dependent upon the type of soil and local drainage. A poor-quality network necessitated numerous alternative routes, which may have been the case in late eighteenth-century Weston judging by



FIGURE 77 HALS 26874, Survey of Mr Robert Priors Estate at Weston, 1774.

⁵⁹⁰ Fletcher, *The Emergence of Estate Maps*.

⁵⁹¹ Whyte, *Inhabiting the Landscape*, 90.

⁵⁹² J. Sugden, 'Highway Authorities since 1800', *Rights of Way Law Review*, May 1995, 32.

the patchwork of routes illustrated on the estate map before Parliamentary enclosure improvements (FIGURES 78 and 79). Again, it is unclear whether such routes represent public routes, private routes used by the local community,



FIGURE 78 HALS 26874, Survey of Mr Robert Priors Estate at Weston, 1774.



FIGURE 79 HALS QS/E73, Weston enclosure map, 1802.

private routes used by a specific group, or private roads reserved for particular individuals. The usage and maintenance of these routes will no doubt have changed over time alongside the ebbs and flows of rural life. Some of these patterns were no doubt formalised by Parliamentary enclosure in cases where the awards list individuals entitled to use specific routes. The status of such routes is rarely acknowledged, perhaps because it was beyond the scope of this survey, but possibly because the legal status was not clear at the time. Routes may have had a fluidity which is difficult to appreciate today. As Parliamentary enclosure reformed the landscape, the Commissioners formalised the status of these routes, often consolidating several routes into single straight highways while also improving their surfacing.

Pre-enclosure maps leave no doubt that numerous Parliamentary enclosure private roads had their origins in the pre-Parliamentary enclosure landscape. However, the status of these routes usually remains unclear. It is incredibly difficult to distinguish constructed roads from 'habitual lines of travel'.⁵⁹³ This was an era in which Arthur Young and other agricultural writers bemoaned the poor state of the roads and the frequency with which one would get lost. Reverend St John Priest complained of 'the difficulty of discerning public roads from mere drift-ways, or from passages to lands of different proprietors'.⁵⁹⁴ The fact that contemporaries had such difficulties illustrates that a continuum of routes existed. Many people may have been unconcerned with the precise legal status of a particular route. Indeed, the categorisation as 'public' or 'private' may have been incompatible with the local communities' usage or maintenance of a route. Roads were not neatly separated into public and private; most existed somewhere in between the two. The communal and intermixed lands of the commons and open fields more likely contained routes which were used and maintained by groups rather than individuals.

⁵⁹³ Hindle, 'Sources for the English Medieval Road System', 33.

⁵⁹⁴ St John Priest, *General View of the Agriculture of Buckinghamshire* (Richard Phillips, 1810), 339.

5.2 Private roads in pre-enclosure tithe apportionments and maps

This section examines how roads described as ‘private’ by Parliamentary enclosure awards are shown on *earlier* tithe apportionments and maps. In this study, 20 of the 24 post-1836 enclosure awards describe a total of 81 private roads, averaging 4.1 per parish. Six of the 20 tithe maps, although dated before the Parliamentary enclosure maps, depict an almost identical landscape. These six tithe maps contain 32 private roads and will be examined first to determine how tithe map-makers described and depicted private roads at the point at which their status was affirmed by Parliamentary enclosure. Next, the 11 private roads which carried public bridleways or footpaths will be examined to determine if they are described or depicted uniquely on the tithe apportionments and maps. Finally, the 38 private roads *without* public rights will be analysed. As discussed in the public roads chapter, the enclosure Commissioners made a wider range of changes to the road network than is often appreciated.⁵⁹⁵ The planned and rectilinear appearance of Parliamentary enclosure is regularly emphasised, which leads to an overemphasis on straight Parliamentary enclosure roads and the corresponding misconception that the Commissioners only established roads of this kind. In fact, analysis of pre-Parliamentary enclosure cartographic and documentary sources indicates that the enclosure Commissioners made various changes to the right of way network (FIGURE 80):

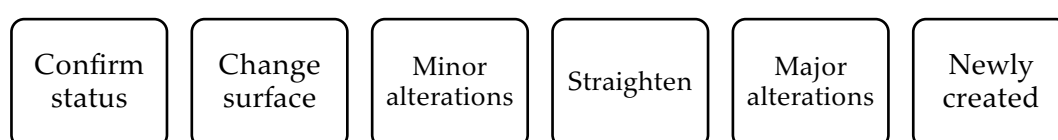


FIGURE 80 Sliding scale of changes made to the road network by Parliamentary enclosure Commissioners.

This research forms a fundamental step in understanding how contemporaries viewed the status of routes and, in this case, how tithe surveyors, map-makers, and valuers described and depicted such routes.

⁵⁹⁵ See Yelling, *Common Field and Enclosure in England, 1450-1850*, 137; Brian Paul Hindle, *Medieval Roads* (Shire Publications, 1982), 21, 32.

5.2.1 The sample of pre-enclosure tithe apportionments and maps

As discussed in Chapter 4, some tithe maps, although dated before the Parliamentary enclosure maps, do not depict the pre-Parliamentary enclosure landscape. There are two main reasons for this, the most obvious being that the Parliamentary enclosure process was already underway and so tithe Commissioners used this proposed landscape as the basis for their tithe maps. The second reason is that some Parliamentary enclosure Acts simply recognised, and gave firm legal sanction to, changes in property rights and arrangements which had already been made by local landowners. Corresponding tithe maps depict a landscape devoid of common land and open fields because lands had already experienced ancient enclosure.

This sample of tithe maps contains 32 private roads described by Parliamentary enclosure awards. The tithe map-makers depicted 82 percent of these private roads in an identical manner to the public roads. FIGURE 81 shows public roads (from Shoseley) appearing in the same fashion as the private roads (extending north) in Shutlanger. Such routes were typically depicted in sienna bounded by



FIGURE 81 NHRO T/013, Shutlanger tithe map, 1844.

solid lines, although dashed lines were used in three occasions to denote those parts open to adjoining land (FIGURE 82). Only in one instance was a private road

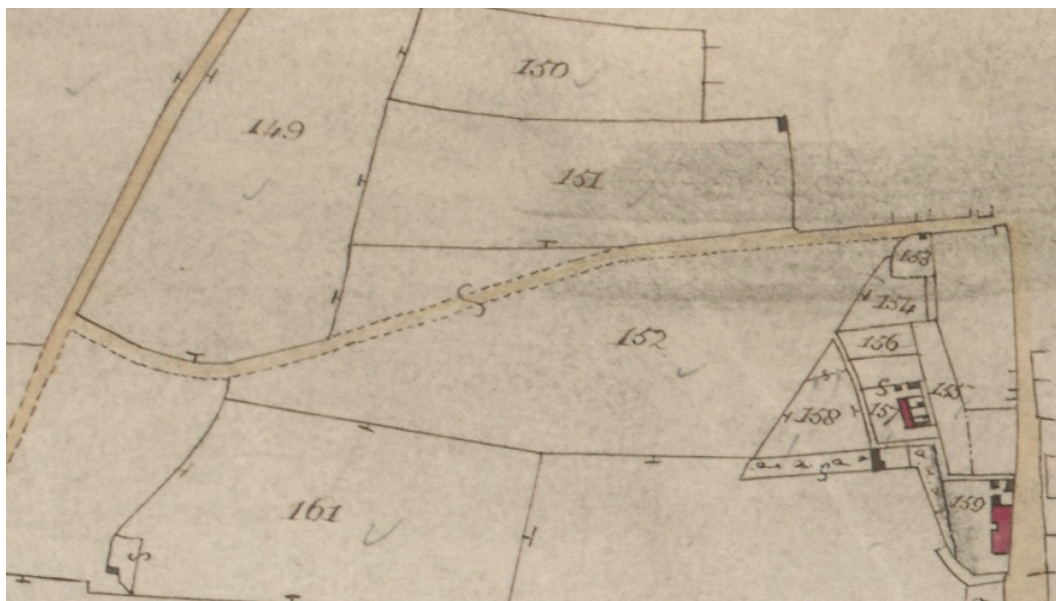


FIGURE 82 HALS DSA4/102/2, Therfield tithe map, 1843.

annotated as such on the tithe map, in Towcester, Northamptonshire (FIGURE 83). Another private road, in Ringstead, only partly appears on the tithe map. This example illustrates the extent to which the tithe maps in these cases reflect the proposed Parliamentary landscape rather than an ‘on the ground’ survey of the land.

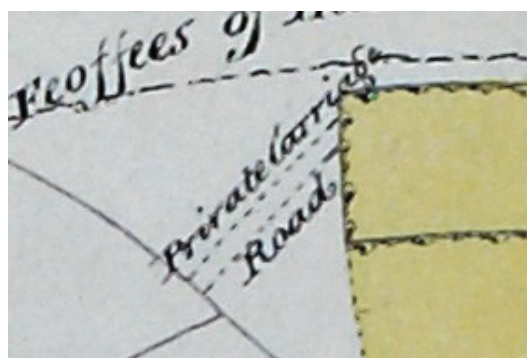


FIGURE 83 NHRO T/007, Towcester tithe map, 1844.

Additional information can be found in the Parliamentary enclosure minutes:

Mr Thomas Green objected to [the second private] road having bought all the allotments except Mr Spences. A letter was read from Mr Young in which he objected to the road being given up. Mr Green's objections having been considered reasonable the road was ordered to be set out to and not across the allotments to Pentelow.⁵⁹⁶

⁵⁹⁶ NHRO ML/779, Ringstead enclosure minutes, 1839–1841.

These objections clarify why colouring was not employed on the tithe map: the road and surrounding allotments were not yet constructed or finalised. Thus, while the road was originally intended to continue across Pentelow's land, '133' on the tithe map, the objections of Mr Green were sufficient to shorten the road (FIGURES 84 and 85). Notably, none of 28 private roads which appear on these tithe maps are numbered. This reflects the fact that many held shared use rights and maintenance duties. For instance, the private road in Thurning was 'set out for the use and convenience of the said John Fortescue and Ann Batson respectively' and was accordingly owned by neither on the tithe map.⁵⁹⁷

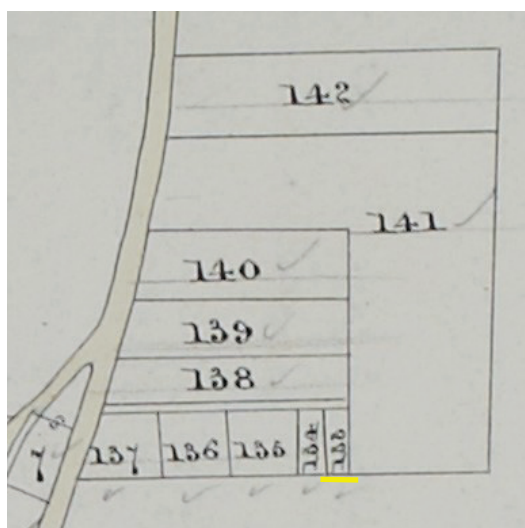


FIGURE 84 NHRO T/050, Ringstead tithe map, 1840.



FIGURE 85 NHRO ML/1550, Ringstead enclosure map, 1841.

In summary, it is necessary to analyse the tithe apportionments and maps in conjunction with the Parliamentary enclosure Acts, awards, and maps to ensure each tithe commutation process is fully understood. This is important because, as shown, some tithe surveys are more representative of the proposed landscape of the Parliamentary enclosure maps than a survey of the contemporary physical environment.

⁵⁹⁷ NHRO ML/1396, Thurning enclosure award, 1839.

5.2.2 Private roads with additional public rights on the pre-enclosure tithe maps

Private rights can co-exist with public rights of way in two major ways in the Parliamentary enclosure awards and maps. First, Commissioners may describe public rights alongside private roads in their enclosure awards. Examples include a 'private carriage and occupation road and public bridleway' set out in Widford and a 'private carriage road and drift way of the width of sixteen feet and one public footway of the width six feet' in Broxbourne.⁵⁹⁸ Secondly, some Parliamentary enclosure Commissioners describe public bridleways and footpaths separately, usually when they extend beyond the private roads. Identifying these can be especially difficult if they are not annotated on the enclosure map, illustrating the importance of carefully analysing documentary evidence. For instance, the fourth private road in Wigginton was set out between 'H' and 'T' on the enclosure map while the fourth public footpath was described from 'r' to 'e' to 'H' (FIGURE 86). This section will examine how these roads were depicted on the tithe maps before being affirmed by Parliamentary enclosure.

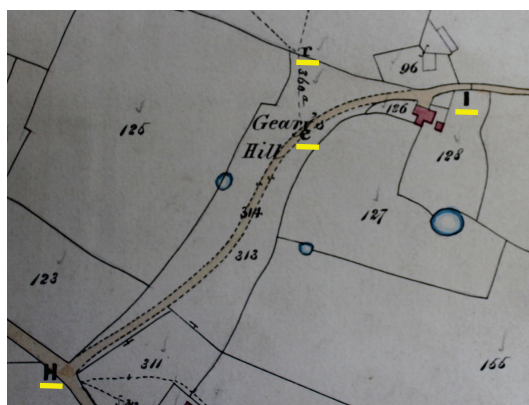


FIGURE 86 HALS QS/E75, Wigginton enclosure map, 1854.

In total, 11 private roads with additional public rights have been identified, six of which appear in the same course on the earlier tithe maps. Occasionally, the enclosure Commissioners confirm the status of existing private roads. For instance, in Buckland, a 'private carriage and occupation road' remained 'in its present track between the Homesteads of Saint Bartholomew's Hospital and Jefferies Trustees' and appeared as such on the earlier tithe map.⁵⁹⁹ However, the public bridleway which ran along this route was stopped up and replaced with a

⁵⁹⁸ HALS QS/E74, Widford enclosure award, 1856; HALS QS/E20, Broxbourne enclosure award, 1844.

⁵⁹⁹ HALS DP/25/26/1, Buckland enclosure award, 1853.

public footway (FIGURES 87 and 88). The other five private roads with public rights do not follow the same course on the earlier tithe maps. Some appear to have been newly created by the Parliamentary enclosure Commissioners, like the seventh 'private carriage and occupation road' in Wigginton, Hertfordshire. This road is within Wigginton common and does not appear on the 1841 tithe map and is shown on the 1854 enclosure map with a distinctive right-angle leading to two new allotments (FIGURES 89 and 90). Other private roads with public rights



FIGURE 87 HALS DP/25/27/1, Buckland tithe map, 1844.



FIGURE 88 HALS DP/25/26/2A, Buckland enclosure map, 1853.

were diverted from existing routes. In 1849 the open fields of Walkern in Hertfordshire were enclosed and the Commissioners 'diverted or altered a certain public bridleway or road' as well as creating a shorter 'private carriage and occupation road'.⁶⁰⁰ Both were illustrated across the open fields of 'Church End Common' on the 1841 tithe map (FIGURES 91 and 92).



FIGURE 89 HALS DSA4/118/2, Wigginton tithe map, 1841.



FIGURE 90 HALS QS/E75, Wigginton enclosure map, 1854.

⁶⁰⁰ HALS DP/114/26/1, Walkern enclosure award, 1849.



FIGURE 91 HALS DP/114/27/1, Walkern tithe map, 1841.



FIGURE 92 HALS DP/114/26/1, Walkern enclosure map, 1849.

While not a huge sample, this study has demonstrated that Parliamentary enclosure Commissioners working after 1836 regularly altered the network of public rights of way and private roads. While most private roads with public rights existed in some form on the earlier tithe maps, the enclosure Commissioners often altered their legal or physical status.

5.2.3 Private roads which are depicted on the pre-enclosure tithe maps

The tithe maps which depict the pre-Parliamentary enclosure landscape include 38 private roads without any public rights. Precisely half appear in the same course on the tithe and enclosure maps, indicating that the Parliamentary enclosure Commissioners used existing routes to create these private roads. However, as shown in FIGURE 80 above, it is possible that the Commissioners were either confirming or altering the physical and legal status of these existing routes. Combined cartographic and documentary analysis of the Parliamentary enclosure and earlier tithe commutation can help clarify what changes the Commissioners made and how the corresponding routes appear on the tithe maps. This will be helpful for future analyses which seek to use pre-Parliamentary enclosure tithe apportionments and maps as evidence for the status of routes.

Of the 19 private roads described by enclosure awards which appear in the same course on the earlier tithe maps, 18 were not assigned apportionment numbers. Most appear without colour and are open to adjoining land. For example, a private road in Wormley, Hertfordshire, extended from the main road in the village across some of the remaining open fields in 1841 (FIGURE 93). By 1854, the Parliamentary enclosure Commissioners retained the existing route as an access route to the new allotments (FIGURE 94). Similarly, in Widford, Hertfordshire, three private roads previously afforded access to the open fields. The Parliamentary enclosure Commissioners were able to create routes which essentially functioned as private entrance routes for Barrows Farms and the 'old inclosures called Great Light Lands and Winding Four Acres' (FIGURE 95).⁶⁰¹ In

⁶⁰¹ HALS QS/E74, Widford enclosure award, 1856.

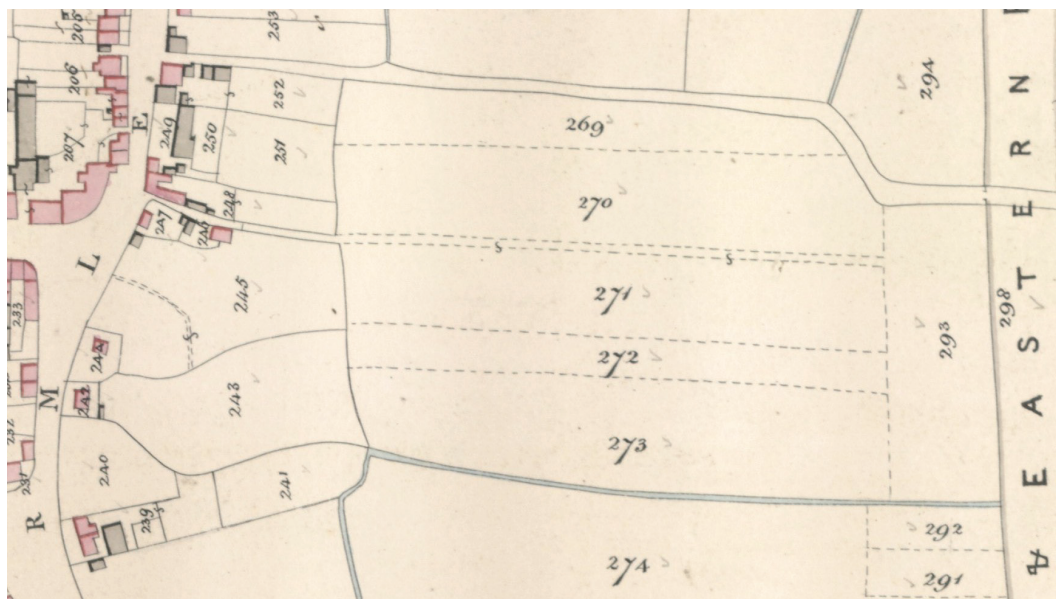


FIGURE 93 HALS DSA4/120/2, Wormley tithe map, 1841.



FIGURE 94 HALS QS/E79, Wormley enclosure map, 1854.

each case the enclosure Commissioners appear to confirm the legal status of existing private roads while simultaneously erecting fences or planting hedges as they enclosed the surrounding landscape. The usage of such routes was henceforth reserved for the owners and occupiers of the new parcels of land held in severalty. The status of such routes before Parliamentary enclosure is not entirely clear. Nearly all were cul-de-sacs which provided access to agricultural land and it can be presumed that only those individuals who owned or occupied



FIGURE 95 HALS DSA4/117/2, Widford tithe map, 1839.

adjoining lands were entitled to use them. This follows the judgement in *Gallagher* which demonstrated that some Parliamentary enclosure Acts could not remove public rights by setting out a private road in their place.⁶⁰² As such, in the absence of any extinguishment by the enclosure Commissioners, it can be inferred that the private roads depicted on the earlier tithe maps held no public rights.

This sample contains five private roads created by extinguishing public rights to an existing highway. All five are coloured on the earlier tithe map. This is a significant finding which suggests some tithe map-makers used colour to denote the surfacing of routes or possibly their legal status. One 807-metre 'public bridleway and footway' named 'Partridge Way' was stopped up and replaced with a 474-metre 'private carriage and occupation road' in the 1862 Ashwell enclosure award.⁶⁰³ The 1841 tithe map-makers depict the entirety of this route as a blue-coloured route of varying width and annotated it 'Partridge Way' (FIGURE 96).

⁶⁰² *Commission for New Towns v Gallagher Ltd* [2002] EWHC 2668, [2003] 2 P & CR 3.

⁶⁰³ HALS QS/E9, Ashwell enclosure award, 1862.



FIGURE 96 HALS DSA4/6/2, Ashwell tithe map, 1841.

A further three private roads on the Ashwell tithe map are coloured blue yet do not represent highways converted to private roads by the Parliamentary enclosure award. In each case these routes appear longer on the earlier tithe maps and form part of a network of routes differentiated from the sienna-coloured roads in the parish. This suggests the enclosure Commissioners utilised existing routes to create a network of private roads to new enclosures. The Ashwell tithe map is unique as the only tithe map in the sample to employ two colours for routes. The map-maker also coloured common land blue (FIGURE 97). As W. G. Hoskins and L. D. Stamp point out:

The general public, as distinct from the commoners, had no right of access to [common] land. Until 1925 there was no right of public access to common land except in two types of case. A village or a town green might by customary right be open to access by the inhabitants of a specific locality. And secondly, many commons had been set aside by inclosure awards for the recreation of the inhabitants of a particular parish.⁶⁰⁴



FIGURE 97 HALS DSA4/6/2, Ashwell tithe map, 1841.

⁶⁰⁴ Hoskins and Stamp, *The Common Lands of England and Wales*, 82.

In both these cases, use was thus restricted to the local community. However, the reality of the physical world cannot have been so clear-cut. As the Ashwell tithe map shows, the blue common land routes intermingled with the sienna routes such that the line between highway and common must have been blurred. In fact, highways were sometimes viewed as ‘part of the common land of the manor’ by contemporaries.⁶⁰⁵ In different seasons and weather conditions, the community will have used different routes. The physical and legal status of particular routes was in flux as custom continually defined and redefined who used and maintained these routes. In many cases, it was the Parliamentary enclosure process which first defined the physical and legal status of routes, providing a written record to rights previously held in custom and memory.

Of the 19 private roads depicted in the same course on the earlier tithe maps, only one was numbered, a 244-metre ‘private carriage and occupation road’ in Benington, Hertfordshire.⁶⁰⁶ On the 1840 tithe map it appears as a sienna-coloured route and continues north-west as a narrow route for 1153 metres across the open fields of Great Brook Field (FIGURE 98). It is numbered ‘491a’ in a separate section of the apportionment titled ‘Public Roads and Wastes’ and is named ‘Road from 392 to 501’.⁶⁰⁷ As it has no owner, it was either not titheable, held shared ownership rights, or represented a public highway. An 1831 plan of the glebe lands sheds further light as this route is annotated ‘Poulters Highway’ (FIGURE 99). This, together with the annotation ‘To Watton’, suggest that the public had bridle or foot rights, considering the width of the route. This casts doubt on the *Gallagher* judgement since the Parliamentary enclosure Commissioners failed to explicitly extinguish any public rights which may have existed on this alignment, despite stopping up 20 other such ‘public roads and ways’.⁶⁰⁸ Nonetheless, this is the only example of a private road which *may* have held public rights found in the sample.

⁶⁰⁵ Rackham, *The History of the Countryside*, 265.

⁶⁰⁶ HALS QS/E15, Benington enclosure award, 1860.

⁶⁰⁷ HALS DSA4/17/1, Benington tithe apportionment, 1840.

⁶⁰⁸ *Commission for New Towns v Gallagher Ltd* [2002] EWHC 2668, [2003] 2 P & CR 3; HALS QS/E15, Benington enclosure award, 1860.



FIGURE 98 HALS DSA4/17/2, Benington tithe map, 1840.



FIGURE 99 HALS 43730, Survey of glebe lands in Great Brook Field, Benington, 1831.

Overall, half of the private roads described by Parliamentary enclosure awards appear in the same course on the earlier tithe maps. Practically, it seems the enclosure Commissioners preferred wherever possible to use existing routes as access routes to the new allotments they created. Most appear uncoloured on the earlier tithe maps which possibly signal their physical rather than legal status. However, the private roads which appear sienna on the earlier tithe maps all represent public rights which were extinguished by the enclosure Commissioners. Those which are blue on the tithe maps are all located in Ashwell and illustrate the blurred line between commons and highways. All these examples underscore the extent to which the Parliamentary enclosure movement clarified the physical and legal status of routes.

5.2.4 Private roads which are partly depicted on the pre-enclosure tithe maps

Two of the 38 private roads described by Parliamentary enclosure awards appear for only part of their length on the earlier tithe maps. A private road in Wormley, Hertfordshire, is described as joining 'the private roadway to the Old Inclosures'.⁶⁰⁹ This section appears on the 1841 tithe map only insofar as 'West End Green' common narrows to a road-like width (FIGURE 100). By 1854, the enclosure Commissioners clarified this route as they enclosed the common (FIGURE 101). Again, it is clear that the enclosure Commissioners utilised existing private roads when setting out new private roads and allotments. The



FIGURE 100 HALS DSA4/120/2, Wormley tithe map, 1841.



FIGURE 101 HALS QS/E79, Wormley enclosure map, 1854.

⁶⁰⁹ HALS QS/E76, Wormley enclosure award, 1858.

corresponding tithe maps again affirm that the map-makers were concerned with the titheable value of land: routes across common land were not explicitly depicted, and routes of differing status were not differentiated from one another.

5.2.5 Private roads which are not depicted on the pre-enclosure tithe maps

Almost half of the private roads described by Parliamentary enclosure awards do not appear on the pre-enclosure tithe maps at all. Much like the public roads, some of these private roads may have existed despite not being explicitly depicted on the tithe map. The purpose of the tithe commutation process was to assess the titheable value of the land, and so the omission of a route is not necessarily evidence of its non-existence. This is especially true of land which was not titheable, such as areas of common land. In fact, five such private roads correspond with areas of common land on the earlier tithe maps. For instance, two 'private carriage and occupation road[s]' in Hexton were set out for new allotments created from 'Cow Common' on the earlier tithe map (FIGURE 102 and FIGURE 103). In other instances, private roads were simply not depicted, although they likely existed. Thus, the second 'private carriage road and drift way' in Broxbourne, Hertfordshire, was not expressly depicted on the pre-enclosure tithe map, but a route was shown to the north and a gap was left in the canal,



FIGURE 102 HALS DSA4/52/2, Hexton tithe map, 1837.



FIGURE 103 HALS QS/E35, Hexton enclosure map, 1873.

suggesting that a route of some kind did exist (FIGURE 104 and FIGURE 105).⁶¹⁰ Doubtless, the Parliamentary enclosure process clarified the physical and legal status of such routes. Finally, some private roads which did not appear on the earlier tithe maps were possibly newly created by the enclosure Commissioners, either because they dissected the earlier landscape, or because they led to new allotments. Some private roads were aligned with no pre-existing features such that they must have been newly created.

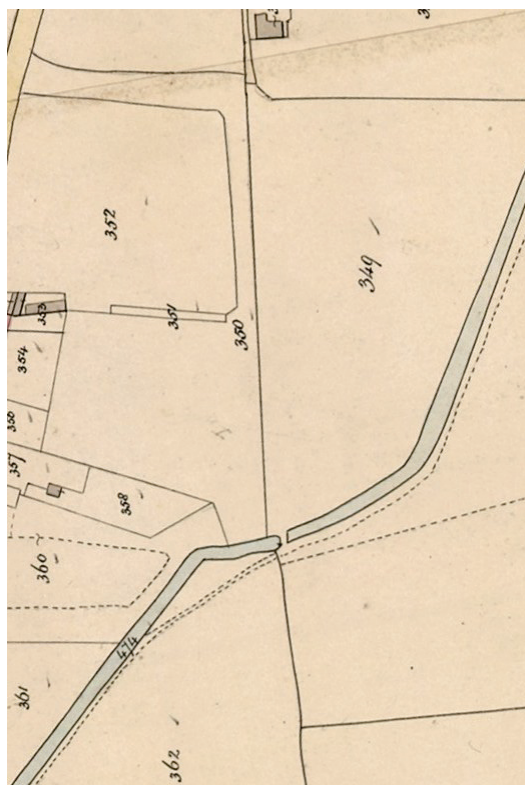


FIGURE 104 HALS DSA4/25/2, Broxbourne tithe map, 1839.

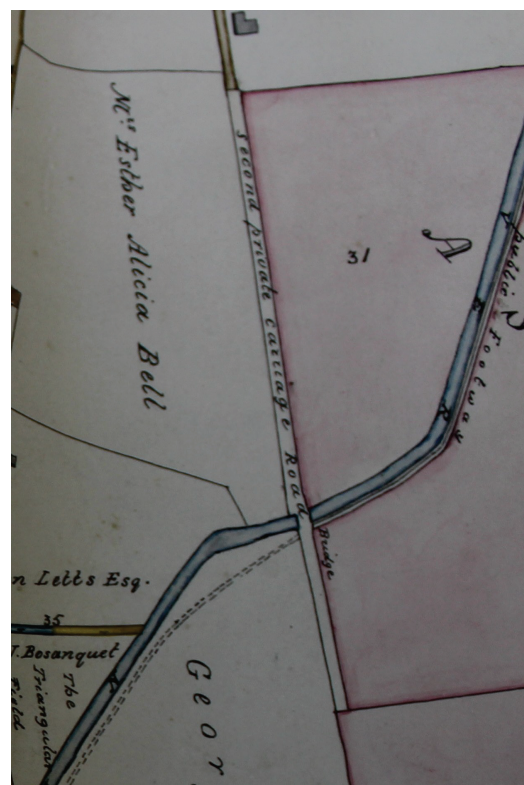


FIGURE 105 HALS QS/E20, Broxbourne enclosure map, 1844.

To summarise, two thirds of private roads which do not appear on the earlier tithe maps may have physically and legally existed before Parliamentary enclosure but were not depicted because it was not the duty of the tithe map-makers to depict each route. In a third of cases it can be inferred that these private roads were newly created, both physically and legally, by the Parliamentary enclosure Act.

⁶¹⁰ HALS QS/E20, Broxbourne enclosure award, 1844.

5.2.6 Conclusions

Tithe apportionments and maps created before a parish was enclosed by Parliamentary Act offer a unique opportunity to examine private roads in the years and decades before they were confirmed by the enclosure Commissioners. Some tithe maps, although dated before the enclosure maps, depict the envisaged Parliamentary enclosure landscape. As expected, nearly all private roads appear in the same course on these tithe and enclosure maps, with only one appearing slightly shorter. Documentary analysis reveals that an objection altered this route when the Commissioners finalised their enclosure award. The weight of this evidence will depend upon whether a ‘cumulative’ or ‘synergistic’ approach is used.⁶¹¹ On the one hand, the tithe and enclosure maps depict almost the same environs and may be regarded as repeating or cumulative evidence, or, considering that each was created for a different purpose, may be regarded as coordinating or synergistic evidence. In these instances, where the maps were sometimes completed by the same surveyor, the former seems more appropriate.

FIGURE 106 shows how the 11 private roads with additional public rights appear on the earlier tithe maps. While half the private roads appear in the same course

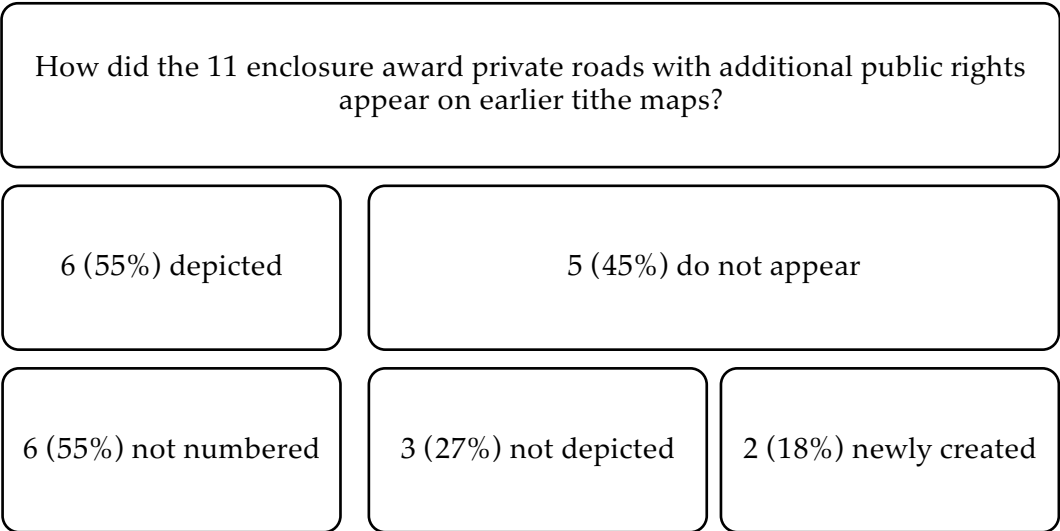


FIGURE 106 How did the 11 enclosure award private roads with additional public rights appear on earlier tithe maps?

⁶¹¹ Planning Inspectorate, *Consistency Guidelines*, Section 2, 5th revision, July 2013, para. 2.17.

on the tithe map, the Commissioners frequently changed the physical and legal status of these earlier routes to create new private roads. Sometimes existing public roads or bridleways were explicitly replaced with lesser public rights. The other half of private roads with public rights did not appear on the tithe maps. Some may have legally existed despite not appearing on the tithe map. Others lead to new allotments on the enclosure maps so it can be surmised that they were newly created to provide access to new individually owned landholdings.

The private roads described without public rights in the Parliamentary enclosure awards similarly appear half the time on the earlier tithe maps (FIGURE 107). These private roads are also nearly all depicted without numbers in the tithe apportionment and most appear without colour and are open to adjoining land. It is clear that the Parliamentary enclosure Commissioners used these existing routes to create their private roads, clarifying their legal status while simultaneously improving the surrounding physical landscape. Perhaps the most notable discovery is that all private roads which appear sienna on the earlier tithe maps previously held public rights. This is true for private roads both with and without public rights. It seems the tithe surveyors and map-makers used sienna to denote the physical status of routes, possibly surfacing, which closely corresponds with their legal status. This is a significant finding which may prove vital in future inquiries which seek to use the tithe apportionments and maps as

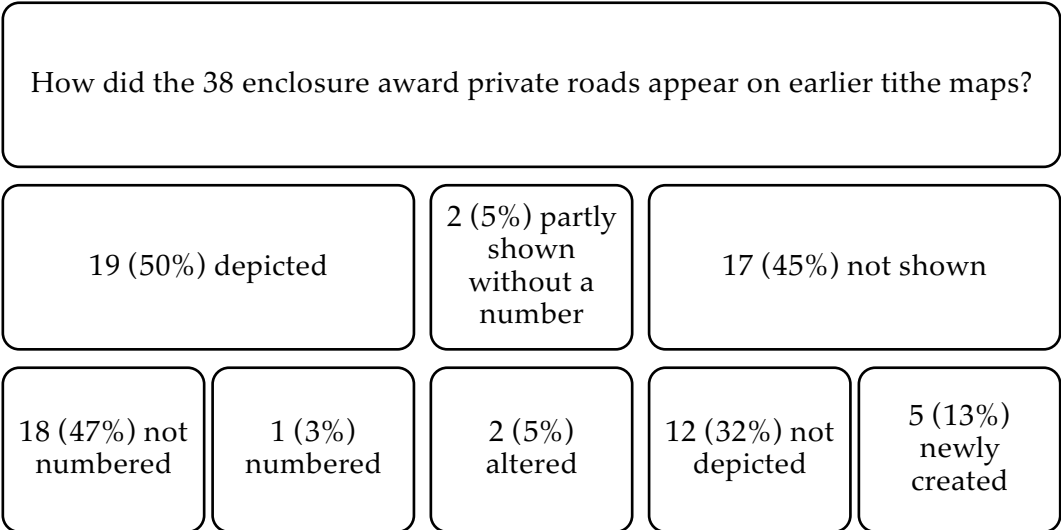


FIGURE 107 How did the 38 enclosure award private roads appear on earlier tithe maps?

evidence of status. Additionally, private roads with and without public rights do not appear on the earlier tithe maps 45 percent of the time. In both cases routes of some kind may have existed before but were not depicted by the tithe map-makers who were not intent on depicting all routes in a parish. Often these routes exist over common land or other areas which were not titheable. Sometimes it is likely these roads were newly created by the enclosure Commissioners because they dissected the earlier landscape or because they lead to new allotments created by enclosure.

The private roads stand in stark contrast to the public roads. While 72 percent of public roads are partly depicted on the earlier tithe maps, only five percent of private roads partly appear. This makes sense considering one of the principal goals of Parliamentary enclosure was *public* road improvement. As Mingay highlights, 'old lanes were often narrow, poorly made and badly maintained, deeply rutted and overgrown, and dangerous where there were steep hills and sharp bends to be negotiated'.⁶¹² As such, the enclosure Commissioners regularly improved the public roads, often making physical improvements or widening, straightening, or wholesale diverting them. However, private roads were either confirmed in place or created *de novo* for new enclosures. Moreover, the public and private roads described by Parliamentary enclosure awards appear fundamentally different on the earlier tithe maps. Private roads are regularly open to adjoining land, with 70 percent appearing open on at least one side on the earlier tithe maps. Public roads, on the other hand, are open to adjoining land only 48 percent of the time. More striking is that 78 percent of roads identified as public at Parliamentary enclosure appear sienna on the earlier tithe maps, compared to only 26 percent of private roads. Moreover, all sienna-coloured private roads previously held public rights which were extinguished by the Parliamentary enclosure awards. This is strong evidence that sienna-coloured routes on tithe maps typically correspond with public routes.

⁶¹² Mingay, *Parliamentary Enclosure in England*, 48.

5.3 Private roads in post-enclosure tithe apportionments and maps

This section analyses parishes in which the tithe commutation occurred after Parliamentary enclosure to assess what happened to private roads in the years and decades following the implementation of the award. The sample consists of 41 enclosure awards, 36 of which describe private roads. These Parliamentary enclosure awards contain 267 private roads and average 7.4 per parish. This compares to a 4.1 average for those awards dated after the tithe commutation, which confirms that more significant changes were made by earlier Parliamentary enclosure awards. This analysis will first explore the 43 private roads which are described with additional public bridle or foot rights to ascertain whether they are depicted in any particular manner on the tithe maps. Then the 224 private roads without public rights will be examined to clarify how routes of differing status were described and depicted by the tithe map-makers and valuers. This will facilitate a better understanding of how contemporaries viewed routes and will be particularly relevant for future inquiries which seek to employ the tithe apportionments and maps as historical evidence for the status of routes.

5.3.1 Private roads with additional public rights on the post-enclosure tithe maps

Some 43 private roads described by Parliamentary enclosure awards held public bridleways or footpaths. Several private roads are described with additional public rights, such as a 'public bridle and drift road and foot-way and private carriage way or road' in Brigstock which:

shall not only be and remain a public bridle and drift way or road for all persons whomsoever; but also as and for a private carriage way or road from its commencement to the said lane leading into Geddington Chase for the use of such of the proprietors of estates in Brigstock aforesaid as shall have occasion to use the same⁶¹³

⁶¹³ NHRO Enclosure vol. L, Brigstock enclosure award, 1850.

In other cases, bridleways or footpaths were described following the same course as a private road. Examples include a 'path proceeding along the first private road' in Tibenham, Norfolk, and 'one public footpath from the said Sharpenhow End Road along the first thereinbefore described private road' in Barley, Hertfordshire.⁶¹⁴ Each enclosure award needs to be carefully analysed to verify the Commissioners' intended meaning.

A total of 24 of the 43 private roads with public rights do not appear on the later tithe maps because they depict a different area to the enclosure maps. This occurred where Parliamentary Acts had already removed tithe liabilities, most often in regions which experienced significant enclosure in the second peak between 1793–1815.⁶¹⁵ If these are excluded, then 16 of the 19 private roads



FIGURE 108 NHRO T/182, Paulerspury tithe map, 1839.

appear in their entirety on the tithe maps and almost all are depicted in the same fashion as the public roads. Two 'public bridleway and footway and private carriage road[s]' in Paulerspury appear as enclosed sienna-coloured routes on the 1839 tithe map, in the same style as the public roads (FIGURE 108).⁶¹⁶ Nearly all lead to other routes, average a length of 470 metres, and connect to 2.2 other routes. Incidentally, two of these private roads with public rights were numbered and listed without owners in the tithe apportionments for Sustead and Hockwold-cum-Wilton, Norfolk. It is notable that none of these

⁶¹⁴ NFRO C/Sca 2/300, Tibenham enclosure award, 1820; HALS QS/E12, Barley enclosure award, 1822.

⁶¹⁵ Turner, *English Parliamentary Enclosure*.

⁶¹⁶ NHRO ML/1405, Paulerspury enclosure award, 1820.

16 private roads with public rights were identified with owners or occupiers. This perhaps reflects their shared use and maintenance as most private carriage rights were reserved for adjoining landowners in the Parliamentary enclosure awards.

The remaining roads did not appear in their entirety on the post-enclosure tithe maps. One was originally set out at 391 metres but only appeared as a 120-metre route on the Tibenham tithe map in Norfolk (FIGURES 109 and 110). The other



FIGURE 109 NFRO C/Sca 2/300, Tibenham enclosure map, 1820.

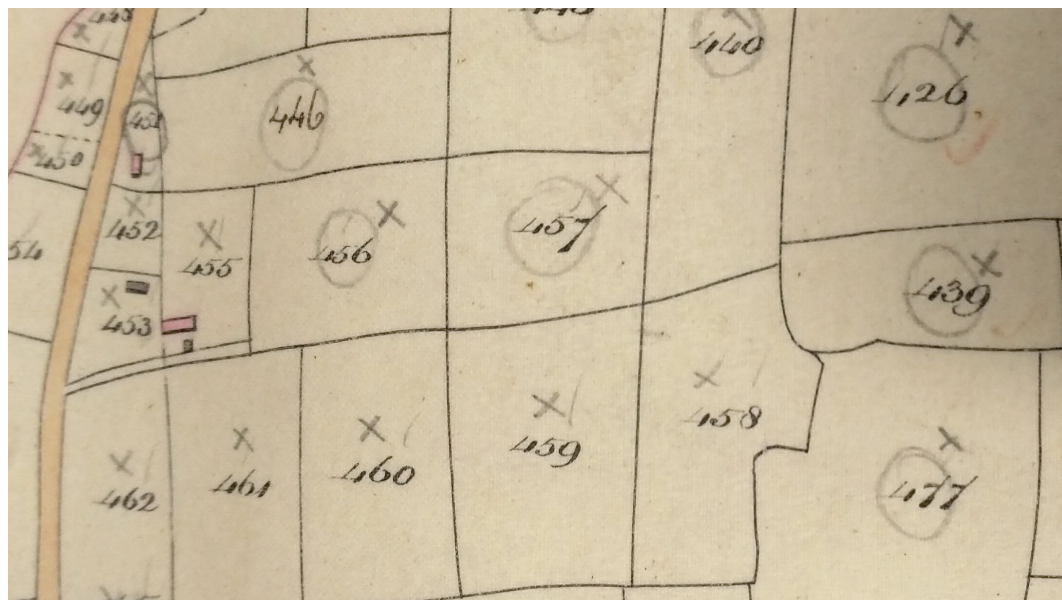


FIGURE 110 NFRO DN/TA 479, Tibenham tithe map, 1840.

two private roads, which happened to be some of the shortest identified by Parliamentary enclosure at 119 and 65 metres, were not depicted at all. These examples are a stark reminder that the tithe commutation was not concerned with routes which did not diminish the titheable produce of land. FIGURE 111 shows a 180-acre area of the Tibenham tithe map, marked in yellow, which is inaccessible from the nearby routes. It can be presumed that routes of some kind did exist but did not warrant inclusion as they did not affect the commutation.

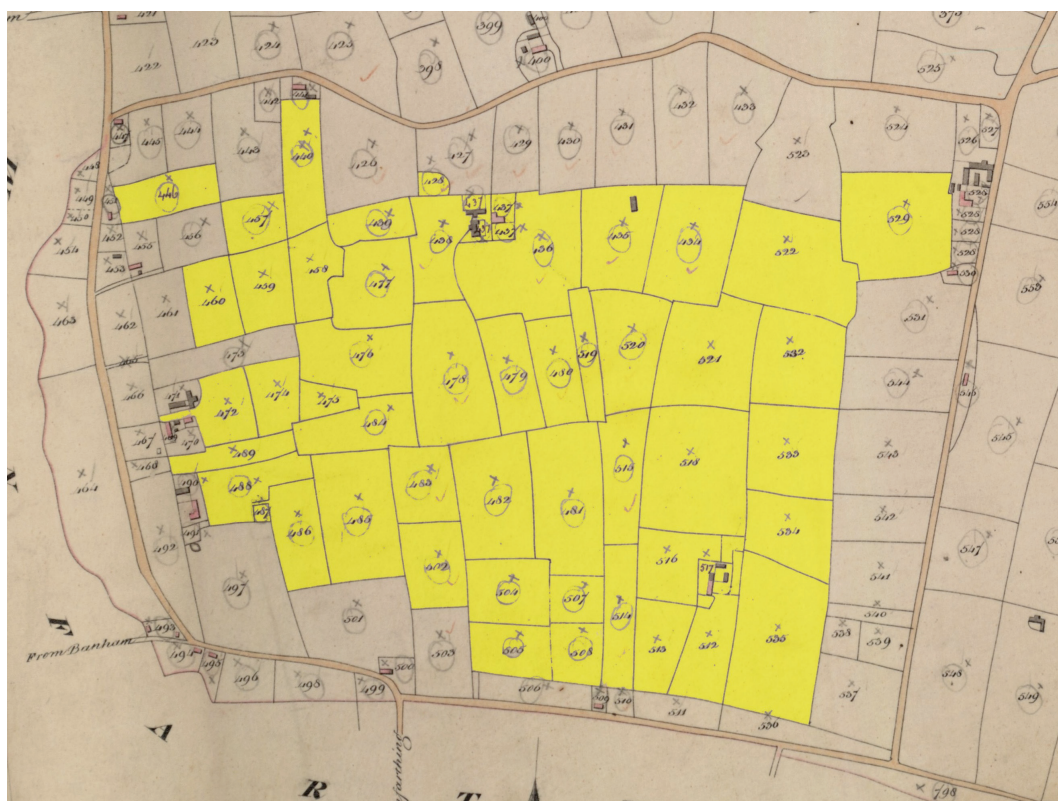


FIGURE 111 NFRO DN/TA 479, Tibenham tithe map, 1840, enclosures inaccessible from routes have been marked in yellow.

Very few private roads with public rights did not appear on the tithe maps which depicted the areas enclosed by Parliamentary Act. This reflects the longevity of such routes, as well as hinting at their possible physical status. These routes were probably surfaced or used to such an extent that they did not produce any titheable income. Nearly all were set out for the use of all adjoining landowners by the Parliamentary enclosure Commissioners and all presumably experienced considerable vehicular usage together with public bridleway or footpath usage.

5.3.2 Private roads which are depicted on the post-enclosure tithe maps

The following sections examine the remaining 224 private roads which did not co-exist with any public rights in the Parliamentary enclosure awards. Two thirds of these roads, totalling 147, are depicted on the post-enclosure tithe maps. Each appears in the same course as originally identified by the Parliamentary enclosure awards and maps. This indicates that most private roads described by the enclosure Commissioners remained in place in the years and decades following the enclosure award. Of the 147 private roads depicted on the post-enclosure tithe maps, 81 are unnumbered and 66 are numbered and listed in the tithe apportionments; each group will be examined separately.

Private roads which are not numbered on the post-enclosure tithe maps

A total of 81 private roads described by Parliamentary enclosure awards appear without apportionment numbers on the later tithe maps. Usually, this is used as evidence that such routes were exempt from the tithes for one of the nine reasons detailed in Section 4.2.1. However, this research has found examples of routes which are numbered but do not have a titheable rent-charge in the apportionment. Thus, the tithe map-makers and valuers were using the apportionment numbers to indicate ownership rather than the titheable value of land. It can be surmised that the omission of an apportionment number in these instances meant no *individual* owner or occupier could be identified. Such unnumbered routes likely held *shared* use and maintenance rights.

To emphasise again, the tithe map-makers rarely distinguished between public and private roads in their tithe apportionments and maps since the purpose of the commutation was to assess titheable land rather than the status of routes. As such, 56 of the 81 unnumbered private roads appear in the same fashion as the public roads on the tithe maps. For the purposes of the tithe, these roads were evidently viewed in the same manner. Herein lies the difficulty of employing the tithe commutation as evidence of the status of routes: public and private roads diminish the titheable value of land in much the same fashion. As 'naturally

barren' lands were exempt from tithe, any surfaced or regularly used routes would be unproductive whether public or private.⁶¹⁷ These 56 private roads must have had a similar physical appearance to the public roads to have been depicted in the same manner by the tithe map-makers. None contained apportionment numbers, which, as seen, is an indication that no individual could be identified as owner or occupier by the tithe valuers. It is entirely possible that these routes produced grass and herbage but that this could not be claimed by the tithe commutation as it was shared amongst an amorphous group which could not be defined by the tithe valuers. This is the same reason the verges of particularly wide public roads were not titheable, as there was no way to claim against the passers-by and poor who grazed their animals there. Provision for the poor was sometimes formalised on such verges with the creation of potato gardens.⁶¹⁸ FIGURE 112 illustrates such 'potato plots' alongside Watling Street in Paulerspury, Northamptonshire.



FIGURE 112 NHRO T182, Paulerspury tithe map, 1839.

⁶¹⁷ Prince, 'The Tithe Surveys of the Mid-Nineteenth Century', 20.

⁶¹⁸ Tracey Partida, 'Drawing the Lines: A GIS Study of Enclosure and Landscape in Northamptonshire' (PhD, University of Huddersfield, 2014), 235.

The remaining 25 private roads are depicted differently from the public roads on the tithe maps, and likely had a different physical appearance. In 13 instances the private roads were coloured differently from the sienna-coloured public roads. One private road in Barney was coloured green, while the others were left without colour, an indication that they were physically distinct from the public roads. 'A convention on large-scale maps at this time was to colour public highways and to leave private and occupation roads uncoloured, though there was no requirement to make this distinction.'⁶¹⁹ While it is possible some tithe map-makers distinguished the *legal* status of routes based on colour, it is more likely colour was used to distinguish the *physical* status of routes. This is especially true given both the difficulty of making enquiries into the legal status of routes, and the fact that the tithe commutation was more concerned with the titheable value of land. The tithe map for Standon, Hertfordshire, outlines this as the five private roads which led solely to agricultural land and were unlikely to be metalled were not coloured by the map-makers, whereas the two private roads which led to houses and were likely metalled were coloured sienna.

The other 12 private roads were distinguished from the public roads by means of the lines they were depicted with. Public roads were typically enclosed routes bounded by solid-lines, whereas these private roads were indicated with dashed lines and open to adjoining land. One road in Abthorpe, Northamptonshire, is described in the 1826 Parliamentary enclosure award as a 'private carriage road or woodway' and appears on the 1839 tithe map as a single dashed line annotated 'Wood Way' (FIGURE 113).

All in all, 56 of the 81 private roads without apportionment numbers appear indistinguishable from the enclosure award public roads on these tithe maps. The other 25 private roads



FIGURE 113 NHRO T/226, Abthorpe parish tithe map, 1839.

⁶¹⁹ Kain and Oliver, *The Tithe Maps of England and Wales*, 751.

are either distinguished by means of colour or the lines they were bounded with on the tithe maps. Analysis has indicated that a difference in colouring is related to the surfacing of the route since it is far more likely the tithe map-makers distinguished physical features rather than inquired into the legal status of such routes. The numbering of routes was linked to the ease with which ownership could be identified, as will be explored next.

Private roads which are numbered on the post-enclosure tithe maps

Of the 147 private roads which appear in their entirety on the post-enclosure tithe maps, 66, or 45 percent, are numbered and listed in the associated tithe apportionments. Each followed Dawson's recommendation that 'Roads, rivers, lakes, ponds and canals should be numbered upon the Plans in the same manner as inclosures, and their contents given separately in the Schedule'.⁶²⁰ However, as previously outlined, following the Tithe Act 1837 and the introduction of two classes of tithe map, map-makers were not required to follow Dawson's recommendations. This, combined with the fact that such individuals tended to work in confined geographic locales, meant that particular methods for creating tithe apportionments and maps dominated in particular regions.⁶²¹ This perhaps explains why 63 of the 66 numbered private roads set out at Parliamentary enclosure appear in Norfolk. As discussed in Section 4.3.1, all numbered public roads were also situated in Norfolk. Comparisons indicate that a greater proportion of private roads were numbered at 45 percent compared to 26 percent of public roads, and, more importantly, they were numbered *differently*. Numbered roads are listed in the tithe apportionment in four possible ways (FIGURE 114). All roads described as public by Parliamentary enclosure awards are listed without owners and without 'private' in their name whereas only 44 percent of private roads appear in this manner. The following section will

⁶²⁰ Dawson, 'Report from Lieutenant Dawson on Plans Required for the Tithe', 12.

⁶²¹ Nearly all of the tithe maps produced in Hertfordshire, Norfolk, and Northamptonshire were made by individuals from these respective counties, for figures see Kain and Oliver, *The Tithe Maps of England and Wales*, 219, 322, 350.

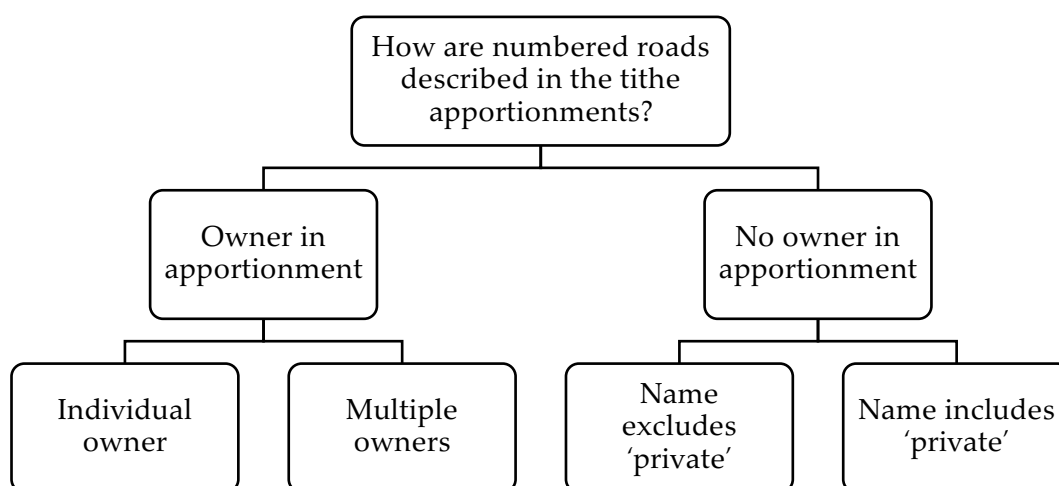


FIGURE 114 How are numbered roads described in the tithe apportionments?

examine the four ways the numbered private roads are listed in the apportionments.

First, 29 of the 66 numbered private roads are listed in a separate section of the tithe apportionment without owners, occupiers, land use, acreage, or a titheable rent-charge. Instead, these roads simply include an apportionment number and a name which excluded 'private'. All are located in the same six Norfolk tithe maps which numbered public roads, three of which are first class maps. This is clear evidence that these tithe map-makers followed Dawson's recommendation to number such features. In total, 25 of these private roads are indistinguishable from the public roads as they are coloured the same, enclosed, and listed without an owner and without 'private' in their names. The numbered *private* roads appear as cul-de-sacs a third of the time and connect to an average of 2.2 other routes, whereas the numbered *public* roads always lead to two or more routes and connect to an average of four routes on the tithe maps.

Moreover, there are some underlying differences between the names of public and private roads. While 63 percent of enclosure award public roads include place names, only seven percent or two of the private roads include places: 'Drove from Whittington to Adventures Lane' and 'Road to Somerton Road'. While 26 percent of public roads feature local landmarks such as 'Church Road' or 'Mill Lane', only ten percent of private roads include landmarks such as

'Lighthouse Road' and 'Mill Lane and Occupation Roads out of Lane'. Instead, most of the private roads established at enclosure have descriptive names illustrating the map-makers' desire to number all parcels of land in accordance with Dawson's recommendations, such as 'Drove to no. 176' and 'Roads and Lanes in the Village'. 'Road' is more commonly used for public roads at 86 percent compared to 34 percent for private roads, whereas 'lane' appears in 24 percent of private roads and 11 percent of public roads. 'Drove' features prominently with 15 private road examples, all in the west Breckland parishes of Hockwold-cum-Wilton and Northwold.⁶²² Historically, 'drove' refers to a highway used for the long-distance herding of cattle but is used in this case for routes leading to fenland on the sandy soils surrounding the Little Ouse and River Wissey (FIGURE 115). Thus, in many cases numbered public and private roads can be distinguished, and, with sufficient data, it may be possible to predict the legal status of routes from the tithe apportionments and maps.



FIGURE 115 TNA IR 30/23/293, Hockwold-cum-Wilton tithe map, 1838.

Second, as already alluded to, this study has uncovered nine private roads which are named 'Private Road', despite being included in a separate section of the tithe apportionment. This separate section is variously titled 'Public Roads' in East Ruston, Gresham, and Sustead; 'Roads, Rivers and Waste' in Hockwold-cum-Wilton and Northwold; and 'Public and private roads' in Winterton (FIGURE 116).

⁶²² 'Where Is Breckland?', *UEA Landscape History* (blog), 21 September 2016, <https://uealandscape.wordpress.com/2016/09/21/where-is-breckland/>.

<u>Public Roads</u>	
642	South fen Road
643	Holmes Road
644	Fox Green Road
645	Brunstead Road
646	Back Lane & Drabbs Lane
647	Plummer's Lane
648	Staithe Road
649	New Road
650	Horners Lane
651	Manor House Lane
652	Old Farm Road
653	Honing & Happisburgh Road
654	Statham & Walcot Road
655	Hawbro' & Statham Road
656	Private Road
657	Littlemoor Green Road
658	Private Road
659	Church Soaks
660	Fox and Hounds Road
661	Dyballs Road
662	Private Road
663	Private Road
664	Weight field Lane
665	Locke's Lane
666	Croftwright Road
667	Private Road
668	Private Road
669	Moorlands Lane
670	Ridlington Road
671	Walcot Green Lane
672	Mill Lane
673	Moorlands Soaks
674	New Road
675	Mill Road
676	Boundary Road

FIGURE 116 TNA IR 29/23/466, East Ruston tithe apportionment, 1841.

Aside from Winterton which specifically includes 'private' in the title of this section, the inclusion of 'Private Road' under a 'Public Roads' title appears paradoxical to a modern audience. Further examination exposes a sound logic to this anomaly. All these examples are in the same six Norfolk tithe maps which number all public roads, a sign that these particular tithe map-makers were determined to give all parcels of land an apportionment number irrespective of whether they produced titheable income. Land which was not owned by a single individual or easily defined group is listed without an owner in a separate section of the tithe apportionment. Having committed themselves to naming all such routes, the tithe map-makers and valuers used descriptive names, as seen above, or utilised local names. As such, it can be concluded that the roads named 'Private Road' were considered private by the local community. Importantly though, no individual or group was identified as the owner which suggests shared use and maintenance rights existed.

Third, 20 of the 66 numbered private roads are listed in the main body of the tithe apportionment with individual owners and occupiers, alongside land use, acreage, and, sometimes, a titheable rent-charge. Rather than following Dawson's recommendation to number *all* parcels of land, these tithe map-makers and valuers only seem to number land in which a single individual or defined group could be identified as the owner and occupier. It is not always clear whether individual parcels of land were titheable as the 'Amount of Rent-Charge apportioned' was sometimes grouped together. This can be seen in Sedgeford, Norfolk, as the lands owned by John Davy Esquire and occupied by Edmund Jary are given a single titheable rent-charge (FIGURE 117). It is thus unclear if the 'Private Road' numbered '101' was titheable. Like most roads in this category, it only provided access to lands owned and occupied by those individuals. Another stark example of this can be found in Hoe, Norfolk, where two private roads form contiguous parts of larger parcels of land numbered '15' and '16' (FIGURE 118).

U.—London: Printed and Published (By Authority) by Shaw & Sons, 137 & 138, Fetter Lane.

Journal of the charges appertaining upon the several Lands, and to whom payable.

LANDOWNERS.	OCCUPIERS.	Number relating to the Plan.	NAME AND DESCRIPTION OF LANDS AND PREMISES.	STATE OF CULTIVATION.	QUANTITIES IN STATUTE MEASURE.			PAYABLE TO VICAR.			PAYABLE TO PARISH.			REMARKS.
					A.	R.	P.	S.	D.	F.	A.	R.	P.	
Creak John	Barton John	77	Stages and Gardens											
Pacy John Esq.	Sarg Edmund	16	Thornham Field	Orable	13	2	10							
		17	Marled Piece	9*	13	0	32							
		18	Proves End	9*	13	1	15							
		19	Devils Bottom	9*	13	1	4							
		20	Softest Acres	9*	14	3	0							
		21	Foxes Field	9*	14	0	0							
		22	Hard Pit Piece	9*	6	2	12							
		23	Brush Piece	9*	6	2	16							
		24	Woodgate Piece	9*	11	3	16							
		25	Lower New Acres	9*	9	3	0							
		26	Long Foulton Acres	9*	11	0	19							
		27	Cottage Piece	9*	12	2	24							
		28	Cottage and Garden											
		29	Forster Piece	Orable	6	3	1							
		30	Washdown Piece	9*		3	8							
		31	Plantation	Wood	1	2	22							
		32	" "	Orable	5	2	0							
		33	Stouth Road											
		34	Plantation Piece	Orable	5	2	26							
		35	Plantation	Wood	5	2	9							
		36	Romshad	Pasture	5	3	17							
		37	Ramp Rightle	Orable	2	3	28							
		38	Plantation	Wood			11							
		39	Road and Paved	Pasture	1	0	0							
		40	Margate Piece	Orable	3	3	34							
		41	Plantation	Wood	1	3	30							
					189	3	18							
								13	10	0	32	15	6	DA.2.
Pacy and Heyler of Farnham	Stoffe Richard	37	Plantation	Wood	1	0	24							
		38	" "	Wood	6	2	17							
							7	2	1					

FIGURE 117 TNA IR 29/23/482, Sedgeford tithe apportionment, 1840.



FIGURE 118 NFRO MC 62/39, Hockwold-cum-Wilton tithe map, 1838.

As stated in Chapter 2, sometimes there are 'quite remarkable differences between the various copies of the maps'.⁶²³ A single such discrepancy has been found in Abthorpe, Northamptonshire, in which a private road is numbered '254' on the parochial tithe map but appears unnumbered on the Commissioner copy (FIGURES 119, 120, and 121). This encapsulates the fallibility of cartographic sources: surveys can vary greatly depending upon the proclivities of the surveyor and the time, season, and date at which the survey was completed.

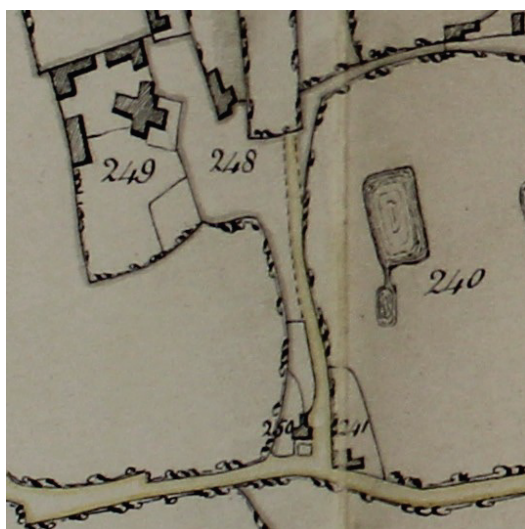


FIGURE 119 NHRO V2797, Abthorpe enclosure map, 1826.

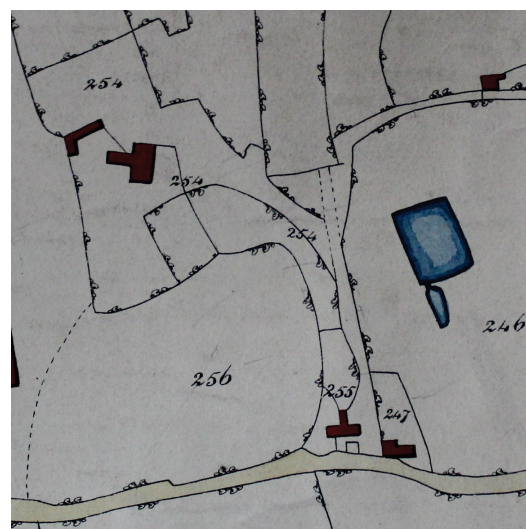


FIGURE 120 TNA IR 30/24/2, Abthorpe Commissioner tithe map, 1839.

Fourth, the final eight numbered private roads described at enclosure are listed in the main body of the tithe apportionment with multiple owners or occupiers. Three private roads in Barney, Norfolk, are owned or occupied by a named individual followed by 'and others'. One was 'appointed for the use and convenience' of 13 named individuals by the 1813 enclosure award and, by



FIGURE 121 NHRO T/226, Abthorpe parochial tithe map, 1839.

⁶²³ Andrews, 'Tithe Map Case Studies', 68.

1838, led to ten allotments on the tithe map and is owned and occupied by 'George Philippo and others' in the tithe apportionment (FIGURE 122).⁶²⁴ A further five private roads are owned or occupied by larger groups or organisations such as the 'Commissioners of Drainage' in Norton Subcourse, and the 'Trustees for the Poor' in Hoe. The status of such routes is more difficult to determine, but ownership or occupation by 'surveyor of highways' or other public officials has generally been held as 'very good evidence of public highway status'.⁶²⁵ Two private roads in Surlingham in Norfolk are owned and occupied by the 'Town' (FIGURE 123). The fact that these roads were distinguished from the public roads in the parish illustrates that there was a distinction between public roads

LANDOWNERS.	OCCUPIERS.	Numbers referring to the Plan.	NAME AND DESCRIPTION OF LANDS AND PREMISES.	STATE OF CULTIVATION.
Philippo George (continued)	Barnes William	177	Cottage and Garden	Pasture
	Seville Anne	178	ditto	Pasture
Philippo George and others	Themselves	184	Private Road	Waste
Barney	Barnes James	119	Old House and Pighile	Arable
	Butler John	111	Claypit Allotment	Arable
	Mann David	221	Garden	Pasture

FIGURE 122 NFRO DN/TA 80, Barney tithe apportionment, 1838.

LANDOWNERS.	OCCUPIERS.	Numbers referring to the Plan.	NAME AND DESCRIPTION OF LANDS AND PREMISES.	STATE OF CULTIVATION.	QUANTITIES STATUTE MEASURE.	PAYABLE TO	PAYABLE TO	REMARKS.
Luck, C & Co (continued)	Henry Townsend	197	Cottage	Pasture	1 5	1 5	1 5	
		198	Pighile	Arable	2 20	10 4	2 5	
	John Dunnington	277	Marsh	Pasture	6 0 24		6 3	
	Mr Eccleston	278	Cottage	Pasture	1 20		1 3	
	John Dewley and Adam Fisk	301	Cottage &c	Pasture	2 15		2 5	
	Mr Eccleston	333	Marsh	Pasture	2 1 4		3 5	
Simpson, Chas Esq	Richard Gostling	338	House and Yards	Pasture	1 2 35		5 4	
		339	Marsh	Pasture	1 1 24		4 4	
				Pasture	3 0 22		9 5	
Town, The	Town	180	Marsh	Pasture	2 0 3	2 5		
		214	Marsh	Pasture	1 24			
		314	Road to	Pasture	2 1 12			
				Pasture	4 2 39	2 5		

FIGURE 123 TNA IR 29/23/536, Surlingham tithe apportionment, 1843.

⁶²⁴ NFRO ACC Hayes & Storr 28.8.74 190, Barney enclosure award, 1814; NFRO DN/TA 80, Barney tithe apportionment, 1838.
⁶²⁵ Bucks and Wadey, Rights of Way, 76.

available for the general public, and private roads available for the occupants of a particular locality. This is something which has caused considerable confusion for the courts, particularly in the *Dunlop* case regarding the term 'private carriage road' in Parliamentary enclosure awards.⁶²⁶

Seymour has argued that roads set out for inhabitants, parishioners, or owners and occupiers in Parliamentary enclosure awards were, for the purposes of highway law, set out for the public.⁶²⁷ This is erroneous as there is abundant historical evidence of the Parliamentary enclosure Commissioners distinguishing public roads from private roads, as well as setting out private roads with public rights. To do so would have been meaningless if, as Seymour claimed, the Commissioners intended private roads to be used by the public when they were set out for the use of the inhabitants or parishioners.⁶²⁸ While many private roads set out for a large section of the public at enclosure typically *become* public through dedication and acceptance, they are by no means automatically public. The legal position is clear: public rights must be available to 'the public at large (not merely a section of it)', however large that section may be.⁶²⁹ As Angela Sydenham outlines: private rights of way, easements, accommodation roads, church ways, and local roads will not amount to public highways because they are only available to particular individuals or parishioners.⁶³⁰ The two private roads owned by the 'Town' in Surlingham are named 'Road to' and 'Staithe' and lead to the Broads, land which has historically been fraught with complicated legal issues amid competing landowner claims.⁶³¹ In such situations custom reigned supreme, dictating which individuals were entitled to exercise which rights over which areas of land. It is likely many more private roads held shared ownership rights but most were not given numbers by the tithe map-makers as

⁶²⁶ *Dunlop v Secretary of State for the Environment and Cambridgeshire CC* (1995) 94 LGR 427.

⁶²⁷ Seymour, 'Public of the Locality'.

⁶²⁸ Seymour, 69.

⁶²⁹ Barsby, *Private Roads*, 3.19.

⁶³⁰ Sydenham, *Public Rights of Way and Access to Land*, 1.2.2.

⁶³¹ For a detailed overview of staithes in the Broads see Tom Williamson, Philippa Parker, and Ivan Ringwood, 'The Staithes of the Broads: A History and Assessment', n.d.

it would be impractical to identify the owners and occupiers of such roads. Additionally, no tithes were payable on any of these roads, and so many map-makers and valuers would have considered it fruitless to list such roads in the apportionment.

To conclude, it was the tithe map-makers and valuers who determined whether or not a road was numbered. Following the Tithe Act 1837 these social actors were increasingly free to dictate the style and design of the apportionments and maps, and those working in Norfolk regularly numbered private roads. Of the 66 identified in this sample, 38 were listed *without* an owner and nine of these were named 'Private Road'. The other 20 were listed *with* individual owners and occupiers, and eight were owned or occupied by groups or organisations. Interestingly, those private roads owned and occupied by individuals in the tithe apportionments were set out for fewer individuals in the Parliamentary enclosure awards. Likewise, those private roads left without owners in the tithe apportionments are more commonly set out for larger groups of people or all adjoining landowners. Five private roads in Hockwold-cum-Wilton were set out for all adjoining landowners but with additional stipulations, such as: 'and likewise for all persons who shall be entitled to take a Firing from the last mentioned allotment'; 'and of all persons who shall have occasion to use the drove called The Sluice Drove'; 'and also of all persons who shall have occasion to resort to and from Feltwell Mill'.⁶³² The addition of such stipulations increases the likelihood of the roads being listed without owners in the tithe apportionment. While by no means a conclusive pattern, this illustrates that there is a link between the number of individuals a private road was set out for and how it subsequently appears on the tithe apportionments and maps. This will be explored in more detail in comparisons with the Finance Act documents and maps.

⁶³² NFRO C/Sca 2/159, Hockwold-cum-Wilton enclosure award, 1814.

Summary

In summary, 147 of the 224 private roads described by Parliamentary enclosure awards are depicted in the same course on the later tithe maps. In most cases, especially in Hertfordshire and Northamptonshire, tithe map-makers and valuers left private roads without apportionment numbers. Overall, 69 percent of the private roads without apportionment numbers were indistinguishable from the public roads in the parish. Clearly the tithe map-makers and valuers were not concerned with the status of routes, but rather were distinguishing titheable and non-titheable land or where individuals or organisations could be identified as owners or occupiers. There was no easy way for the tithe valuers to indicate a route with shared ownership or occupation. Indeed, the ownership of some routes may have never come into question if their use and maintenance was happily shared. While many lands were owned by corporate bodies, organisations, or Oxbridge colleges, the tithe was ill-equipped to deal with an amorphous group of individuals such as those adjoining a route. Only in three instances in Barney is there a clear attempt by the tithe valuers to illustrate such ownership or occupation. In most cases, the tithe map-makers and valuers preferred to leave such routes without apportionment numbers.

5.3.3 Private roads which are partly depicted on the post-enclosure tithe maps

A mere eight of the 224 private roads described by Parliamentary enclosure awards are shown for only part of their length on the later tithe maps. Three are a result of the tithe and enclosure maps depicting different areas. The other five do not appear in the same course despite forming part of the tithe survey. For instance, the first private road in Ringstead, Norfolk, is described as the 'Road to the Town Chalk Pit' by the 1781 Parliamentary enclosure award and appears on the map as a 326-metre route.⁶³³ The 1841 tithe map depicts only a 193-metre route here because the chalk pits had been planted with European larch, creating

⁶³³ NFRO PD 696/1, Ringstead enclosure award, 1781.

5.3.4 Private roads which are not depicted on the post-enclosure tithe maps

Almost a third of all private roads described by Parliamentary enclosure awards did not appear on later tithe maps. Of the 69 private roads not depicted, 43 are a result of the tithe maps depicting a different area to the Parliamentary enclosure maps. As indicated, this was usually because the earlier Parliamentary enclosure Act had already commuted such tithes. This means 26, or 12 percent, of the 224 private roads in the sample are not depicted on the post-enclosure tithe maps. The tithe surveyors, map-makers, and valuers depicted the physical boundaries and ascertained the legal ownership of titheable parcels of land. As is abundantly clear from court cases and inquiries, it is difficult to establish the legal status of routes and this was certainly beyond the purview of the tithe map-makers and valuers. As such, the absence of a route cannot be used as evidence for its physical and legal non-existence. The twelfth ‘private carriage road and driftway’ in Cottingham cum Middleton provided access to an allotment owned by George Rowell in 1825 (FIGURE 126).⁶³⁴ By 1843, several of the allotments are still intact but the route does not appear on the tithe map (FIGURE 127). This private road *may* have continued to physically and legally exist.

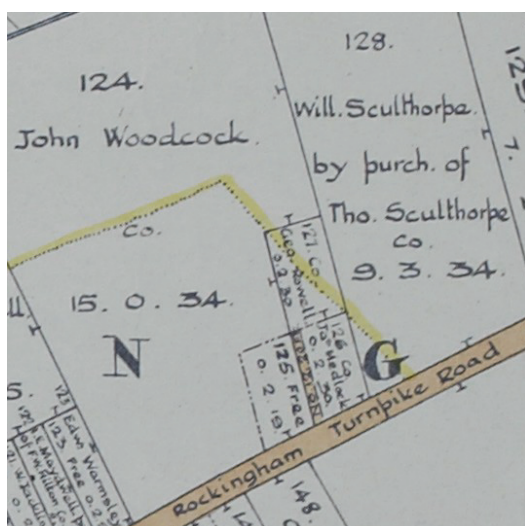


FIGURE 126 NHRO Map/5914, Cottingham cum Middleton enclosure map, 1825.



FIGURE 127 NHRO T/044, Cottingham cum Middleton tithe map, 1843.

⁶³⁴ NHRO Enclosure vol. O, Cottingham cum Middleton enclosure award, 1825.

While the tithe can be admissible as evidence for the existence or non-existence of a right of way, as confirmed by *Maltbridge*, this research has demonstrated that the omission of a route, especially over non-titheable land, is not evidence of its legal non-existence.⁶³⁵ For instance, the first private road in Necton, Norfolk, is not explicitly depicted on the tithe map, but apportionments '660' and '723' are connected via a road-width parcel of land, suggesting a route of some kind continued to exist on this alignment (FIGURE 128).



FIGURE 128 NFRO DN/TA 327, Necton tithe map, 1839.

Conversely, some private roads which do not appear on the tithe maps had probably ceased to exist by the date of the tithe commutation. Various private roads were no longer required as lands were reorganised. Moreover, several of these private roads represent the shortest described and depicted by Parliamentary enclosure awards and maps in this study, with 12 of the 26 set out at lengths shorter than 100 metres. At 11 metres, the seventh private road in

⁶³⁵ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] EGCS 134 (QB).

Barney, Norfolk, was one of the shortest private roads identified. Acting as little more than a turning circle for a plough, it was not depicted on the tithe map 24 years after the Parliamentary enclosure Act (FIGURES 129 and 130). As land use and ownership changed, some private roads were simply no longer required.

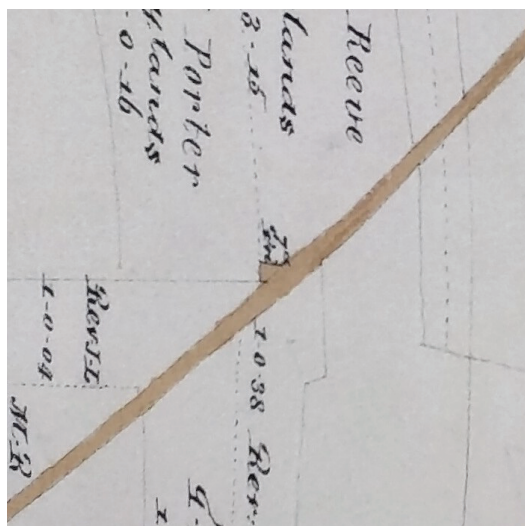


FIGURE 129 NFRO C/Sca 2/14, Barney enclosure map, 1814.

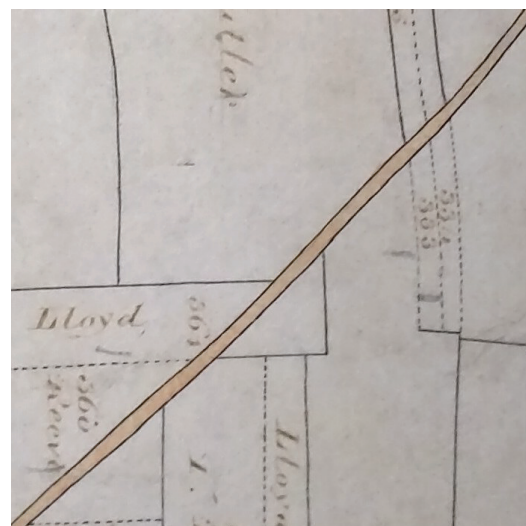


FIGURE 130 NFRO DN/TA 80, Barney tithe map, 1838.

This analysis has confirmed that, in most cases, the tithe apportionments and maps cannot be used in isolation as evidence for the legal non-existence of routes. The tithe surveys were created for a specific purpose and the map-makers were not expected to depict all routes, especially if they did not interfere with the commutation. Nonetheless, the 26 private roads which did not appear on the tithe maps were set out for the fewest named individuals in the Parliamentary enclosure awards, averaging just 2.4 per road. There is a clear correlation between how many individuals a private road is set out for and the likelihood of the road not appearing on the later tithe maps.

5.3.5 Conclusions

The post-enclosure tithe apportionments and maps provide valuable landholding information after Parliamentary enclosure. The physical extent of many routes are recorded on the tithe maps, occasionally with additional information in the tithe apportionments. As outlined, 43 private roads described by Parliamentary enclosure awards include public bridleways or footpaths (FIGURE 131). Of these, 24 are not wholly depicted on the tithe maps because the tithe and enclosure maps covered different areas. If these 24 roads are excluded from the sample, 84 percent appear on the post-enclosure tithe maps, five percent are partly depicted, and 11 percent do not appear at all. Almost all are connected to several other routes and form part of the wider communication network.

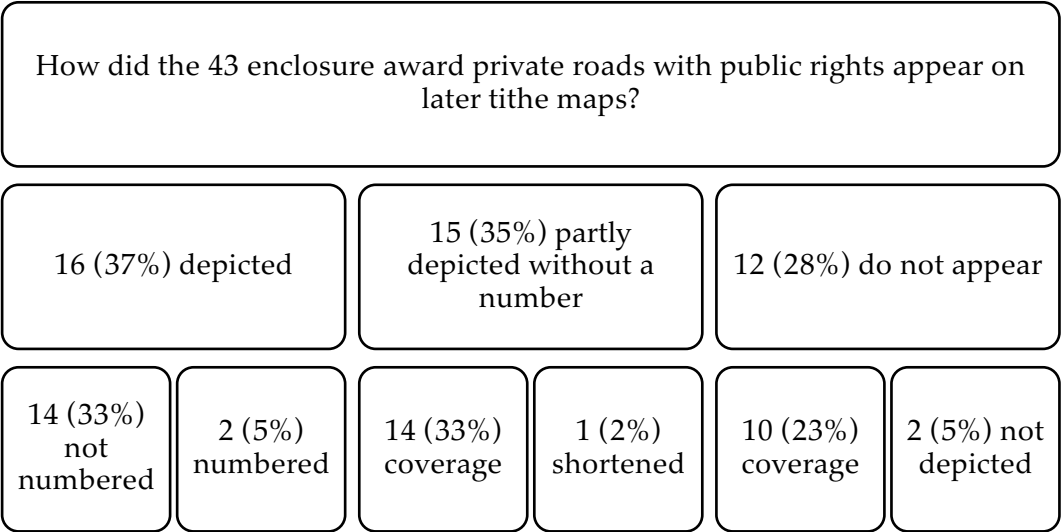


FIGURE 131 How did the 43 enclosure award private roads with public rights appear on later tithe maps?

A total of 224 private roads did not specify additional public rights at Parliamentary enclosure. Similarly, 45 are not depicted in their entirety because the tithe maps depict a different area to the enclosure maps. If these are excluded, 82 percent are depicted on the tithe maps, three percent are partly depicted, and 15 percent do not appear (FIGURE 132):

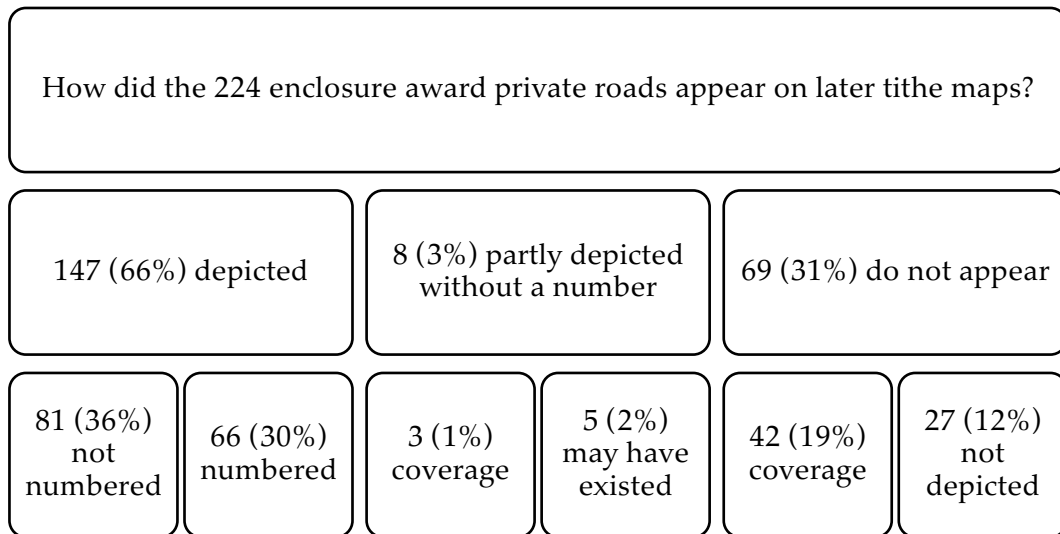


FIGURE 132 How did the 224 enclosure award private roads appear on later tithe maps?

Thus, the private roads *with* public rights appear slightly more often on the post-enclosure tithe maps. They also tend to be better connected; only a quarter are cul-de-sacs, compared to half of the unnumbered private roads. Additionally, 45 percent of the private roads are numbered compared to just 13 percent of private roads with public rights. This variation can be attributed to the tithe map-makers and valuers who had different approaches to the tithe apportionments and maps. Some were intent on providing all parcels of land with an apportionment number as recommended by Dawson, while others were content to omit parcels of land which did not produce titheable income.

Private roads established at Parliamentary enclosure regularly continue to exist in the following years and decades. Private roads both with and without public rights appear in 84 and 82 percent of cases respectively. While undoubtedly large proportions, these figures pale in comparison to the 99 percent of public roads which are depicted on post-enclosure tithe maps. Public roads represented long, wide, surfaced routes which could not be easily excluded from a survey. In many cases, the inclusion of public roads was absolutely essential to aid map comprehension, whereas some private roads, particularly short, narrow, unsurfaced routes, were not necessary to complete the tithe commutation and some tithe map-makers accordingly did not depict such routes.

Comparisons between the public and private roads which are depicted on the tithe maps illustrate that it is rarely possible to distinguish between the two. Private roads without apportionment numbers appear in the same colour and bounded by the same lines, either solid or dashed, 69 percent of the time. Only in 22 percent of cases did particular tithe map-makers and valuers conform to the practice of colouring public highways and leaving 'private and occupation roads uncoloured'.⁶³⁶

On the other hand, numbered public and private roads can more easily be distinguished from one another. Private roads more frequently contain apportionment numbers at 45 percent compared to 26 percent. Numbered public roads are *always* listed in a separate section of the tithe apportionment without owners or occupiers and their names often include places, local landmarks, or 'road'. In contrast, only 44 percent of private roads described by Parliamentary enclosure appear in a separate section of the tithe apportionment without owners or occupiers and are not named 'private'. Most are given descriptive names and 'road' features less often. Thus, there is unquestionably a dichotomy between numbered public and private roads. It is therefore usually possible to differentiate between public and private roads on the post-enclosure tithe maps if the roads are numbered, but rarely when roads are left unnumbered.

⁶³⁶ Kain and Oliver, *The Tithe Maps of England and Wales*, 751.

5.4 Private roads in Finance Act 1910 documents and maps

This section examines how private roads described and depicted by Parliamentary enclosure awards and maps appear in the Finance Act 1910 documents and maps. As discussed, the Finance Act valuation assessed the ownership of all land in the United Kingdom as part of the introduction of a new tax, the 'Increment Value Duty'.⁶³⁷ While the valuation was not directly concerned with the status of particular routes, it has been used in court to determine the historic status of routes.⁶³⁸ The Finance Act 1910 evidence is formed of two principal sources: the Finance Act maps, and Finance Act documents, discussed in Section 2.3. The first revision 1:2500 OS maps are used most often and are coloured in hereditaments according to ownership. The 'white' road rule is a presumption that those roads outside of coloured hereditaments hold public vehicular highways. Analysis of roads known to be private at Parliamentary enclosure can help determine the validity of this rule. Finance Act documents can also offer evidence of public rights of way where they contain tax deductions for such rights. This section will examine how the 60 private roads with public rights and the 286 private roads without public rights are depicted and described by the Finance Act 1910 documents and maps. This will have important implications for legal inquiries which seek to determine the status of routes by using the Finance Act as a historic source.

5.4.1 Private roads with additional public rights

In this sample of 346 private roads, 60 held additional public rights at Parliamentary enclosure. Almost all extend between two 'white' roads or lead to dashed routes annotated *B.R.* or *F.P.* on the OS maps used by the Finance Act valuers. These annotations indicate routes which are suitable only for horse or foot traffic and do not necessarily indicate the existence of any public right of way. Nonetheless, it is informative that many private roads with public rights

⁶³⁷ Finance (1909–10) Act 1910, 10 Edw. VII c. 8, s. 1.

⁶³⁸ Planning Inspectorate, *Consistency Guidelines*, Section 11, 5th revision, July 2013, 1.

lead to *B.R.* and *F.P.* annotated routes, and nearly all extend across multiple hereditaments. The stark similarities between these annotations and the public rights of way network will be explored in more detail in Chapter 6.

Of the 60 private roads with public rights, 24 are entirely 'white' on the Finance Act maps. All are enclosed and all but one lead to other routes. FIGURE 133 shows a 'private carriage road and driftway and public footway' in Therfield, Hertfordshire, between two 'white' roads which provides access to four newly constructed houses on a road annotated 'Royse Grove' by the valuers.⁶³⁹ Likewise, FIGURE 134 shows a private road and public footpath in Necton,



FIGURE 133 TNA IR 126/4/19, Finance Act record sheet Hertfordshire IV 12, c. 1910.

⁶³⁹ HALS DP/107/26/1, Therfield enclosure award, 1848.



FIGURE 134 TNA IR 127/9/868 and IR 127/9/872, Finance Act record sheets Norfolk LX 5 and 9, c. 1910.

Norfolk, which is named 'Black Drift' on the OS map and extends between two 'white' roads. These roads regularly lead to routes annotated *B.R.* or *F.P.*, such as a private road and footway in Broxbourne, Hertfordshire, which extends beyond the New River and continues as a *F.P.* annotated route (FIGURE 135). Several of these roads are named on the OS maps used by the Finance Act valuers, including

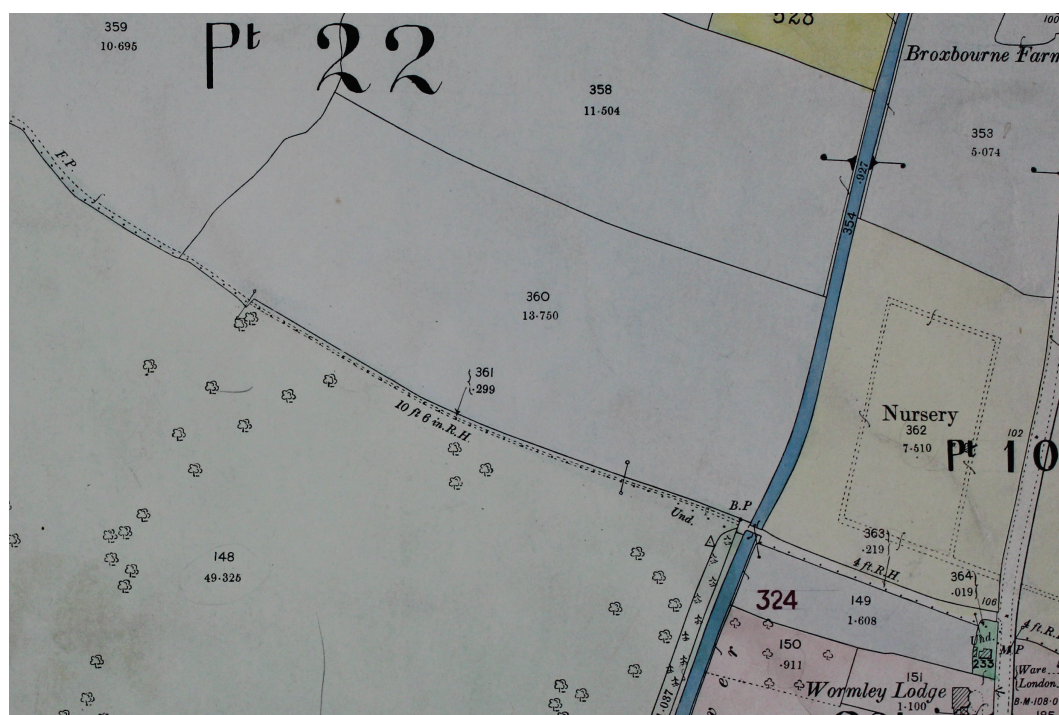


FIGURE 135 TNA IR 126/4/274, Finance Act record sheet Hertfordshire XXXVI 16, c. 1910.

'Splash Lane' in Castor, 'Slough Lane' in Tibenham, 'Lime Kiln Lane' in Weston, and 'Levenage Lane' in Widford. In contrast, none of the coloured private roads with public rights are named. Overall, the 'white' roads appear to function as part of the transport network and it is possible that they acquired further public rights either by statute or at common law.⁶⁴⁰

In seven cases, private roads with public rights described in Parliamentary enclosure awards appear partly 'white' and partly coloured on the Finance Act 1910 maps. In six cases the enclosed portions of the road are 'white' and the open

⁶⁴⁰ Sauvain, *Highway Law*, 2013, chap. 2.

portions are coloured as part of hereditaments. Two examples in Greens Norton, Northamptonshire, are open to adjoining land and coloured near the 'Brick Works' and the 'Old Quarries', but 'white' where they are enclosed (FIGURE 136).



FIGURE 136 TNA IR 126/5/436, Finance Act record sheet Northamptonshire LVI 5, c. 1910.

This illustrates the extent to which the valuers were constrained by the 1:2500 OS sheets. These were surveyed and printed on a county-by-county basis, with 16 fitting within a single 1:10560 OS sheet.⁶⁴¹ Since each 1:2500 sheet depicts 1.5 square miles, some roads extend across multiple sheets. A single instance has been found in Weston, Hertfordshire, in which a 'private carriage and horse road and public foot way' appears 'white' on one sheet but coloured on the adjoining sheet (FIGURE 137).⁶⁴² It is extremely unlikely that the southern section was coloured because William Jan, the owner of hereditament '51', considered it part of his lands but did not consider the northern half in the same manner since there were no topographical features on the division between the sheets which indicate any change in status. Unfortunately, because of the way the working

⁶⁴¹ Richard R. Oliver, *Ordnance Survey Maps: A Concise Guide for Historians* (Charles Close Society, 2005), 69.

⁶⁴² HALS QS/E73, Weston enclosure award, 1802.



FIGURE 137 TNA IR 126/4/69 and IR 126/4/115, Finance Act record sheets Hertfordshire VIII 13 and XIII 1, c. 1910.

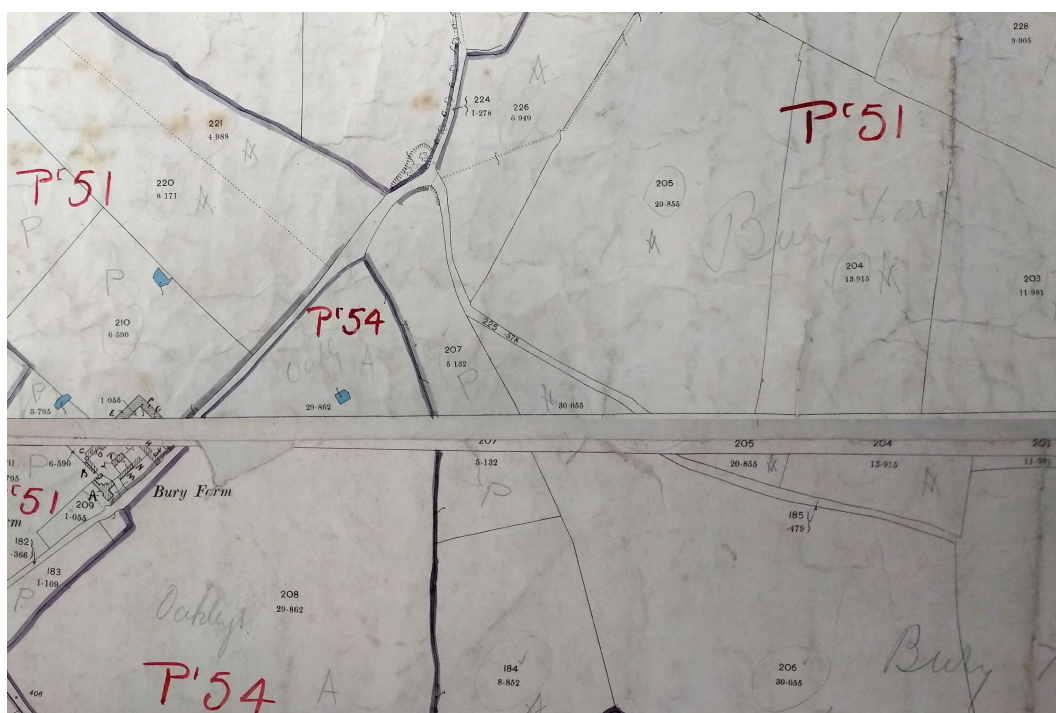


FIGURE 138 HALS IR1/79a and IR1/94, Finance Act working sheets Hertfordshire VIII 3 and XIII 1, c. 1909–1910.

sheet was coloured it sheds little further light on this discrepancy (FIGURE 138). It must be concluded that the valuers erroneously left the northern section 'white' or coloured the southern section. This should serve as a caution of attaching too great a value to the Finance Act maps as a source in rights of way cases. Not only was the status of roads of little concern to the Finance Act valuers, but the colouring of individual roads was not always consistent.

A further 17 of the 60 private roads with public rights are entirely coloured on the Finance Act maps. Most are open to adjoining land and almost all lead to 'white' roads or dashed routes annotated *B.R.* or *F.P.* on the OS maps. As discussed, such annotations reflect the physical appearance of routes rather than their legal status. This is aptly displayed in Buckland, Hertfordshire, in which a 'private carriage and occupation road' widens and narrows (FIGURE 139).⁶⁴³ In Aldenham, the 1803 enclosure award describes a 'private horse and carriage road and driftway...and public foot road...along the course of an ancient highway now shut up and abolished'.⁶⁴⁴ The surrounding parkland was expanded through the nineteenth century and, by 1910, the private road is entirely coloured as part of

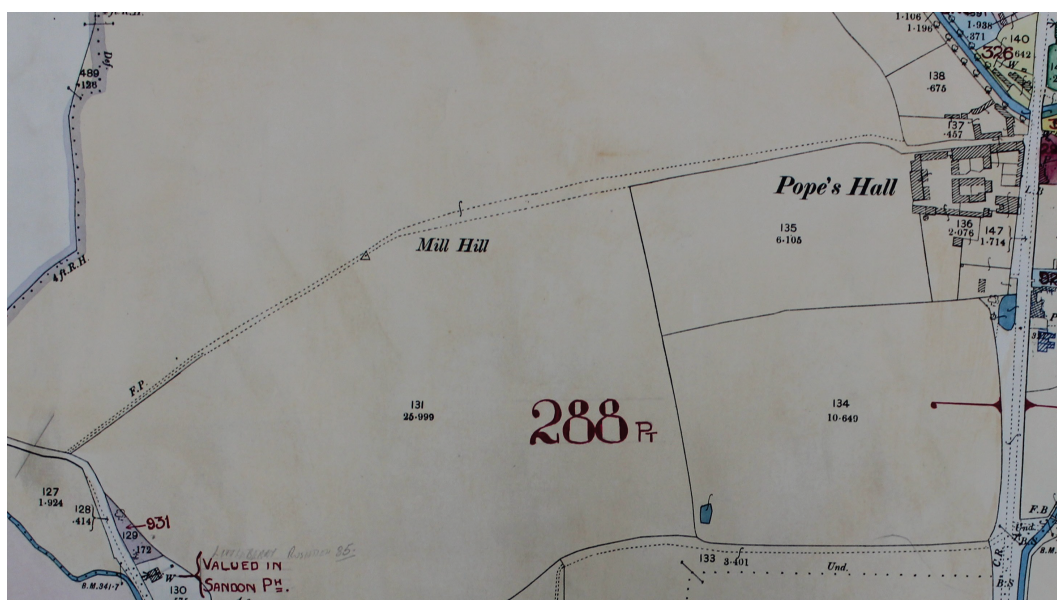


FIGURE 139 TNA IR 126/4/72 part 1, Finance Act record sheet Hertfordshire VIII 16, c. 1910.

⁶⁴³ HALS DP/25/26/1, Buckland enclosure award, 1853.

⁶⁴⁴ HALS QS/E3, Aldenham enclosure award, 1803.

the 'Edge Grove' hereditament, while another *F.P.* annotated route is depicted to the east. The working sheet is especially insightful as several routes are annotated 'Public' (FIGURE 140). It appears that the public footpath was relocated 150 metres further from the house while the original route was retained as a private entrance route. This is evocative of landscape gardens of this era in which even the smallest estates attempted to remove routes from view. Edward Kemp discussed sinking a footpath five feet at Shendish Manor, Hertfordshire, such that 'persons using the footpath are not observed from the house'.⁶⁴⁵



FIGURE 140 HALS IR1/468, Finance Act working sheets Hertfordshire XXXIX15, c. 1909–1910.

⁶⁴⁵ Edward Kemp, *How to Lay Out a Garden*, 2nd ed. (London: Bradbury & Evans, 1858), 243.

The final three private roads with public rights do not appear on the Finance Act maps at all. One in Standon forms a field boundary and was removed through the nineteenth century as fields were amalgamated. The other two form part of an adjoining route in the Northamptonshire parishes of Paulerspury and Whittlebury. This provides a rare opportunity to examine how roads are described and depicted by different Parliamentary enclosure processes. The 1797 Whittlebury enclosure award describes the road as a:

public bridle and private carriage and drift road leading from and out of the open fields of Paulerspury...set out as and for a public bridle road for all persons whomsoever and as and for a private carriage road for...Sholebrook Lodge and Issac Lovell⁶⁴⁷

In contrast, the road is described in the 1820 Paulerspury enclosure award as a:

private carriage road and bridleway and public footway...for the use of the owners and occupiers of Burtons Assart Close in the Parish of Whittlebury [and] Sholebrook Lodge...and for a public footway for all persons whomsoever⁶⁴⁸

The fact that the Paulerspury Commissioners did not record public bridleway rights may have been a mistake since, according to the precedent in *Gallagher*, they held no authority to remove a public bridleway by setting out a private road and public footpath in its place.⁶⁴⁹ A consistent analysis of adjoining Parliamentary enclosure awards of different dates may shed greater light on how contemporaries described routes of differing status. In this case, the presence of Sholebrook Lodge, a 500-acre estate in 1910, may have influenced how routes were perceived. Overall, the fact that so many private roads with public rights appear on the Finance Act maps is a testament to the longevity of the changes made by the Parliamentary enclosure Commissioners.

⁶⁴⁷ NHRO M36, Whittlebury enclosure award, 1797; NHRO ML/1405, Paulerspury enclosure award, 1820

⁶⁴⁸ NHRO ML/1405, Paulerspury enclosure award, 1820.

⁶⁴⁹ *Commission for New Towns v Gallagher Ltd* [2002] EWHC 2668, [2003] 2 P & CR 3.

To summarise, private roads with public rights appear in a multitude of ways on the Finance Act maps but conform to two general patterns. First and foremost, 93 percent lead to 'white' roads or dashed routes annotated *B.R.* or *F.P.*, with only four appearing as cul-de-sacs on the Finance Act maps. Second, 'white' roads are always enclosed while coloured roads are almost always open to adjoining land. Attention can now be turned to the remaining 286 private roads which did not carry any additional public rights. Comparisons can then be made between private roads and private roads with public rights to see if they were treated differently by the Finance Act valuers.

5.4.2 Private roads which are 'white' on the Finance Act maps

The following sections explore the 286 private roads described by Parliamentary enclosure awards *without* public rights. In total, 113 private roads appear 'white' on the Finance Act maps. As discussed, roads were left 'white' by the valuers for a variety of reasons. While there may be a presumption that 'white' roads are public vehicular highways, roads could equally be left 'white' if the adjoining landowners did not wish to acknowledge, were not interested in, or were ignorant of the route's status.⁶⁵⁰ These possibilities were identified by Short, but 'white' roads could equally represent routes which held shared rights. This is a possibility which is often overlooked but could play a fundamental part in explaining why so many private roads appear 'white' on the Finance Act maps.

The 113 'white' private roads appear in four major ways on the Finance Act maps, either as: through routes, agricultural access routes, routes to houses, or multi-purpose routes. Most 'white' private roads provide through routes and lead to 'white' or coloured roads. Others are cul-de-sacs like the fourth 'private carriage and occupation road' in Ashwell, Hertfordshire, which was set out for and to be maintained by 12 individuals who own adjoining allotments in the 1862 Parliamentary enclosure award (FIGURE 143).⁶⁵¹ By 1910 the road was left 'white'

⁶⁵⁰ Short, *Land and Society in Edwardian Britain*, 25:128.

⁶⁵¹ HALS QS/E9, Ashwell enclosure award, 1862.



FIGURE 143 HALS QS/E9, Ashwell enclosure roads, 1862.



FIGURE 144 TNA IR 126/4/16, Finance Act record sheet Hertfordshire IV 9, c. 1910.

and annotated 'Small Gains Lane' by the valuers (FIGURE 144). This is an excellent example of a route which probably held shared rights and was not claimed by any single adjoining landowner. Such a private road is unlikely to hold public

rights as provides no through route, and does not connect 'to a popular resort, a river, the sea, or a beauty spot', features typical of public highways which are cul-de-sacs.⁶⁵²

Several 'white' private roads provide access to houses on the Finance Act maps. Some of these are significantly shorter than the other 'white' private roads, such as a 52-metre private road in Towcester which connects to 'Plank Houses', or a 130-metre private road in Stoke Bruern which provides access to three houses (FIGURES 145 and 146). Of course, private roads may 'become public highways through the usual principles of dedication and acceptance'.⁶⁵³ It is possible that routes were adopted as public highways if numerous houses were constructed.⁶⁵⁴ The ownership of such roads is often unclear since they are 'never recorded on the Land Register, because no transactions occur to trigger the requirement to register'.⁶⁵⁵ Such arrangements may continue indefinitely if landowners are not prevented from accessing their properties. These issues are only



FIGURE 145 TNA IR 126/5/437, Finance Act record sheet Northamptonshire LVI 6, c. 1910.

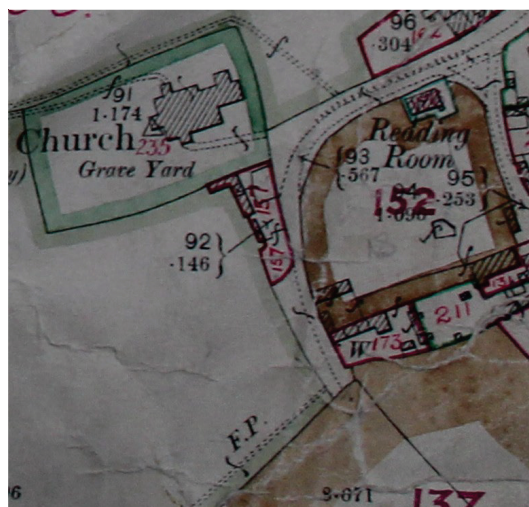


FIGURE 146 TNA IR 126/5/435, Finance Act record sheet Northamptonshire LVI 4, c. 1910.

⁶⁵² Sydenham, *Public Rights of Way and Access to Land*, 1.2.3.

⁶⁵³ Sauvain, *Highway Law*, 2013, paras 1–08.

⁶⁵⁴ Provision for adopting highways originally outlined in Highways Act 1835, 5 & 6 Will. IV c. 50, s. 23.

⁶⁵⁵ Barsby, *Private Roads*, 2.10.

examined when disputes occur like *Hanning* and *Robinson*, which were subsequently overruled by *Bakewell*, a case in which vehicular rights to houses



FIGURE 147 TNA IR 127/8/381, Finance Act record sheet Norfolk LXXXII 7, c. 1910.

across a common were acquired through long use.⁶⁵⁶ Thus, although there was undoubtedly a link between the number of houses and the likelihood of a road being 'white' on the Finance Act maps, this does not necessarily mean public vehicular rights existed. FIGURE 147 shows a private road in Little London, Northwold, Norfolk, which was left 'white' and leads to 14 houses but was never adopted as a public highway.

Finally, some 'white' private roads serve multiple functions: connecting to numerous other routes, providing access to agricultural land, and access to several houses. A 3261-metre private road described in the 1786 Ashill enclosure award provides access to six houses across 13 hereditaments on the Finance Act map. This road was set out for 14 people as well as 'all other Persons having occasion to go to and from the said second allotment hereby made in Trust as aforesaid', illustrating potential extensive usage by the local community and paving the way for dedication and acceptance as a public highway.⁶⁵⁷ Many areas of the countryside experienced urbanisation in the late nineteenth and early twentieth centuries, particularly in Hertfordshire.⁶⁵⁸ A clear instance of this can be found in Bushey, Hertfordshire, in which a private road was named 'Water Lane' on the Finance Act map and formed a major linking route to the rapidly expanding town of Watford (FIGURE 148).

⁶⁵⁶ *Hanning v Top Deck Travel Group Ltd* (1994) 68 P & CR 14; *Robinson v Adair* [1995] NPC 30; *Bakewell Management Ltd v Brandwood* [2004] UKHL 14, [2004] 2 AC 519.

⁶⁵⁷ NFRO PD 548/86, Ashill enclosure award, 1786.

⁶⁵⁸ See Chapter 10, Suburbs and New Towns, 1870–1970, in Rowe and Williamson, *Hertfordshire*, 268–96.

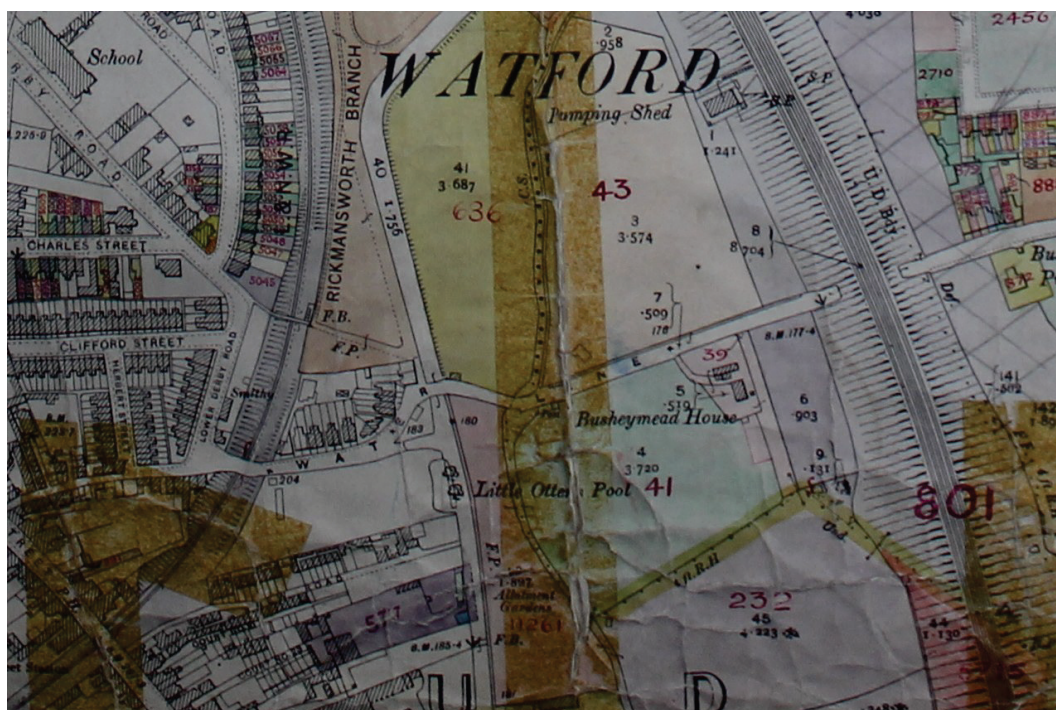


FIGURE 148 TNA IR 126/10/8, Finance Act record sheet Hertfordshire XLIV 2, c. 1910.

Private roads described by Parliamentary enclosure awards which are 'white' on the Finance Act maps have three distinct characteristics. First, 'white' private roads typically provide the sole means of access to numerous plots of land. FIGURE 149 shows 'Occupation Road', renamed 'Westlea Road' by the valuers, in

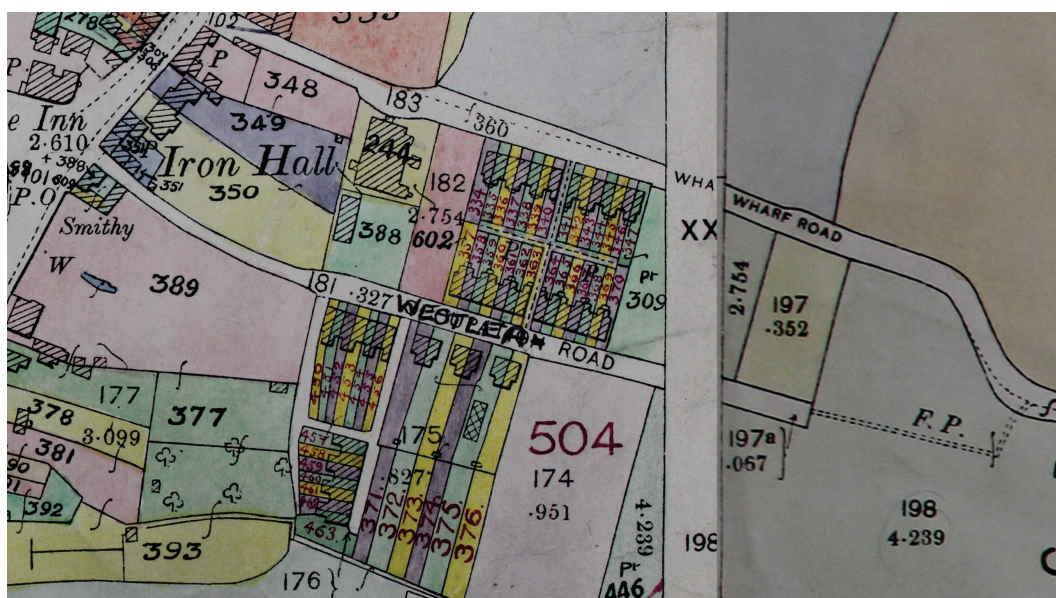


FIGURE 149 TNA IR 126/4/274 and IR 126/4/281, Finance Act record sheets Hertfordshire XXXVI 16 and XXXVII 13, c. 1910.

Wormley leading to 30 hereditaments and FIGURE 150 shows a private road in Bushey leading to 38 hereditaments, both late nineteenth or early twentieth century terraced housing. Most 'white' roads connect to three or more hereditaments and average 4.6, considerably more than those private roads which are not 'white' on the Finance Act maps. Another instance can be found in



FIGURE 150 TNA IR 126/10/13, Finance Act record sheet Hertfordshire XLIV 11, c. 1910.

Kings Sutton, Northamptonshire, in which a road annotated 'Richmond Street' by the valuers provides access to 24 hereditaments including a school and several houses (FIGURE 151). Although these are exceptional examples, they illustrate how the valuation process worked in practice. While it was the duty of the valuers



FIGURE 151 TNA IR 126/5/514, Finance Act record sheet Northamptonshire LXII 6, c. 1910.

to ensure ‘that the hereditament boundaries were properly claimed and that no private land was being left unclaimed’, it is doubtful whether they had the time or inclination to arbitrate over routes which no adjoining landowner claimed.⁶⁵⁹ As such, if a private road provided access to three or more hereditaments, there is a 94 percent chance it would be left ‘white’ by the Finance Act valuers.

The second distinguishing characteristic of ‘white’ private roads is the proportion which are bounded by solid lines on the OS maps: 99.5 percent. This echoes the findings for the ‘white’ public roads, 98.5 percent of which are bounded by solid lines. Nearly all ‘white’ private roads are enclosed and indicated with two solid lines or two dashed lines within two solid lines. The latter is an OS convention used to distinguish the surfaced and non-surfaced portion of a road.⁶⁶⁰ Only part of one ‘white’ private road in East Ruston, Norfolk, appears open to adjoining land where it meets marshland named ‘The Holmes’ (FIGURE 152). The Finance Act valuers clearly worked within the constraints of the OS maps and used the

⁶⁵⁹ Short, *Land and Society in Edwardian Britain*, 25:129.

⁶⁶⁰ Oliver, *Ordnance Survey Maps*, 2005.



FIGURE 152 TNA IR 127/6/234 and IR 127/6/290, Finance Act record sheets Norfolk XXIX 16 and XL 4, c. 1910.

existing boundaries as a basis for their hereditaments. This makes sense as it would have been difficult for neighbouring landowners to separate property without the existence of some form of physical boundary. While the *ad medium filum* presumption may have applied, resulting in adjoining landowners owning up to the centre of the highway, no road was coloured like this on the Finance Act maps. Valuers, and perhaps landowners alike, were content to leave particular routes outside of hereditaments, especially if they were enclosed and provided access to numerous hereditaments.

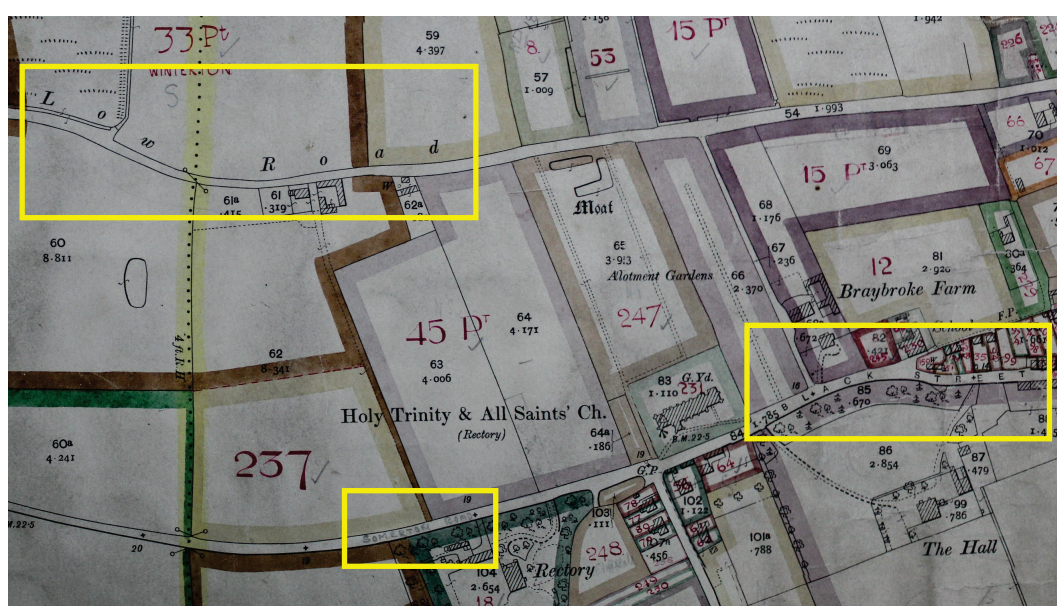


FIGURE 153 TNA IR 127/6/387, Finance Act record sheet Norfolk LIV 2, c. 1910.

Thirdly, 20 percent of 'white' private roads are named on the OS maps and five percent are annotated by the Finance Act valuers. FIGURE 153 shows OS surveyors placing names inside and outside the boundary of the road: 'Black Street' and 'Low Road' marked in yellow, as well as 'Somerton Road' annotated by the Finance Act valuers. Such names can offer important insights into the legal status of these routes. For example, a private road in Collyweston, Northamptonshire, was annotated 'Quarry Drift' and may have carried multiple use rights for the ten hereditaments it provided access to (FIGURE 154). Thus 'white' private roads are distinguished from other private roads in three main

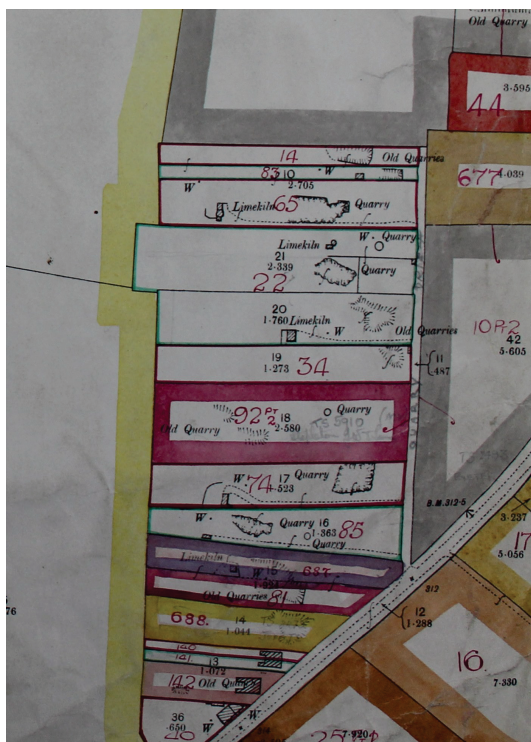


FIGURE 154 TNA IR 127/7/4, Finance Act record sheet Northamptonshire I 15, c. 1910.

ways: they regularly provide access to numerous hereditaments, are always bounded by solid lines, and are named more often on the Finance Act maps.

'White' private roads were also originally set out with different characteristics at Parliamentary enclosure, supporting the contention that various types of private road were set out which served different functions. Private roads which are 'white' on the Finance Act maps were usually set out at lengths exceeding 350 metres, and average 588 metres overall. All six private roads set out at lengths greater than 2,000 metres

appear 'white' on the Finance Act maps. Also 'white' private roads frequently represent the widest private roads established by Parliamentary enclosure, with 86 percent set out at 18 feet or wider and 28 percent set out at 30 feet or wider. Likewise, the only two private roads set out at widths greater than 30 feet both appear 'white' on the Finance Act maps. Furthermore, 'white' private roads commonly connect with two or more other routes on the Parliamentary enclosure maps and a quarter connect to three or more. Finally, Parliamentary enclosure awards specified who was entitled to use each private road and who held maintenance duties in 91 percent of cases. The private roads which appear 'white' on the Finance Act maps were set out for an average of 5.4 named individuals, the largest at Parliamentary enclosure. Since more people used these routes, it is easy to imagine public rights being acquired over time through long use, either giving rise to an 'inferred dedication at common law' or a 'statutory deemed dedication under the Highways Act 1980'.⁶⁶¹ This is especially true in

⁶⁶¹ Highways Act 1980 s. 31; Sydenham, *Public Rights of Way and Access to Land*, 3.5.1.

cases where roads provide through routes or access to newly-constructed houses. Overall, 'white' private roads represent the longest, widest, most well-connected routes, which are set out for the largest group of individuals at Parliamentary enclosure. By 1910, all 'white' private roads are bounded by solid lines, most lead to numerous hereditaments, and a quarter are named on the Finance Act maps. While this is not conclusive evidence of legal status, there is certainly a correlation between 'white' roads and public vehicular highways.

5.4.3 Private roads which are partly 'white' and partly coloured on the Finance Act maps

Of the 286 private roads described by Parliamentary enclosure awards, 15 have sections which are 'white' and sections which are coloured on the Finance Act maps, representing five percent of the overall sample. Almost all display the same pattern as the public roads: enclosed sections are 'white' and open sections are coloured. This again emphasises that the Finance Act valuers worked within the constraints of the OS maps and that hereditament boundaries reflected the 'on the ground' boundaries illustrated by the OS surveyors. FIGURE 155 shows a typical example in Westmill, Hertfordshire, in which the fifth 'private carriage road and driftway' is open to adjoining land and coloured as part of hereditament '1089' until it turns east and is separated from hereditament '24' on the Finance Act map.⁶⁶² This was the usual approach of the valuers and reflects that hereditament boundaries often align with physical features such as fences and hedges. However, the Finance Act valuers do not always consistently apply colour wash to the OS record sheets. The fifth private road in Northwold, Norfolk, marked by the southernmost yellow marking in FIGURE 156, is coloured as part of hereditament '211' at the junction with the other 'white' road, but the colour wash does not extend across the southern part of the hereditament. Likewise, a road 650 metres to the north, marked in yellow, also has colour wash applied inconsistently. These cases cast doubt over the use of specific colouring on the Finance Act maps as evidence of the legal status of particular routes. The

⁶⁶² HALS QS/E72, Westmill enclosure award, 1819.



FIGURE 155 TNA IR 126/4/143, Finance Act record sheet Hertfordshire XIV 13, c. 1910.

central yellow marking in FIGURE 156 shows a route was added between hereditaments '211' and '258' and encapsulates the purpose of the Finance Act. The valuers and landowners were concerned with the boundaries and value of the hereditaments, and so depicting these boundaries was more important than whether a road was uncoloured where it connected with another road.

Overall, just five percent of the private roads described by enclosure awards appear partly 'white' and partly coloured on the Finance Act maps. Nearly all conform to the pattern identified in the public roads chapter: the 'white' sections are enclosed, and the coloured sections are open to adjoining land. The next section will explore the private roads which are entirely coloured on the Finance Act maps.

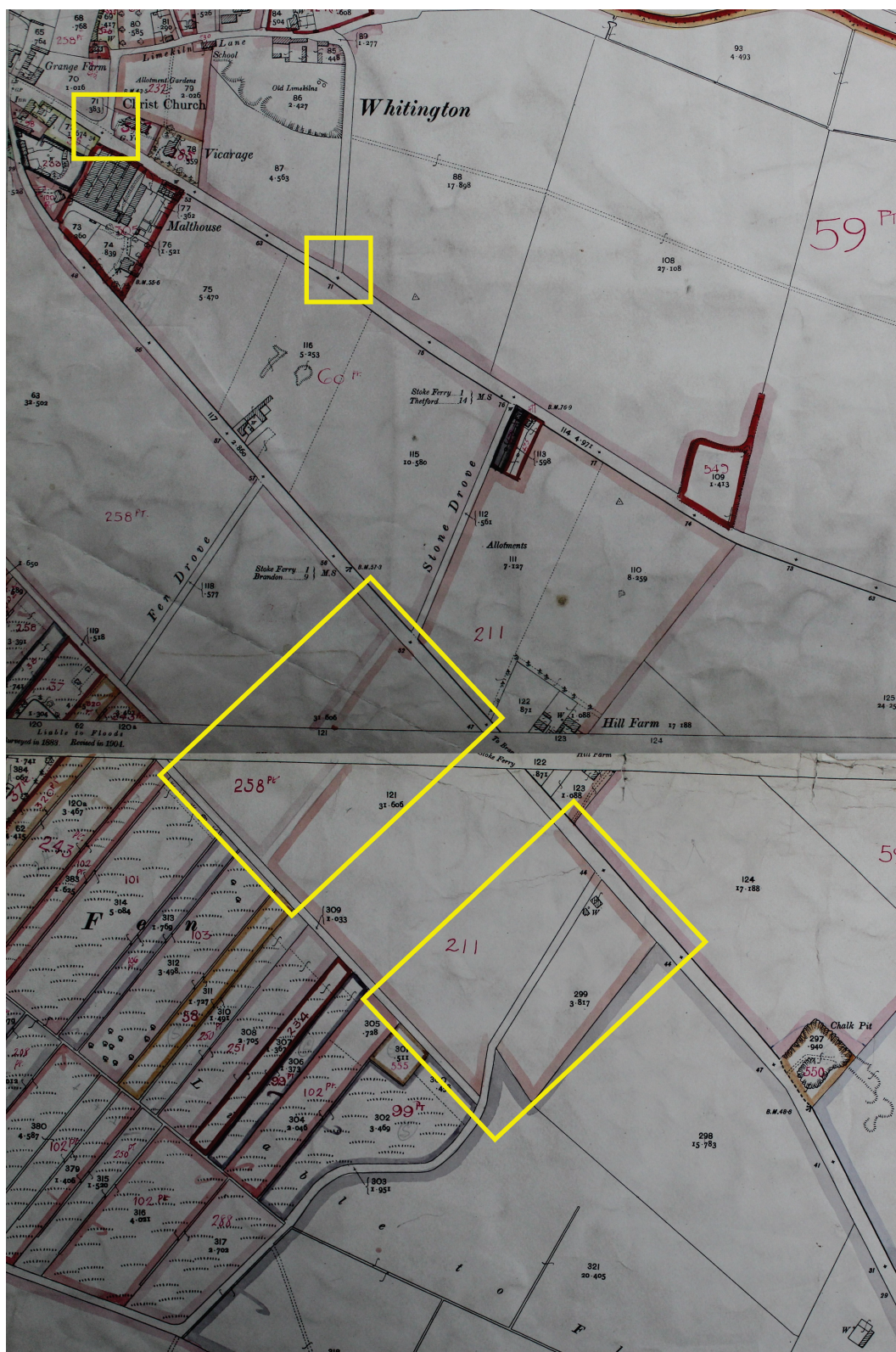


FIGURE 156 TNA IR 127/8/342 and IR 127/8/377, Finance Act record sheet Norfolk LXX 14 and LXXXII 2, c. 1910.

5.4.4 Private roads which are coloured on the Finance Act maps

Over a quarter of the private roads described by enclosure awards are coloured on the Finance Act maps, totalling 78 of the 286. As discussed, the extent of each hereditament was determined in the first instance by the landowners in the 'Form 4-Land' questionnaires they completed. It is unclear what would happen if land ownership was disputed. 'There was no public consultation on the 1910 maps', which meant most matters were dealt with privately and leave little historical record.⁶⁶³ Nonetheless, the final decision rested with the Finance Act valuers who had to ensure all private land was claimed, and 'would have been extremely reluctant to show any land as a public road if it could be assessed for duty'.⁶⁶⁴ The analysis thus far has already firmly established the link between enclosed roads being left 'white' and open roads being coloured by the Finance Act valuers. This pattern highlights the extent to which the OS surveyors were an invisible third party, shaping how the valuation proceeded.

The private roads described at Parliamentary enclosure which are coloured on the Finance Act maps appear to function in three principal ways: as agricultural access routes, entrance routes to houses or estates, or part of longer routes. First, those which appear as agricultural access routes are always cul-de-sacs and are typically short and enclosed. For instance, the second private road in East Ruston, Norfolk, provides access to an enclosure set further back from the 'white' road and is entirely within hereditament '216' (FIGURE 157). One private road in Barley, Hertfordshire, was coloured as part of two hereditaments and it is probable that the hereditament set further back from the public road held rights on the private road, although the valuers had little freedom within the valuation procedure to express this.

Secondly, coloured private roads also regularly function as entrance routes, providing access to houses or estates rather than allotments or fields. For instance, the fourth 'private carriage and drift road' in Kings Sutton only provides

⁶⁶³ Short, *Land and Society in Edwardian Britain*, 25:129.

⁶⁶⁴ *Fortune v Wiltshire Council* [2011] EWCA Civ 883, [2013] 1 WLR 808, 828.



FIGURE 157 TNA IR 127/6/230, Finance Act record sheet Norfolk XXIX 12, c. 1910.

access to a single house (FIGURE 158).⁶⁶⁵ Although two grander entrances exist to the west, a private road in Northaw, Hertfordshire, provides access to the 'St Thomas a Becket's Church' from the 'Nyn Park' estate under the shade and privacy of this planted route (FIGURE 159). Many coloured private roads thus lead

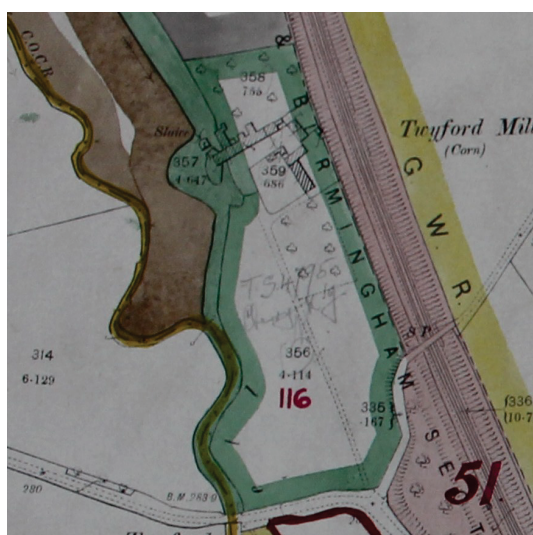


FIGURE 158 TNA IR 126/5/511, Finance Act record sheet Northamptonshire LXII 2, c. 1910.

to individual estates or houses rather than groups of properties.

Thirdly, enclosure award private roads which are coloured often provide access to additional routes, many of which are annotated *F.P.* on the Finance Act maps. Although these private roads may have been cul-de-sacs at Parliamentary enclosure, over time additional routes formed as the desires and needs of locals changed.

⁶⁶⁵ NHRO Enclosure 20, Kings Sutton enclosure map, 1805.

Most extend across several hereditaments which raises the possibility of shared use and maintenance rights existing. This, together with an analysis of *B.R.* and *F.P.* annotations on OS maps, will be explored in Chapter 6. FIGURE 160 shows a typical example in Pentney, Norfolk, in which a private road is coloured as part of hereditament '328' and continues west across two hereditaments as an *F.P.* annotated route. Likewise, FIGURE 161 shows two private roads in Hoe, Norfolk, coloured as part of hereditaments '11' and '104' and connected through a single *F.P.* annotated route.



FIGURE 159 TNA IR 126/8/195, Finance Act record sheet Hertfordshire XLI 5, c. 1910.

More generally, private roads which are coloured differ considerably from those which are 'white' on the Finance Act maps. Only six percent of coloured private roads provide access to three or more hereditaments, compared to 56 percent for 'white' private roads. Also, while all 'white' private roads are bounded by solid lines, 43 percent of coloured private roads are bounded by dashed lines.



FIGURE 160 TNA IR 127/8/244, Finance Act record sheet Norfolk XLVI 10, c. 1910.

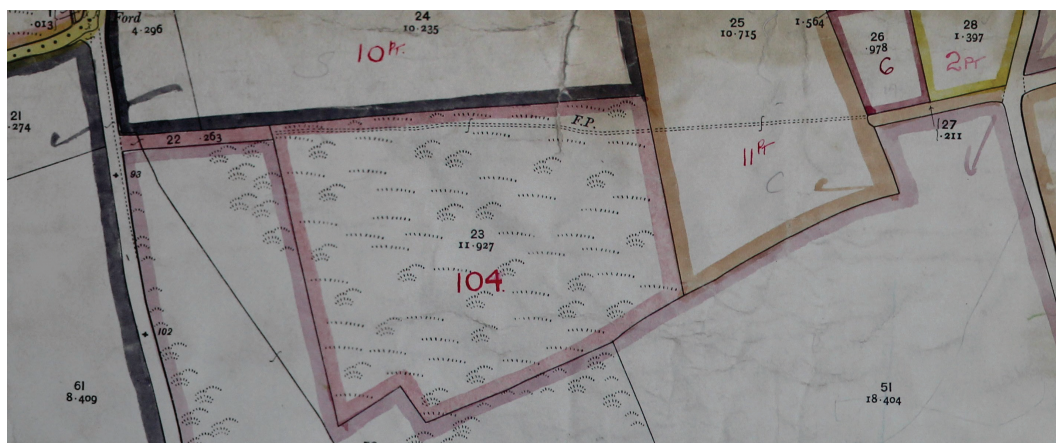


FIGURE 161 TNA IR 127/9/823, Finance Act record sheet Norfolk XLIX 5, c. 1910.

Moreover, coloured private roads are rarely named: none are annotated by the valuers and only two percent are named on the OS maps. In contrast, a quarter of the 'white' private roads are named. Thus, the coloured private roads can regularly be distinguished from the private roads left 'white' on the Finance Act maps, exposing a possible divergence in their legal status.

Private roads which appear coloured on the Finance Act maps are, on average, shorter, narrower, and less-connected than the private roads set out by the enclosure Commissioners. They average 345 metres, with 79 percent under 500 metres, compared to an average of 588 metres, with 62 percent under 500 metres, for the 'white' private roads. Likewise, coloured private roads average 19.3 feet wide compared to 22.5 feet for 'white' private roads. Of course, averages rarely tell the whole story; more striking is the fact that 28 percent of 'white' private roads were set out at 30 feet or wider, compared to only nine percent of coloured private roads. Additionally, 74 percent of coloured private roads are cul-de-sacs compared to 43 percent of 'white' private roads.

Finally, the enclosure Commissioners regularly specified who was entitled to use and who held maintenance duties for each private road. These rights were typically given to adjoining landowners or to a specific list of people, as in the case of the private road in Sedgeford, Norfolk, which was 'for the use and convenience of the said Thomas Bradfield and John Forester and Anne his wife

respectively'.⁶⁶⁶ Analysis of all 286 private roads reveals that those which are coloured on the Finance Act maps were invariably set out for the use of *fewer* named individuals in the Parliamentary enclosure awards. On average, private roads which are coloured were set out for three individuals, compared to 5.4 for 'white' private roads. While a third of 'white' private roads were set out for six or more named individuals, only 8 percent of coloured private roads were set out for that many. Such differences strengthen the argument that Parliamentary enclosure Commissioners set out different types of private road.

5.4.5 Private roads which are annotated *B.R.* on the Finance Act maps

Of the 286 private roads in the sample, just four contain *B.R.* annotations. Two appear dashed and open to adjoining coloured land as part of multiple hereditaments. The other two are enclosed 'white' routes in Pentney, Norfolk, and connect to a total of seven hereditaments (FIGURE 162). The *B.R.* annotation

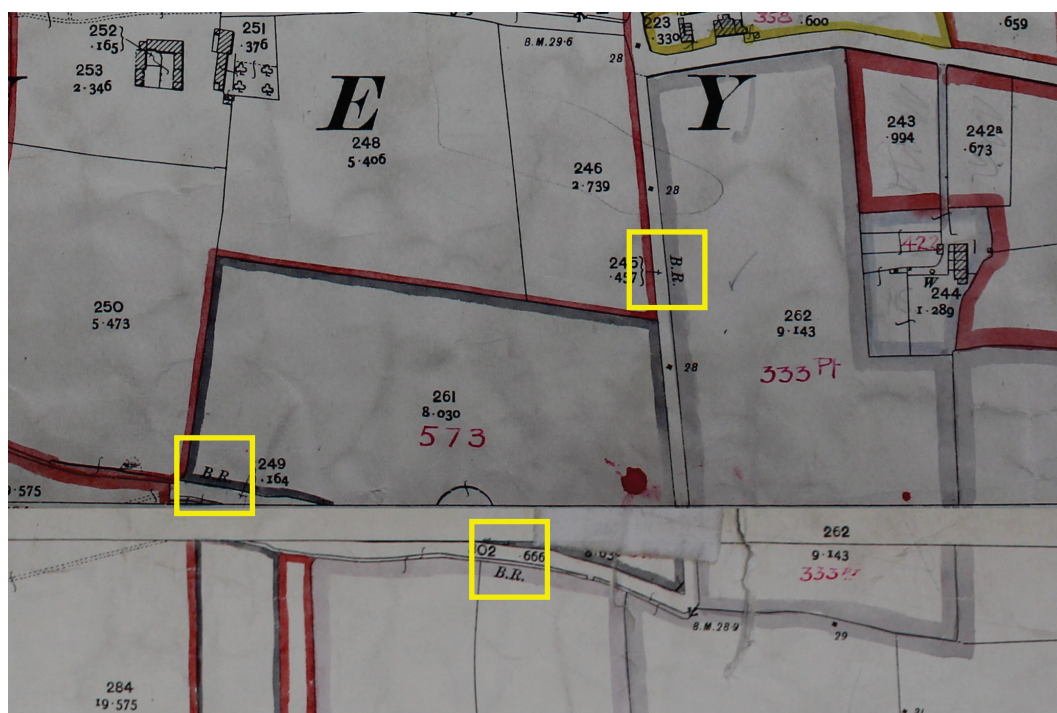


FIGURE 162 TNA IR 127/8/244 and IR 127/8/248, Finance Act record sheets Norfolk XLVI 10 and 14, c. 1910.

⁶⁶⁶ NFRO PD 601/150, Sedgford enclosure award 1797.

was used by OS surveyors to indicate those routes suitable only for horse traffic and was not used to determine the status of a route. Nonetheless, it is striking that all four private roads annotated *B.R.* on the Finance Act maps continue beyond their original routes set out by Parliamentary enclosure.

5.4.6 Private roads which are annotated *F.P.* on the Finance Act maps

A total of 13 private roads are annotated *F.P.* on the OS maps used by the Finance Act valuers. As discussed, such annotations are not indicative of any public rights, and were used by OS surveyors to distinguish those routes suitable only for foot traffic. All are depicted with dashed lines, open to adjoining land, and coloured on the Finance Act maps. Each extends beyond the original route set out by Parliamentary enclosure and continues across multiple hereditaments, often in different parishes. For instance, a 'private horse and carriage road and driftway' in Aldenham, Hertfordshire, is annotated *F.P.* and continues south into the parish of Edgware (FIGURE 163).⁶⁶⁷ Many of the landowners in these instances claimed deductions for public rights of way, including a £50 deduction in Aldenham and Weston, a £35 deduction in Weston, and a £5 deduction in Tibenham. As will be explored in more detail in Chapter 6, abatements for public rights of way, while providing valuable information, often cannot be associated with an individual route. All in all, those



FIGURE 163 TNA IR 126/10/11, Finance Act record sheet Hertfordshire XLIV 8, c. 1910.

⁶⁶⁷ HALS QS/E3, Aldenham enclosure award, 1803.

private roads described by Parliamentary enclosure awards which are annotated as *F.P.* on the Finance Act maps closely correlate with the network of public rights of way and there are grounds for further research to be completed here.

5.4.7 Private roads which are not depicted on the Finance Act maps

Over a fifth of the 286 private roads set out at enclosure do not appear on the OS maps employed by the Finance Act at all, totalling 63 instances. Many are situated in areas which experienced changes through the nineteenth century. The landscape was regularly reorganised as land was bought and sold, land use was altered, and houses and infrastructure were constructed. As such, some private roads were simply no longer necessary. For example, In Hoe, Norfolk, a private road was removed to accommodate the Wymondham to Wells railway in the 1840s. Likewise, as the village of Puckeridge in Hertfordshire expanded, a private road which originally provided access to three enclosures was replaced by a single property by 1878 (FIGURES 164 and 165). It seems the consolidation of lands through the nineteenth and early twentieth centuries left little need for



FIGURE 164 HALS QS/E61, Standon enclosure award, 1835.



FIGURE 166 TNA IR 127/8/248, Finance Act record sheet Norfolk XLVI 14, c. 1910.

short agricultural routes and were likely never surfaced, giving them less permanence in the landscape.

The private roads which do not appear on the OS maps used the Finance Act valuers were among the shortest set out by the Parliamentary enclosure Commissioners. They averaged just 183 metres and 92 percent were

shorter than 500 metres. Compared to the 588- and 345-metre averages for 'white' and coloured private roads, it is clear that shorter private roads tended to not appear on the Finance Act maps. Also, these private roads were the narrowest set out by Parliamentary enclosure, averaging 18.1 feet, compared to the 19.3 feet average for coloured private roads and the 22.5 feet average for 'white' private roads. Moreover, 85 percent of the private roads which did not appear on the Finance Act maps were set out as cul-de-sacs, a greater proportion than the 43 and 74 percent of 'white' and coloured private roads. In fact, unique in this sample, two private roads did not connect to any other route and simply linked two enclosures owned by the same individual (Figures 167 and 168). Finally, these private roads were commonly set out for fewer individuals at 2.4 named individuals per road, compared to 5.4 and three for 'white' and coloured private roads. Evidently, the shortest, narrowest, least well-connected private roads set out for the fewest individuals are unlikely to appear on the Finance Act maps.

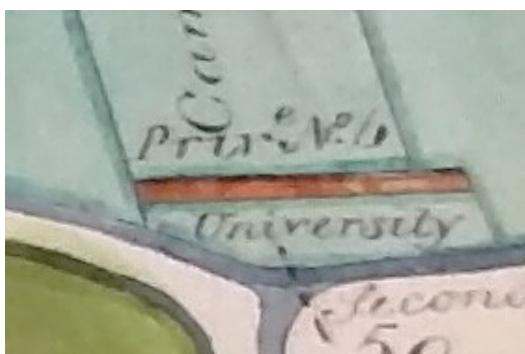


FIGURE 168 NFRO C/Sca 2/209, Norton Subcourse enclosure map, 1817.

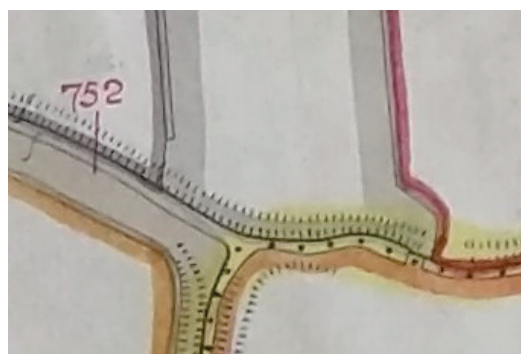


FIGURE 167 TNA IR 127/6/620, Finance Act record sheet Norfolk LXXXIX 3, c. 1910.

5.4.8 Conclusions

The Finance Act documents and maps are regularly used to determine the historic legal status of routes. This analysis of 346 private roads described and depicted by the Parliamentary enclosure awards and maps has helped clarify how the Finance Act valuers treated private roads. As outlined, private roads function in a spectrum of ways from private roads for single individuals to private roads with public bridleway rights for large groups of people.

In this sample, 60 private roads are described in the Parliamentary enclosure awards with public bridleways or footpaths. These represented the longest, widest, most well-connected private roads set out at Parliamentary enclosure, averaging 638 metres, 23 feet wide, with 2.3 connections per road. Such roads were established as part of the broader public right of way network as well as being used and maintained by adjoining landowners as private roads. This remained the case through to 1910 as nearly all these roads—whether ‘white’ or coloured—lead to ‘white’ roads or dashed routes annotated *B.R.* or *F.P.* on the OS maps used by the valuation (FIGURE 169). Such private roads functioned in a very different manner to those without public rights.

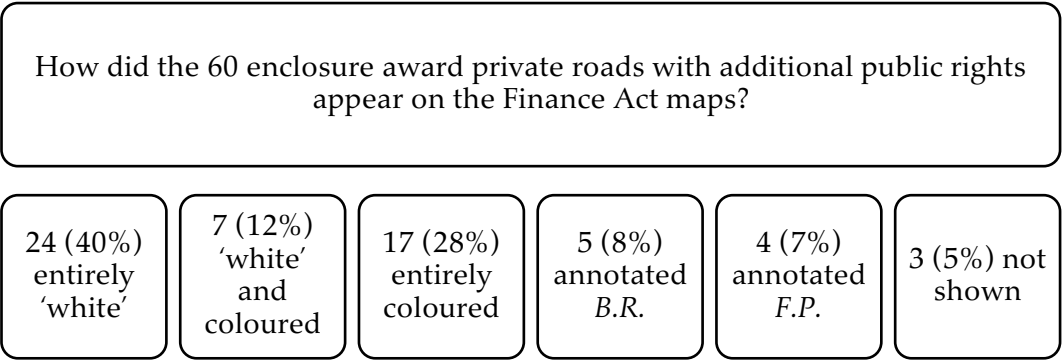


FIGURE 169 How did the 60 enclosure award private roads with additional public rights appear on the Finance Act maps?

The 286 private roads without public rights represent a more varied sample as they function in a broader spectrum of ways. Most are left ‘white’ or coloured by the Finance Act valuers, or not depicted at all on the OS maps (FIGURE 170). The

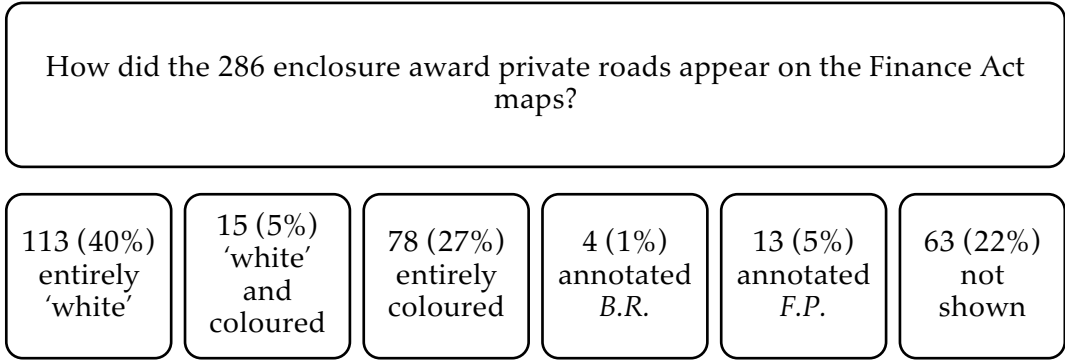


FIGURE 170 How did the 286 enclosure award private roads appear on the Finance Act maps?

longest, widest, most connected private roads set out for the largest number of people appear 'white' on the Finance Act maps. On the other hand, the shortest, narrowest, least connected private roads set out for the fewest number of people do not appear on the OS maps. These characteristics signal the different functions of each private road: some are agricultural routes to single allotments, or entrance routes for particular individuals, while others lead to several fields or houses owned by different individuals, or are well-connected routes set out for an entire locality. This has sometimes led to the miscomprehension that these roads were in fact public, but such notions do not align with the Commissioners' intentions.⁶⁶⁹

This analysis has revealed that the Parliamentary enclosure Commissioners created private roads with varying functions. Those with public rights typically function as through routes, are usually long and wide and are set out for all adjoining landowners in 71 percent of cases. As a result, 15 percent are annotated *B.R.* or *F.P.* on the Finance Act maps, and just 5 percent do not appear at all. In contrast, only six percent of the private roads without public rights are annotated *B.R.* or *F.P.* and 22 percent do not appear on the Finance Act maps. In cases where a number of different hereditaments front onto a 'white' road, the status of that road may be a public vehicular highway, following the 'white' road rule. However, as seen already, Short specified three alternative possibilities as the adjoining landowners may: be ignorant of the road's status, not wish to

⁶⁶⁹ Seymour, 'Public of the Locality'.

acknowledge its status, or not be interested in its status.⁶⁷⁰ General apathy or an active disengagement with the valuation process certainly could have played a role but an overlooked factor is the ineffectiveness of the valuation to determine and illustrate the status of roads. The purpose of the valuation was to establish the ownership and value all land in the United Kingdom, and it would therefore have been infeasible to determine the various rights which exist over lands, especially given the time constraints. Thus, in cases where rights were recognised as shared between multiple landowners, the route in question would appear 'white' on the Finance Act maps. Several of the 'white' private roads are symptomatic of shared-use roads as they are cul-de-sacs which lead to lands owned by various hereditaments. As such, the 'white' road rule does not systematically apply, and it will be necessary to consult all historical sources to build the clearest possible picture in determining the status of particular routes.

⁶⁷⁰ Short, *Land and Society in Edwardian Britain*, 25:128.

5.5 Private roads: conclusions

To conclude, 'private road' is perhaps the most divisive yet ubiquitous term employed in Parliamentary enclosure awards. It has been the subject of numerous court cases, notably in *Dunlop* where the precise meaning of 'private carriage road' was debated.⁶⁷¹ This research clarifies how the term 'private road' was used by the Parliamentary enclosure Commissioners as well as establishes how such routes are described and depicted in the tithe apportionments and maps and Finance Act 1910 documents and maps. Together these three sources are the most consulted in inquiries which determine the historic status of routes, yet no consistent analysis of how private roads appear on these sources has previously been undertaken.

Analysis of 65 Parliamentary enclosure awards across three counties has indicated that the Commissioners set out various types of private road. Some were set out as short cul-de-sacs for single individuals. Others were set out for groups of people, either named or identified by those who owned land adjoining the road in question. These private roads may have been used and maintained by dozens of people depending upon the length and purpose of the route. Some private roads were even set out for the entire parish, although this was very rare. Such private roads have prompted significant legal debate concerning their precise legal status. To take one example, in *Wright* the enclosure Commissioners specified that a private road should be maintained by the township and it was argued such a route constituted a public road.⁶⁷² Some have reached the erroneous conclusion that all private roads set out for the parish constitute public highways.⁶⁷³ However, the legal position is clear: public rights must be available to 'the public at large (not merely a section of it)' and so roads set out for those in a specific locality represent private roads.⁶⁷⁴ Of course, this is not to say that such routes could not acquire public rights through dedication and acceptance,

⁶⁷¹ *Dunlop v Secretary of State for the Environment and Cambridgeshire CC* (1995) 94 LGR 427

⁶⁷² *R v Wright* (1832) 110 ER 248.

⁶⁷³ Seymour, 'Public of the Locality'.

⁶⁷⁴ Barsby, *Private Roads*, 3.19.

indeed, particular private roads are certainly more prone to *acquire* public rights, whether carriage, bridle, or foot, through the passage of time. This following document relating to the 1817 Parliamentary enclosure in Thompson, Norfolk, encapsulates contemporary attitudes to roads:

The private road adjoining the Slades set out for the use of the Proprietors in its present form goes through three Pit Holes late full of water and which will cost about £30 the filling up. But if the ancient road is continued round the Edge of those Pits the expence of filling them up will be saved...which will afford the same accommodation of water which it is now entirely destitute. And it is to be observed that the present road is set out too narrow for a Team of Horses with a loaded Waggon.⁶⁷⁵

This illustrates that practical and financial concerns were foremost in the minds of contemporaries. It was the road's drainage, width, surface materials, and their suitability for the traffic it was to carry, that most concerned contemporaries. Restricting usage of particular private roads must surely have come second to such practical considerations. 'The trouble with so many decisions and landowning proponents is the lack of understanding of what life was actually like when horses, asses and oxen were the main means of transport. The greatest concern to parishioners was not who may use a route, but their liability as to repair.'⁶⁷⁶

Comparisons between Parliamentary enclosure and documents relating to the Tithe Act 1836 and Finance Act 1910 has been especially revealing. Tithe apportionments and maps which depict the pre-Parliamentary enclosure landscape help establish the origins of private roads described by the enclosure awards. Both private roads with and without public rights appear in the same course on the earlier tithe maps in a little over half of cases, a clear indication that the enclosure Commissioners used existing routes to create private roads. Most appear without colour and are open to adjoining land and it seems the enclosure

⁶⁷⁵ NFRO WLS XXII/15, 414X2, Various documents relating to Thompson Inclosure and Estate papers, 1816-1830.

⁶⁷⁶ Catriona Cook, 'Much More on Methley', *Byway and Bridleway* 8 (2010): 138.

Commissioners clarified both their legal and physical status as they enclosed the surrounding landscape. In contrast, almost half the private roads do not appear on the earlier tithe maps and were likely newly created by the enclosure Commissioners.

Post-enclosure tithe apportionments and maps offer critical landholding information in the years and decades after Parliamentary enclosure. Private roads with public rights are depicted on the later tithe maps 84 percent of the time, five percent are partly depicted, and 11 percent do not appear at all. This compares to 82 percent of private roads without public rights which are depicted, three percent which are partly depicted, and 15 percent which do not appear. In the majority of cases the shortest, narrowest private roads set out for the fewest people by enclosure awards tend to not appear on the later tithe maps.

Comparisons with the Finance Act 1910 documents and maps capture the difficulty of assessing the legal status of private roads set out by the Parliamentary enclosure awards. Different types of private road appear differently on the Finance Act maps. Private roads with public rights usually appear to remain as part of the transport network in the parish as almost all lead to 'white' roads or *B.R.* or *F.P.* annotated routes. Likewise, private roads set out as long, wide, well-connected routes for the largest number of people typically appear as 'white' roads on the Finance Act maps. In contrast, the shortest, narrowest, least well-connected routes set out for the fewest individuals tend to be coloured or not appear at all on the OS used by the Finance Act valuers.

The Tithe Act 1836 and Finance Act 1910 documents and maps display a wealth of information. Both sources are invaluable to inquiries which seek to determine the status of particular routes. This study of private roads described and depicted by Parliamentary enclosure awards and maps has clarified how such routes typically appear on the tithe maps and Finance Act maps. For the most part private roads are depicted in a variety of ways on both sources and corresponding historical analysis and legal interpretation must be tempered by comparisons with all available evidence.

6 Bridleways and footpaths

Public bridleways and footpaths provide substantial economic, environmental, and health benefits. Recreational use of public rights of way has increased incalculably through the twentieth century as walking became a popular recreation.⁶⁷⁷ This is only likely to increase as a greater emphasis on health and longer retirements impact the country. Today, rights of way are the principal way people access the countryside. As Sarah Bucks and Phil Wadey aptly put, ‘the beauty of England and Wales can often be seen best from paths, tracks and meandering lanes that cross the countryside’.⁶⁷⁸ In recent years the historical value of rights of way has been increasingly appreciated, especially as forthcoming legislative changes will extinguish historic rights of way.⁶⁷⁹ Campaigns such as the Ramblers’ ‘Don’t Lose Your Way’ project have further increased awareness of the 2026 cut-off date.

Today bridleways and footpaths can be defined as:

- *Bridleways* are highways over which the public have a right of way on foot, on horseback, or leading a horse, with or without a right to drive animals of any description along the highway;⁶⁸⁰
- *Footpaths* are highways over which the public have a right of way only on foot.

Note that ‘horse’ includes ‘pony, ass or mule, but not a llama’.⁶⁸¹ Also, the Countryside Act 1968 s. 30 extended bridleway rights to include bicycles, which must give way to pedestrians and horse riders, although unitary authorities may restrict or prohibit cycling with specific bylaws.⁶⁸² Footpath users may carry all

⁶⁷⁷ Department for Transport, *Walking and Cycling Statistics*, 2020.

⁶⁷⁸ Bucks and Wadey, *Rights of Way*, xxi.

⁶⁷⁹ Countryside and Rights of Way Act 2000, s. 53.

⁶⁸⁰ The relevant statutes are Wildlife and Countryside Act 1981 s. 66(1) and Highways Act 1980 s. 329(1); Sydenham, *Public Rights of Way and Access to Land*, 1.3.4.

⁶⁸¹ Sydenham, 1.3.4; llamas, much like camelids, elephants, and yaks, are non-native species and so would not qualify as beasts of burden under common law definitions.

⁶⁸² Riddall and Trevelyan, *Rights of Way: A Guide to Law and Practice*, 2.6.2.

items usual for walkers, including a perambulator, a bicycle, if carried, and a dog, although this remains untested by the courts. These definitions have been updated by legislation throughout the twentieth and twenty-first century.⁶⁸³ However, these terms did not necessarily hold the same meaning across time and space.

Bridleways and footpaths form the basis of numerous legal inquiries each year. As with disputes over highways, three historic sources are regularly consulted: the Parliamentary enclosure Acts, awards, and maps; the Tithe Act 1836 apportionments and maps; and the Finance Act 1910 documents and maps. However, no attempt has been made to establish a broader chronology of the changing status of rights of way from the late eighteenth century to the modern day. This study analyses the origins of bridleways and footpaths described by Parliamentary enclosure through comparisons with the pre-enclosure maps and tithe apportionment and maps. This will not only help ascertain where these rights of way originated, it will also help define contemporary attitudes to public rights of way, and, more broadly, public and private space. The analysis will shed light on the usage of the tithe documents in rights of way cases which are typically viewed as offering only a supporting role to other forms of evidence. The tithe evidence produced after Parliamentary enclosure can then be used to identify the subsequent history of the bridleways and footpaths. This is particularly illuminating as it offers evidence of the rights of way in the years and decades following enclosure. Finally, the Finance Act valuation evidence will be used to examine the bridleways and footpaths. The Finance Act maps and OS maps will first be discussed, and then the documentary evidence will be considered in detail. How the bridleways and footpaths were depicted in the late nineteenth and early twentieth century is fundamental to understanding their modern status.

⁶⁸³ Sydenham, *Public Rights of Way and Access to Land*, 1.3.5; Riddall and Trevelyan, *Rights of Way: A Guide to Law and Practice*, 2.3.

6.1 Bridleways and footpaths in the pre-enclosure landscape

An understanding of the origins of bridleways and footpaths is vital as this can help determine whether the Parliamentary enclosure Commissioners were newly creating or confirming existing rights of way, as well as offering clues as to their future status. In an era of right to roam and recreational public rights of way it is easy to be swayed by nostalgic notions that one was free to wander anywhere in the pre-enclosure landscape. This is an idealistic impression which contrasts with the realities of pre-modern agricultural life. While some view anti-enclosure sentiment, like the poetry of John Clare, as evidence of the privatising force of enclosure, there was never any widespread popular opposition to the eighteenth and nineteenth century Acts.⁶⁸⁴ Nonetheless, such a view developed and arguably manifested in the World War propaganda campaigns urging all to aid the war effort to protect the countryside.⁶⁸⁵ Thus, the idea that one could wander freely has survived to the modern day. Landownership was more complex in the pre-enclosure landscape, but the local population were firmly aware of the tenure of these intermixed and scattered holdings. Since meadows were not ploughed, 'there were various complicated ways of establishing where the strips lay at hay time'.⁶⁸⁶ In Northamptonshire, boughs, holes, or stones were used to mark boundaries. In some areas, common rights were also tightly controlled, with the breed and number of livestock each individual was entitled to graze being carefully recorded together with the times such rights may be exercised. With several such controls in place, it is doubtful whether the presence of strangers would have been accepted.

⁶⁸⁴ Barrell, *The Idea of Landscape and the Sense of Place 1730-1840*, 189; Neeson, *Commoners*, 3–9.

⁶⁸⁵ Christine Berberich, "'Isn't This Worth Fighting For?'" The First World War and the (Ab)Uses of the Pastoral Tradition', in *Conflict, Nationhood and Corporeality in Modern Literature: Bodies-at-War*, by Petra Rau (Springer, 2010), 26–45; Keith Grieves, 'War Comes To The Fields: Sacrifice, Localism And Ploughing Up The English Countryside In 1917', in *1917: Beyond the Western Front*, by I. F. W. Beckett (Brill, 2008), 163–64; George Robb, *British Culture and the First World War* (Macmillan International Higher Education, 2014), 176.

⁶⁸⁶ Hall, *The Open Fields of England*, 18.

Analysis of pre-enclosure cartographic sources is particularly difficult as routes cannot readily be distinguished within areas of common and/or open field arable. Open fields contained large numbers of intermingled unhedged parcels of land which were narrow and strip like in form and can easily be mistaken for routes. H. A. Beecham categorised four principal types of unploughed pieces of land in the open fields: paths; headlands; sikes which were 'awkward corners, steep banks or low-lying wet places'; and stintins sometimes called half-balks.⁶⁸⁷ This highlights the difficulty of interpreting pre-enclosure maps but also emphasises the nature of the open fields: these were agriculturally productive landscapes which people worked in. Such field systems varied greatly in field and holding layout, fallow grazing, and regulation of cropping.⁶⁸⁸ Some systems may have had more seasonal and impermanent right of way networks.

While numerous pre-enclosure maps mark defined routes across commons and open fields, their status is undefined. It has been suggested that:

the very fact that defined rights of way existed in the open fields, and were curtailed at enclosure, has the necessary implication that there had never been unlimited public rights of access within the unenclosed landscape, for otherwise the definition of footpaths would have been meaningless⁶⁸⁹

While this is compelling, the extent to which defined *public* footpaths existed in the pre-enclosure landscape remains unclear. As explored below, public bridleways and footpaths described by enclosure awards regularly had their origins in the pre-enclosure landscape. It is reasonable to infer that these earlier routes also served a public function. The notion that Parliamentary enclosure evidence can be applied to earlier cartographic evidence will be tested below.

⁶⁸⁷ H. A. Beecham, 'A Review of Balks as Strip Boundaries in the Open Fields', *The Agricultural History Review* 4, no. 1 (1956): 24.

⁶⁸⁸ Bruce M. S. Campbell, 'Commonfield Origins - The Regional Dimension', in *The Origins of Open Field Agriculture*, by Trevor Rowley, 1981, 113–18.

⁶⁸⁹ Williamson, Liddiard, and Partida, *Champion*, 160.

6.1.1 Bridleways and footpaths on pre-enclosure maps

Pre-enclosure and pre-Parliamentary enclosure estate maps can offer insight into the origins of public rights of way. Before cheaper methods became available, maps were expensive to produce and were typically status symbols created by those who could afford to flaunt their wealth or were practical objects created for a financial or managerial purpose, and often both.⁶⁹⁰ Pre-enclosure maps often illustrate an abundance of routes which can be difficult to categorise as their function is noted more often than their physical or legal status. Some early eighteenth-century examples were examined to explore this further.

Northamptonshire

Little Oakley in Northamptonshire provides an excellent illustration of defined routes existing across open fields. This 1727 estate map surveyed by George Nunns portrays lands belonging to the Duke of Montagu. One of the open fields, 'Nether Field', formed a 165-acre open field of numerous strips which were intersected by various routes (FIGURE 171). While it is probable that these routes were used by all those who held land in the adjoining open fields, the degree to which they were used by the wider public is unclear. The widest and straightest was annotated 'Meer' and marked the boundary between Little Oakley and Geddington. A reconstruction of the map in GIS provides a clearer picture of the furlongs, in pink, and headlands, in purple, in the pre-enclosure landscape (FIGURE 172). Headlands separate furlong blocks and also seem to provide access to them; in fact, there may have been little difference those headlands which provided access to open fields and those which provided access to other parishes and settlements. As Beecham noted, 'the headlands would be cultivated each year after their use as a turning ground was over', indicating that these routes could change depending upon the seasonal and annual shifts of agriculture.⁶⁹¹

⁶⁹⁰ Whyte, *Inhabiting the Landscape*, 90.

⁶⁹¹ Beecham, 'A Review of Balks as Strip Boundaries in the Open Fields', 24.



FIGURE 171 Boughton House, Little Oakley estate map, 1727.

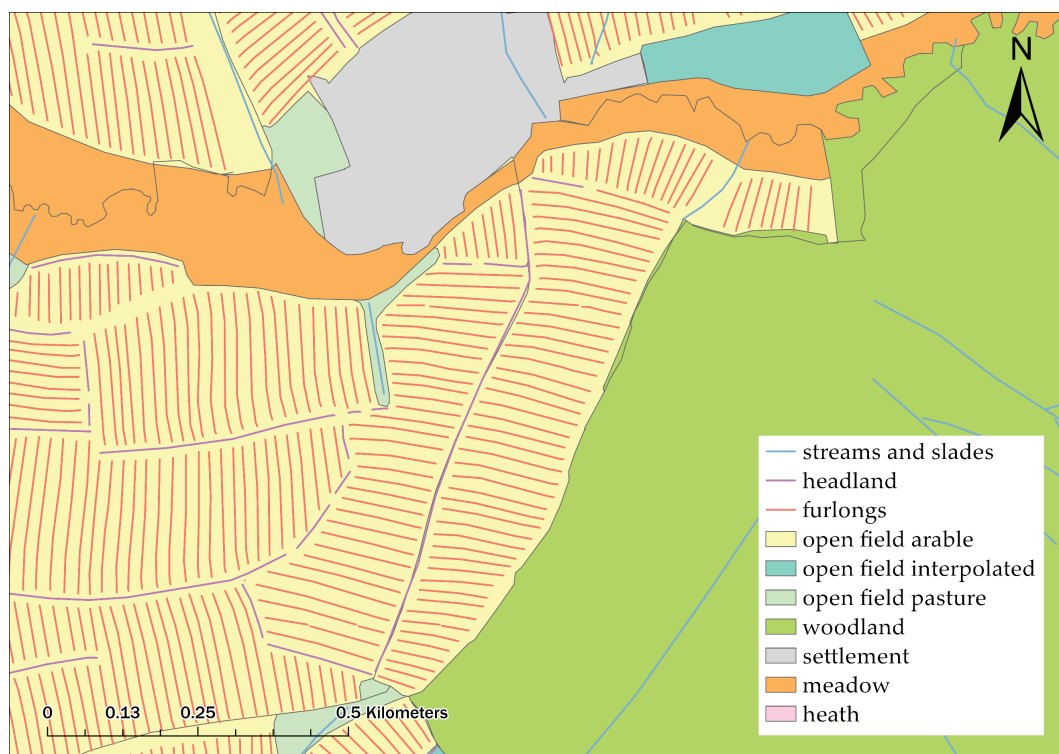


FIGURE 172 GIS map of Little Oakley reconstructed from Tom Williamson et al., *A GIS Aided Study of Agriculture and Landscape in Midland England* (Archaeology Data Service, 2011).

Comparisons with the Parliamentary enclosure map indicate some of the changes the Commissioners made (FIGURE 173). For instance, the route leading west to Great Oakley formed the first 'public carriage road' and the route annotated 'Meer' on the 1727 map was straightened and annotated 'foot road' on the map (FIGURES 171, 172 and 173).⁶⁹² The earlier estate map shows both routes, and both must have experienced a degree of public use for the Parliamentary enclosure Commissioners to assign them as public highways, albeit of differing status, in 1808.



FIGURE 173 NHRO Map/2844, Little Oakley enclosure map, 1808.

⁶⁹² NHRO Map/2844, Little Oakley enclosure award, 1808.

Norfolk

In Norfolk, a book of field maps drawn in c. 1723 depicts the open fields of Ringstead with a plethora of routes.⁶⁹³ Comparisons with the 1781 Parliamentary enclosure illustrate how pre-enclosure routes snaked rather than shot across the landscape (FIGURE 174). Few were straight and had a consistent width. Some routes such as 'Docking Way', 'Greengate Way', and 'Ling gate Way' appear substantially wider than their counterparts. This may be evidence that they were well-used public roads or, equally, that they were wide unsurfaced drifts with no public access. Nonetheless, the fact that all extended outside the parish is usually an indication of public use. For instance, one narrow route is annotated 'Peddars Way', a long-distance route of ancient origins regularly used by travellers on foot. In contrast, numerous routes narrowed and ended in cul-de-sacs. These appeared to function as 'the paths by which a farmer could approach his land without crossing those of his neighbour [called] common balks or footbalks' but could equally represent headlands 'where the ploughs and their teams had room to



FIGURE 174 NFRO LEST/EH 8, Field book Ringstead and Holme, c. 1723.

⁶⁹³ NFRO LEST/EH 8, Field book with maps Ringstead, c. 1723.

turn'.⁶⁹⁴ It is unclear whether the wider public made use of such routes. The Parliamentary Commissioners did not specify any bridleways or footpaths and the modern definitive map corresponds with very little of the c. 1723 map. It is thus difficult to ascertain which routes were considered public in the early eighteenth century or if the terms 'public' and 'private' were so stringently applied. The Parliamentary Commissioners did make significant changes, especially in the case of the 'Heacham Road', 'Holme Road', 'Thornham Road', and 'Sedgeford Road' which were 'the only new public Roads and Ways which will want to be formed and made previous to the parish Statute Duty'.⁶⁹⁵ These represented entirely new routes while roads such as the 'Burnham Road' and 'Road from Thornham to Lynn' were straightened from existing routes.

Hertfordshire

Finally, some of the earliest maps in the sample depict Therfield in Hertfordshire. John Dougharty of Worcester produced two surveys in 1724 and 1725 covering 'the Enclosed Part' and 'the common field to the north of Therfield' respectively.⁶⁹⁶ These maps illustrate the complexity of the pre-Parliamentary enclosure landscape. Close examination of the north-easterly part of Therfield, near Royston, reveals that the basis for the first, second, and third private roads described by the 1848 enclosure award were in place by 1725. Each appeared to be created from enclosed, open, or green routes, which were then straightened and improved in 1848. These private roads were all described as 'private carriage road and driftway and *public bridleway[s]*' (emphasis added).⁶⁹⁷ As with most pre-enclosure maps, the status of such routes is unclear. Very few dashed routes were depicted across other open fields on the 1725 map, even though routes must have existed in order for parishioners to access their landholdings. The routes which

⁶⁹⁴ Beecham, 'A Review of Balks as Strip Boundaries in the Open Fields', 23–24.

⁶⁹⁵ NFRO PD 696/1, Ringstead enclosure award, 1781.

⁶⁹⁶ HALS DP/107/29/1a, Map of the Enclosed Part of the Parish of Therfield, 1724; HALS DP/107/29/2, Map of common field to north of Therfield, 1725.

⁶⁹⁷ DP/107/26/1, Therfield enclosure map, 1848.

do appear were evidently defined, well-established, and well-used. This is not necessarily evidence of public status but highlights that distinct routes did exist across the open fields. The fourth and fifth public footpaths described at enclosure were also in this area but were not depicted by Dougharty. The fourth traversed the edge of the green so it is possible it existed before enclosure despite not being depicted. The fifth public footpath formed a path around the newly formed enclosures but was also on the same alignment as a route which continued south-west across 17 strips in the open fields in 1725. This is an excellent example of a defined route existing in the pre-enclosure landscape. Although the status of this route cannot be ascertained, it is possible that a distinction between public and private routes was not considered at the time.

Summary

While these early eighteenth-century maps demonstrate that defined routes existed across the pre-enclosure landscape, they also highlight that they did not necessarily have a defined status. None are annotated 'public' or 'private' nor, indeed, 'road', 'bridleway' or 'footpath', indicating that the legal and physical boundaries were less defined than they were to become. Routes widened and narrowed according to the surrounding environment; routes may be open where they adjoined arable fields but enclosed where livestock grazed. Likewise, encroachments and changes to landownership could alter the transport network as alternative routes became preferred. In fact, numerous routes in each map narrowed and appeared to end as cul-de-sacs. This was undoubtedly the world in which Celia Fiennes, Daniel Defoe, and William Cobbett travelled, a world in which local guides were necessary and signposts were recent innovations.

6.2 Bridleways in pre-enclosure tithe apportionments and maps

The following sections examine the tithe apportionments and maps created *before* Parliamentary enclosure awards. The study includes 22 bridleways and 72 footpaths set out at Parliamentary enclosure. It is not always clear if the enclosure Commissioners were newly creating or confirming existing bridleways and footpaths. The changes should instead be based on a sliding scale:

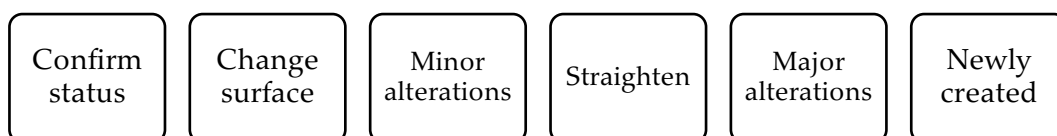


FIGURE 175 Sliding scale of changes made to the road network by Parliamentary enclosure Commissioners

To begin, it is worthwhile examining an instance of Parliamentary enclosure in Cambridge found by Philomena Guillebaud:

The inhabitants of Coton had objected to the omission of ‘a certain ancient bridle road from Coton to Cambridge’ which if not included ‘will become stopped up and the inhabitants of Coton and others will be put to the inconvenience of travelling three miles instead of two and will also incur a considerable additional expense for turnpikes’. The Commissioners, presumably at the request of St John’s, refused to retain the old bridleway, which bisected the largest allotment to that college, downgraded it to what is still today the Coton footpath, but added a new bridleway linking Coton to the turnpike road on the hither side of the tollgate.⁶⁹⁸

This encapsulates part of the process of Parliamentary enclosure in which public rights of way were to be valued and confirmed, altered, removed, or created anew. This necessitated the weighing of competing views from different

⁶⁹⁸ Philomena Guillebaud, ‘The Enclosure of Cambridge St Giles: Cambridge University and the Parliamentary Act of 1802’, *Proceedings of the Cambridge Antiquarian Society* XCIV (2005): 7.

members of society. While it is inferred that, in this instance, the Commissioners yielded to St John's College, there are numerous examples of the converse occurring. The earlier tithe apportionments and maps can help determine where such public rights of way originated. A total of 22 bridleways were described across ten Parliamentary enclosure awards. Most were not depicted on the tithe maps which means they were either newly formed or existed but were not included as part of the tithe commutation. A comparison with the other routes on the tithe can help highlight which is the case. As the origins of the network are increasingly understood, it will be easier to appreciate how rights of way were viewed in the past and how they transformed over time.

6.2.1 Bridleways which are depicted on the pre-enclosure tithe maps

Five enclosure award bridleways appear in the same location on the earlier tithe maps, totalling 23 percent. Only one, the first 'public bridle and footway' in Stoke Bruern, was annotated 'public bridleway' (FIGURE 176).⁶⁹⁹ Most other routes later identified as public bridleways by the Parliamentary enclosure Commissioners were indistinguishable from other routes on the tithe maps. Two 'bridle and footways' in Widford, Hertfordshire, appeared on the 1839 tithe map as narrow, uncoloured routes across 'Great Levenage Common Field' (FIGURE 177).⁷⁰⁰ Upon enclosure in 1856, the Commissioners were content to retain these routes. While it is possible that the Commissioners were upgrading a previously private track, the fact that



FIGURE 176 NHRO T/163, Stoke Bruern tithe map, 1843.

⁶⁹⁹ NHRO V2796, Stoke Bruern and Shutlanger enclosure award, 1844; NHRO T/163, Stoke Bruern tithe map, 1843.

⁷⁰⁰ HALS QS/E74, Widford enclosure award, 1856.



FIGURE 177 HALS DSA4/117/2, Widford tithe map, 1839.

these routes connected to the wider public network and were unchanged indicates that they were already part of the public network before Parliamentary enclosure.

6.2.2 Bridleways which are partly depicted on the pre-enclosure tithe maps

The Parliamentary enclosure Commissioners straightened, narrowed, widened, or otherwise consolidated nine of the 22 bridleways from earlier routes. This was most apparent in Walkern as the Commissioners straightened a narrow, sienna, dashed route across 'Church End Common' to create a public bridleway (FIGURES 178 and 179). It is unclear if this route held public rights before enclosure, although it did extend to the neighbouring parish, usually an indication of public status. The Parliamentary enclosure Commissioners extinguished several similarly depicted routes, calling some 'public road *or* footway' (emphasis added), which suggests they struggled to identify whether routes were roads or footpaths.⁷⁰¹ This echoes a point made in Section 6.1 about the difficulty of ascribing routes a particular legal and physical status in the pre-enclosure

⁷⁰¹ HALS DP/114/26/1, Walkern enclosure award, 1849.



FIGURE 178 HALS DP/114/27/1, Walkern tithe map, 1841.



FIGURE 179 HALS DP/114/26/1, Walkern enclosure map, 1849.

landscape. Although modern roads and footpaths are easily distinguishable, this was not always the case in the nineteenth century. For example, a 'public bridle and footway' in Little Hornead was created from an earlier 'public carriage road bridleway and footway' which represented a narrow, uncoloured, dashed route across 'Further Jefferies Common'.⁷⁰² This earlier, more sinuous route was stopped up and replaced with a new 'bridle and footway' (FIGURES 180 and 181).⁷⁰³ It is somewhat surprising that this earlier route represented a 'public carriage road' as it was not coloured sienna or indicated with solid lines, as other public roads in the parish were. Moreover, it is difficult to differentiate the furlongs and headlands in the open fields from routes which must have existed



FIGURE 180 HALS DSA4/55/2, Little Hornead tithe map, 1844.



FIGURE 181 HALS DE/H/P28, Little Hornead enclosure map, 1864.

⁷⁰² HALS DP/114/26/1, Walkern enclosure award, 1849.

⁷⁰³ HALS DE/H/P28, Little Hornead enclosure award, 1864.

across them. Consider the public bridle road in Aston, which appears to be consolidated from a series of tracks to the west of Feckney Common (FIGURE 182). It is possible that the question of whether the public *at large* held rights had genuinely never concerned the residents of Aston and it was only with the Parliamentary enclosure award that this issue was first contested. These examples demonstrate the ephemeral nature of routes in the pre-enclosure landscape, and the way in which they were altered, both physically and legally, according to the ebbs and flows of rural life. In many cases it was the

Parliamentary enclosure process which clarified and fixed the physical and legal status of such routes.



FIGURE 182 HALS DAcc 1154, Aston tithe map, 1840



FIGURE 183 HALS QS/E1, Albury enclosure map, 1869.

Some of the bridleways laid out by Parliamentary enclosure awards were explicitly described as 'diversions'. Four public bridleways in Albury, Hertfordshire, were diversions of older bridleways and footpaths. These earlier routes were invariably more sinuous on the tithe map than the newly created network (FIGURE 183).

Two examples in Elsing, Norfolk, also formed diversions: one, a more direct route to 'Spring Meadow Lane', the other, moving a route 420 metres further from Elsing Hall. The earlier routes are both indicated on the tithe map (FIGURE 184 and FIGURE 185). To summarise, the enclosure Commissioners often altered earlier routes to create public bridleways, with some specifically diverted older routes.



FIGURE 184 NFRO DN/TA 653, Elsing tithe map, 1841.



FIGURE 185 NFRO C/Sca 2/106, Elsing enclosure map, 1849.

6.2.3 Bridleways which are not depicted on the pre-enclosure tithe maps

Over a third of the bridleways newly set out or confirmed by enclosure Commissioners do not appear, in any form, on tithe maps surveyed before the enclosure of the parishes in question. There are three main possibilities for this:

- the bridleways fell outside the areas of titheable land included in the commutation (they may or may not have existed before enclosure);

- the bridleways existed but were not depicted by the tithe Commissioners;
or
- the bridleways did not exist.

In Towcester, three bridleways were not depicted because they fell outside the tithe commutation. In Ringstead, Northamptonshire, the existence of a route can be inferred as portions were depicted adjoining titheable enclosures (FIGURE 186). In most cases it is unclear whether bridleways existed and were not depicted, or did not exist before Parliamentary enclosure. Only in one instance was a public bridleway almost certainly newly created by the enclosure Commissioners, the ninth public bridleway in Albury. This was an entirely straight route of 1006 metres which dissected land which previously formed open fields but was enclosed piecemeal through the nineteenth century. The new bridleway provided access to Farnham in Essex.



FIGURE 186 NHRO T/050, Ringstead tithe map, 1840.

6.2.4 Conclusions

Overall, excluding those which could not be depicted because the tithe covered a different area from the enclosure, half the bridleways described by enclosure awards partly appear on the tithe maps with a further quarter depicted in their entirety (FIGURE 187).

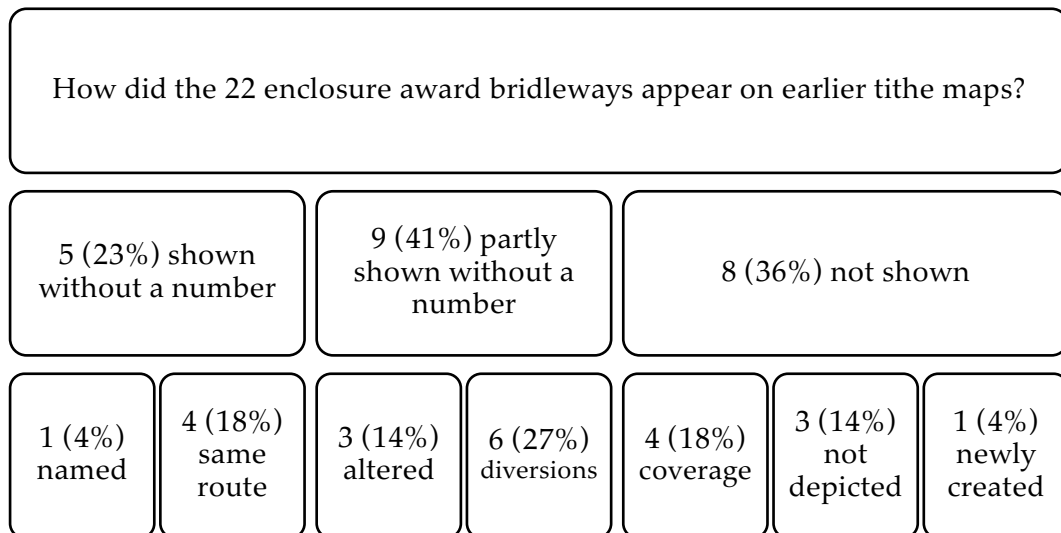


FIGURE 187 How did the 22 enclosure award bridleways appear on earlier tithe maps?

This confirms that the enclosure Commissioners were regularly confirming or creating public bridleways from earlier routes. This makes sense as the local populace were more likely to resist wholesale extinguishment of bridleways, particularly those which connected to other parishes and provided access to surrounding attractions, markets, and settlements. The Commissioners thus straightened, narrowed, and widened various existing routes to create a rationalised, but not significantly different bridleway network. After all, Parliamentary enclosure was most often completed on a parish-by-parish basis, and so it was difficult to restructure the right of way network wholesale, even if there was appetite for this. This analysis of pre-enclosure tithe maps has also shown that the tithe map-makers regularly depict the right of way network, including bridleways.

6.3 Footpaths in pre-enclosure tithe apportionments and maps

This section examines how the 72 footpaths described by Parliamentary enclosure awards appear on *earlier* tithe apportionments and maps. Over half were not depicted by the tithe Commissioners whereas a quarter are clearly distinguished from roads. The remaining footpaths exist somewhere in between the two and are often difficult to identify. This does not mirror the findings of Kain and Oliver that 37 percent of tithe maps 'distinguish footpaths or bridleways from other roads and highways'.⁷⁰⁴ Only 19 percent of the sample pre-Parliamentary enclosure tithe maps distinguish bridleways and footpaths. In fact, half were not depicted at all. This was undoubtedly because the tithe Commissioners were assessing the titheable produce of the land and were not concerned with public rights of way.

6.3.1 Footpaths which are depicted on the pre-enclosure tithe maps

Much like bridleways described by Parliamentary enclosure, it was rare for footpaths to be depicted and annotated on the tithe maps. This only seems to have occurred in the cases of Passenham and Towcester in Northamptonshire.

Both are annotated 'Footway' and indicated with single dashed lines, and both maps were created by John Durham of Stony Stratford (FIGURES 188 and 189). Passenham is the neighbouring village and Towcester is just eight miles north of Stony Stratford, so it is possible that Durham was familiar with these parishes and able to add such additional information. Rights of way were

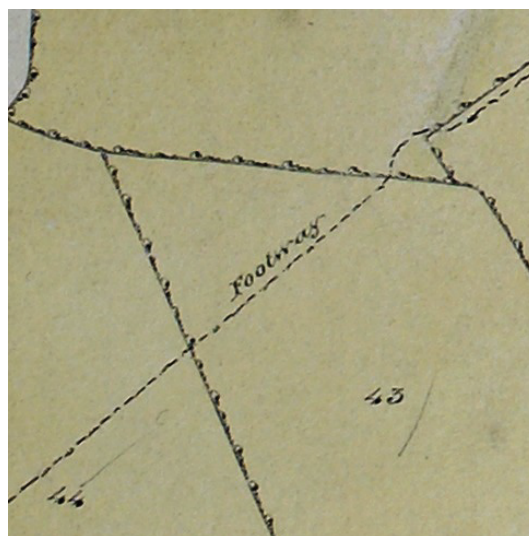


FIGURE 188 NHRO T/007, Towcester tithe map, 1844.

⁷⁰⁴ Kain and Oliver, *The Tithe Maps of England and Wales*, 751.



FIGURE 189 NFRO T/204, Passenham tithe map, 1845.

unnecessary in assessing titheable produce but may have helped orientate the map readers. It appears that the enclosure Commissioners confirmed these existing footpath rights a decade or two later.

Other tithe maps indicate 11 routes following the same course as footpaths depicted on enclosure maps. Some of these appear wider than the stated six-foot width in the enclosure award and

may have been narrowed by the

enclosure Commissioners. As seen, consolidating the transport network was one of the principal goals of the enclosure process. This was achieved by stopping up and extinguishing unnecessary routes, but also by narrowing and downgrading status. This created more land to enclose since reducing a standard 30 feet road to the width of a footpath represents an eight-metre gain. Over a square acre, this creates 13 percent more usable agricultural land, something landowners would relish. This occurred in Buckland, where roads and bridleways were downgraded to public footpaths. These examples illustrate that, although public footpaths appeared in the same course on the earlier tithe maps, they were probably created by wider routes with existing public rights.

6.3.2 Footpaths which are partly depicted on the pre-enclosure tithe maps

All in all, 20 of the 72 footpaths described by Parliamentary enclosure appear only in part on the earlier tithe maps. There are various reasons for this, the most obvious being that the tithe Commissioners were not concerned with footpaths and so did not illustrate them. However, this presumes that footpaths in the pre-Parliamentary enclosure landscape had a defined physical and legal existence, which may not have been the case. Even if footpaths had formed the focus of a

cartographic study, it would have been difficult to replicate the overlapping rights, seasonal shifts, and informality of footpaths in the pre-enclosure landscape. The Parliamentary enclosure Commissioners appear to rationalise this pre-existing network, both physically and legally. In Bengo, a route crosses the open fields of 'Anstley Common' in 1843 and forms the basis for a public footway in 1852 as the surrounding lands are enclosed (FIGURES 190 and 191). Some footpaths set out by Parliamentary enclosure are difficult to identify on the

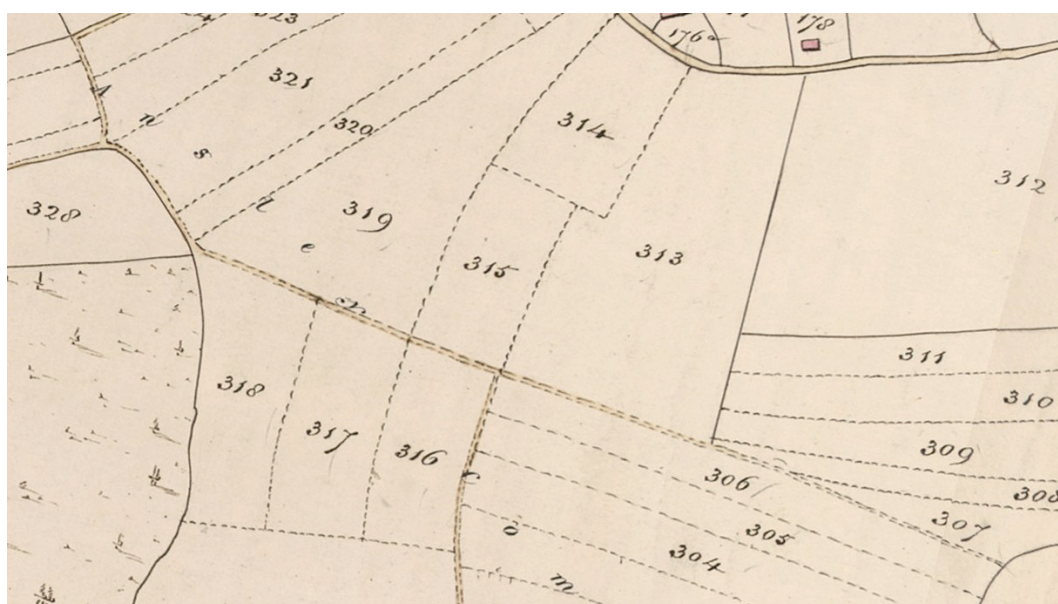


FIGURE 190 HALS DSA4/16/2, Bengo tithe map, 1843.



FIGURE 191 HALS QS/E14, Bengo enclosure map, 1852.

corresponding tithe maps. For example, the fifth 'public footway' in Buckland continued 'in its present track' north of 'Hodson's Hill Shot'.⁷⁰⁵ Although an uncoloured, narrow, dashed route is indicated in this alignment on the tithe map, it did not extend beyond (FIGURES 192 and 193). It thus appears that the enclosure Commissioners augmented an existing route to create a new public footpath. It can be especially difficult to distinguish routes from narrow strips in the open fields. As David Hall points out, there have been 'controversies and confusion between balks and green furrows in the past'.⁷⁰⁶ This is a consistent issue when examining pre-enclosure tithe maps and may reflect the customary nature of the multifaceted rights which existed over the open fields. Unsurprisingly, the pre-enclosure landscape appears to have a less structured network of public rights of



FIGURE 192 HALS DP/25/27/1, Buckland tithe map, 1844.

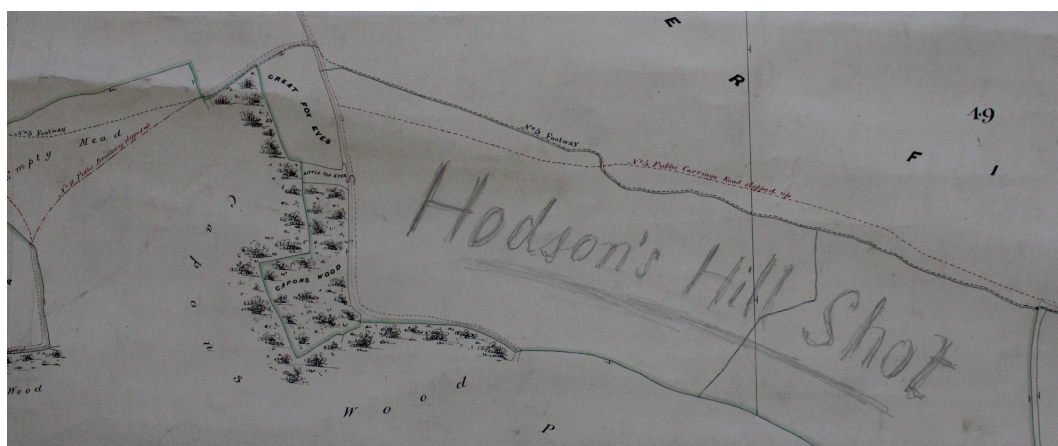


FIGURE 193 HALS DP/25/26/2A, Buckland enclosure map, 1853.

⁷⁰⁵ HALS DP/25/26/1, Buckland enclosure award, 1853.

⁷⁰⁶ Hall, *The Open Fields of England*, 26.

way than the post-enclosure landscape. For instance, the 1846 tithe map for Castor illustrates an abundance of 'common' named strips in the open fields which may have functioned as routes of some kind (FIGURE 194). The right of way network was also unclear in areas which had experienced enclosure ahead of Parliamentary Acts such as 'Church Field Common' in Little Hornead. Several routes are depicted on the 1844 tithe map, including one annotated 'Footpath', and the Parliamentary enclosure Commissioners seem to amalgamate these in 1864 (FIGURES 195 and 196). It is difficult to draw conclusions here since the tithe maps do not always accurately depict footpaths. Nevertheless, almost two thirds of those which were depicted by the tithe Commissioners were altered to create



FIGURE 194 NHRO T/236, Castor tithe map, 1846.

the enclosure award footpaths. This indicates that the enclosure Commissioners regularly used existing routes, whether public or private, to create a new footpath network.



FIGURE 195 HALS DSA4/55/2, Little Hornead tithe map, 1844.



FIGURE 196 HALS DE/H/P28, Little Hornead enclosure map, 1864.

6.3.3 Footpaths which are not depicted on the pre-enclosure tithe maps

Over half of footpaths set out by Parliamentary enclosure were not indicated on the earlier tithe maps. Some areas were depicted by enclosure maps but did not form part of the earlier tithe commutation. Occasionally, broad areas were depicted by the tithe map-makers but were not titheable and so did not include any detail. This was regularly the case for areas of common land, and it is unclear if the enclosure Commissioners were confirming existing public footpaths, straightening or otherwise altering existing routes, or newly creating a network of footpaths.

All the footpaths described in Ringstead, Stoke Bruern, Shutlanger, and Therfield enclosure awards do not appear on the tithe map despite the difference of only a few years between such maps. Even in modest fields, a three feet wide footpath will have had a negligible impact on the value of titheable land, and so would not be worth including. To emphasise again, it was not the purpose of the tithe to identify public rights of way as they did not affect the commutation. The 20 footpaths in these parishes provide stark evidence of this. A further 29 footpaths *may* have existed before Parliamentary enclosure but were not explicitly depicted on the tithe maps but the surrounding landscape may have accommodated routes of some kind.

Only two footpaths were found which cut across earlier land in such a fashion that they could not have existed before Parliamentary enclosure. The second public footpath in Castor dissected 'Normangate Field' and is not depicted on the 1846 tithe map.⁷⁰⁷ The new path provided access to a 'Bathing Place' marked by the 1898 enclosure map.⁷⁰⁸ Similarly, the eighth public footpath in Albury cut through a wood and was a straighter more direct route than the surrounding stopped up footpaths. These are the only two instances of footpaths almost certainly being newly created by the enclosure Commissioners.

⁷⁰⁷ NHRO T/236, Castor tithe map, 1846.

⁷⁰⁸ NHRO 060p 504, Castor and Ailsworth enclosure map, 1898.

6.3.4 Conclusions

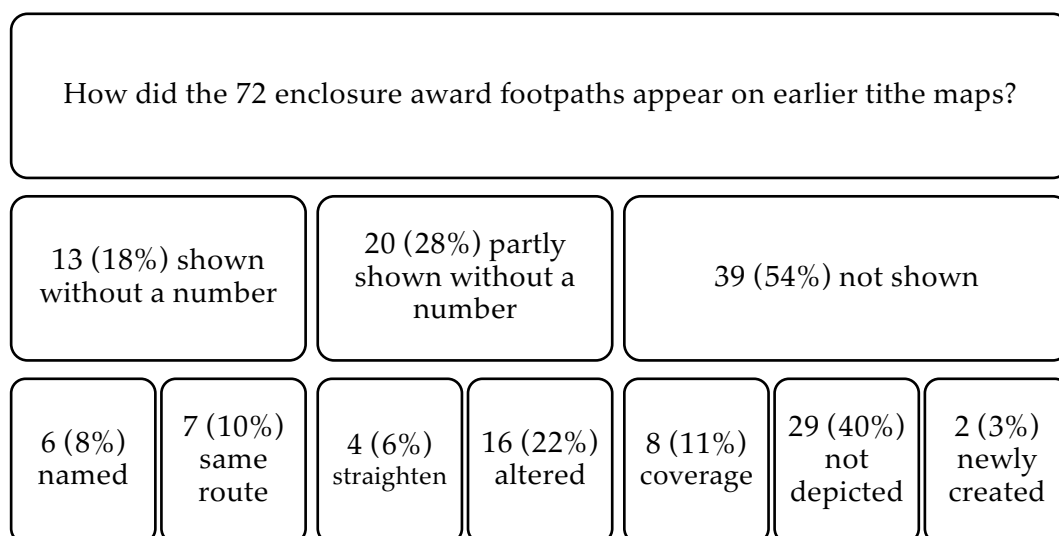


FIGURE 197 How did the 72 enclosure award footpaths appear on earlier tithe maps?

Overall, this study of Parliamentary enclosure footpaths in pre-enclosure tithe maps indicates that few footpaths conclusively appear on such maps (FIGURE 197). Without deeper analysis it would seem as if the enclosure Commissioners imposed an entirely new footpath network on each locality. In actual fact, only two footpaths in Albury and Castor were almost certainly newly created by the Parliamentary enclosure process. The other footpaths which were not depicted by the tithe Commissioners may well have existed before enclosure, at least in some form. This is strong evidence that the Commissioners used the existing network, however informal, seasonal, and unstructured, to create a newly rationalised footpath network. This exercise has also brought to light how tithe maps display routes across the pre-enclosure landscape, emphasising how difficult it is to identify the status of these routes. As discussed earlier, there were an abundance of routes in the pre-enclosure landscape. It would have been impossible for any source to unpick the precise rights attached to each, least of all the tithe which did not have this explicit purpose. It is clear that the Parliamentary enclosure process solidified the landscape and its right of way network, both physically and legally.

6.4 Bridleways in post-enclosure tithe apportionments and maps

Having established some of the possible origins of the bridleways and footpaths described by Parliamentary enclosure, attention can be turned to those parishes which produced tithe apportionments after they were enclosed by Parliamentary Act. These tithe maps can be used to explore what happened to such bridleways and footpaths in the years and decades following enclosure. Of course, a large caveat must be applied: since it was not the purpose of the tithe to illustrate rights of way, the absence of a public right of way on a tithe map cannot be used as evidence for its non-existence. The following sections explores how bridleways described by Parliamentary enclosure are described and depicted on *later* tithe apportionments and maps.

6.4.1 Bridleways which are depicted on the post-enclosure tithe maps

Of the 26 bridleways in the sample, just four appear on the later tithe maps. Much like those tithe maps produced before Parliamentary enclosure, it was very rare for routes to be annotated on post-enclosure tithe maps. In fact, only one instance was found in both cases: a 'public bridleway' in Stoke Bruern, discussed earlier, and a 'Bridle Road' in Paulerspury which was coloured sienna with dashed lines (FIGURE 198).⁷⁰⁹ Both maps were produced by John Durham of Stony Stratford. Although it was not his duty to outline public rights of way, where he did so, this constitutes strong evidence of public bridle rights existing. Three other bridleways appear on post-

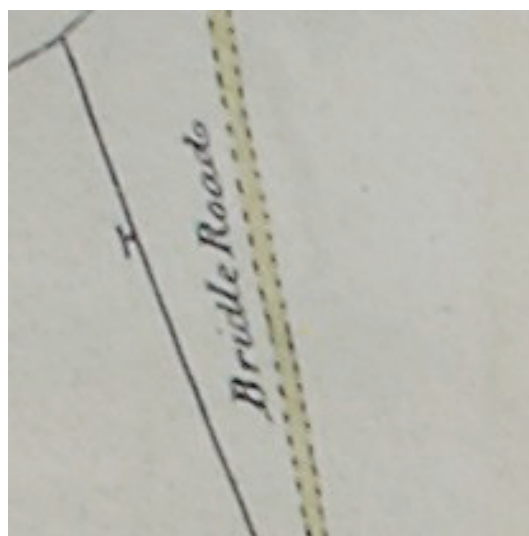


FIGURE 198 NHRO T/182, Paulerspury tithe map, 1839.

⁷⁰⁹ NHRO T/163, Stoke Bruern tithe map, 1843; NHRO T/182, Paulerspury tithe map, 1839.

enclosure tithe maps following the same route outlined on the enclosure maps. None were annotated by the tithe map-makers but each connected to a public road at either end or extended beyond the parish boundaries, like the public bridleway in Benefield, Northamptonshire (FIGURE 199). This bridleway was set out at 30 feet instead of 16 feet like the other bridleways in the parish, which may have influenced its inclusion in

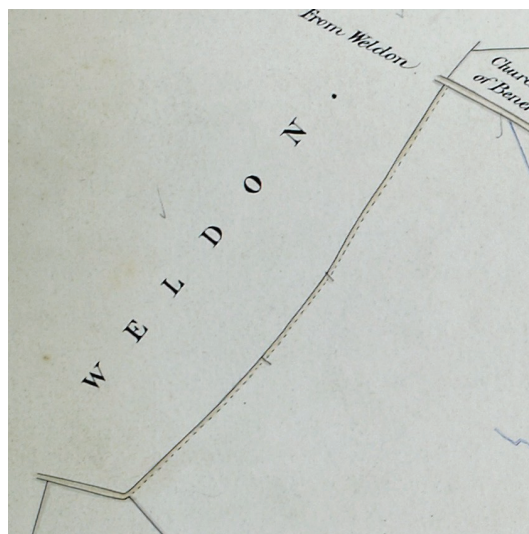


FIGURE 199 NHRO T/174, Benefield tithe map, 1850.

the tithe survey.⁷¹⁰ It seems only those bridleways which formed the most permanent features of the landscape were depicted on the post-enclosure tithe maps. Enclosed, wide bridleways which extend between two roads are most likely to appear. Such bridleways must have been well-used and possibly surfaced, which raises the possibility of higher rights being acquired.

6.4.2 Bridleways which are partly depicted on the post-enclosure tithe maps

As outlined, routes may carry *public* bridleway rights as well as *private* vehicular rights for specific individuals. In three instances, bridleways established by Parliamentary enclosure align with private roads which are depicted on the later tithe maps. Thus, part of a bridleway in Standon was 'along the course of the private road on the south west side of the said Common to and along the ancient Bridle Balk to the Bridle Gate leading into an ancient Inclosure'.⁷¹¹ This 16-foot private road appears on the tithe map, while the six-foot bridleway which continued beyond does not appear (FIGURES 200 and 201). As Beecham clarified following a debate between the Charles and Christabel Orwin and Eric Kerridge,

⁷¹⁰ NHRO Enclosure vol. O, Benefield enclosure award, 1824.

⁷¹¹ HALS QS/E61, Standon enclosure award, 1835.



FIGURE 200 HALS QS/E61, Standon enclosure map, 1835.



FIGURE 201 HALS DSA4/96/2, Standon tithe map, 1839.

balks were not only 'strip boundaries' and could also represent 'sikes, common ways, headlands, or stintins'.⁷¹² In this case the balk represented a bridle balk,

⁷¹² Beecham, 'A Review of Balks as Strip Boundaries in the Open Fields', 33; Eric Kerridge, 'Ridge and Furrow and Agrarian History', *The Economic History Review* 4, no. 1 (1951): 14–36; Charles Stewart Orwin and Christabel Susan Orwin, *The Open Fields*, 2nd ed. (Oxford, 1954).

which can be added to the 'common balks or footbalks', identified by Beecham.⁷¹³ As always, the purpose of the tithe must be borne in mind: it was concerned with agricultural production and only those routes which affected this would be depicted. Routes were omitted either because the titheable income they produced could not be attributed to any single individual, or because they did not produce any titheable income.

6.4.3 Bridleways which are not depicted on the post-enclosure tithe maps

Most of the bridleways described by Parliamentary enclosure awards do not appear on the later tithe maps, totalling 19 of the 26. The tithe survey often depicted a different area and so 11 of these bridleways were not depicted. Benefield is an exceptional example since a tithe map was completed for the entire 4472-acre parish despite only 357 acres, 8 percent, being subject to the tithe commutation. The map is exceptionally sparse and while the 30-foot bridleway appears, the two 16-foot bridleways are absent (FIGURE 202). The 1810 Parliamentary enclosure Commissioners in East Ruston, Norfolk, set out a 'Public Bridleway and Foot Way' between two public roads (FIGURE 203). However, this

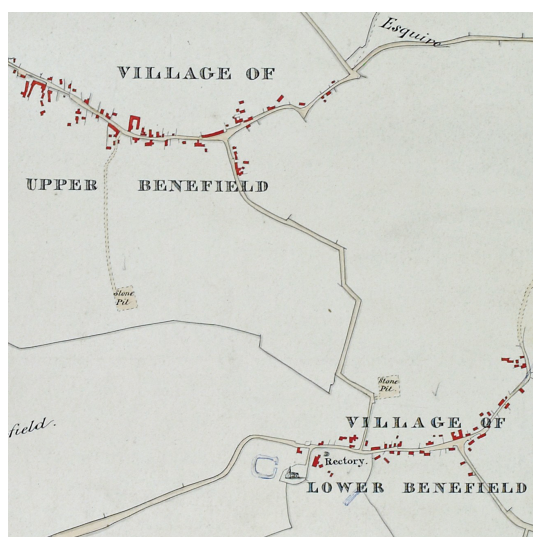


FIGURE 202 NHRO T/174, Benefield tithe map, 1850.

bridleway was not illustrated on the 1841 tithe map despite the fact that the public road numbered '644' ended at the field boundary (FIGURE 204). While a public highway can be a cul-de-sac, these invariably lead 'to a popular resort, a river, the sea, or a beauty spot'.⁷¹⁴ The fact that this route, as well as two others, terminate at this boundary, increases the likelihood that a route continued to exist but was

⁷¹³ Beecham, 'A Review of Balks as Strip Boundaries in the Open Fields', 23.

⁷¹⁴ Sydenham, *Public Rights of Way and Access to Land*, 1.2.3.

not depicted by the tithe map-makers. This solidifies the accepted view that the tithe surveyors were not concerned with rights of way, and non-existence is not evidence that a route did not legally exist.



FIGURE 203 NFRO C/Sca 2/236, East Ruston enclosure map, 1806.



FIGURE 204 NFRO DN/TA 525, East Ruston tithe map, 1841.

6.4.4 Conclusions

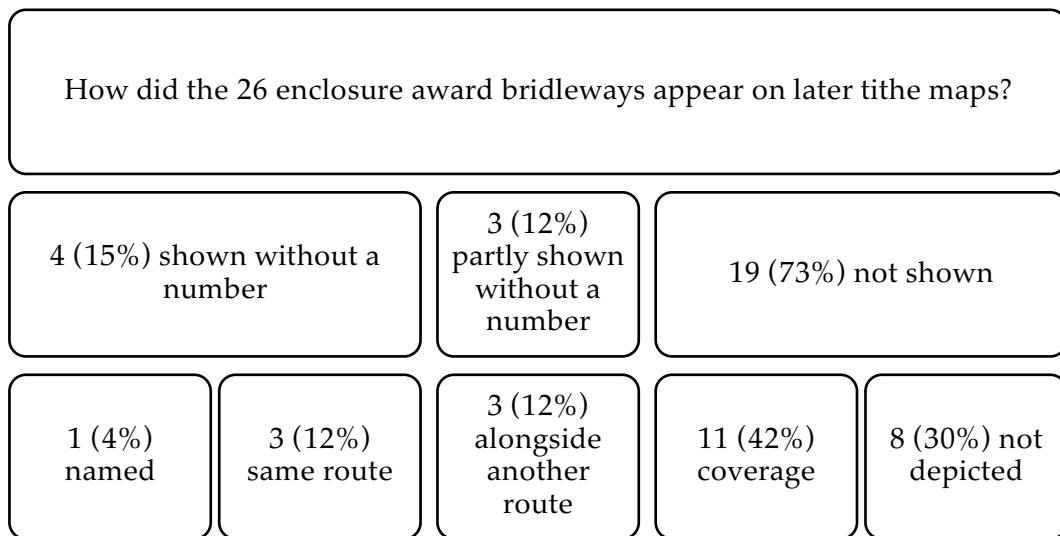


FIGURE 205 How did the 26 enclosure award bridleways appear on later tithe maps?

Excluding those which could not be shown because the maps covered different areas, the post-enclosure tithe maps depict enclosure award bridleways a third of the time. These bridleways invariably left a more significant mark on the landscape as they were usually particularly wide, enclosed on both sides, or connected to various other routes. In contrast, two thirds of bridleways identified by enclosure awards did not appear on the post-enclosure tithe maps and were regularly alongside field boundaries and reasonably narrow. In fact, the characteristics of bridleways at Parliamentary enclosure often signify whether such routes will appear on the tithe maps. Thus, the most well-connected, widest bridleways are typically depicted by the tithe map-makers. The length of enclosure award bridleways does not appear to influence whether or not they will be depicted, with those which did appear averaging 840 metres compared to 858 metres for those which did not appear. In contrast, bridleways which did appear on the post-enclosure tithe maps averaged 2.5 connections and 24.4 feet wide, compared to 1.9 connections and just 8.5 feet for those which did not appear. This analysis illustrates the extent to which tithe surveyors and map-makers surveyed the physical rather than the legal environment.

6.5 Footpaths in post-enclosure tithe apportionments and maps

This section examines how the footpaths described by Parliamentary enclosure awards are described and depicted by tithe apportionments and maps. Enclosure Commissioners describe an average of five public footpaths in each award for a total of 129 in this sample. Like the bridleways discussed above, the vast majority of footpaths did not appear on the post-enclosure tithe maps.

6.5.1 Footpaths which are depicted on the post-enclosure tithe maps

Of the 129 footpaths identified by enclosure awards, 16 appear on the corresponding tithe maps in the same route and are commonly annotated as such. A total of 13 footpaths in Abthorpe, Bugbrooke, East Ruston, and Paulerspury are annotated 'Footway' or 'Foot Way'. One instance in Paulerspury is a rare case of a minor difference between different copies of the tithe maps proving consequential to rights of way. This footpath is annotated 'Foot Way' on the Commissioner copy held at TNA but not on the parochial copy at the Northamptonshire Record Office (FIGURES 206 and 207). While minor, such a detail could prove material in a case which seeks to determine the status of a route. It is therefore paramount that all copies of cartographic evidence are

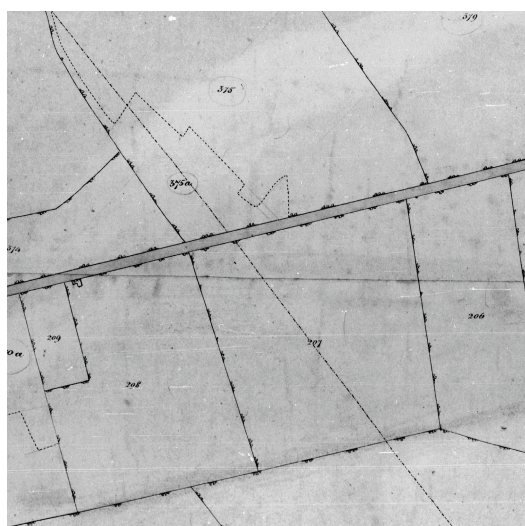


FIGURE 206 TNA IR 30/24/94, Paulerspury Commissioner tithe map, 1839.



FIGURE 207 NHRO T/182, Paulerspury parochial tithe map, 1839.

sought and compared. Yet again, the provenance of the source is paramount. Like the annotated footpaths discussed earlier, these tithe maps were created by John Durham of Stony Stratford, who regularly annotated public footpaths on his tithe maps. James Wright of Aylsham also produced the tithe maps which annotated certain routes. This supports the contention that particular map-makers differentiated status. Other public footpaths were not annotated, including a notable example from Cottingham cum Middleton (FIGURES 208 and 209). The



FIGURE 208 NHRO T/044, Cottingham cum Middleton tithe map, 1843.



FIGURE 209 NHRO T/044, Cottingham cum Middleton tithe map, 1843.

main body of this tithe map was produced at six chains to the inch while an inset of the village at three chains to the inch. The smaller scale map only shows part of the public footpath in question while the inset map displays considerably more detail. This outlines one of the key issues facing the interpretation of all cartographic sources, namely that the depiction of routes was inextricably linked to the scale the map was drawn at. Incidentally, the public footpath extended between two private roads but the Parliamentary enclosure Commissioners did not specify that these held public rights. Although such a peculiarity is rare, it illustrates that the rights affirmed by Parliamentary enclosure would be reaffirmed and changed through custom as the local community used and maintained routes in the decades and centuries following the Act.

6.5.2 Footpaths which are partly depicted on the post-enclosure tithe maps

In a mere five cases, footpaths set out or confirmed by the enclosure Commissioners are shown partly, rather than in their entirety on the post-enclosure tithe maps, emphasising again how the tithe surveyors and map-makers were concerned with the physical environment. One footpath is numbered in Gresham, Norfolk (FIGURES 210 and 211). This is exceptionally rare: none of the other bridleways or footpaths described by enclosure awards are



FIGURE 210 NFRO C/Sca 2/112, Gresham enclosure map, 1828.



numbered on any other tithe maps, pre- or post-enclosure. This footpath is coloured sienna, annotated 'Ratling's Lane', and numbered '337' on the tithe map and listed without an owner in the tithe apportionment. It is possible that part of this route acquired higher rights or that it represented a shared agricultural track as it was shortened from 810 metres to 190 metres.

The other footpaths which only partly appear on the later tithe maps are similarly shortened. Consider a footpath in Standon which extends between the third private road and 'Hall Green Road' on the enclosure map, but does not continue past 'Hill Farm' on the tithe map (FIGURES 212 and 213). The route appears sienna with solid lines, much like the roads in the parish; it is thus possible that the tithe surveyors were not indicating the public footpath but rather a private entrance route to 'Hill Farm'. This demonstrates the shortcomings of the tithe: while this is excellent evidence that a physical route existed on this alignment in 1839, it fails to indicate whether any public rights exist. All in all, the footpaths which are



FIGURE 212 HALS QS/E61, Standon enclosure map, 1835.



FIGURE 213 HALS DSA4/96/2, Standon tithe map, 1839.

partly depicted on the post-enclosure tithe maps illustrate the speed with which the physical landscape changes.

6.5.3 Footpaths which are not depicted on the post-enclosure tithe maps

The remaining 108 footpaths described by enclosure awards are not depicted on the post-enclosure tithe maps. This is a staggering proportion but includes those which exist outside the area commuted by the tithe Commissioners. This was particularly pronounced in Northamptonshire, the 'archetypal enclosure county', which often removed titheable duties ahead of the commutation in 1836.⁷¹⁵ As such, 43 footpaths are not depicted purely because the tithe map did not depict that area. Excluding these leaves 65 footpaths which are not depicted on the post-enclosure tithe maps, representing 75 percent of the remaining sample. This illustrates the extent to which tithe Commissioners were not concerned with public rights of way. After all, the purpose of the tithe was to assess the titheable produce of land and so if rights of way did not affect this, they would not be included.

6.5.4 Conclusions

The tithe surveyors and map-makers rarely depict enclosure award footpaths on their maps. Six of the 25 parishes did not show any footpaths because the tithe and enclosure maps did not depict the same areas. A further eight parishes did not depict *any* footpaths despite including the surrounding areas. Nine parishes only depict a single footpath, leaving only two parishes which depicted more than one enclosure award footpath, both the work of John Durham. Although other counties will no doubt have map-makers who regularly depicted footpaths on their tithe maps, by and large it was the norm to exclude footpaths.

⁷¹⁵ Kain, Chapman, and Oliver, *The Enclosure Maps of England and Wales 1595-1918*, 101.

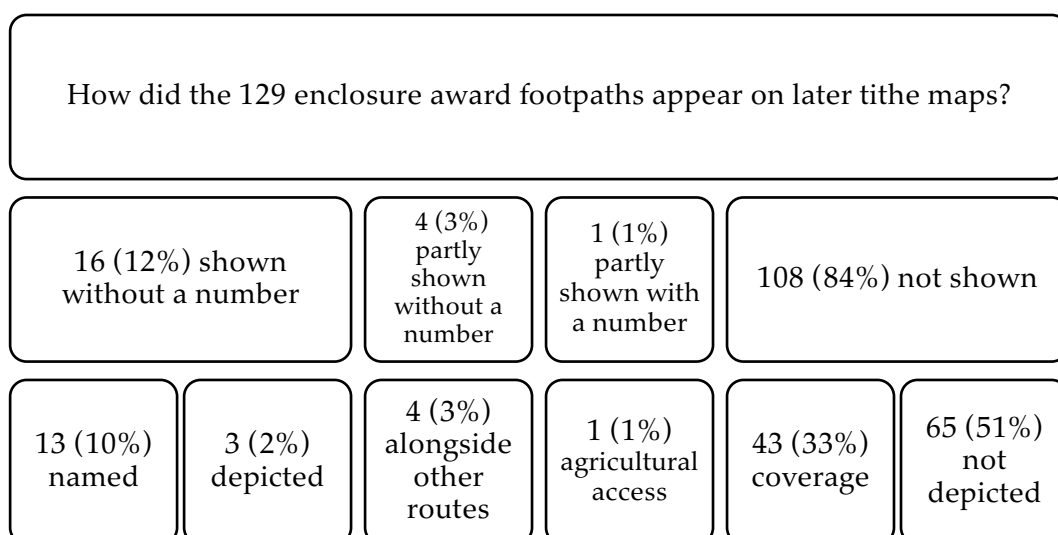


FIGURE 214 How did the 129 enclosure award footpaths appear on later tithe maps?

This analysis of tithe apportionments and maps created after Parliamentary enclosure has been particularly insightful. Excluding those areas of the enclosure map which are not surveyed by the tithe commutation, about a third of bridleways and footpaths described by Parliamentary enclosure are depicted on the post-enclosure tithe maps. Such bridleways are typically depicted where they represent significant physical features, perhaps because they were particularly wide, connected to numerous other routes, or because they were enclosed on both sides. Enclosure award footpaths, on the other hand, were easier to exclude from the survey. Again, it is worthwhile highlighting the purpose of the tithe, which was to assess the titheable produce of the land. 'The portrayal of roads [and bridleways and footpaths] is one matter that is incidental to this prime purpose of tithe commutation and its associated map record'.⁷¹⁶ Overall, the decision to depict a bridleway or footpath fell to the individual map-makers who created the tithe maps. Most did not have to be included, and so were not depicted. The next large-scale production of cartographic sources was the era of the Ordnance Survey which formed the basis for the Finance Act in 1910.

⁷¹⁶ Kain and Oliver, *The Tithe Maps of England and Wales*, 751.

6.6 Bridleways in Finance Act documents and maps

Attention can now be turned to the 1910 Finance Act documents. These have been discussed in detail before, but it is worthwhile highlighting that they can provide evidence in two principal ways. First, where the documents specifically refer to public rights of way, chiefly in the form of valuation deductions for such, and second, where the maps exclude routes from surrounding hereditaments, indicating the possible existence of vehicular highways. The nature of the evidence means the Finance Act documents cannot be discussed without some consideration of the depiction of bridleways and footpaths on the OS maps themselves. It was the OS surveyors who determined the appearance of the maps, the Finance Act valuers simply applied colouring based on ownership of hereditaments.⁷¹⁷ This is especially important for the depiction of routes, some of which are coloured within particular hereditaments by virtue of being open to such land. Equally, the inclusion of *B.R.* and *F.P.* annotations was purely a result of the OS surveyors rather than any actions of the Finance Act valuers. This section will examine how the bridleways set out by Parliamentary enclosure awards are described and depicted on the Finance Act documents and maps. Such analysis will prove useful to legal inquiries which seek to determine the historic status of rights of way, especially since *B.R.* and *F.P.* annotations have proven a source of ongoing contention.

6.6.1 *B.R.* and *F.P.* annotations on OS maps

It is first necessary to provide a brief background to the OS map making process, particularly the practice of annotating paths. Paths were first annotated *F.P.* in 1883, with *B.R.* following a year later. Complaints were received that such annotations may be mistaken for *public* bridleways and footpaths. Landowner complaints were especially prevalent in *The Times* in 1885, for instance: ‘many mere private and accidental tracks across farms are marked and lettered “F.P.” as

⁷¹⁷ The Finance Act valuers occasionally made manuscript revisions as well, although these were less common.

though they were public footpaths' and 'about a dozen private roads and paths, used solely by my own tenants and gamekeepers for their own convenience, are so marked that no one would suppose that they were not public'.⁷¹⁸ Lieutenant-Colonel Pilkington-White clarified the position of the OS in August 1885:

All footpaths (except some in back yards and small gardens), whether public or private, which are a physical feature on the ground are shown on our large scale maps, and the letters "F.P.," signifying footpath, are printed along the path, unless it is a very short one. Mere convenience footpaths for the use of a household, cottage, farm &c., or for the temporary use of workmen, are generally not shown. It is not apparent why an abbreviation of the word "footpath" should mislead those using our maps into conjecturing it meant a public thoroughfare. If we wrote "P.F.," one might perhaps be in doubt whether the path was public or private. But "F.P." is simply intended to distinguish a footway from a bridle road or cart road.⁷¹⁹

Nevertheless, several landowners claimed such 'convenience footpaths' were annotated: 'one quite imaginary path has been marked and lettered', and 'a footpath is shown which is a new trespass by my own shepherd who happened to change his residence shortly before the surveys were completed'.⁷²⁰ This illustrates the ephemeral nature of the survey and the importance of the time at which it was completed. More broadly, such complaints indicate the lack of input landowners had in the surveying process and annotation of routes. The OS issued a statement and ensured all maps from 1888 contained a disclaimer such as:

⁷¹⁸ J. S. G., 'The New Ordnance Survey: To The Editor of The Times', *The Times*, 21 August 1885; J. P and D. L., 'The New Ordnance Survey: To The Editor of The Times', *The Times*, 29 August 1885.

⁷¹⁹ T. Pilkington White, 'The New Ordnance Survey: To The Editor of The Times', *The Times*, 28 August 1885.

⁷²⁰ J. S. G., 'The New Ordnance Survey: To The Editor of The Times', *The Times*, 1 September 1885; 'The New Ordnance Survey: To The Editor of The Times', *The Times*, 5 September 1885.

- 'The representation on this map of a Road, Track or Footpath is no evidence of a right of way'; or
- 'The representation on this map of any other road, track or path is no evidence of the existence of a right of way' for those published after the definitive map.⁷²¹

A circular from 1893 instructed that 'all footpaths over which there is a well-known and undisputed public right of way should be shown' but this does not mean *all* footpaths were necessarily public.⁷²² Conflicting statements from the OS can be found throughout this period, both in the internal circulars and *Instructions to Field Examiners*, and public assertions such as Lieutenant-Colonel Pilkington-White's response to annotations in *The Times*, and the Dorrington Committee report.⁷²³ The OS first issued *Instructions* in c. 1874, and numerous successive revisions were made. The 1905 *Instructions* were the first to include the statement that 'The Ordnance Survey does not concern itself with rights of way, and Survey employees are not to enquire into them'.⁷²⁴ Despite this it also stated: 'A clearly marked track on the ground is not in itself sufficient to justify showing a path, unless it is in obvious use by the public'.⁷²⁵ The 1912 *Instructions* also included the statement that the OS was not concerned with rights of way, but were equally contradictory, continuing:

Paths to be shown on Ordnance Survey plans must be clearly marked and permanent (i.e., gravelled, paved, or defined by stiles, gates, or permanent gaps), and must lead to some place the public want to go, i.e., between two roads or groups of houses, to a church, public well, or assembly room, &c.

⁷²¹ Bucks and Wadey, *Rights of Way*, 166.

⁷²² Planning Inspectorate, *Consistency Guidelines*, Section 12, 6th revision, May 2015, para. 12.21.

⁷²³ Planning Inspectorate, *Consistency Guidelines*, Section 12, 6th revision, May 2015, para. 12.20.

⁷²⁴ Duncan A. Johnston, *Instructions to Field Examiners*, Ordnance Survey, 1905.

⁷²⁵ Duncan A. Johnston, *Instructions to Field Examiners*, Ordnance Survey, 1905.

Paths leading only to a cottage or farm should not be shown, as they are used only by the occupants of the house and their friends, and not the general public.

Except in gardens, or where the omission is not likely to mislead, the initials F.P. should be inserted to foot-paths, with the object of avoiding the chance of their being mistaken on the plans for roads traversable by horses or wheeled traffic.⁷²⁶

These passages suggest that the surveyors were expected to depict all *public* footpaths and only use the *F.P.* annotation where it was necessary to distinguish such paths from bridleways and carriageways. Curiously the 1912 *Instructions* note that bridle roads 'are sometimes the width of the cart-tracks, sometimes only of foot-paths'.⁷²⁷ This suggests that it was not width alone which determined the inclusion of *B.R.* annotations, and other factors were equally important. Thus, while the OS surveyors were given instructions that stipulate the paths to be shown should be public, the official stance of the OS was that public rights of way were not included. Hodson also notes this 'ambivalence' and suggests the OS was concerned about the 'potential unreliability of the information which, in turn, would lead inevitable to endless litigation'.⁷²⁸

6.6.2 Bridleways which are 'white' on the Finance Act maps

Of the 50 bridleways described by Parliamentary enclosure awards in the sample, only five appear entirely 'white' on the Finance Act maps. This means they were not claimed by any single individual and *may* represent routes with public vehicular rights. In total, these five bridleways average 906 metres and connect to 2.4 other routes. Colouring on the Finance Act maps could be inconsistent between adjoining sheets, as well as between the working sheets and record

⁷²⁶ TNA OS 45/11, Instructions to field examiners and revisers, 1912.

⁷²⁷ TNA OS 45/11, Instructions to field examiners and revisers, 1912.

⁷²⁸ Yolande Hodson, 'Ordnance Survey and the Definitive Map of Public Rights of Way of England and Wales', *The Cartographic Journal* 39, no. 2 (1 December 2002): 105.

sheets. For instance, the fourth 'public bridle and footway' in Widford appeared 'white' on the record sheet but coloured on the working sheet (FIGURES 215 and 216).⁷²⁹ This illuminates the complexity of establishing precise landownership boundaries, especially where public rights existed. While leaving a particular route 'white' was the Finance Act valuers' decision, it was determined to an enormous degree by the earlier OS surveyors. As such, routes which are 'white'

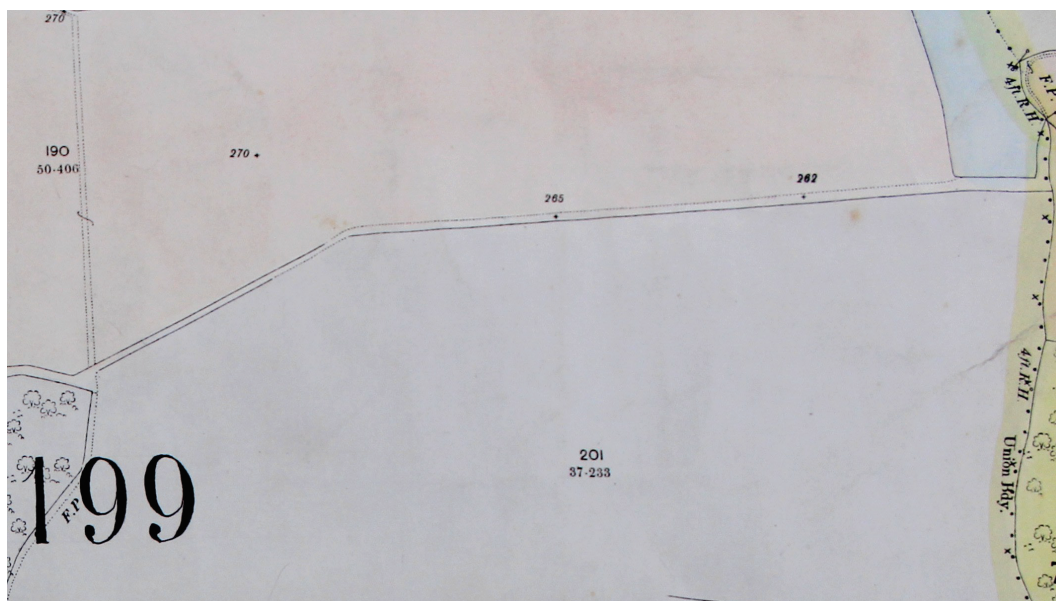


FIGURE 215 TNA IR 126/4/241, Finance Act record sheet Hertfordshire XXX 7, c. 1910.



FIGURE 216 HALS IR1/279, Finance Act working sheet Hertfordshire XXX 7, c. 1909–1910.

⁷²⁹ HALS QS/E74, Widford enclosure award, 1856.

are almost always depicted with two solid lines as these enclosed routes were typically not claimed by adjoining landowners in 1910. While 'white' roads do not conclusively indicate public status, it is telling that the only bridleways which are today highways maintainable at the public expense are all 'white' on the Finance Act maps.

6.6.3 Bridleways which are coloured on the Finance Act maps

Eight of the 50 bridleways, 16 percent, were coloured by the Finance Act valuers as part of hereditaments. In stark contrast to those left 'white', not one of these routes is bounded by solid lines on the OS maps used by the valuation. Again, this illustrates the extent to which the colouring of routes on the Finance Act maps was determined by the decisions of the OS surveyors. By and large, if a bridleway was enclosed, it appeared 'white', and if it was open, it was coloured as part of the hereditament it adjoined.

The bridleways which were coloured on the Finance Act maps average 661 metres, a little shorter than the other categories identified. Most were six feet wide, but average 8.4 feet overall. Also, half of these bridleways were shorter in 1910 compared to their original lengths at Parliamentary enclosure, often because of wider changes made in the landscape, such as the construction of a railway in Standon. Perhaps the defining feature of these coloured bridleways is the proportion which are cul-de-sacs. Four of the eight are cul-de-sacs on the enclosure map, with a further two appearing as cul-de-sacs on the Finance Act map. This was perhaps an important factor in the OS surveyors' decision to leave these routes without *B.R.* or *F.P.* annotations. Variation in OS surveying cannot be underestimated. Although they represent the earliest most consistent survey of the entire country, this is not to presuppose that all surveyors approached annotating routes in the same manner. Different surveyors may have valued the width, surfacing, connectivity, or legal status of such routes differently when deciding whether to apply *B.R.* or *F.P.* annotations. The eight coloured bridleways discussed here illustrate that the OS surveyors were reluctant to annotate

enclosure award bridleways which did not appear to connect to the right of way network. This sample also illustrates the extent to which Finance Act hereditaments mirrored the physical boundaries indicated by the OS surveyors.

6.6.4 Bridleways which are annotated *B.R.* on the Finance Act maps

As discussed, it was the OS surveyors who dictated whether to annotate a particular track *B.R.* or *F.P.*, assigning such annotations based principally on the physical status of routes. Thus, a route annotated *B.R.* was suitable only for bridle and foot traffic, whether public or private. While these annotations did not result from the actions of the Finance Act valuers, it is necessary to examine them as they have proven particularly divisive in legal inquiries. Of the 50 bridleways examined, 20 are annotated *B.R.*, and a further two are partly annotated *B.R.*, totalling 44 percent. While this represents the largest portion of the sample, almost all are in the county of Northamptonshire and it seems the OS surveyors in Hertfordshire and Norfolk utilised the *B.R.* annotation less often. This exposes a remarkable lack of consistency across a cartographic source typically considered uniform. It is easy to fall into this trap as the zincographic printed sheets have the appearance of uniformity yet specific decisions, including annotations, could vary considerably.

Bridleways described by Parliamentary enclosure awards which are annotated *B.R.* on the Finance Act maps are the longest in the sample, averaging 1002 metres. They also represent the widest at 15.2 feet, with only one set out at less than ten feet wide. Width appears to be a deciding factor when the OS surveyed lands in the late nineteenth century: 15 feet wide routes were often assigned *B.R.* annotations, while narrower routes were annotated *F.P.* more often, and wider routes are more likely to appear without annotations. This can be seen in FIGURE 217, which shows a narrow *F.P.* east-west route and a north-south unannotated route. However, this is by no means a clear-cut rule, and many *B.R.* and *F.P.* annotated routes are of equal width.



FIGURE 217 TNA IR 126/4/136, Finance Act record sheet Hertfordshire XIV 6, c. 1910.

All the bridleways examined in this sample connect to at least two other routes, with 63 percent extending outside of the parish. Each must have *appeared* like bridleways in the Edwardian era as they were distinguished from surrounding footpaths and carriageways. The OS surveyors were not casual observers, but trained cartographers whose job was to survey and depict the physical environment. Nonetheless, the physical world is not neatly divided into footpaths, bridleways, and carriageways; routes may be suitable for different forms of traffic at different times of year, and this is constantly changing as the desires and needs of the community change.

6.6.5 Bridleways which are annotated *F.P.* on the Finance Act maps

In this sample, 18 percent of the bridleways described at Parliamentary enclosure are annotated *F.P.* on the OS maps used by the Finance Act valuation, representing the second most common way in which they appear on this source. Again, this decision was solely the responsibility of the OS surveyors and not the Finance Act valuers. A total of eight bridleways were annotated *F.P.* on the

Finance Act maps, with a further two containing an *F.P.* annotation for only part of their length. Aside from one, all appear with double dashed lines, indicating that these routes were open to adjoining land. Six are located alongside field boundaries, such as the 'public bridle road' in Aston and third 'bridleway and foot way' in Benefield.⁷³⁰ FIGURE 218 shows this route in Benefield as well as three *B.R.* routes, marked in yellow. Note that the one to the south of 'Banham Wood' is the same width as the *F.P.* route, illustrating that width was not the sole factor determining how routes would be annotated by the OS surveyors. While the legal



FIGURE 218 TNA IR 127/7/121, Finance Act record sheet Northamptonshire XVIII 7, c. 1910.

⁷³⁰ HALS QS/E10, Aston enclosure award, 1860; NHRO Map/2885, Benefield enclosure award, 1824.

position of public rights of way is fixed, it is a physical reality that some routes changed course without legal mechanism. To take one example, the second 'bridle and footway' in Widford appears on the 1839 tithe map as a dashed path which continues east and then south-east across 'Ainsborough Common Field' (FIGURE 219).⁷³¹ The enclosure Commissioners diverted the footpath to alongside the woodland in 1856 (FIGURE 220). A comparison with the OS map indicates that

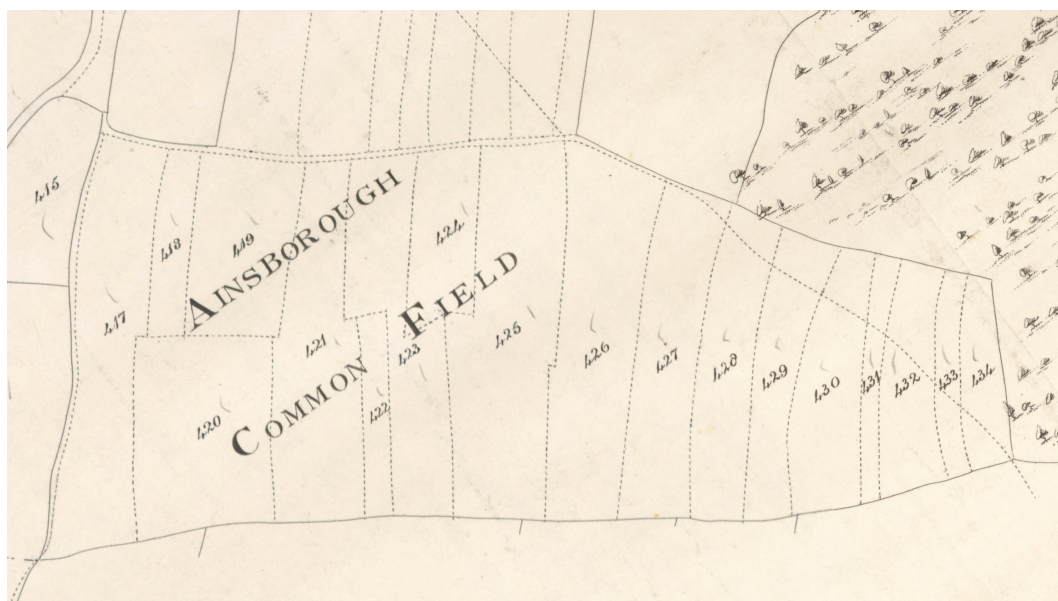


FIGURE 219 HALS DSA4/117/2, Widford tithe map, 1839.



FIGURE 220 HALS QS/E74, Widford enclosure map, 1856.

⁷³¹ HALS QS/E74, Widford enclosure award, 1856.

people using this path had begun to cut across the field rather than continuing along the edge of the wood (FIGURES 221 and 222). Although minor, this illustrates that the public rights of way network could change course through the nineteenth century and would subsequently be legally sanctioned when the definitive map was created in the 1950s.

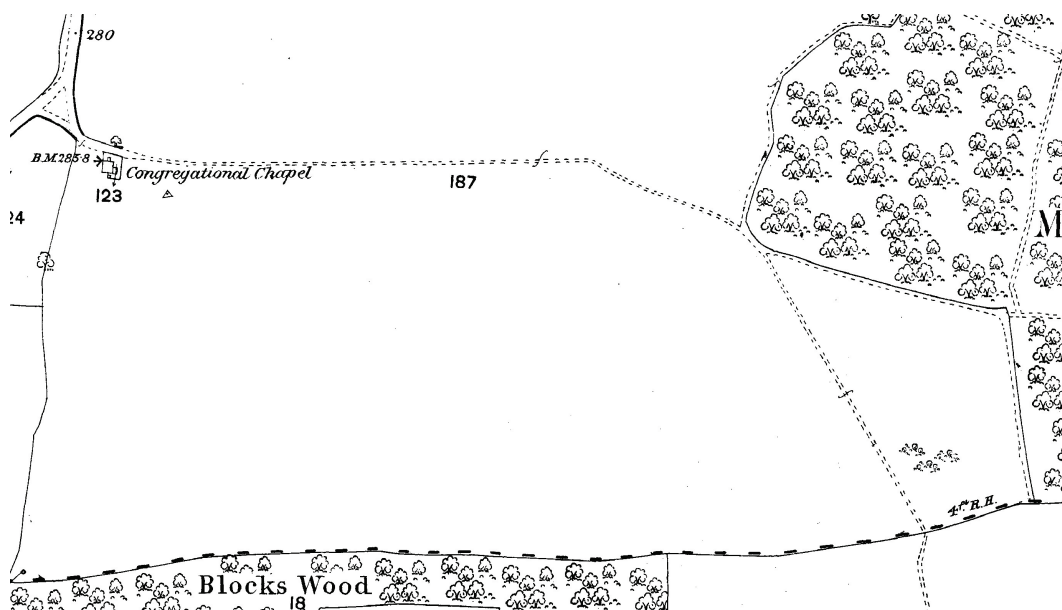


FIGURE 221 Ordnance Survey first edition 1:2500 Hertfordshire XXX 7, c. 1880.

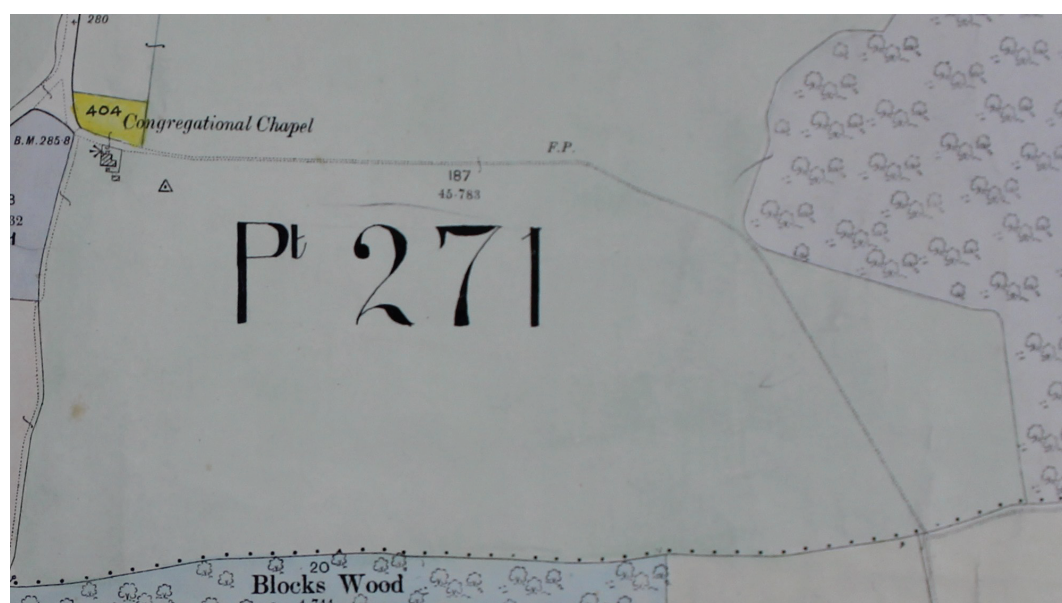


FIGURE 222 TNA IR 126/4/241, Finance Act record sheet Hertfordshire XXX 7, c. 1910.

To summarise, *F.P.* annotated bridleways average 898 metres, among the longest in the sample, and connect to an average of 2.6 other routes. All appear open to adjoining land and are coloured as part of these hereditaments on the Finance Act maps. As such, the bridleways annotated *F.P.* are very similar to those annotated *B.R.*, differing in one key respect: width. Bridleways annotated *B.R.* average 15.2 feet, with only one instance *under* ten feet, whereas bridleways annotated *F.P.* average 8.3 feet, with only one instance *over* ten feet. It certainly seems that width was an important factor which determined whether *B.R.* or *F.P.* would be used by the OS surveyors.

6.6.6 Bridleways which are not depicted on the Finance Act maps

The final eight bridleways described by Parliamentary enclosure awards, accounting for 16 percent, are not depicted on the OS maps used by the Finance Act valuation in any manner. Again, this does not necessarily mean that the public rights of way had been legally extinguished, only that they were not physically apparent when the survey was completed. These bridleways were the shortest in the sample, averaging just 412 metres at enclosure. They also connected to 1.7 other routes, which, together with the coloured bridleways, is the fewest of any category. In many cases the purpose of these bridleways was served by nearby routes. For instance, the fifth 'public bridle road and foot way' in Aynho did not appear on the Finance Act map, but a route was depicted to the east, connecting directly with the sixth 'public bridle road and foot way' to the north (FIGURES 223 and 224).⁷³² It is easy to envisage this route being used in preference to the original bridleway. The usage and maintenance of these particular bridleways set out at Parliamentary enclosure had evidently dwindled to such an extent that they were no longer physically apparent by the end of the Victorian era. These bridleways were the shortest in the sample and connected to few other routes. Nonetheless, even though a physical route was not depicted on the Finance Act maps, this is not evidence that the public bridleways were

⁷³² NHRO Enclosure vol. I, Aynho enclosure award, 1793.



FIGURE 223 NHRO Map/2816, Aynho enclosure map, 1793.



FIGURE 224 TNA IR 126/5/521, Finance Act record sheet Northamptonshire LXII 15, c. 1910.

legally extinguished. In fact, 57 percent are included, at least in part, on today's definitive map.

6.6.7 Conclusions

Bridleways described by Parliamentary enclosure awards appear in five principal ways on the Finance Act maps (FIGURE 225). The largest proportion, 40 percent, are annotated *B.R.* on the OS maps used by the valuation. This indicates that the OS surveyors believed these routes to be suitable only for horse or foot traffic. Likewise, 16 percent contain *F.P.* annotations, again indicating the absence of carriage rights. While such annotations cannot be used as legal evidence, it is informative that the largest proportion of bridleways described by enclosure awards appear with such annotations in the late nineteenth century. A further eight bridleways, or 16 percent, appear without annotations and are coloured as

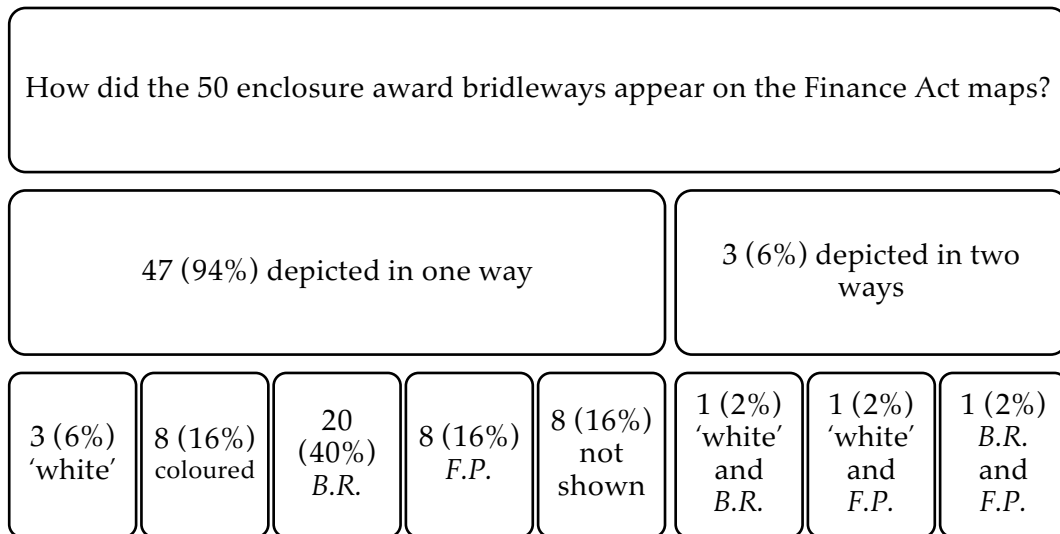


FIGURE 225 How did the 50 enclosure award bridleways appear on the Finance Act maps?

part of hereditaments by the Finance Act valuers. These routes invariably do not connect to the wider network of rights of way. It is possible that they were used as agricultural routes, or that the OS surveyors were reluctant to annotate routes which did not seem to form part of the right of way network. Another eight of the 50 bridleways are not depicted on the OS maps and typically represent the shortest bridleways described at Parliamentary enclosure. It is possible that the usage of these declined to such an extent that they were no longer physically apparent to a trained surveyor. Nonetheless, in the absence of statutory enactment, they will continue to legally exist. Finally, one tenth of the bridleways were left 'white' by the Finance Act valuers. These bridleways are nearly always enclosed on either side and are nearly always the only bridleways that appeared as such on the OS maps. As seen, the Finance Act valuers' colouring was affected to an enormous degree by how these bridleways were depicted by the OS surveyors. Only those bridleways which were indicated with solid lines were subsequently left 'white' by the Finance Act valuers. Despite the fact that the OS surveyors did not purport to show public rights of way, there is certainly a strong correlation in how bridleways described by enclosure awards appear on the OS maps, how they were subsequently coloured by the Finance Act valuers, and how they appear on the definitive map today.

6.7 Footpaths in Finance Act documents and maps

A total of 204 footpaths described by Parliamentary enclosure awards in Hertfordshire, Norfolk, and Northamptonshire were examined as part of this study. Over half of these are in Northamptonshire, a third in Hertfordshire, with the remaining ten percent in Norfolk. These 204 footpaths will be examined based on how they appear on the Finance Act maps to help determine if the valuation documents and OS maps can provide evidence of the existence of public rights of way.

6.7.1 Footpaths which are 'white' on the Finance Act maps

It is very rare for enclosure award footpaths to appear 'white' on the Finance Act maps; of the 204 footpaths examined in this study, only two are entirely 'white'. Both are in the adjoining parishes of Broxbourne and Wormley in Hertfordshire. The Wormley 'public footway' extends to the 'Wharf' and was left 'white' by the Finance Act valuers (FIGURE 226).⁷³³ This was either a mistake or indicates the acquisition of higher public rights, especially considering that either side of the route formed part of a single hereditament. The Broxbourne 'public footway' offers perhaps the most compelling instance of a footpath attaining higher public



FIGURE 226 TNA IR 126/4/274 and IR 126/4/281, Finance Act record sheets Hertfordshire XXXVI 16 and XXXVII 13, c. 1910.

⁷³³ HALS QS/E76, Wormley enclosure award, 1858.

rights by 1898.⁷³⁴ Named 'Church Fields', it was one of the streets built near the railway station. This Finance Act map represented one of the special OS maps 'partially revised in 1911 for Inland Revenue purposes' and includes a dashed outline of what was to become 'St Michael's Road' (FIGURES 227 and 228).⁷³⁵

Two other enclosure award footpaths appear partly 'white' on the Finance Act maps. In Weston, Hertfordshire, only ten percent of the first 'public foot path or way' appears 'white' on the Finance Act map.⁷³⁶ This 'white' portion is entirely adjacent to the '88' hereditament, separated only by a dashed line, and it seems the landowner did not claim ownership of this parcel of land. In Bugbrooke, 22 percent of the third 'public footway' set out by the Parliamentary enclosure Commissioners is enclosed and annotated 'Pilgrims Lane' by the Finance Act

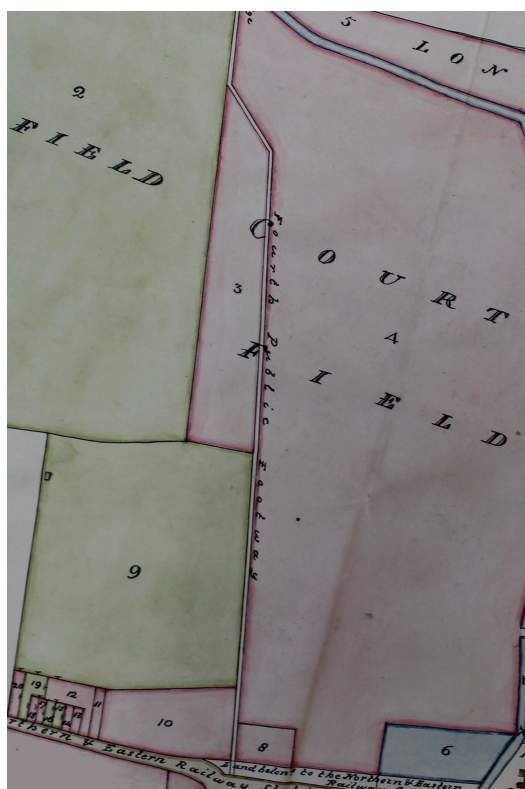


FIGURE 227 HALS QS/E20, Broxbourne enclosure map, 1844.



FIGURE 228 TNA IR 126/4/280, Finance Act record sheet Hertfordshire XXXVII 9, c. 1910.

⁷³⁴ HALS QS/E20, Broxbourne enclosure award, 1844.

⁷³⁵ TNA IR 126/4/280, Finance Act 1910 OS Sheet Hertfordshire XXXVII 9.

⁷³⁶ HALS QS/E73, Weston enclosure award, 1802.



FIGURE 229 TNA IR 126/5/360, Finance Act record sheet Northamptonshire LI 2, c. 1910.

valuers (FIGURE 229).⁷³⁷ It extends from the public road and adjoins nine separate hereditaments and, since no single individual claimed ownership, this section was left 'white'. Contrast this with the remainder of the footpath, which was dashed and formed part of the three hereditaments. Both illustrate the extent to which colouring on the Finance Act maps was dictated by the OS surveyors.

6.7.2 Footpaths which are coloured on the Finance Act maps

A total of nine percent of the Parliamentary enclosure award footpaths in the sample were coloured by the Finance Act valuers. None contained *B.R.* or *F.P.* annotations on the OS maps but, as emphasised, this does not mean that public rights did not exist. Four footpaths appear to have functioned as entrance routes. Some, like the first public footway in Buckland, appeared as wide agricultural routes (FIGURE 230). It can sometimes be difficult to ascertain whether a particular route is annotated. In Bugbrooke for instance, the sixth public footway connects to several routes annotated *F.P.* but does not appear to be annotated itself. Likewise, the first public footway in Widford appears with solid lines but was otherwise contiguous with a *F.P.* annotated route. All in all, these enclosure award footpaths were the shortest and narrowest in the sample, averaging 570 metres and 3.8 feet. Such footpaths connected to an average of 2.2 other routes.

⁷³⁷ NHRO Enclosure vol. G, Bugbrooke enclosure award, 1779.

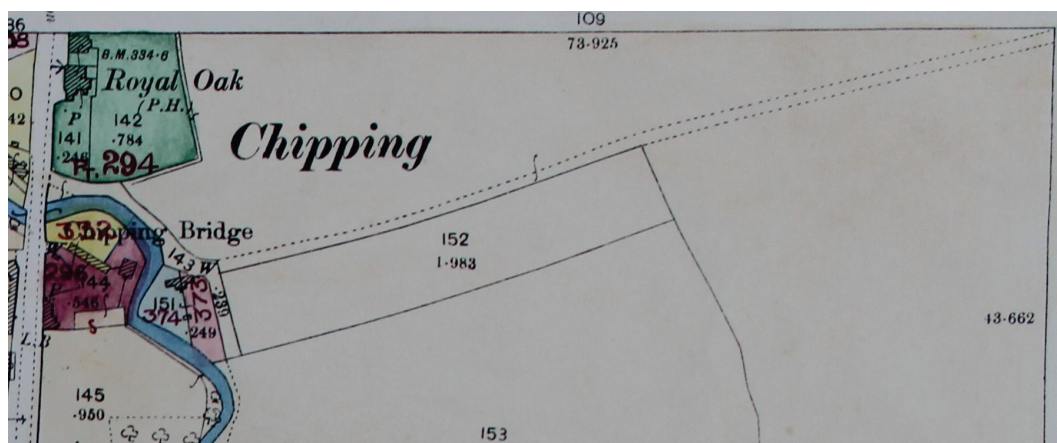


FIGURE 230 TNA IR 126/4/72 part 1, Finance Act record sheet Hertfordshire VIII 16, c. 1910.

6.7.3 Footpaths which are annotated *B.R.* on the Finance Act maps

Only three footpaths described by Parliamentary enclosure awards are annotated *B.R.* on the Finance Act maps. This is a considerable departure from the bridleways discussed above, 40 percent of which appear with *B.R.* annotations. Moreover, there was no correlation between the width, length, and connections of the footpaths at Parliamentary enclosure and their subsequent depiction on the Finance Act maps. In addition, the first 'public footway' in Little Oakley raises some important questions concerning the interpretation of annotations on the OS maps.⁷³⁸ Discerning whether a path is annotated *B.R.* or *F.P.* is usually straightforward but sheet and parish

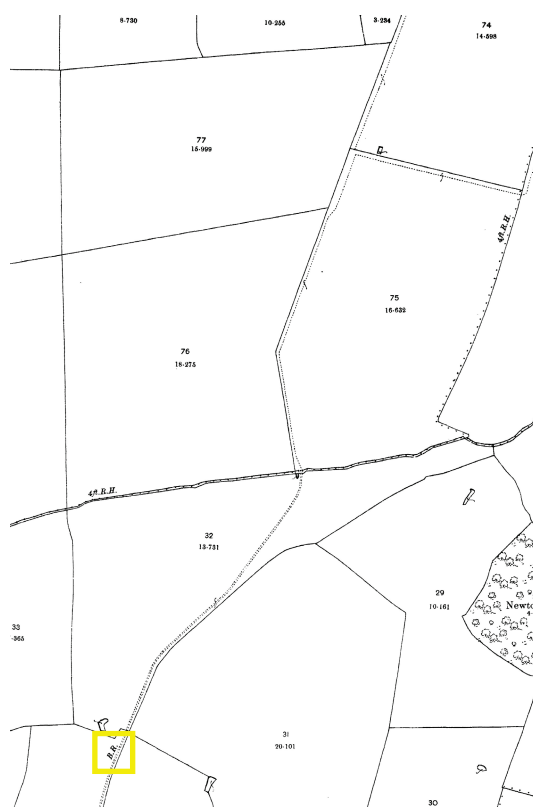


FIGURE 231 Ordnance Survey first revision 1:2500 Northamptonshire XVII 15, c. 1900.

⁷³⁸ NHRO Enclosure vol. N, Little Oakley enclosure award, 1808.

boundaries can create problems. For instance, this footpath was annotated *B.R.* in the parish of Newton to the south, marked in yellow, but was not annotated in Little Oakley (FIGURE 231). It is unclear whether this indicated a physical or legal change in status. Although the OS maps did not officially reflect the legal status of public rights of way, it is informative that so few public footpaths described by Parliamentary enclosure awards later appeared annotated *B.R.* on the Finance Act maps.

6.7.4 Footpaths which are annotated *F.P.* on the Finance Act maps

By far the largest proportion of enclosure award footpaths, accounting for 62 percent of the sample, are annotated *F.P.* on the OS maps used by the Finance Act valuation. This indicates that the OS surveyors deemed these routes to be suitable only for foot traffic, whether public or private. Averaging 844 metres, 4.2 feet wide, and connecting to 2.2 other routes, these footpaths were average in every respect, no doubt because they represented such a large proportion of the sample. The vast majority appeared in precisely the same route indicated by the enclosure maps, but some appear to follow a marginally different course. To take a single example, the third 'public footpath' in Standon, Hertfordshire, extended from the first 'private carriage road and driftway' to the parish of Great Munden on the 1835 Parliamentary enclosure map (FIGURE 232).⁷³⁹ It appears as an *F.P.* annotated route on the 1898 first revision OS map used by the Finance Act valuers (FIGURE 234). However, the earlier 1878 first edition OS map depicts the footpath crossing the western field, and the later 1923 second revision OS map depicts the footpath crossing the eastern field (FIGURE 233 and FIGURE 235). This demonstrates a pattern of change over 88 years which is not reflected in the legal literature. The legal maxim *once a highway always a highway* presupposes that public rights of way cannot change course except by definitive legal fiat. As such most public rights of way were fixed in place in the 1950s when the definitive maps were first compiled. Although legally a public right of way might exist along

⁷³⁹ HALS QS/E61, Standon enclosure award, 1835.

a particular course, the physical reality may differ quite significantly. The OS maps and Finance Act maps capture this complexity. Nonetheless, it is significant that the majority of public footpaths identified by Parliamentary enclosure

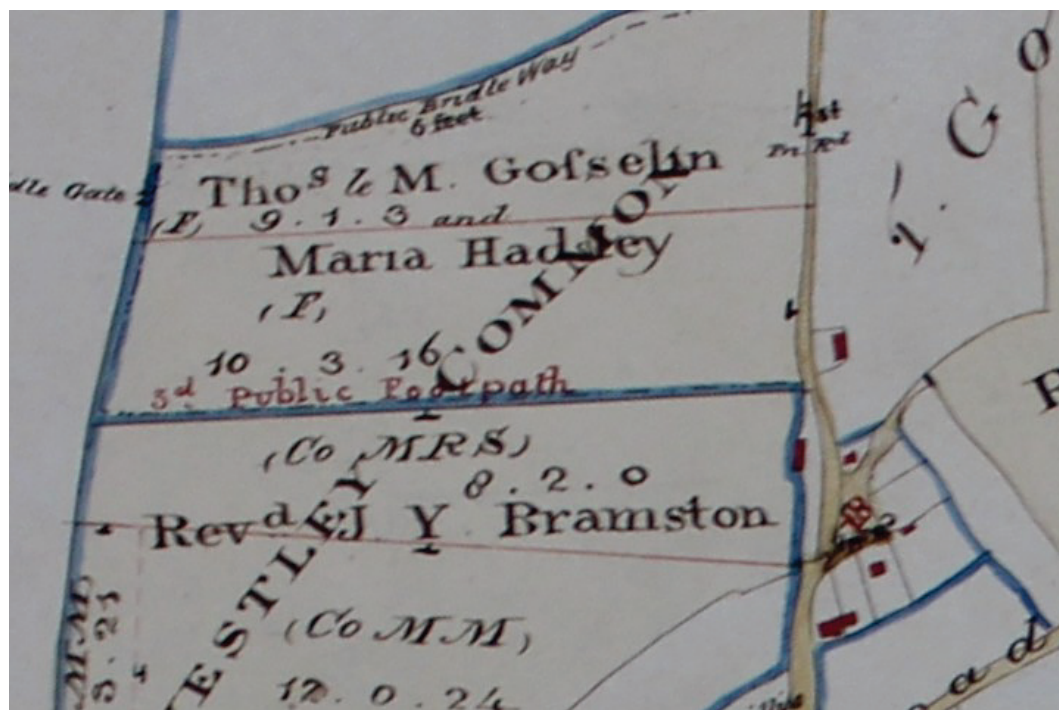


FIGURE 232 HALS QS/E61, Standon enclosure award, 1835.

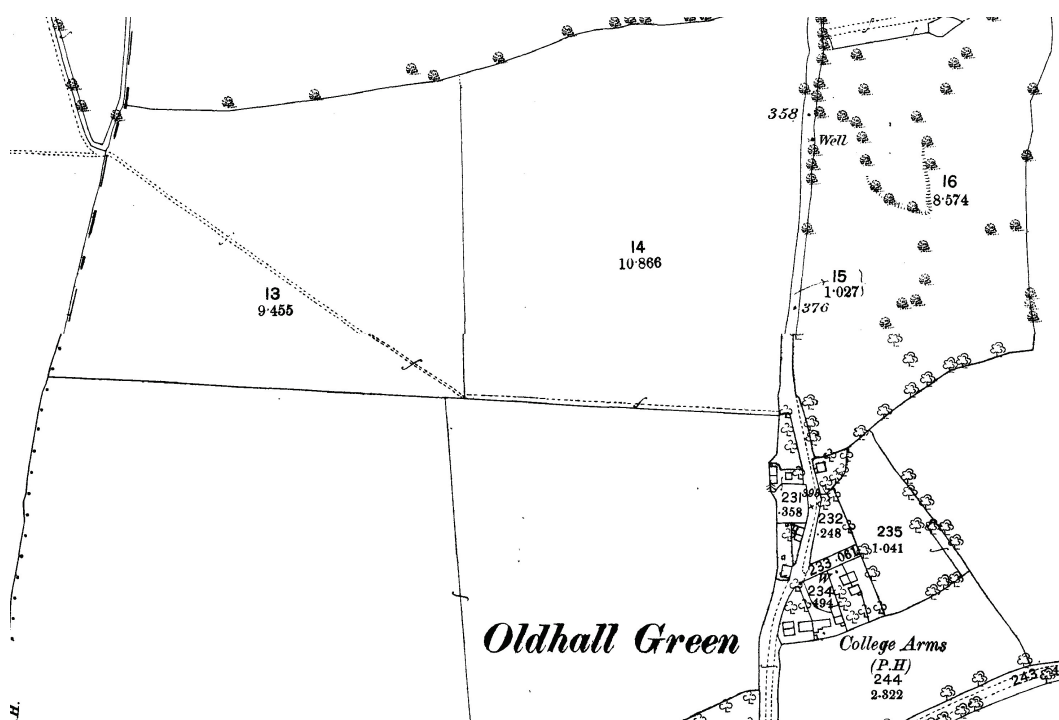


FIGURE 233 Ordnance Survey first edition 1:2500 Hertfordshire XXII 1 and 5, c. 1878.

appear as *F.P.* annotated routes on the OS maps used by the Finance Act valuers, illustrating both the longevity of these routes as well as the faint correlation between *F.P.* and public footpaths.

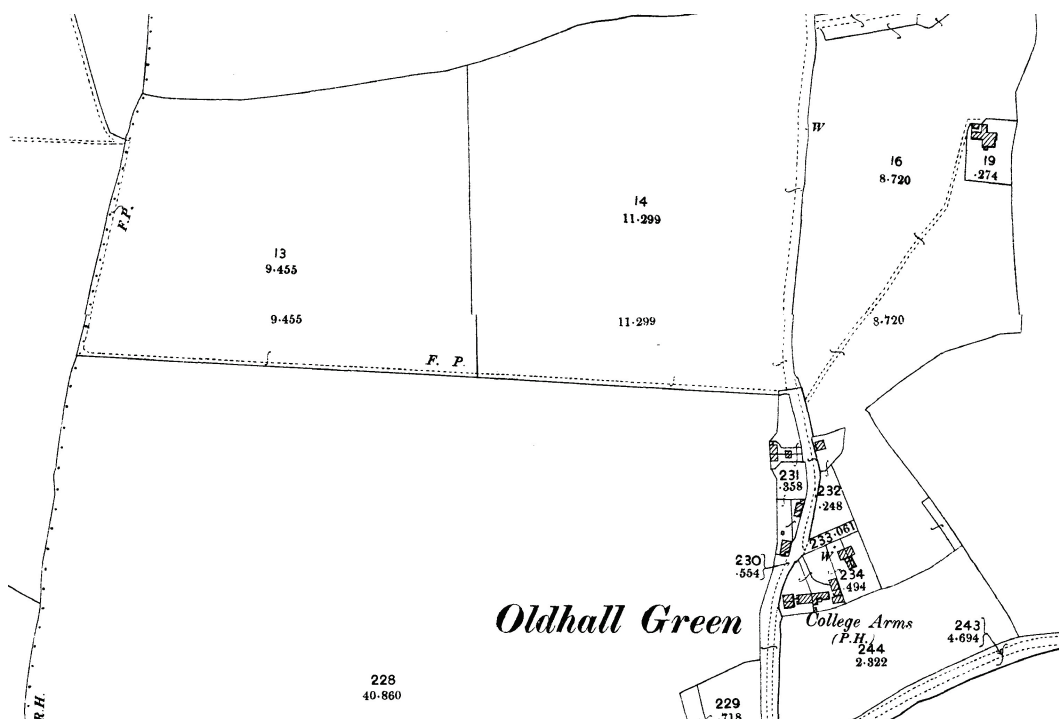


FIGURE 234 Ordnance Survey first revision 1:2500 Hertfordshire XXII 1 and 5, c. 1898.

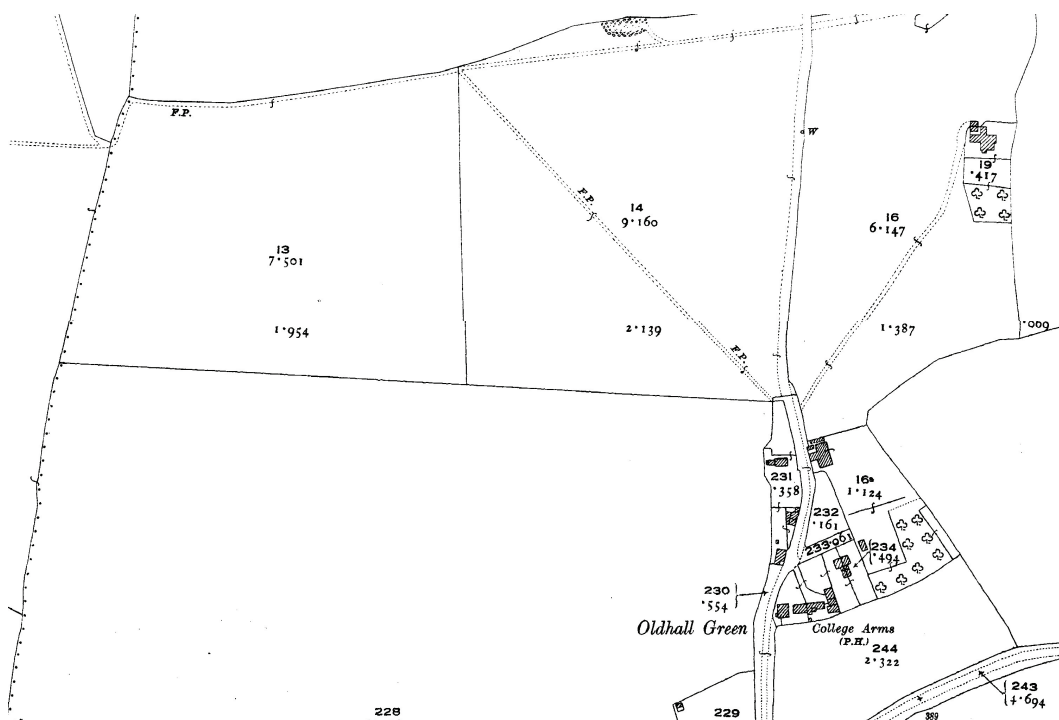


FIGURE 235 Ordnance Survey second revision 1:2500 Hertfordshire XXII 1 and 5, c. 1923.

6.7.5 Footpaths which are not depicted on the Finance Act maps

The second largest proportion of footpaths described at Parliamentary enclosure do not appear on the Finance Act maps at all, totalling 25 percent. Since footpaths represent the narrowest, least well-defined routes, it is to be expected that a survey illustrating the physical world would omit many of them. In the absence of definitive legal fiat, such footpaths continue to legally exist but may not have been physically apparent, even to trained surveyors. It seems the usage and maintenance of such footpaths declined through the Victorian era. If alternative, more convenient routes were available it is likely these would be used instead. As land use and priorities of the community changed, it seems the thinnest lines of communication were the first to fade.

The footpaths which are not depicted on the Finance Act maps were usually shorter, narrower, and less connected than the other Parliamentary enclosure footpaths in the sample. They averaged 577 metres, 4.3 feet wide, and 1.94 connections to other routes. As such, these footpaths represent the least well-connected footpaths identified at enclosure. This is perhaps the best proxy for likely subsequent use, although is far from reliable. Equally, a large proportion of these footpaths were served by nearby routes by the late nineteenth century and it seems these were used in preference to the footpaths depicted on the enclosure maps. The first 'public footway' in Aldenham, among others, did not appear on the Finance Act maps, but nearby routes served the same purpose (Figures 236 and 237).⁷⁴⁰ Sometimes the footpaths appeared superfluous from the date of enclosure. For instance, the first 'public footway' in Bugbrooke and fourth 'public footway' in Paulerspury both served similar functions to other footpaths identified on the enclosure maps.⁷⁴¹ Some public footpaths were set out near or alongside public roads, and it seems usage of such footpaths declined through the nineteenth century. Comparisons between enclosure and Finance Act maps,

⁷⁴⁰ HALS QS/E3, Aldenham enclosure award, 1803; NHRO Enclosure 55, Greens Norton enclosure award, 1799; HALS DE/H/P28, Little Hornead enclosure award, 1864; HALS QS/E73, Weston enclosure award, 1802.

⁷⁴¹ NHRO Enclosure vol. G, Bugbrooke enclosure award, 1779; NHRO ML/1405, Paulerspury enclosure award, 1820.



FIGURE 236 HALS IR1/468, Finance Act working sheet Hertfordshire XXXIX 15, c. 1909–1910.



FIGURE 237 HALS QS/E3, Aldenham enclosure map, 1803.

as well as other OS maps, illustrate the regularity with which paths, particularly unenclosed narrow routes, changed course.

6.7.6 Conclusions

To conclude, footpaths described by Parliamentary enclosure awards are most often annotated *F.P.* on the Finance Act maps. This indicates that the OS surveyors believed these routes suitable only for foot traffic rather than horses or carriages, whether public or private, as was the official stance of the OS. Nonetheless, it is remarkable that so many footpaths appear annotated *F.P.* if, as discussed in Section 6.6.1 above, the legal status was not considered by the OS surveyors. It seems likely that particular surveyors may have interpreted the *Instructions* and circulars in different manners. Indeed, in some cases the *B.R.* and *F.P.* annotations may have been used to distinguish *public* bridleways and footpaths. This analysis has illustrated how far from uniform the OS maps are. A quarter of the footpaths identified are not indicated on the OS maps at all; again, this means the OS surveyors did not note the *physical* existence of a defined route, but such a footpath will continue to have *legal* existence according to the principal of *once a highway always a highway*. As stated, the usage and maintenance of such

footpaths likely declined in the nineteenth century. A further nine percent were depicted by the OS surveyors without annotations and coloured as part of hereditaments by the Finance Act valuers. Such routes were always open to adjoining hereditaments, either alongside a field boundary or across a field. It is possible that these routes were surfaced by the late nineteenth century and additional vehicular rights may have existed. The remaining portion of footpaths described by enclosure awards appear ‘white’, with *B.R.* annotation, or in multiple ways on the Finance Act maps and account for just four percent of the sample (FIGURE 238).

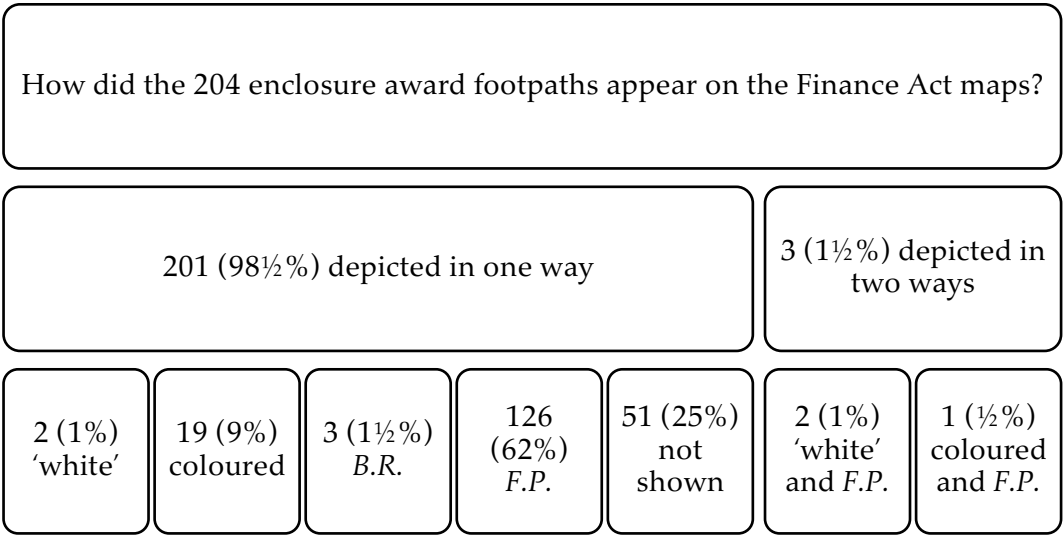


FIGURE 238 How did the 204 enclosure award footpath appear on the Finance Act maps?

While annotations on the OS maps cannot be used as evidence of public rights of way, analysis of bridleways and footpaths described by Parliamentary enclosure awards have been particularly insightful. The most common way for bridleways to appear on the Finance Act maps is with the annotation *B.R.*, representing 42 percent of the sample. Likewise, most footpaths, 62 percent, are annotated *F.P.* on the Finance Act maps. Although far from conclusive, this certainly indicates a correlation between annotations on the OS maps and the network of public rights of way. The following section will explore this further by using the documentary evidence of the Finance Act valuation.

6.8 Public right of way deductions in Finance Act documents

While the Finance Act *maps* constitute strong evidence for establishing the existence of public roads, they offer weaker evidence of bridleways and footpaths. First and foremost, this is because the OS maps officially provide no evidence of the existence of rights of way since the *B.R.* and *F.P.* annotations were used to denote the physical rather than the legal status of paths. As discussed, various *Instructions to Field Examiners* stipulate this while also offering contradicting statements which suggest surveyors should depict only *public* paths. It is hoped that analysis of these documents will shed greater light on the use of the OS maps in legal inquiries.

The Finance Act *documents* on the other hand, provide strong evidence of the existence of public rights of way. The valuation produced a multitude of documents which were outlined in the Chapter 2. Evidence of deductions for 'any public right of way or any public rights of user' were included in several such documents.⁷⁴² Foremost of these are the Valuation Books which represent the final official record of the Finance Act valuation.⁷⁴³ The Field Books were used by the valuers to actually make the valuation, and may include additional information relating to public rights of way.⁷⁴⁴ The Field Book evidence 'varies a great deal from area to area, but at its very best gives an unparalleled view of land use and property'.⁷⁴⁵ The detail accrued therein came from various 'Forms of Return', including 'Form 4-Land' filled out by landowners and 'Form 37-Land' which contained a provisional valuation.⁷⁴⁶ Although many of these forms do not survive, occasionally those which do also contain information relating to public rights of way.⁷⁴⁷ The following analysis is based principally upon the deductions for public rights of way detailed in the Valuation Books.

⁷⁴² Finance (1909–10) Act 1910, 10 Edw. VII c. 8, s. 25(3).

⁷⁴³ Short, *Land and Society in Edwardian Britain*, 25:54.

⁷⁴⁴ Bowles, 'Rights of Way & the 1910 Finance Act', 18–19.

⁷⁴⁵ Tony Austin, 'Field Books: A Twentieth-Century Domesday', *The Local Historian* 16, no. 5 (February 1985): 282–83.

⁷⁴⁶ Short, *Land and Society in Edwardian Britain*, vol. 25, chap. 4.

⁷⁴⁷ Beech and Mitchell, *Maps for Family and Local History*, 66.

6.8.1 'Form 4-Land'

It is necessary to understand the contemporary environment in which the valuation was completed. The 1909–1910 People's Budget introduced an unprecedented tax on landowners and required a comprehensive land valuation of the country. Landowners were expected to complete 'Form 4-Land' with details of any deductions they were claiming. Much like footpaths on the OS maps, numerous complaints were filed in newspapers as many took umbrage to filling out 'Form 4' and the press response was 'extraordinary vociferous'.⁷⁴⁸ As ever, a *Punch* cartoon suitably summarised the situation: 'Free-born Briton who, within the period usually allotted to his holidays, is required, under threat of a penalty of £50, to answer a mass of obscure conundrums relating to land values, in order to facilitate his future taxation' (FIGURE 239).⁷⁴⁹ Complaints ranged from the practical to the political, as some protested the 'complexity and difficulty of the forms themselves', and others argued the 'forms cannot be filled up without paid assistance from solicitors', all amidst wider resistance from aristocratic landowners and the Parliamentary opposition.⁷⁵⁰ The Land Union, a pressure group formed in April 1910, was working to repeal the land taxes.⁷⁵¹ It was necessary for Lloyd George, the architect of the 1909–1910 People's Budget, to respond to these complaints.⁷⁵² The extent to which this outcry reflected the attitudes of the general populace is debatable, and Short attributed it to the timing the forms were issued in 'the holiday season when the press were short of copy'.⁷⁵³ While the *Punch* cartoon portrays a memorable image, it obscures the fact that many had, like a landowner in *The Manchester Guardian*, 'no difficulty in filling up the forms. Four-fifths of his own had been filled up by his office boy.'⁷⁵⁴ This contrasts with the image of an individual landowner struggling with the

⁷⁴⁸ Short, *Land and Society in Edwardian Britain*, 25:60.

⁷⁴⁹ B. Partridge, 'The Holiday Task', *Punch*, 24 August 1910, 137.

⁷⁵⁰ Lloyd George, 'Land Valuation', 7.

⁷⁵¹ David Spring, 'Land and Politics in Edwardian England', *Agricultural History* 58, no. 1 (1984): 31–32.

⁷⁵² Lloyd George, 'Land Valuation', 7.

⁷⁵³ Short, *Land and Society in Edwardian Britain*, 25:62.

⁷⁵⁴ 'Land Valuation Forms: Discussion in the Liverpool Council Chamber', *The Manchester Guardian*, 8 September 1910, 9.



FIGURE 239 B. Partridge, 'The Holiday Task', Punch, 24 August 1910, 137.

forms and illustrates that many large landowners existed who had agents and clerks completing the work. Indeed, some 'had their own copies of Form 4 made

out, which were boldly stamped unofficial at the top'.⁷⁵⁵ The £50 (c. £5000 today) penalty for not returning forms was often remarked upon in the newspapers, but there is no evidence that the Valuation Office charged such penalties.⁷⁵⁶ Out of the 10.7 million 'Form 4's sent out, 9.6 million were returned.⁷⁵⁷ Considering this 1.1 million deficit represents ten percent, it seems the £50 penalty was unenforceable. Indeed, the chairman of the Legal Committee of the Land Union argued that:

unless the notice sent with the form was personally served on the owner...or unless it was posted to him on that date, and received by him within due course of post, he is not liable for any penalty whatever [and could] return the form and notice without comment⁷⁵⁸

This represents a hard-line political resistance to the Finance Act process, and it seems more likely that forms were not returned either because of administrative error, apathy, or ignorance.

6.8.2 Using public right of way deductions as legal evidence

The returns detailed in 'Form 4' were entered into the Valuation Books, including the deductions for 'public right of way or user'. However, four caveats must first be highlighted. First, the valuers could not compel any landowner to claim deductions. 'Different owners may have filled in their forms in different ways, with not all applying for deductions.'⁷⁵⁹ It is not that landowners were not aware they could claim deductions, although this may have occurred, but rather that some were 'uncertain of the precise meaning of words, and afraid of making a mistake'.⁷⁶⁰ Following complaints, Lloyd-George held a conference in which he stated that landowners were 'not bound to express an opinion on intricate legal

⁷⁵⁵ Short, *Land and Society in Edwardian Britain*, 25:63–64.

⁷⁵⁶ Beech and Mitchell, *Maps for Family and Local History*, 38.

⁷⁵⁷ Short, *Land and Society in Edwardian Britain*, 25:63.

⁷⁵⁸ 'The Land Valuation Forms', *The Manchester Guardian*, 2 September 1910, 3.

⁷⁵⁹ Short, *Land and Society in Edwardian Britain*, 25:128.

⁷⁶⁰ 'Mr. Lloyd George and the Land Valuation Forms', 11.

points, such as rights-of-way and ancient rights'.⁷⁶¹ This suggests that some landowners may have avoided claimed deductions because of fear or ignorance. Conversely, some landowners may take the view that 'additional tax liability was less onerous than the implications of disclosing a public rights of way'.⁷⁶² Indeed, particular landowners may have hoped rights would be forgotten if they did not acknowledge them. Thus, the lack of any deduction cannot be used as evidence that a right of way did *not* exist.

Secondly, specific bridleways and footpaths were not claimed, only a total deduction was made based on the *entire* hereditament (parcel of land). This means that the precise location, length, and number of public rights of way cannot be determined from the valuation deductions alone. For instance, a three-acre allotment named 'Smith's End' in Barley, Hertfordshire, was identified as hereditament '418' and contained £10 of public right of way deductions but it is not clear whether such abatements correspond with the three *F.P.* annotated routes marked on the OS map (FIGURE 240).



FIGURE 240 TNA IR 126/4/31 Finance Act record sheet Hertfordshire V 14, c. 1910.

⁷⁶¹ 'Mr. Lloyd George and the Land Valuation Forms'.

⁷⁶² Bowles, 'Rights of Way & the 1910 Finance Act', 17.

Thirdly, hereditaments could represent substantial plots of land encompassing hundreds of acres and may include several detached portions, making the task of identifying possible rights of way all the more difficult. Hereditament '164' in Little Hornead has been marked in yellow to better illustrates this (FIGURE 241).

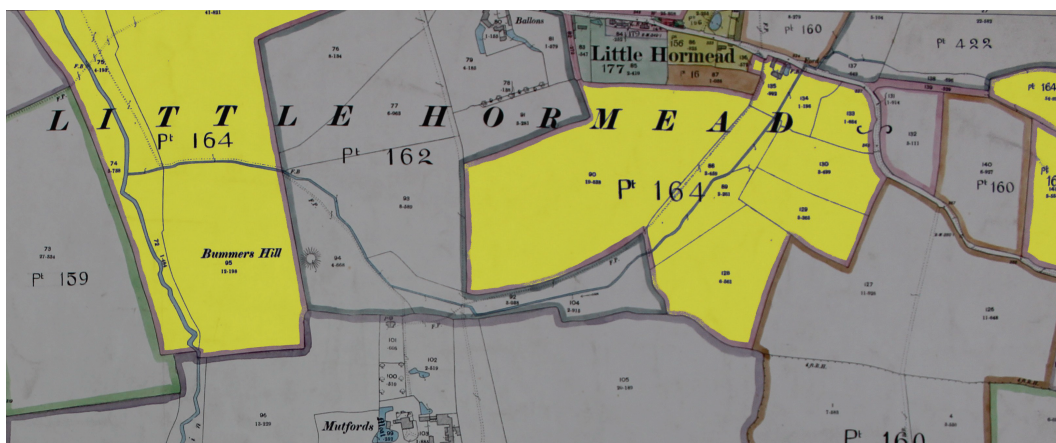


FIGURE 241 TNA IR 126/4/136, Finance Act record sheet Hertfordshire XIV 6, c. 1910.

Finally, no one has yet established an empirical link between the value of public right of way deductions and their corresponding number and length. Hereditaments '386', '418', and '483' in Barley include deductions for public rights of way, so it may be reasonable to infer the path crossing all was being claimed (FIGURE 242). The southern two hereditaments only had deductions worth £10, while hereditament '386' had £75; did this represent a seven-fold increase in the length of public rights of way, wider routes, or higher rights? Theoretically a link exists but establishing one represents a substantial undertaking which has yet to be completed.

Given the large number of hereditaments in the sample, comprehensive analysis would have been prohibitive, and a sample of 48 parishes in Hertfordshire and Norfolk was investigated, totalling 18,847 hereditaments. Based on this analysis, deductions for public rights of way or public right of user were made in just 2.1 percent of cases. Therefore, it was very rare for landowners to claim public right of way deductions. In fact, the highest proportion of deductions in any parish in



FIGURE 242 TNA IR 126/4/31 Finance Act record sheet Hertfordshire V 14, c. 1910.

the sample was only ten percent in Hexton, and most were between one and four percent. Since landowners did not have to claim deductions, it is probable that more hereditaments held public rights of way left unclaimed by their landowners. This analysis has also shown that greater deductions were claimed in hereditaments which were of a higher value. This typically meant the hereditaments were physically larger and more likely to have public rights of way crossing them, but those with more valuable landholdings may have been more likely to claim deductions. The 'Original Gross Value' of the hereditaments which contained deductions varied from £30 for a cottage in Winterton-on-Sea to £75,517 for Lord Rothschild's 3643-acre Tring Park Mansion. Most were valued between £1,000 and £8,000, a range typical for hereditaments in Hertfordshire

and Norfolk. With an average of £4,300, it seems that landowners who claimed deductions were among the wealthiest. To establish whether the valuation deduction evidence can aid discussions surrounding the OS maps, the bridleways and footpaths described by Parliamentary enclosure awards have been examined below.

6.8.3 Bridleways and deductions in the Finance Act documents

A total of 22 bridleways described by Parliamentary enclosure in Hertfordshire and Norfolk were analysed. Four were excluded from surrounding land and left 'white' by the Finance Act valuers. These bridleways were not part of any hereditament and so no landowner could be taxed nor claim deductions on them. Of more interest are the remaining 18 bridleways which appear in three main ways. First, four bridleways are part of single hereditaments which contain no deductions for public right of way. Each is depicted by the OS surveyors with a *F.P.* annotation and follows the same course as the Parliamentary enclosure map, indicating that a path suitable only for foot traffic continued to exist on this alignment. However, as stated, the absence of a deduction cannot be used as evidence that no right of way existed as landowners were not obligated to claim such abatements.

Second, eight bridleways described by enclosure awards are part of single hereditaments for which public right of way deductions were claimed. Three of these bridleways appear with solid lines on the OS map and were coloured as part of hereditaments by the Finance Act valuers. Two 'public bridle and footway[s]' in Albury are indicated with dashed lines and annotated *F.P.* on the OS maps.⁷⁶³ The final three bridleways do not appear on the OS maps used by the Finance Act valuers. The second 'public bridle way' in Standon corresponded with hereditament '517' (coloured pink) which contains four *F.P.s*, but the £30 deduction could have been made for any number of the paths which may or may

⁷⁶³ HALS QS/E1, Albury enclosure award, 1869.



FIGURE 243 TNA IR 126/4/189, Finance Act record sheet Hertfordshire XXII 1, c. 1910.

not have been depicted (FIGURE 243). This is the essential problem with these abatements: it is impossible to determine the location, length, and number of public rights of way each owner was claiming from the records of the valuation deductions alone. For instance, while the two bridleways in Albury appear as *F.P.* annotated routes, there is no guarantee that the £100 and £30 deductions were made for these specific routes. Nonetheless, it is noteworthy that the hereditaments which contained deductions for public rights of way *always* include multiple *F.P.* annotated routes, whether or not these correspond with the bridleways described by Parliamentary enclosure. This is especially significant considering that only 2.1 percent of hereditaments included deductions for public rights of way.

Third, bridleways described and depicted by Parliamentary enclosure awards did not necessarily correspond with single 1910 hereditaments. Four bridleways extended across two hereditaments. In two cases, both these hereditaments contained deductions for public rights of way, whereas the other two extended across hereditaments which did not contain deductions. The fourth 'public bridle and footway' in Little Hormead is the only bridleway in the study to cross more

than two hereditaments.⁷⁶⁴ All four hereditaments contain deductions as well as *B.R.* or *F.P.* annotated paths. As emphasised, this is not conclusive evidence that a particular route was public, but it does seem very likely. Thus, in those rare instances in which bridleways or footpaths crossed multiple hereditaments, *B.R.* or *F.P.* annotated paths may offer compelling evidence of public status.

With enough data it may be feasible to draw a link between the Finance Act deductions and the corresponding annotations on OS maps. In this case, it is informative that, although there was no obligation to claim deductions, and only 2.1 percent of hereditaments included deductions, 45 percent of the bridleways in the sample were in hereditaments which included deductions. FIGURE 244 illustrates how these bridleways appeared in the Finance Act documents.

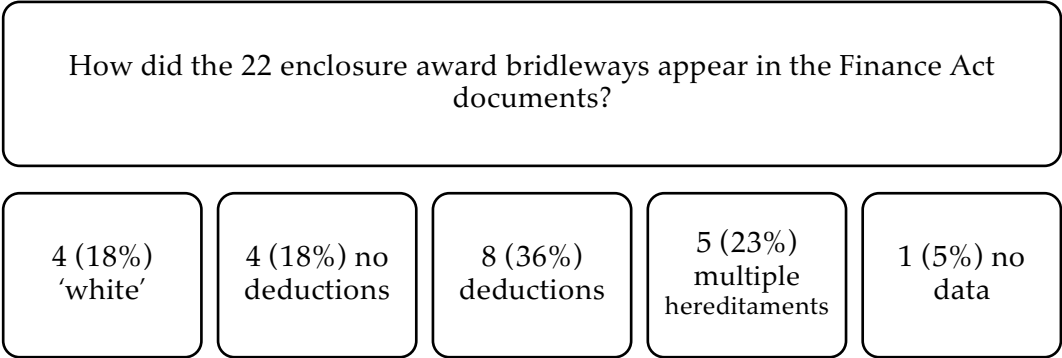


FIGURE 244 How did the 22 enclosure award bridleways appear in the Finance Act documents?

6.8.4 Footpaths and deductions in the Finance Act documents

This section examines the 93 footpaths described by Parliamentary enclosure awards in Hertfordshire and Norfolk to explore the annotations on the OS maps, and the deductions made in the Finance Act valuation. Generally, these were located in hereditaments for which ‘public right of way or user’ deductions were claimed. Only two of the 93 footpaths were left ‘white’ by the Finance Act valuers, both can be excluded since no individual could claim deductions for them.

⁷⁶⁴ HALS DE/H/P28, Little Hornead enclosure award, 1864.

Footpaths in hereditaments with no public right of way deductions

While the absence of a deduction is not evidence that public rights of way did not exist, it is telling that only 17 of the 93 enclosure award footpaths were located in hereditaments which did not claim deductions. Three quarters of these hereditaments contained at least one annotated path with only four containing none. To emphasise again, landowners did not have to claim deductions and so the lack of any is not evidence that a public right of way did not exist. However, the fact that these hereditaments were the only ones to contain no annotated paths indicates a possible link between annotations on the OS maps and public rights of way. FIGURE 245 shows hereditament '846' in Aldenham, which



FIGURE 245 TNA IR 126/10/11, Finance Act record sheet Hertfordshire XLIV 8, c. 1910.

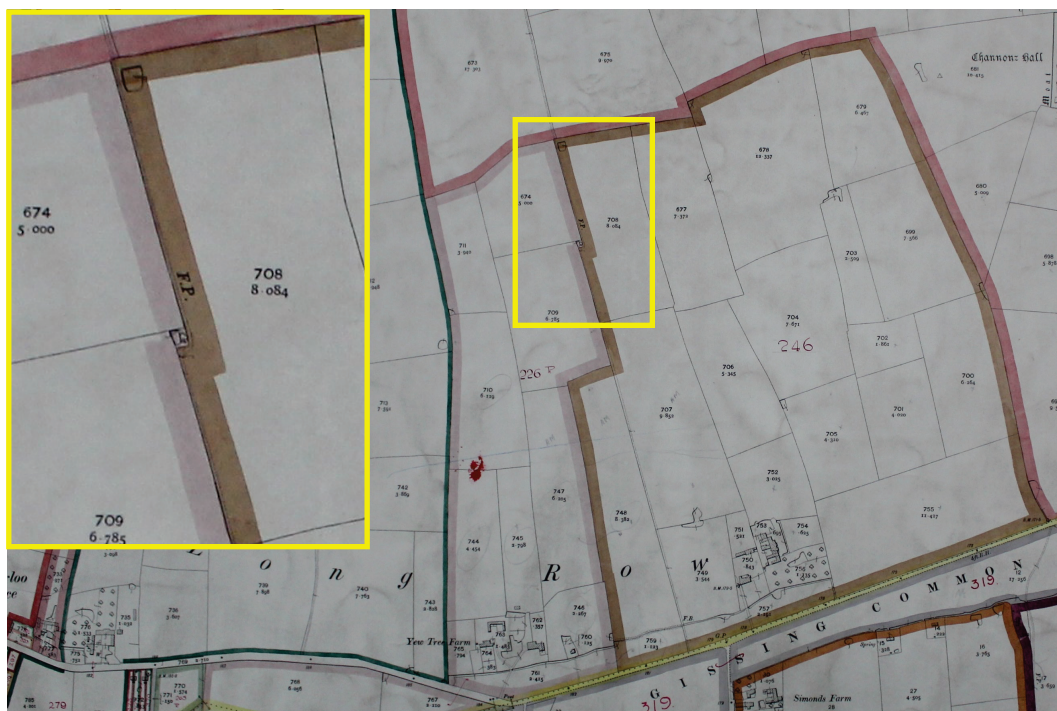


FIGURE 246 TNA IR 127/6/651, Finance Act record sheet Norfolk XCVI 15, c. 1910.

contained no paths, annotated or otherwise. FIGURE 246 shows hereditament '246' in Tibenham, which contained a single *F.P.* annotated path. Neither landowner claimed deductions for public rights of way.

Footpaths in hereditaments with public right of way deductions

Half of the footpaths described by Parliamentary enclosure awards are found in hereditaments which contain public right of way deductions. While a deduction constitutes strong evidence that a public right of way existed, the precise number, length, and location of these are difficult to determine. Theoretically, it is possible for deductions to be claimed in hereditaments which did not depict paths. However, this did not occur in the sample analysed. *F.P.s* were *always* depicted in the hereditaments for which deductions were claimed. This is a substantial finding as it illustrates a conclusive link between annotated paths on the OS maps and Finance Act public right of way deductions. Hereditaments which contain footpaths described at Parliamentary enclosure always had at least one *F.P.* annotated path (FIGURE 247). Moreover, hereditaments with more annotated

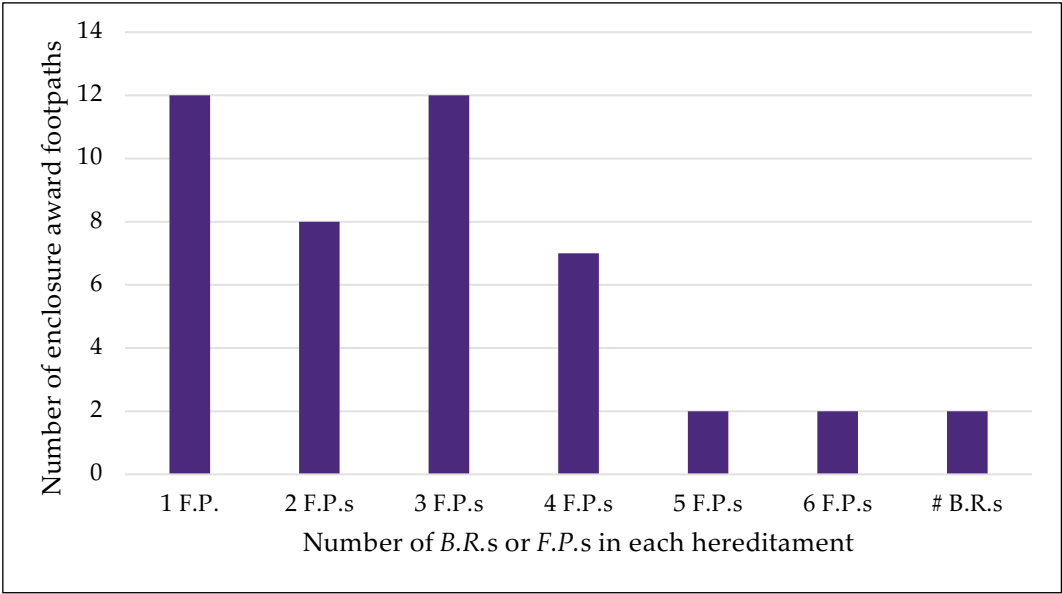


FIGURE 247 Number of annotated paths within hereditaments which contain footpaths described by Parliamentary enclosure awards.

paths generally claimed greater deductions (FIGURE 248). Those hereditaments which contained one *F.P.* included deductions averaging £24, ranging from £2 and £7 in Norton Subcourse, a village on the Norfolk Broads, to a £70 deduction in the more urban setting of Broxbourne, Hertfordshire. In Wormley, hereditament ‘512’ contained £120 of public right of way deductions in a property with an ‘Original Gross Value’ of £12,585 which contained four *F.P.* annotated

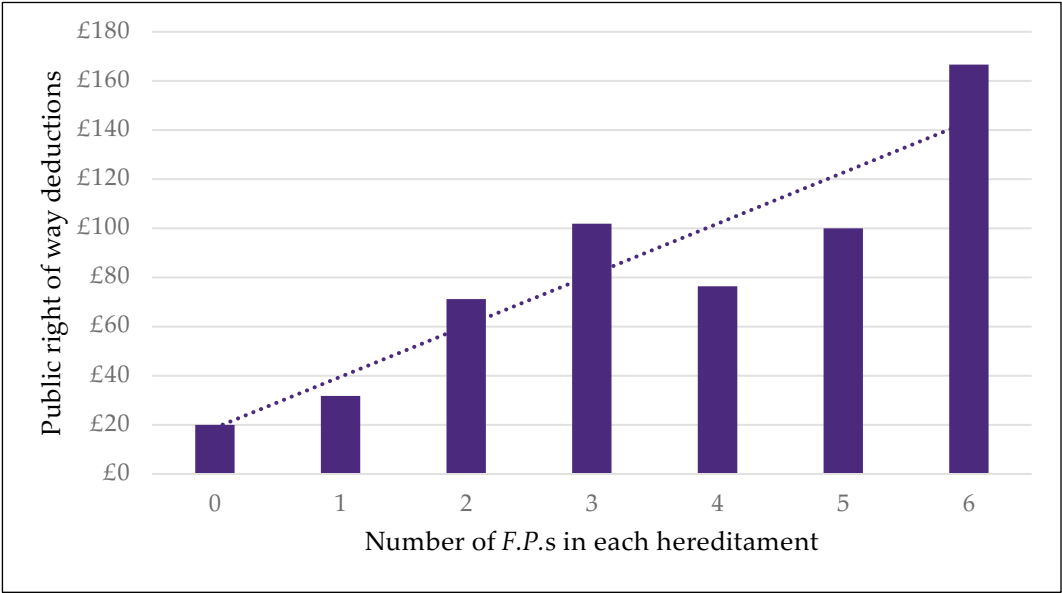


FIGURE 248 Average public right of way deduction for hereditaments based on number of *B.R.* and *F.P.* annotated paths.

paths (FIGURE 249). The overall value of the land certainly influences the total deductions claimed as a public right of way crossing higher value land was deducted at a higher rate than poorer quality or situated land. More work remains to be completed, as it may be possible to establish an empirical link between the value of deductions and the length and status of public right of way being claimed. This research has established a link between the value of deductions and the number of annotated paths depicted in these hereditaments. It may be possible to establish what paths the landowner was claiming deductions for by referencing other Finance Act source material such as the Forms of Return, Field Books, or working sheets.

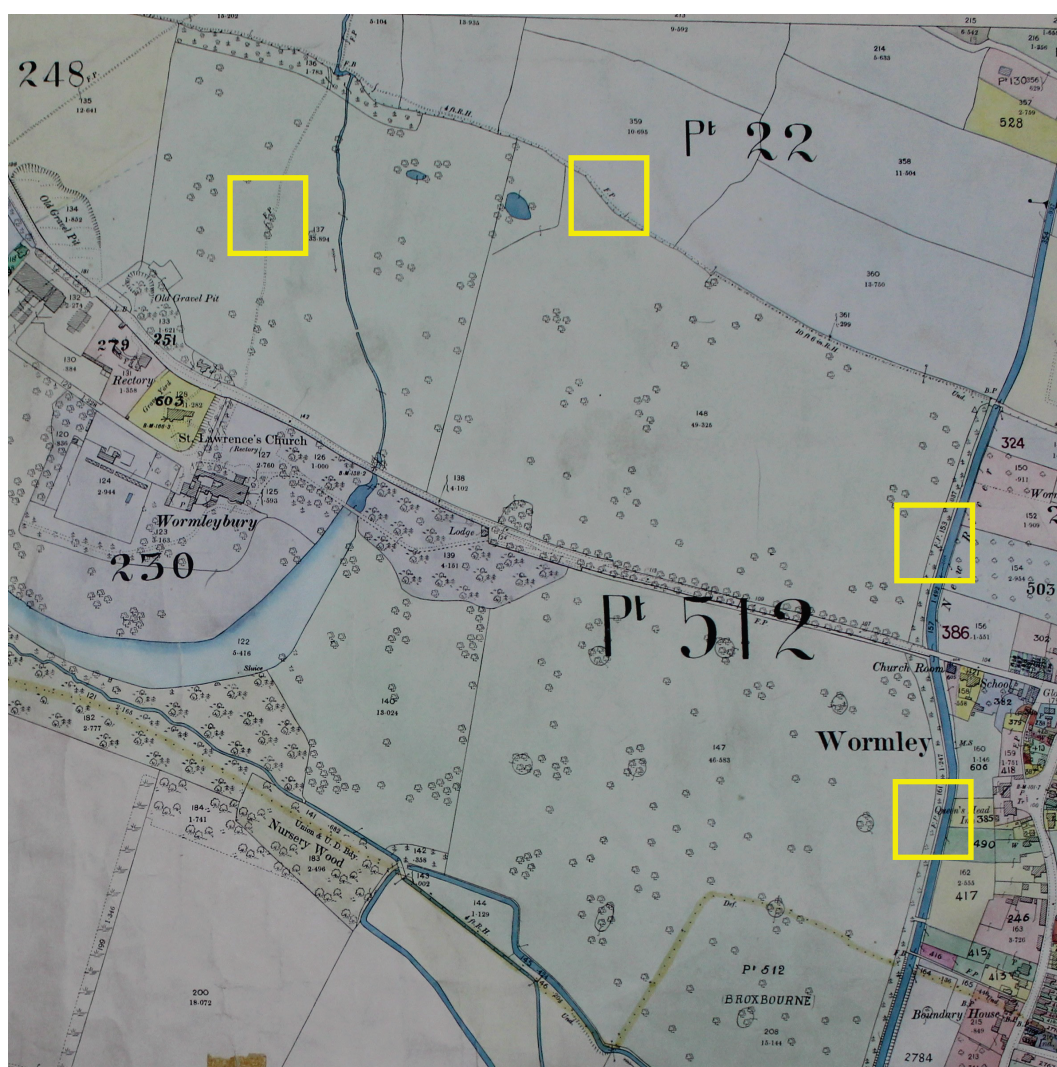


FIGURE 249 TNA IR 126/4/274, Finance Act record sheet Hertfordshire XXXVI 16, c. 1910.

Footpaths in multiple hereditaments

The final quarter of footpaths described by Parliamentary enclosure awards, totalling 24, correspond with two or more hereditaments. FIGURE 250 shows the sixth public footpath in East Ruston which appears across two hereditaments, '281' and '230' as well as a detached portion of '281'. While '281' contained £100 of public right of way deductions, the owner of '230' did not claim any. Overall, these 24 footpaths described by Parliamentary enclosure awards correspond with 61 hereditaments on the Finance Act maps. The owners of three-fifths of these hereditaments claimed deductions for public rights of way. This is a large proportion considering only 2.1 percent of all hereditaments in the sample



FIGURE 250 TNA IR 127/6/234, Finance Act record sheet Norfolk XXIX 16, c. 1910.

included public rights of way deductions. Remarkably, all 36 hereditaments with deductions for public rights of way contain an annotated path on the OS maps: 35 contain at least one *F.P.* path, and one hereditament contains a *B.R.* path. The owners of the other 25 hereditaments did not claim deductions for public rights of way, and six of these, representing a quarter, contain no annotated paths. While this sample is limited in size and scope, it illustrates a link between public right of way deductions and those paths annotated *B.R.* or *F.P.* on the OS maps.

Summary

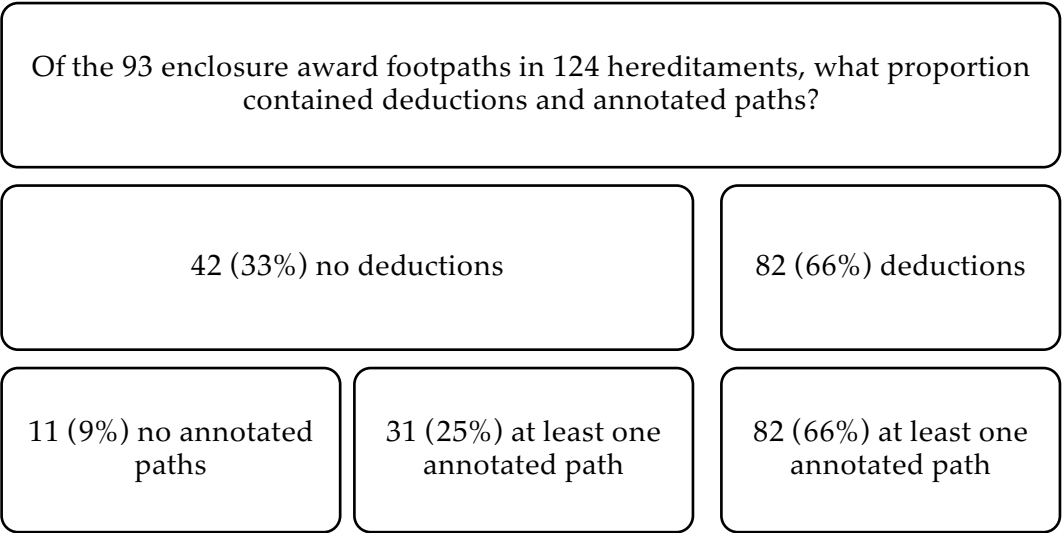


FIGURE 251 Of the 93 enclosure award footpaths in 124 hereditaments, what proportion contained deductions and annotated paths?

Although many land boundaries changed dramatically following Parliamentary enclosure, 63 of the 93 enclosure award footpaths correspond with single hereditaments on the Finance Act maps. These 63 hereditaments included public right of way deductions three fifths of the time. A quarter of the footpaths extend across multiple hereditaments on the Finance Act maps. Taken altogether, this means the 93 footpaths described by Parliamentary enclosure awards correspond with 124 hereditaments. Landowners claimed deductions for public rights of way for 82 of these 124 hereditaments, representing two thirds (FIGURE 251). This is a

substantial proportion considering only 2.1 percent of all 18,847 hereditaments in the sample include public right of way deductions. Most strikingly, all 82 hereditaments for which deductions are claimed include at least one annotated path. In contrast, 11 of the 42 hereditaments which include no deductions do not contain any annotated paths. This means landowners only claim deductions in hereditaments which contain annotated paths (FIGURE 251). Such a finding is of paramount importance as it reveals an important link between deductions made for public rights of way and the *B.R.* and *F.P.* annotations on the OS maps.

6.8.5 Conclusions

While not an exhaustive exercise, this analysis has helped clarify how the Finance Act valuation deductions can be used to determine the status of public rights of way. It reaffirms the limitations of the source since:

1. landowners were not obliged to claim deductions,
2. deductions were based on entire hereditaments,
3. hereditaments could be large and include detached portions, and
4. how the value of deductions was calculated is undetermined.

The 1909–1910 People’s Budget was born out of controversy and represented a fundamental change in how land and agriculture were valued. Examination of press coverage during the valuation process reveals widespread agitation of landowners, both of a constitutional and political nature, as well as practical in the ‘not readily intelligible’ ‘Form 4’s.’⁷⁶⁵ It was widely reported that landowners would have difficulty with the ‘intricate legal points’, particularly claiming deductions for rights of way, rights of user, and easements.⁷⁶⁶ Landowners may have been hesitant to claim deductions, fearing fines if they made an error. Equally, some landowners may have deliberately avoided claiming deductions

⁷⁶⁵ Spring, ‘Land and Politics in Edwardian England’, 31.

⁷⁶⁶ ‘Mr. Lloyd George and the Land Valuation Forms’, 11.

for public rights of way as they did not want to acknowledge and perpetuate such rights, fearing increased use and expense. Whatever the reason, this study has found that deductions were extraordinarily rare: only 2.1 percent of the 18,847 hereditaments examined included deductions for 'public right of way or user'. Such a finding offers wide-ranging implications for future legal disputes.

These investigations have also explored a long-standing issue concerning annotated paths on the OS maps. *B.R.* and *F.P.* annotations were a source of agitation for landowners in the 1880s when they were first used on large-scale OS maps. As discussed in Chapter 2, numerous complaints were printed in newspapers in 1885, and the OS affirmed their position that such annotations were used only to distinguish the physical and not the legal status of paths. Nevertheless, circulars and *Instructions to Field Examiners* continued to contradict each other, suggesting surveyors were to depict only *public* footpaths. This evidence has never been combined with the Finance Act valuation deductions for public right of way. As stated, 18,847 hereditaments were analysed with a focus on the 22 bridleways and 93 footpaths described by Parliamentary enclosure awards depicted in Hertfordshire and Norfolk. Those hereditaments which contained deductions *always* included an annotated path. Aside from one, which was a *B.R.*, all were *F.P.s*. This analysis forms the first step in understanding the link between annotated paths on OS maps and the deductions claimed through the Finance Act valuation. More research remains to be done but already it is clear that this would be immensely valuable in public right of way inquiries.

6.9 Bridleways and footpaths: conclusions

Footpaths and bridleways have attained further significance over the last century, by providing access into the countryside for the increasing number of ramblers and leisure horse riders.⁷⁶⁷ Today, public bridleways and footpaths are more important than ever as the legislative changes resulting from Countryside and Rights of Way Act 2000 specify 2026 as the cut-off date for adding historic rights of way to the definitive map.⁷⁶⁸ The COVID-19 pandemic has illustrated the importance of access to the countryside as national restrictions have increased the numbers of people using local public rights of way. This has placed a greater emphasis on particular public rights of way, especially those on the urban fringes, and has brought questions concerning rights of way to the foreground. Bridleways and footpaths have formed the subject of innumerable public inquiries and court cases. Such investigations typically seek to ascertain the legal status of rights of way by recourse to user evidence or historical evidence. As outlined, the Parliamentary enclosure awards, Tithe Act 1836 apportionments, and the Finance Act 1910 documents form the three principal sources used to determine the historic status of rights of way.

This study has also examined pre-enclosure cartographic evidence in order to ascertain the possible origins of rights of way. Pre-enclosure sources typically illustrate more complex arrangements of fields, landholding, routes, and tenure when compared to post-enclosure maps. The extent to which such sources accurately reflect the contemporary landscape and were not limited by antiquated surveying methods, an inability to reflect customary rights, and different aims of the public and the elites who created them, is an open question. This, of course, is well known to landscape historians:

Court records provide invaluable access to the knowledge and memories of local people which, when used in conjunction with cartographic material, highlights the powerful meanings and associations attributed to

⁷⁶⁷ Sauvain, *Highway Law*, 2013, 12.02.

⁷⁶⁸ Countryside and Rights of Way Act 2000, s. 53.

various landmarks. The depiction or indeed omission of the features discussed during court proceedings points to the complex interplay between elite and popular understandings of the landscape.⁷⁶⁹

The depiction of the right of way network on pre-enclosure cartographic sources highlight such friction between the organised, idealised view of an estate, and the difficulty in capturing the numerous winding 'desire lines' of the community. This study has indicated the abundance of routes which existed in the pre-enclosure landscape of commons and open fields and the extent to which Parliamentary enclosure clarified both the physical and legal landscape.

Comparisons with the pre-enclosure tithe maps show how often Parliamentary enclosure Commissioners confirmed and created bridleways and footpaths from existing routes. Overall, 78 percent of the bridleways set out at enclosure appear on the earlier tithe maps, and were probably confirmed, upgraded, or downgraded by the enclosure Commissioners. Only two footpaths were found which were conclusively newly created by the enclosure Commissioners. All other footpaths may have existed, however informal, seasonal, and unstructured, and were rationalised by the Parliamentary enclosure process. Overall, this study emphasises how difficult it is to decipher the pre-enclosure landscape from cartographic evidence alone. The tithe Commissioners were not intent on depicting the physical or legal status of rights of way, but rather assessed the titheable value of land. It is therefore unsurprising that public bridleways and footpaths rarely appear conclusively in the tithe apportionments and maps.

The tithe surveyors and map-makers were intent on depicting the physical rather than the legal world. Only the most well-connected, widest, and most physically apparent bridleways appear on tithe maps produced after Parliamentary enclosure, whereas two-thirds were not depicted at all. Likewise, three-quarters of the enclosure award footpaths do not appear on these tithe maps. Notably, there is a clear parallel between the map-makers and the decision to include public footpaths. Of the 13 footpaths annotated as such on the tithe maps, 11 are

⁷⁶⁹ Whyte, *Inhabiting the Landscape*, 90.

the work of John Durham. The individual proclivities of tithe surveyors and map-makers are no doubt vital when it comes to decisions to add additional extraneous information such as rights of way.

Finally, the Finance Act documents were examined together with the OS maps, which were used to create the Finance Act maps. The colouring applied by the Finance Act valuers was determined to an extraordinary degree by the OS. Thus, enclosure award bridleways which appear enclosed in the late nineteenth century and are depicted with solid lines on the OS maps are always left 'white' by the Finance Act valuers. In fact, across the entire sample of 1,972 recorded routes, 875 appear 'white' on the Finance Act maps. Only 2.2 percent of these are not indicated with solid lines: 1.3 percent with a dashed line open to adjoining land; and 0.9 percent with double dashed lines. It was therefore very rare for the Finance Act valuers to leave dashed routes 'white'. Moreover, it is clear that the *B.R.* and *F.P.* annotations on the OS maps are significant. While the legal position of the OS is clear and noted by their famous disclaimer, the historical evidence is not quite so clear cut. Various circulars and *Instructions to Field Examiners* contradict one another and contribute to the idea that surveyors were afforded freedom to make their own decisions. This study has indicated a pronounced link between the bridleways and footpaths described by Parliamentary enclosure awards and the *B.R.* and *F.P.* annotations used by the OS surveyors. Most bridleways are annotated *B.R.*, representing 42 percent of the sample. Likewise, 62 percent of the footpaths appear with *F.P.* annotations. There is also a strong correlation between such annotations and how the rights of way subsequently appear on the definitive map, although this requires further research. Of particular interest is the deductions made from the Finance Act valuation, which offer an excellent source of evidence for the existence of public rights of way, yet have not been analysed in such detail before now. This study has uncovered an unquestionable link between hereditaments which contain deductions for public rights of way, and the paths annotated *B.R.* or *F.P.* by the OS surveyors. The ground is ripe for future research, especially as the 2026 deadline to add historical rights of way to the definitive map draws ever nearer.

7 Conclusions

This thesis has examined how historic sources can be used to determine the legal status of rights of way. It advocates for a more holistic approach supported by detailed technical analysis of sources within their historic context. Three sources are used most often to determine the legal status of rights of way in the past: the Parliamentary enclosure Acts, awards, and maps; the Tithe Act 1836 apportionments and maps; and the Finance Act 1910 documents and maps. These sources undoubtedly offer the most comprehensive and best surviving evidence of historic legal status, but often fall short of modern expectations. While each *individual* source rarely offers conclusive evidence of status, they can offer a compelling case when used in combination. Rights of way matters are tested on the 'balance of probability', which is the standard of proof required in civil cases, rather than the criminal test of 'beyond reasonable doubt'. This means a scenario need not be conclusive or 'beyond reasonable doubt' to succeed, it need only be more likely than other scenarios put forward. This balancing of evidence has long been contentious for rights of way matters which seek to determine the precise legal rights of a particular route at some time in the past. Judgements must be made based on the most accurate interpretation of the surviving evidence.

A novel approach is employed by this thesis to better determine how the Parliamentary enclosure, tithe, and Finance Act documents can be interpreted and weighed. A total of 1,972 routes were examined from the sample counties of Hertfordshire, Norfolk, and Northamptonshire. While these counties represent a diverse range of landscape types, they are not representative of England as a whole. The value of this analysis instead lies in the comparisons between the historic cartographic and documentary sources, and the patterns uncovered which can readily be applied to other regions where the sources do not survive. This thesis uses a range of methodologies from landscape history, historical geography, and the history of cartography to re-evaluate how the three principal forms of historic evidence should be valued. While archaeological and other field

evidence forms a key part of landscape history methodology it has not been used in this study because the case law demonstrates that documentary evidence is preferred in historic rights of way matters. This is not to say it is not important, indeed, it may prove pivotal in some cases, and a thorough study of the extent to which field evidence can support the legal interpretation of rights of way would be a valuable endeavour. Fundamentally, this examination of legal inquiries and court cases illustrates severe shortcomings in how the cartographic and documentary evidence is interpreted. Each is only understood in how it can aid or hinder a case, with little regard given to *why* the sources depict rights of way in the manner they do. Individual routes are judged according to how they are described and depicted, and a wealth of knowledge has been accumulated by inquiries and case law, but this has never been synthesised. No attempt has previously been undertaken to systematically analyse a wide range of routes to uncover patterns in their description and depiction. This detailed technical analysis has already uncovered several notable patterns which will provide greater authority to future judgements which seek to determine the historic status of routes.

An examination of pre-enclosure maps illustrates the blurry line between commons, greens, strips in the open fields, verges, and highways. This may reflect a limitation of surveyors and cartographers at the time, but likely reflects the *fluidity* of rights which were shaped more by commons and custom than definitive legal fiat. Comparisons between pre-enclosure maps and Parliamentary enclosure maps demonstrate the extent to which Parliamentary enclosure Commissioners clarified both the physical and legal status of many routes. Barring more significant change, transport networks remained relatively stable as 'settlement-linking' and 'resource-linking' routes were utilised in similar ways by each generation.⁷⁷⁰ Public roads usually appear on the earlier maps, but were typically narrowed, straightened, widened, or otherwise physically

⁷⁷⁰ These terms were first used by Harrison, 'A History of Evolution and Interaction'.

improved by the Parliamentary enclosure Commissioners. It can be surmised that the legal status of these routes was also clarified. This study confirms that earlier Parliamentary enclosure awards tended to make more widespread changes to the right of way network. Far fewer public roads were described by later awards, and these were typically shorter and narrower than the earlier public roads. Nearly all public roads were well-connected and served as access routes to three or four other routes.

While Parliamentary enclosure Commissioners occasionally created entirely new public roads, they more often straightened, widened, or narrowed the existing network. Remember that no Commissioner worked on a blank canvas, each worked within the existing landscape to accommodate the wishes of the local community, or rather, the local landowners. The fact that so few changes were made is a testament to the efficiency of the public road network which had evolved in the centuries prior to Parliamentary enclosure. Of those diversions which did take place, relatively few expanded estates and rerouted public roads further from county houses. Such manifestations of power have long been studied by landscape historians, but this research has shown that local elites utilised Parliamentary enclosure to divert public roads far less than other means. Equally, all Parliamentary enclosure diversions appear genuinely more convenient to the public. Such improvements made adjoining land easier to allot, improved road surfacing and drainage, and, by reducing the overall length of public roads, minimised maintenance duties which could be an enormous burden on the local community.

The changes made to the public road network by the Parliamentary enclosure Commissioners were, unsurprisingly, almost always retained in the years and decades following the Act. Notably, only two of the 275 public roads analysed do not appear on the later tithe maps; one is on a different alignment and the other was likely extinguished. Moreover, the public roads *always* appear in a consistent fashion on the later tithe apportionments and maps. Although the public roads are not described and depicted in the same manner across all tithe apportionments and maps, each individual apportionment and map employs the

same colour and absence or inclusion of numbers. This research has also found that individual tithe map-makers tend to depict public roads in the same manner across the multiple maps they created. This discovery could only be made because a wide range of tithe apportionments and maps were compared and helps provide a statistic grounding to knowledge which previously existed only in the body of case law or the minds of practitioners. Further research is needed, but this study highlights one such methodology which has already proven successful in finding patterns.

This thesis has also provided statistic evidence of received wisdom: public roads are nearly always 'white' on the Finance Act maps. Of the 339 public roads examined, 326, or 96 percent, are entirely 'white' on the Finance Act maps. The Finance Act valuers used OS maps as the basis for their valuation, and so the way routes were treated was heavily influenced by the conventions and practices of the OS. This examination reveals the importance of the OS surveyors as the third party who, in addition to the landowners and valuers, determined how routes appeared. One notable finding is that the Finance Act valuers *always* coloured those parts of public roads which were open to adjoining land and indicated with dashed lines by the OS surveyors. This casts doubt over the simplistic use of 'white' as a proxy for public rights. Further research needs to be undertaken to fully understand the motivations and decisions of the OS surveyors, landowners, and Finance Act valuers who helped create these sources.

This thesis has found that public roads described by Parliamentary enclosure awards appear with remarkable consistency on subsequent tithe and Finance Act maps, a pattern which becomes obvious when such a large sample is analysed. The findings have raised important questions concerning current academic understanding of public roads, as well as brought clarity to a complex legal issue.

Private roads have caused considerable confusion for the courts. The term 'private' is regularly misunderstood by historians and lawyers because, as this study has found, the definition changes at different times and in different places.

A detailed analysis of Parliamentary enclosure awards reveals that different *types* of private road were set out by the Commissioners. Some private roads are short cul-de-sacs for the use of individual landowners, while others are long, well-connected routes for entire parishes or townships. It has been suggested that the latter is evidence that the Parliamentary enclosure Commissioners set out *public* roads in the guise of *private* roads.⁷⁷¹ However, the legal position is clear: if routes do not provide access to the general public, they are considered private roads. Judgements in *Dunlop* and *Buckland* have reaffirmed this position and determined 'private carriage road' signified exclusive use.⁷⁷² Of course, in practical terms a public road available to the general public and a private road available to all those in the surrounding area may differ little. Indeed, it seems likely that many such private roads acquired public rights in the century or so following Parliamentary enclosure. Use of such routes by the public may give rise to an inferred dedication at common law or a deemed dedication under the Highways Act 1980.⁷⁷³ It is important to note that while a legal mechanism exists for a private road to become public, the reverse is not true; a public road cannot become private without a specific legal act. This study seeks to understand the mechanisms by which routes might change status and ascertain the conditions necessary for such changes to occur. Understanding such conditions will allow historical sources to be weighed more effectively in legal cases, even when particular sources do not survive. These findings will also advance academic understanding and help establish how private roads were viewed historically.

As outlined, the term 'private road' was not always so neatly defined. Few private roads were clearly outlined in the pre-Parliamentary enclosure landscape. In fact, no pre-enclosure map examined as part of this study clearly differentiates the legal status of routes. This is a pivotal discovery which serves to highlight the importance of Parliamentary enclosure as a legitimising force which clarified

⁷⁷¹ Seymour, 'Public of the Locality'.

⁷⁷² *Dunlop v Secretary of State for the Environment and Cambridgeshire CC* (1995) 94 LGR 427; *Buckland v Secretary of State for the Environment, Transport and the Regions* [2000] EWHC Admin 279, [2000] 1 WLR 1949.

⁷⁷³ Sydenham, *Public Rights of Way and Access to Land*, 3.4.

both the physical and legal status of routes. Numerous private roads described by Parliamentary enclosure awards had their origins in the pre-enclosure landscape, but it is unclear whether such routes previously held public or private rights. Of course, the two terms are not mutually exclusive; one in every six private roads set out by Parliamentary enclosure included additional public bridle or foot rights. Such rights may not have been captured by pre-enclosure estate maps which were usually created for financial, managerial, or ornamental purposes. Indeed, it is equally possible that such rights were not fixed at the time, and a continuum of rights existed which changed depending on the weather and season in the short term, and alongside shifts in agriculture, land use, and land ownership through the years and decades. Doubtless, the local community would be more concerned with the maintenance of routes rather than determining precise usage rights.

Private roads are rarely depicted as such on the pre-Parliamentary enclosure tithe maps. The tithe map-makers were more concerned with establishing the titheable value of land rather than identifying the precise legal status of routes. Remarkably, all private roads which are coloured sienna on pre-enclosure tithe maps previously held public rights. This is either evidence that tithe map-makers used sienna to denote public legal rights or that sienna was used to distinguish some physical characteristic of roads, like its surfacing, which happened to correspond with public rights. In either case, this is a significant finding which will aid future legal disputes.

This study has found that private roads described by Parliamentary enclosure Commissioners are almost always included on the post-enclosure tithe maps. There is also a marked difference between those with and without additional public bridle or foot rights. For instance, private roads *with* public rights are depicted more often and tend to be better connected; only a quarter are cul-de-sacs, compared to half of the private roads *without* public rights. Similarly, fewer private roads with public rights contain an apportionment number and thus have individual owners and occupiers. A notable pattern emerges from this analysis: the shortest, narrowest private roads set out for the fewest number of individuals

at Parliamentary enclosure tend to not appear on the later tithe maps. This follows earlier discussions concerning different *types* of private road created by the Parliamentary enclosure Commissioners, as the longest, widest, most well-connected private roads set out for the greatest number of people were regularly depicted on the later tithe maps. Such routes could not easily be excluded from the tithe commutation, particularly if they were vital to map comprehension. This research establishes an important link between the description and depiction of private roads at Parliamentary enclosure and their subsequent legal status.

Comparisons between public and private roads described by Parliamentary enclosure reveal that they are usually indistinguishable if neither have apportionment numbers. Only in 22 percent of cases did the tithe map-makers conform to the practice of colouring public highways and leaving 'private and occupation roads uncoloured'.⁷⁷⁴ On the other hand, public and private roads with apportionment numbers can regularly be differentiated from one another. The tithe valuers *always* list public roads in a separate section of the tithe apportionment without owners or occupiers and with names that include places, local landmarks, or 'road'. In contrast, private roads are usually found in the main body of the apportionment with owners or occupiers, or, if they are in a separate section, their names usually include 'private' or are more descriptive. Such a discovery is of obvious assistance to legal cases, but also serves to highlight how contemporaries viewed private roads and how this changed from place to place.

The various *types* of private road set out by Parliamentary enclosure Commissioners can also be seen in the Finance Act 1910 documents and maps. The private roads set out as long, wide, well-connected routes for large numbers of people typically appear 'white' on the Finance Act maps, whereas those private roads set out for fewer individuals tend to be coloured by the valuers or do not appear on the OS maps at all. Private roads with public rights nearly always extend between 'white' roads or lead to *B.R.* or *F.P.* annotated routes. It is therefore clear that private roads with public rights continued to form part of the

⁷⁷⁴ Kain and Oliver, *The Tithe Maps of England and Wales*, 751.

wider right of way network in the early twentieth century. This raises important questions concerning the extent to which *B.R.* and *F.P.* annotations on the OS maps represent public rights which will be explored below. This analysis of the Finance Act maps has also uncovered that 'white' roads are nearly always bounded by continuous solid lines on the OS maps, whereas coloured roads are open to adjoining land and indicated with dashed lines. This fact is all too easily overlooked in cases which focus on individual routes, but is vital for understanding how the valuation was completed, and the implications for its use in legal inquiries. This pattern illustrates how the Finance Act valuers worked within the constraints of the OS maps. The purpose of the valuation was to ascertain the ownership and value of all land in the United Kingdom rather than the legal status of particular routes. Given the speed at which the valuation was achieved, it would not have been possible to determine the various rights which may have existed over individual parcels of land. This may explain why there is a strong correlation between roads bounded by physical features, and thus depicted with continuous solid lines on the OS, and those excluded from adjoining hereditaments by the Finance Act valuers. Practical reasons like these are more likely to be the cause of routes appearing 'white' than any inquiries into their legal status on the part of the valuers. Roads were left 'white' on the Finance Act if no individual claimed ownership. Private roads may thus have been left 'white' if landowners did not wish to acknowledge, were not interested in, or were ignorant of the route's status.⁷⁷⁵ Equally, if rights were known to be shared, it is unlikely that any single individual would claim ownership. Knowledge of such local arrangements is all too often lost in legal matters and helps illustrate the importance of detailed historical analysis.

This examination of private roads across documents relating to Parliamentary enclosure, the Tithe Act 1836, and the Finance Act 1910 illustrates the continuum of rights which may exist over a specific route. Some private roads carried public bridle or foot rights, as specified by the Parliamentary enclosure awards, and these tend to appear more often on the tithe maps and OS maps used as part of

⁷⁷⁵ Short, *Land and Society in Edwardian Britain*, 25:128.

the Finance Act valuation. These routes, together with those set out for large numbers of individuals at Parliamentary enclosure, are more likely to acquire public rights through dedication and acceptance as they experienced greater usage. Conversely, the shortest, least well-connected private roads set out for the use of individuals by Parliamentary enclosure are frequently not depicted on later sources. Such changes in the physical and legal status of routes can be identified when examining a wide range of historic cartographic and documentary evidence and help establish patterns which can be useful for legal cases.

The analysis of bridleways and footpaths in this work is especially important at this time as rights are being solidified in a way that they have never before been as the 2026 cut-off date to add historic rights of way to the definitive map approaches.⁷⁷⁶ There is a critical need for research such as this to understand the historic value of rights of way, how the network developed over time, and how usage changed from agricultural to recreational. Through the twentieth and twenty-first centuries, the recreational and scenic value of public rights of way has been increasingly appreciated. Today, the economic, environmental, and health benefits of bridleways and footpaths are widely acknowledged. The exceptional numbers of people using local public rights of way during the COVID-19 pandemic has thrown the importance of such routes into sharp relief. More people than ever are concerned with protecting and maintaining such routes as they form the subject of greater public attention, particularly as campaigns such as the Ramblers' 'Don't Lose Your Way' project aim to record public rights of way ahead of the 2026 cut-off date. Research such as this is all the more important amidst these upcoming legislative changes. Legal inquiries which seek to determine the historic status of bridleways and footpaths are only likely to increase in the years preceding the 2026 cut-off date. Through a detailed study of the three sources used most often in legal disputes, this research

⁷⁷⁶ Countryside and Rights of Way Act 2000, s. 53.

uncovers how public rights of way, and the wider landscape, have changed since the seventeenth century.

Pre-enclosure maps illustrate the complexity of routes in the commons and open fields, particularly those which were unlikely to be surfaced like bridleways and footpaths. Routes meandered across the landscape and narrowed and widened according to the underlying contours and topographic structures. While routes appear to have a defined physical existence, their legal status is less clear as few are annotated 'public', 'private', 'road', 'bridleway', or 'footpath'. This thesis contests that, before Parliamentary enclosure, many places had a more fluid network of rights of way which could change both physically and legally as crops were rotated, land use changed, shortcuts were taken, and more formal diversions were made.

This analysis reveals that public bridleways appear more frequently on pre-enclosure tithe maps than public footpaths. Public bridleways were regularly confirmed in place or appear as headlands or tracks in the open fields and were consolidated, narrowed, straightened, or widened by the Parliamentary enclosure Commissioners. Most public footpaths, on the other hand, do not appear on the pre-enclosure tithe maps and were either omitted by the tithe map-makers or newly created by the Parliamentary enclosure Commissioners. Systematic analysis has revealed that almost all of these public footpaths likely existed before Parliamentary enclosure but were not depicted by the tithe map-makers who were not required to ascertain the location or status of routes. It would have been quite impossible for the tithe map-makers to depict the intricate and numerous overlapping rights and routes which existed in an area. Bridleways and footpaths were not depicted if they did not affect the titheable value of land or if they were not physically apparent at the time of the survey. This highlights a crucial point of this thesis, that the physical rights of way may not always align with their legal existence. More broadly, this is evidence that the Parliamentary enclosure did not alter the public right of way network as radically as is often supposed. This is a significant finding which supports the methodology employed by this thesis.

The tithe maps created after Parliamentary enclosure again reveal how the tithe surveyors, map-makers, and valuers were more concerned with the titheable value of land rather than any particular bridle or foot rights which may have existed. Only the widest, most well-connected bridleways appear on the later tithe maps. Width is the most significant feature in this regard; public bridleways which are depicted average 24.4 feet compared to 8.5 feet for those which are not. Thus, while the inclusion of a bridleway was at the discretion of the map-maker, few failed to depict the widest and most well-connected. This provides valuable insights for future legal cases as it would be rare for a bridleway set out at over 20 feet to not appear on a later tithe map. It also identifies a cartographic practice which was undoubtedly widespread: wide routes were depicted more often than narrow ones. While seemingly obvious, this statement has never been supported by such a large sample of evidence. Conversely, public footpaths, averaging three feet, rarely appear on the post-enclosure tithe maps as they were unlikely to affect the titheable value of land. The inclusion of public footpaths was determined instead by the proclivities of the individuals who created the tithe maps. John Durham of Stony Stratford is of note, as he is one of the few map-makers who depicted and annotated footpaths on his tithe maps. No doubt future research will identify other individuals who preferred to include public footpaths. The non-existence of a footpath may be strongly supported in cases where the tithe map-maker usually includes them. Such a finding will help provide firmer evidence in legal inquiries.

The depiction of public bridleways and footpaths on OS maps has been a subject of controversy since the *B.R.* and *F.P.* annotations were first introduced in 1883 and 1884. This thesis has helped clarify some of the confusion surrounding these annotations but much remains to be done if they are to be accurately interpreted in legal cases. The framework laid out here analyses how bridleways and footpaths appear on the OS maps *and* Finance Act maps to better understand how rights of way were depicted by cartographers and viewed more generally by contemporaries. The examination of 1,972 routes has found that 'white' routes are nearly always bounded by physical features while coloured routes are often

open to adjoining hereditaments. There is also a distinct link between the public bridleways described by Parliamentary enclosure appearing with *B.R.* annotations on the OS map, and public footpaths appearing with *F.P.* annotations. This is clear evidence of continuity between the Parliamentary enclosure awards and Finance Act maps. Although far from conclusive, this certainly implies an association between *B.R.* and *F.P.* annotations and the network of *public* rights of way. The OS has been clear in public correspondence that such annotations refer only to the physical nature of the route as opposed to any legal status, especially from 1888 where all OS maps carry a disclaimer to that effect. However, this research illustrates the contradictions inherent in the circulars issued by the OS as well as the *Instructions to Field Examiners*, which indicate OS surveyors were expected to depict *public* footpaths. This thesis combines such findings with the ownership patterns shown by the Finance Act valuation. Such an approach is novel and provides more compelling evidence of the legal status of public bridleways and footpaths. For instance, if a *B.R.* or *F.P.* annotated route extends between two public roads across multiple hereditaments, it may be supposed that such a route carried public rights for it cannot serve a solely private purpose. By combining the evidence from both Finance Act and OS maps, significant findings can be made.

Analysis of the deductions claimed for public rights of way by landowners under the Finance Act 1910 further support the link between *public* rights of way and *B.R.* and *F.P.* annotations on the OS maps. Of the 18,847 hereditaments analysed, deductions for 'public right of way or user' were only made in 2.1 percent of cases, making them especially rare. Nonetheless, all public bridleways and footpaths for which deductions were claimed include a *B.R.* or *F.P.* annotated path on the OS map. While the annotations on the OS maps have proven an enigma for rights of way research, this research has confirmed that there is a strong correlation between the annotations on the OS maps and deductions claimed as part of the Finance Act 1910. A comprehensive analysis of internal circulars, *Instructions to Field Examiners*, and other OS communications would greatly enhance understanding of rights of way on the OS.

Public rights of way are more important than ever. The 2026 cut-off date for adding historic rights of way to the definitive map has focused attention on correctly recording as many routes as possible. This study has thrown greater light on the value of historic cartographic and documentary evidence, and has suggested novel ways to examine such sources.

The importance of detailed research into the legal status of rights of way cannot be overstated. This thesis has shown that the social actors who created these historic sources must be placed in their contemporary context if they are to be accurately interpreted. As Sullivan J said in *Maltbridge*:

if detailed analysis shows that even though he was not required to do so, the cartographer...did in fact treat public and private roads differently...I do not see why evidence based upon such analysis should not be admissible as to the existence, or non-existence of public rights of way⁷⁷⁷

This thesis argues that each source must be understood within the context in which it was made, who it was made by, and the popular cartographic practices of the day. Significant findings have already been uncovered by placing the individuals who created these historic sources at the forefront of investigations. For instance, particular tithe map-makers have been identified who noted the existence of public footpaths across all the maps they produced. More fundamentally, the changing usage and maintenance of rights of way has been emphasised as attitudes have changed over the centuries. Such findings raise important longer-term questions about the extent to which historical documents can capture rights which are more ephemeral, multifaceted, and ever-changing. The precise legal status of rights of way has been increasingly codified in many areas since Parliamentary enclosure, but the physical reality can differ as routes are used differently over time. As such, this study suggests novel ways to assess cartographic and documentary sources in rights of way cases. It emphasises that

⁷⁷⁷ *Maltbridge Island Management Co v Secretary of State for the Environment, Transport and the Regions* [1998] CO/540/98 (QB).

the three principal sources employed at inquiries can be weighed collectively to better determine the status of rights of way. Rather than examining individual routes, a more rigorous statistical approach was taken to compare how 1,972 routes were described and depicted across the three sources. This provides a firmer statistic surety from which to draw conclusions about the legal status of rights of way. Although rights of way will continue to be a contested area for landowners and the general public, this thesis has provided a stronger foundation from which to draw more accurate judgements to determine their historic status.

Glossary

ABATEMENT	A deduction from a tax assessment
ACRE	Originally an area ploughed by a team of eight oxen in a day, today standardised to 4,840 square yards
ANCIENT ENCLOSURE	Enclosures predating Parliamentary enclosure
BALANCE OF PROBABILITY	The standard of proof required for civil cases
BALK	A narrow strip of grass between arable lands
BEYOND REASONABLE DOUBT	The standard of proof required for criminal cases
BRIDLEWAY	A highway over which the public have a right of way on foot and horseback or leading a horse, with or without a right to drive animals along, Highways Act 1980 s. 329. A right of way for pedal bicycles was added by Countryside Act 1968 s. 30
BYWAY OPEN TO ALL TRAFFIC (BOAT)	A highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used mainly as a footpath or bridleway, Wildlife and Countryside Act 1981 s. 66
CARRIAGEWAY	A highway over which the public have a right of way for the passage of vehicles, Highways Act 1980 s. 329
CHURCH WAY	Routes for parishioners to access a church not necessarily available to the general public
DEFINITIVE MAP AND STATEMENT	Documents maintained by the surveying authority under Wildlife and Countryside Act s. 53 providing conclusive proof of the existence of the rights shown
DEFINITIVE MAP MODIFICATION ORDER (DMMO)	An order to modify a surveying authority's definitive map

DRIFTWAY	A highway normally used for cattle as well as riding animals and pedestrians
DROVE	An ancient highway associated with the long distance herding of cattle
EASEMENT	The right to use another's land for a specified purpose most often in the form of a private right of way
FOOTPATH	A highway over which the public have a right of way on foot
FURLONG	A division of the open fields typically associated with the distance a team of oxen could plough without a rest, today a length equivalent to 220 yards
GLEBE	Land owned by a rectory or vicarage
GREEN LANE	A term with no legal definition typically meaning an unsurfaced track
HEADLAND	A strip of land in the open fields left unploughed
HEREDITAMENT	Although today an inheritable right of property, used here as a parcel of land with accompanying number in the Finance Act 1910 documents
HIGHWAY	A route over which the public have a right to pass and re-pass
HIGHWAY AUTHORITY	The public body responsible for the highways in an area, Highways Act 1980 s. 1
LYNCHET OR 'STRIP LYNCHET'	A ridge on the side of a hill made by the ancient ploughing
MANOR	Area over which the lord had domain
MEER OR MERE	A boundary sometimes associated with water
METALLED ROAD	A road surfaced with broken stones, distinct from a 'tarred road' which became widespread in 1918
OCCUPATION ROAD	A road set out for the use of owners and occupiers of particular lands
PARISH	An administrative area centred around a church

PERMISSIVE PATH	A signed path which is not dedicated by the landowner as a right of way
RESTRICTED BYWAY	A highway over which the public have a right of way on foot, horseback or leading a horse and in vehicles other than mechanically propelled vehicles, with or without a right to drive animals along, created by Countryside and Rights of Way Act 2000 s. 48
RIDGE AND FURROW	Undulating agricultural earthworks created by medieval ploughing which survive in areas which were grassed over
ROAD	A term defined differently depending upon the statute, but does not necessarily mean the same as highway
ROAD USED AS A PUBLIC PATH (RUPP)	A highway, other than a public path, used by the public mainly for the purposes of a bridleway and footpath, National Parks and Access to the Countryside Act 1949
SEVERALTY	Land held in private ownership rather than in common
STREET	A term defined differently depending upon the statute
SURVEYING AUTHORITY	The county council, county borough council, metropolitan district, unitary authority, or London borough council responsible for maintaining the definitive map and statement for an area, Wildlife and Countryside Act 1981 s. 66
SURVEYOR OF HIGHWAYS	Appointed official responsible with reviewing the condition of the roads within the parish under Mending of Highways 1554 s. 2, later extended to districts or counties
TIME IMMEMORIAL	The start of Richard I's reign, 3 September 1189, identified as the beginning of legal memory
TOWNSHIP	A subdivision of a large parish containing an independent field system
VILL	The smallest administrative unit in medieval law

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QSR, Highway diversions

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C/Sce 2, Road closure orders

DE/TA, Tithe apportionments and maps

P/DLV 1, Finance Act Valuation Books

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T, Tithe apportionments and maps

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