Uncoloured roads on 1910 Finance Act maps

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The relevance of apparent omissions from the valuations made under the Finance (1909-10) Act 1910

David Braham Q.C.

The deductions allowed for the existence of public rights of way in arriving at the valuations required by the Finance (1909-10) Act 1910 can be highly relevant where highway status is in issue.[1] *The marked up maps can also be highly relevant where they show that a road running between inclosures was omitted from the valuations. This article examines the implications of such omissions with particular reference to two unreported High Court cases in which those implications were considered. Both those cases also involved consideration of the weight to be given to the manner in which a road is shown in a tithe map and apportionment.*

S.26 of the Finance (1909-10) Act 1910 ('the 1910 Act') required the Commissioners of Inland Revenue to cause a valuation to be made of "all land in the United Kingdom" to determine the values referred to in the Act. The valuation process is described in *Rights of way & the 1910 Finance Act*[2] and, as mentioned in that article, the surviving material includes 1:2500 Ordnance Survey plans which had been marked up so as to identify the various units of valuation ('the Finance Act maps'). This legislation was repealed by the Finance Act 1920. The valuation work was delayed by the reduction in the available manpower during the 1914-18 war, and in some areas the work was never completed. Nevertheless, it is clear that numerous roads were deliberately omitted from the valuation process.

In areas where the valuation work was completed, all the omitted roads were either stretches of road which ran between inclosures, 'fenced roads', or roads in built-up areas. The valuations and deductions required by the Act were duly made where an *unfenced* stretch of highway crossed a larger area which had to be valued anyway. In such cases the larger area, such as a field or private park, was valued and a deduction was made in respect of the public right of way: that was so even if other stretches of the same highway were fenced roads which were omitted from the valuation.

Some fenced roads were included in the valuation even if they were shown as separate OS plots on the 1:2500 Ordnance Survey plans. The fenced roads which were included in the valuation generally appear to be private roads and, given local knowledge, may be confidently identified as private roads.[3] The relatively modest number of roads in this category reflects the fact that many estate roads and private drives leading to substantial country houses or farmhouses which are now fenced roads were still unfenced in the 1910s.

The Finance Act maps show which of the fenced roads were omitted from the valuation. On the working sheets, distinctive colours were used to distinguish each area which had been treated as a separate unit of valuation, but those fenced roads which were omitted from the valuation were left uncoloured on the working sheets, and appear as uncoloured spaces between the coloured boundaries shown on the record plans. Accordingly such unvalued stretches of road will be referred to as 'uncoloured roads'.[4]

The significance of such omissions has been considered in two unreported cases in the High Court.[5] In *Maltbridge Island Management Company v. Secretary of State for the Environment and Hertfordshire County Council*[6] their significance was considered by Sullivan J., as he then was, in the context of a successful application to quash an Inspector's confirmation, with amendments, of a definitive map modification order adding a byway open to all traffic to the Hertfordshire Definitive Map. In *Robinson Webster (Holdings) Ltd. v. Agombar and Agombar*[7] ('*Agombar*') their significance was considered by Etherton J. in the context of an action for a declaration that the defendants had no right to use a particular lane in Wiltshire, apart from a private right to use the lane for one specific limited purpose. The defendants succeeded on the ground that the lane was a public carriageway.

The *Maltbridge* case

Maltbridge concerned a road called Mill Lane which originally led only to a riverside mill, but which was connected to the towpath on the opposite bank of the river by a further stretch of road and an iron bridge when the river was made navigable under an Act passed in 1766. The whole route, including both Mill Lane and the iron bridge, was shown as an uncoloured road on the Finance Act map.

In *Maltbridge* there was strong evidence of public use of the road and the bridge as a through route by people on foot, and Sullivan J. observed that there was ample material to

[1] See RWLR s.9.3 pp.17-20. 'Can be highly relevant' reflects the fact that it is often difficult to establish the link between the deduction and the route whose status is in issue.

[2] Supra note 1

[3] Mr. Peter Millman, Rights of Way Officer, Hertfordshire County Council, has kindly drawn my attention to examples in Hertfordshire whose status is known.

[4] In areas where the valuations were not completed, this description only applies to those uncoloured roads which had coloured plots on either side.

[5] These are the only unreported cases on the point of which the author is aware.

[6] [1998] EWHC Admin 820 (31 July 1998). A transcript is available at http://www.bailii.org/ew/cases/EWHC/Admin/1998/820.html

[7] Unreported, judgment delivered by Etherton J. on 9 April 2001.

support a decision that there was a public right of way on foot along the road and bridge. The Inspector's decision letter referred to the fact that some witnesses who dealt with use of the lane by people on foot "spoke of public use of it by their families going back 150 years". However, what was in issue was a decision that the whole of the route was a byway open to all traffic, and Sullivan J. concluded that:
a) the evidence of the bridge being used with carts and with horses was consistent with the private use of the iron bridge as an accommodation bridge, for the use of the owners of land on either bank of the river;[8] and
b) "One would naturally except substantial vehicular traffic to and from a mill. Such traffic would be equally consistent with a private carriageway".

Hence, he disagreed with the Inspector's approach to the evidence of use with horses and with horse-drawn carts. On that view, byway status depended on whether the documentary evidence showed that it was more probable than not that Mill Lane was a public carriage road.

In *Maltbridge,* the tithe map seemed to point to public carriage road status and the 1910 Finance Act material appeared to corroborate the tithe map. Against that, at various dates between 1814 and 1981 conveyances and leases of the properties abutting the road had clearly proceeded on the basis that the cost of maintaining the road fell to be borne by the proprietors of those properties in defined proportions. Sullivan J. accepted that the Inspector was entitled to place some weight on the tithe map and the Finance Act material but, differing from the Inspector, he concluded that the documentary evidence as a whole was neutral.[9]

The position in *Maltbridge* was complicated by the fact that a deduction for a right of way had been made in valuing one of the plots adjoining Mill Lane. On one interpretation that deduction was more consistent with the view that the roadway was regarded as a private road as respects vehicular traffic, but on another interpretation it was consistent with the view that the road was regarded as a public carriage road at the time. In those circumstances Counsel for the Secretary of State conceded that it would have been wrong for the Inspector to approach the Finance Act material on the generalised basis that if the way is shown uncoloured on the map it may be presumed to be a public highway. Instead, he relied on the fact that the significance of that deduction had been addressed by the Inspector and by Mr. Millman, and contended successfully that the Inspector was entitled to accept Mr. Millman's explanation and conclude that the Finance Act material had some corroborative value. However, Sullivan J. did not consider that the indications afforded by the tithe map and the Finance Act material outweighed the indications afforded by the private documents.

In part the decision in *Maltbridge* turned on the terms of the 1766 Local Act, but Sullivan J.'s approach to the tithe map, discussed below, and the Finance Act material is of wider interest. So, too, is the evidence of Mr. Millman who was called as a witness at the local inquiry.

Instruction to Valuers No.560
Mr. Millman referred to the common practice of omitting certain roads from the Finance Act valuations; the apparent correlation between the omitted roads and known highways; and the fact that some omitted roads were evidently not carriage roads. He also referred to an Instruction to Valuers (No.560), issued by the Chief Valuer on 28 February 1911 'By order of the Board', which sheds some light on the practice.[10] The Instruction is headed "Deduction of value attributable to appropriation of land for Streets" and reads as follows:
"In normal cases the ownership of land abutting upon a road carries with it the ownership of half the adjoining roadway, subject to the rights of the public, and in such cases the unit of valuation is the land abutting the roadway plus half the site of such roadway and, under such circumstances, no deduction falls to be made under Section 25(4)(c)[11] because there is no part of the site value of the whole proved to be directly attributable to the appropriation of land for the purposes of the street.

"Although the unit of valuation includes half the site of the adjoining roadway the area recorded on the record plan should continue to be exclusive of the site of the external roadways and the area to be included in the Valuation Book should be computed accordingly.

"In any case where, having regard to local custom, it is usual to compute the area by including a portion of the size of external roadways, upon the demand of any owner a

[8] S.13 of the 1766 Act had authorised the undertakers to construct such bridges over the new cuts "as shall be proper for the use of the occupiers of the lands thereunto adjoining".

[9] Sullivan J. duly tackled the point that he could not simply substitute his own opinion on the weight of the user evidence and documentary evidence for that of the Inspector.

[10] I am indebted to Mr Millman for the information that
(1) this was the only instruction that he found which dealt with the omission of the uncoloured roads although he spent a whole day in the Inland Revenue Library, where the Instructions were then held; and
(2) according to an earlier Instruction (No. 157) all land in the district was to be recorded on the plans.

[11] S.25(4)(c) of the 1910 Act.

statement may be made in the "Remarks" column of the Valuation Book and also on Forms 36 and 37 and likewise in any amended Provisional Valuation which may be served stating that the "Gross area including so much of the adjoining roadways as passes with the land - a. r. p. yds.

"In any case where the ownership of the land is severed from the ownership of the land abutting upon such roadways and where, under those circumstances, a claim for deduction is made under Section 25(4)(c) in respect of the land appropriated for the purpose of such roadways the specific case should be reported for further instructions".

'Subject to the rights of the public' tells us that where Instruction 560 refers to 'roadways' it is referring to highways. Some qualification, such as '(where the road is a highway)' or 'the rights (if any) of the public' or 'subject to any rights of the public' was to be expected if any other roadways were in mind.

The direction that 'the area recorded on the record plans should continue to be exclusive of the site of the external roadways' tells us that such roadways were already being excluded from the valuations, but Instruction 560 does not spell out why that was so.

The reference to the ownership of half the adjoining roadway is questionable because in many instances the 'top two spits' of the uncoloured roads were vested in the highway authority. Nonetheless, it tells us how the Inland Revenue viewed the ownership.

The reference to the unit of valuation including half the adjoining roadway is questionable independently of the ownership point, but it tells us how the Inland Revenue viewed that aspect. (It is questionable because s.26(1) of the 1910 Act specifically directed that "each piece of land which is under separate occupation ... shall be separately valued", and a highway which runs between rows of houses or between inclosures is not normally in the same occupation as any of the adjoining houses or inclosures).[12]

The comment on s.25(4)(c) is difficult to follow at first reading, but it would have made more sense to a valuer who had mastered the concepts laid down in the 1910 Act. So far as material here, s.25(4)(c) provided for the deduction of "any part of the total value which is ... directly attributable to the appropriation of any land or to the gift of any land ... for the purpose of streets, roads, paths, squares, gardens or other open spaces for the use of the public". However, by definition the 'total value' was the value of the land after making the normal deduction for public rights of way.[13] Hence, any impact which such an appropriation or gift for use as a highway would have had on values had been wiped out in arriving at the 'total value'. For that reason, no part of the 'total value' of the unit was attributable to a gift of land for the purposes of streets even if half the street was included in the unit of valuation.

Unfortunately for us, Instruction 560 does not explain the original decision to exclude the uncoloured roads. One possibility is that the original decision was designed to avoid claims for the double deductions for public rights which are discussed in Instruction 560. Another possible explanation[14] is that 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. The pointlessness of valuing the uncoloured roads becomes apparent when the four new duties imposed by the 1910 Act are considered.

1) Increment value duty[15] was charged on increases in the 'assessable site value'[16] when the increases were realised (e.g. on a sale) or were deemed to be realised (e.g. on a death). The uncoloured highways were unlikely to have, *or to acquire*, any significant assessable site value. By definition, that value took into account the depreciatory impact of public rights of way over the land.[17] Trees growing in the roadside verges could have some value but the assessable site value was what the value of the land would have been if the land was "divested of ... all growing timber, fruit trees, fruit bushes, and other things growing thereon".[18] A nil valuation was relevant where a unit might eventually become part of a building plot,[19] but the uncoloured highways had no such potential.[20]

2) Reversion duty [21] was chargeable on the benefit accruing to the lessor on the determination of a lease, and was unlikely to be relevant to highways.

3) The annual charge to undeveloped land duty [22] was quantified by reference to the 'assessable site value'. As mentioned above, the uncoloured highways were unlikely to have any significant site value.

4) Mineral rights duty was only concerned

[12] The official view might have turned on the fact that s.26(1) drew a distinction between "each piece of land which is under separate occupation" and "any part of any land which is under separate occupation": the latter category only fell to be valued separately if the owner requested.

[13] See below

[14] In the writer's view this is the most likely explanation.

[15] Ss.1-12

[16] References to 'site value' in the charging sections are references to the 'assessable site value': see the final paragraph of s.25(4)

[17] S.25(3) and s.25(4)

[18] Ibid. In *C.I.R. v. Smyth* [1914] 3 KB 406 'other things growing thereon' was held to include grass.

[19] cf. *C.I.R v. Herbert* [1913] AC 226

[20] In 1910 the legislation did not include any counterpart of s.247 or s.257 of the Town and Country Planning Act 1990.

[21] Ss.13-15

[22] Ss.16-19

with the rental value of rights to work minerals.[23]

In *Agombar,* Etherton J. referred to 'untaxed public roads'. It is tempting to conclude that the treatment of the uncoloured roads stemmed from the exemption afforded to land owned by a rating authority,[24] but Instruction 560 shows that the Inland Revenue were regarding the frontagers, not the highway authority, as the relevant owners of the uncoloured roads.[25]

The *Agombar* case

Finance Act material played a more influential part in the decision in *Agombar* [26] than in *Maltbridge.* In *Agombar,* too, there was a conflict between (a) the indications afforded by the tithe map and Finance Act material and (b) the indications afforded by conveyances and the grant of private easements, but in *Agombar* the latter indications could be discounted on the basis that they dated from a period when all concerned were unaware that earlier history pointed to public carriage road status. The earlier history had been overlooked in the 1929 Handover map, and all the relevant private documents dated from the 1950s onwards.

The lane whose status was in question in *Agombar* was referred to as 'the Blue Land'. The lane is a rural *cul de sac* which leads from a public road to three properties at its western end, and which also provides access to two other properties on either side of the lane. The three properties at the western end of the lane are (1) 'a large country house [27] dating from at least the seventeenth century', owned by the defendants (2) a farmhouse [28] owned by the claimant and (3) a Victorian property which formerly comprised two individual cottages.

The public road is called Thickwood Lane. At the Thickwood Lane end the Blue Land splits into two branches which bound two sides of a small triangular area of land adjacent to Thickwood Lane. Evidence of modern public use of the two branches, mainly in connection with the use of a public telephone box sited in the triangle, satisfied Etherton J. that the branches had been dedicated as a public carriage road. The evidence of public use of the remainder of the Blue Land was confined to use within living memory: that evidence was more equivocal, and did not satisfy him that the stretch between the triangle and the three properties mentioned above had been dedicated as a highway. Hence in *Agombar,* as well as in *Maltbridge,*[29] establishing public carriage road status depended on the documentary evidence.

The relevant private documents included conveyances and express grants of easements. Since the 1950s those documents had unmistakably proceeded on the basis that the Blue Land was not a public carriage road. They included grants of rights of way over the Blue Land for a consideration of £30 a year in one instance and for a lump sum of £6,000 in another instance.

Against that, in the tithe map the Blue Land bore the same reference number as the local public roads, and in the apportionment schedule the roads bearing that reference number were described as being in the occupation of 'Parish Officers'. That was a very strong indication that the Blue Land was regarded as a publicly maintainable highway at the time.

Further, in the Finance Act map the Blue Land was shown as an uncoloured road, and a County Council Rights of Way Officer, Mr. Alan Harbour, gave evidence as to the significance of that treatment. Etherton J. said: "I found his evidence helpful. He emphasised that the effect of the arrangements made under the Act was that local people with local knowledge undertook the valuation and conducted the detailed consultation with the owner of the land. He described how the valuation became the most comprehensive record of land ever undertaken and became known as 'the Second Doomsday'. The 1910 Act includes specific provision for reducing the gross value of land to take account of any public rights of way or public rights of user, as well as easements. Importantly, the Act contained criminal sanctions for falsification of evidence". Etherton J. concluded that "The 1910 Finance Act map and schedule are in my judgment most material evidence in relation to the status of the Blue Land at the time".[30]

Tithe maps

The function of the tithe maps has been explained in detail elsewhere in RWLR.[31] Put shortly, some tithe maps and apportionments do give a strong indication of highway status, but the nature of the exercise did not require the surveyor to distinguish between highways and private roads. The apportionment commonly reflected the value of the tithable produce which had been yielded by

[23] Ss.20-24

[24] S.35

[25] See also RWLR s.1.1 p.42 for the point that roads for whose maintenance a R.D.C. was responsible did not vest in the R.D.C. Many of the uncoloured roads were in R.D.C. areas.

[26] Supra note 7

[27] Described in a 1767 map as "Madam Fisher's Manor House".

[28] Called 'The Old Farmhouse'.

[29] Supra note 6

[30] There was no evidence to suggest that the Blue Land might have been nothing more than a bridleway.

[31] See e.g. RWLR s.9.3 pp.97-106

the respective plots of land, but a lane which was nothing more than a private road might have yielded no tithable produce because the road was metalled, whereas a green lane might have had significant value for grazing or for making hay notwithstanding that it was a public highway of one kind or another.

In the tithe map which was relevant in *Maltbridge,* Mill Lane was shown, in common with other local highways, coloured ochre and without a plot number. Mill Lane was not identified individually in the apportionment schedule as a private road, although other private roads in the area were. Sullivan J. pointed out why tithe maps did not need to give any indication of highway status, but he continued: "But if detailed analysis shows that even though he was not required to do so, the cartographer, or the compiler of this particular map and 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".

As appears above, in *Agombar* the tithe map gave an unusually clear indication of public status, in as much as the road in question bore the same reference number as the local public roads, and in the apportionment schedule the roads bearing that reference number were described as being in the occupation of 'Parish Officers'. Etherton J. said: "It is that fact, rather than the issue of whether the Blue Land or the surrounding land were titheable, that is significant".

Private documents

In the author's view, the fact that private documents dealt specifically with the cost of maintaining a road usually points to the conclusion that, rightly or wrongly, the road was not regarded at the time as a highway which was maintainable at the public expense. However, it should be borne in mind that such a provision does not necessarily carry that implication. For example, in *Maltbridge* the mill owners may have been concerned to ensure that the road was maintained to the high standard needed for the commercial operation of the mill and, accordingly, may have attached no weight to the fact that it was publicly maintainable as a footpath or bridleway. Further, such a provision does not necessarily carry the implication that the road was not regarded at the time as a highway of any kind: in some cases the correct inference may be that the road was regarded as a public carriage road at the time, but was regarded as a road which was not maintainable at the public expense. Some public carriage roads are privately maintainable under a special enactment or by reason of tenure, inclosure or prescription.[32] A public road is not maintainable at the public expense if it was dedicated after s.23 of the Highway Act 1835 came into force and was never 'adopted'.[33] In *Maltbridge,* though, the route had existed as a through route for over 60 years before s.23 of the Highway Act 1835 came into force, and there was no apparent reason to suppose that any dedication as a public carriage road would have been delayed until after 1836. *Agombar* illustrates the point that private documents are less significant where earlier history points to highway status and the document in question dates from a period when all concerned were probably unaware of that earlier history.

Caveats

It is evident that the uncoloured roads included some fenced roads which, although highways, were no more than public bridleways.[34] The facts in *Maltbridge* might even be seen to indicate that the same treatment was extended to fenced roads which were merely footpaths, but Sullivan J. did not actually hold that Mill Lane was not a bridleway: his view was that bridleway status was 'not proven', not that bridleway status had been disproved. Further, the evidence available to the valuer in the 1910s might have pointed more clearly to bridleway status.[35] The fact that the road is uncoloured may point strongly to the conclusion that the road was recognised as a highway at the time but, viewed in isolation, the fact that the road is uncoloured leaves open the question whether it was recognised as a public carriage road or as a lesser highway.

In *Maltbridge* Mr. Millman's evidence included the statement that: "On three occasions I have seen routes uncoloured which were too narrow to have been vehicular routes". Sullivan J. expressed the view that the Finance Act material might be explained in another way. He said: "the Finance Act evidence from the map and field book could be explained if, as seemed likely, this road

[32] See RWLR s.5.1 pp.1-11

[33] This is subject to exceptions concerning some roads shown on the definitive map: see RWLR s.5.1 p.87

[34] As respects development potential, these stood on the same footing as public carriage roads.

[35] It is to be noted that Mill Lane was classified as a 'lane or bridleway' on Bryant's 1822 map; see para.10 of the judgment.

was in private, but multiple ownership, with each side in the possession of different people. In these circumstances there would be several people with private rights over it, and it would thus appear superficially that the road was public". However, it seems less likely that this was the actual reason when the landowners' involvement in the valuation process is taken into account.[36]

Exceptionally, the Finance Act maps may be found to include errors where they distinguish between coloured and uncoloured roads. All the available evidence needs to be weighed carefully where there is other evidence which suggests that the depiction on the Finance Act maps may be wrong.

Again exceptionally, an uncoloured road may be found to peter out in the middle of nowhere,[37] at a point which holds no attraction which might have caused the public to want to use the road. The problem in such cases might have been uncertainty as to the route which an old but disused highway followed beyond that point. The valuation process did not prompt the kind of historical research which is now commonplace where a definitive map modification order is under consideration.

The balance of probabilities

On the facts in *Agombar*, the indications afforded by private documents was outweighed by the indications afforded by the tithe map and the Finance Act material. On the facts in *Maltbridge* the apparent significance of the tithe map and Finance Act material was seen to be evenly balanced by the indications afforded by private documents which pointed the other way. It is quite common for evidence to be found insufficient because there is evidence of equal or greater weight pointing the other way, even though the evidence would establish a particular point on the balance of probabilities if it stood alone.

That is not to say that cartographic evidence should be, or even can be, discounted on the basis that, despite the extensive investigation which has been carried out, further research might show that the map or plan reflected an error of judgment. A grossly inaccurate commercial map produced by a local printer might be discounted on the basis that it is so full of errors that there is at least a 50-50 chance that its depiction of the route under consideration is inaccurate, but the fact that few cartographers, if any, were wholly free from error in particular respects does not mean that entries on their maps should not be seen to establish the balance of probability in the absence of equally cogent or more cogent evidence pointing the other way. As Denning J. observed in *Miller v. Minister of Pensions,*[38] the burden of proof in a civil case is not so high as the burden which is required in a criminal case. "If the evidence is such that the tribunal can say: we think it more probable than not, the burden is discharged, but if the probabilities are equal it is not".

The weight of the evidence

Another aspect of the evaluation of documentary evidence is that a given document may afford useful evidence on some aspects but be of less value for other purposes. The fact that a road has been left uncoloured on the Finance Act map usually points strongly to highway status but, on the facts in particular cases, it may be seen to point to nothing more than a public bridleway along an otherwise private road. An early map which portrays the road network diagrammatically is valueless in so far as the precise alignment of a road is in issue but, as in the case of Road Book maps, a diagrammatic map may give a strong indication of the status of roads whose alignment can be deduced from other maps. Similarly, the fact that the cartographer was notorious for his plagiarism is likely to nullify the apparent value of his map where the issue is whether a road or track which does not appear on his map had come into existence by the time when the map was prepared, but his notorious plagiarism does not deprive the map of all value for other purposes. The working practices and reputation of the cartographers concerned can be highly relevant where maps appear to contradict one another but, in the absence of any conflicting evidence, the fact that the cartographer had probably copied from other sources does not go to prove that those other sources were probably themselves faulty. That point is illustrated by the analysis of the map evidence in *Attorney-General v. Woolwich Metropolitan Borough Council ex rel. the Public Trustee and others*.[39] There, Shearman J. said: "of course, I know that old maps are rather in the habit of being copied one from the other", but that did not prevent him from concluding that the evidence afforded by the early maps was "overwhelming" as to the pre-1836 highway status of the road whose status was in issue.

[36] That factor is not mentioned in the judgment, but was treated as a relevant factor in *Agombar*.

[37] This does not refer to cases where the uncoloured road continues as an *unfenced* road.

[38] [1947] 2 All ER 372

[39] (1929) 93 JP 175. The unusual feature of the case was that early maps were admitted without objection. Until the Rights of Way Act 1932, which included the precursor of s.32 of the Highways Act 1980, the use of maps in legal proceedings could be severely curtailed by a strict application of the hearsay rule.