

## CHAPTER III.

## OWNERSHIP OF THE WAY.

**Dedication does not affect Ownership.**—An owner who dedicates land to the public as a highway does not thereby relinquish his property in the soil. A similar proposition was generally applicable to roads constructed or maintained under Turnpike Acts. "As to the consent of the trustees of the turnpike road, the soil is not vested in them, but remains in the persons who were entitled to it before the Act passed by which they are appointed. The trustees have only the control of the highway" (a). "In general, Turnpike Acts have no effect upon the ownership of the soil" (b). In every case where roads have been constructed by trustees acting under the provisions of an Act of Parliament, which provisions could be consistently carried out without purchasing the soil, even although the Act contains powers of compulsory purchase, the burden of proof is upon the trustees to show that they have acquired the ownership of the soil (c); but where the scheme of the Act is that the trustees should purchase the absolute fee simple of the site of the road, and there is evidence that they have done so in other parts of the road, the burden of proof is shifted (d).

**Presumption as to Ownership of Soil.**—It is a presumption of the law, in the absence of evidence to the contrary, that the soil of a highway, to the middle of the road (*usque ad medium filum viæ*) belongs to the owner of the land adjoining the highway (e). This presumption has been said to rest on the supposition that, when the road was originally set out, the proprietors

(a) Lord KENYON, C.J.: *Davison v. Gill* (1800), 1 East, 64.

(b) BYLES, J.: *Salisbury v. Great Northern Rail. Co.* (1858), 5 C. B. (N.S.) 174.

(c) *Conservators of River Lea Navigation v. Button* (1881), 6 App. Cas. 685; cf. *Hollis v. Goldfinch* (1823), 1 B. & C. 205, where there were no compulsory powers in the Act of Parliament.

(d) *Northam Bridge and Roads Co. v. Stoneham Rural District Council* (1907), 71 J. P. 345.

(e) *Stevens v. Whistler* (1809), 11 East, 51; *Cooke v. Green* (1832), 11 Price, 736; *Frost v. Richardson* (1910), 103 L. T. 416. In *Hodges v. Lawrence* (1854), 18 J. P. 347, goods on a waggon standing on the side of a highway adjoining a demised land were held to be on the land for the purposes of a distress by a landlord. See also *Gillingham v. Gwyer* (1867), 16 L. T. (N.S.) 640. And where the land tax upon land adjoining a public highway has been redeemed, this presumption applies so as to extend the exoneration from tax to the middle of the highway (*City of London Land Tax Commissioners v. Central London Railway*, [1913] A. C. 364).

of the adjoining land each contributed a portion of their land for its formation (f). But a similar presumption is applied in cases where this explanation is inadmissible, as where two properties are separated by a stream (g); and the presumption seems to be sufficiently accounted for as an obvious principle of equity and convenience joined to the feudal maxim that the fee must be in some one. The same presumption applies to a private or occupation road as to a public highway (h), but subject to this qualification that the user of the private road must be *qua* road and not in the exercise of a claim of ownership (i). Where an Inclosure Act provided for the allotment of land to the lord of the manor in compensation for all rights of soil, it was held that the soil of land set out as a private road in pursuance of the Act was vested in the allottees of the adjacent land *ad medium filum* (k).

The presumption does not apply where there is direct evidence of title to the soil; for example, where the way has been set out under an inclosure award, or "where the road is defined for the first time under a newly-created authority" (l). In such a case, the ownership of the soil in general "remains in the lord of the manor; for that portion of the soil only is taken from him for which he receives compensation, and which is allotted to others" (m). The fact that under the Inclosure Act the herbage on the road is given to the proprietors of the allotments on each side does not raise any presumption that the soil of the road also is allotted to them (n).

The presumption may always be rebutted by evidence of acts of ownership (o). Thus, where the lord of the manor proved that he and his predecessors had for a great number of years received a yearly rent in consideration of the right to lay down water pipes

(f) BAYLEY, J.: *Doe d. Pring v. Pearsey* (1827), 7 B. & C. 304; COCKBURN, C.J.: *Holmes v. Bellingham* (1859), 7 C. B. (N.S.) 329.

(g) And so, "where two parishes are separated by a river, and there is no positive evidence of the boundary line between them, it is to be presumed to coincide with the middle line of the channel" (PATTESON, J.: *Rex v. Landulph* (1834), 1 Moo. & R. 393; *cf. R. v. Strand District Board of Works* (1864), 4 B. & S. 526).

(h) *Holmes v. Bellingham* (1859), 7 C. B. (N.S.) 329.

(i) *Ibid.*, *per* COCKBURN, C.J.

(k) *Neaverson v. Peterborough Rural District Council*, [1901] 1 Ch. 22.

(l) Lord DENMAN, C.J.: *Rex v. Hatfield* (1835), 4 A. & E. 156; Lord TENTERDEN, C.J.: *Rex v. Edmonton* (1831), 1 Moo. & R. 24. In *Haigh v. West*, *post*, p. 65, it was held that the soil of a road was vested in the churchwardens and overseers as trustees for the parishioners subject to the public right of way.

(m) PARKE, B.: *Poole v. Huskisson* (1843), 11 M. & W. 827.

(n) Lord DENMAN, C.J.: *Rex v. Hatfield* (1835), 4 A. & E. 156; *cf. Hooper v. Bourne* (1877), 3 Q. B. D. 258.

(o) WILLIAMS, J.: *Holmes v. Bellingham* (1859), 7 C. B. (N.S.) 329.

in "any of the streets and highways" in the town of Leeds, and that on several occasions payments by way of fine or rent had been made to the lord in respect of encroachments on a particular street, these acts of ownership were held to be sufficient to rebut the presumption that the soil of that street was vested in the owner of the adjoining houses (p).

**Presumption applied to Conveyances.**—"In the ordinary case, where a man who is the owner of two pieces of land conveys them to a purchaser, if a turnpike road lies between them, the soil of the road passes by the conveyance, although the conveyance is silent as to its existence, and although the particular measurement of each field is given and would exclude the road" (q). "The rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, and by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances or enough in the expressions of the instrument to show that that is not the intention of the parties" (r). This construction was allowed to prevail in a case where the lands conveyed were described by reference to a plan annexed to the conveyance, the measurement and colouring of which would have excluded the highway (s). Where the plaintiff's lease contained a direction that the lessors and their assigns (the defendants) should have power without obtaining any consent from, or making any compensation to, the lessee (the plaintiff), to deal as they might think fit with any of the premises adjoining or contiguous to the hereditaments demised, and to erect on such adjoining premises buildings which might diminish the light enjoyed by the plaintiff, and the lessors owned land on the opposite side of the same street on which buildings were erected which did diminish the plaintiff's light, it was held that the subsoil of the street *usque ad medium filum* passed by implication, and therefore that the defendant's premises were adjacent or contiguous to those of the plaintiff's, and that defendant was entitled to build so as to obstruct the plaintiff's light (t). Similarly, where lands were described as bounded by a small creek, it

(p) *Beckett v. Corporation of Leeds* (1872), L. R. 7 Ch. 421.

(q) WILLIAMS, J., in *Salisbury v. Great Northern Rail Co.* (1858), 5 C. B. (N.S.) 174.

(r) COTTON, L.J.: *Micklethwait v. Newlay Bridge Co.* (1886), 33 Ch. D. 133. See also FITZGERALD, J., in *Dwyer v. Rich* (1871), Ir. R. 6 C. L., at p. 149; and *Thames Conservators v. Kent*, [1918] 2 K. B. 272.

(s) *Berridge v. Ward* (1861), 10 C. B. (N.S.) 400.

(t) *Haynes v. King*, [1893] 3 Ch. 441.

was held by the Privy Council that the soil of the creek *usque ad medium filum aquæ* passed by the conveyance, although it was not necessary to include any portion of the creek to make up the quantity of land specified in the grant (*u*). It does not matter whether the land conveyed is copyhold, freehold or leasehold (*v*), and the presumption is equally applicable to streets in a town as to highways in the country (*x*). The presumption is not rebutted by the fact that the vendor is the owner of the soil beyond the *medium filum viæ*: in such case, the presumption is that the conveyance passes the soil of the highway so far as it is vested in the vendor (*y*).

On the other hand, this *primâ facie* rule of construction may be excluded by clear indications of intention appearing in the conveyance itself. Thus, where a grantor conveyed two pieces of land separated by a turnpike road, and in the plan, referred to in the deed, the two pieces of land and the road were all numbered separately, the court thought the deed and the plan together clearly showed that both parties believed (though erroneously) that the soil of the road was vested in the turnpike trustees, and, therefore, that it could not have been intended to pass by the conveyance (*z*). Again, a land company sold land in lots to different purchasers, each lot having a frontage to a certain highway and being described in the conveyance as adjoining the road, and in the plan attached to the conveyance the lot was marked out by colour and measurement as not including any part of the road but was separated therefrom by a strong line; the Court of Queen's Bench thought that the conveyance plainly indicated an intention that the land company should retain the property in the soil of the road (*a*).

The rule of construction may also be displaced by proof of surrounding circumstances, existing at the date of the conveyance, which sufficiently indicate that the parties did not intend that the soil should pass. Thus, where a deed conveyed a piece of land "bounded on or towards the south by a public road or street called Grundy Street," and the evidence showed that no such street then in fact existed, but only a piece of land which the grantor intended

(*u*) *Lord v. Commissioners of Sydney* (1859), 12 Moo. P. C. C. 473.

(*v*) *Tilbury v. Silva* (1890), 45 Ch. D. 98, per KAY, J., at p. 109.

(*x*) *In re White's Charities, Charity Commissioners v. Mayor of London*, [1898] 1 Ch. 659; ROMER, J. In *London and North Western Rail. Co. v. Mayor, etc. of Westminster*, [1902] 1 Ch., at p. 279, JOYCE, J., seems to have doubted this.

(*y*) *In re White's Charities, supra*. As to evidence of acts of ownership, see *University College, Oxford v. Corporation of Oxford* (1904), 20 T. L. R. 637.

(*z*) *Salisbury v. Great Northern Rail. Co.* (1858), 5 C. B. (N.S.) 174; *Landrock v. Metropolitan Rail. Co.*, W. N. (1886) 195.

(*a*) *Plumstead Board of Works v. British Land Co.* (1874), L. R. 10 Q. B. 16. The Exchequer Chamber did not express any opinion on this point (*ibid.*, 203).

to dedicate to the public, it was held that the soil of the intended street *ad medium filum viæ* did not pass to the grantees (b). In *Pryor v. Petre* (c), a wood which abutted on a highway was described in the deed of conveyance by its acreage and by reference to a map which did not include any part of the highway. By other recitals in the deed it was stated that it was one of the conditions of the contract for sale that the trees on the land sold should be paid for as part of the consideration at a valuation, and that such valuation had been made and the amount paid by the plaintiff. There were trees in the highway on the side adjoining the wood; but evidence was given showing that none of these trees were included in the valuation. It was held that the fact the trees were not included in the valuation, coupled with the fact the highway was not included in the measurement on the map, was sufficient to rebut the presumption that the soil of the land *ad medium filum* passed by the conveyance. In *Mappin Brothers v. Liberty & Co., Limited* (d), the Commissioners of Woods and Forests acquired a tract of land under an Act of Parliament passed for the purpose of executing a scheme of street improvements in the metropolis. Under this Act they made Regent Street, and leased the houses in the street as they were built, including a house sub-demised to the plaintiff. The plaintiff claimed to be entitled to the soil of the moiety of the street next to his house for the residue of his interest therein by virtue of the above presumption. The head lease of the plaintiff's house described the property by dimensions and abutments and by a map, and referred to it as abutting on a street then forming. It was held that the presumption was rebutted by the surrounding circumstances, regard being had to the terms of the lease and the provisions of the Act. So, where a fishery had been treated as a separate tenement and was actually under lease to a third party when the riparian land was conveyed, it was held that the grantor could not have intended to grant a right inconsistent with his previous demise, and consequently that the conveyance did not pass half the bed of the river to the grantees (e). But the presumption is not rebutted merely because circumstances, not in the contemplation of the parties at the date of the grant, subsequently show it to be very injurious to the grantor that the conveyance should include half of the bed of the river or half the soil of the road, and make it probable that if they had been contemplated the parties would have expressly excluded the presumption (f).

(b) *Leigh v. Jack* (1879), 5 Ex. D. 264.

(c) [1894] 2 Ch. 11.

(d) [1903] 1 Ch. 118.

(e) *Duke of Devonshire v. Pattinson* (1887), 20 Q. B. D. 263.

(f) *Micklethwait v. Neulay Bridge Co.* (1886), 33 Ch. D. 133.

In one case the Court of Common Pleas held that where the lord of the manor granted a piece of land adjoining a turnpike road, to be held as part of the copyhold of the manor, it could not have been intended to pass any right to the soil of the road, which therefore remained in the lord (*g*). There are also several dicta of eminent judges which tend to narrow the application of this presumption. Where there was between two rows of houses a wide open space used for fairs and markets, the franchise of the markets and fairs being in the lord of the manor, JAMES and MELLISH, L.JJ., thought it would be inconsistent with common sense to apply the presumption to a grant by the lord of the manor of the tofts on which the houses were built (*h*). JAMES, L.J., further stated that where there was a road going through an estate, and a site was granted by the roadside for the erection of a cottage or house, he would be very slow to presume that such a grant or demise extended to the middle of the high road so as to deprive the owner of the estate of his possessory title or his freehold in respect of the half of the highway (*i*). COTTON, L.J., while thinking it reasonable that when a man grants all his land or all his fields he should be held to grant also the soil of such roads as form the boundary of his property *usque ad medium flum viæ*, thought it very questionable whether the presumption could ever be held to extend to cases where land is sold in plots for building purposes, even when the roads have been actually laid out (*k*).

**Waste Lands adjoining Highway.**—Where strips of land lie between the highway and the adjoining inclosure, the legal presumption is, that the soil belongs to the owner of the adjoining old inclosure (*l*). This presumption applies in favour of the adjoining owner in a question as between him and the lord of the manor (*m*), but apparently not as between him and another person claiming under a subsequent grant from the same lord (*n*). The presumption applies whether the owner of the adjoining close is freeholder, copyholder, or leaseholder (*o*).

(*g*) *Salisbury v. Great Northern Rail. Co.* (1858), 5 C. B. (N.S.) 174.

(*h*) *Beckett v. Corporation of Leeds* (1872), L. R. 7 Ch. 421.

(*i*) *Ibid.*

(*k*) *Leigh v. Jack* (1879), 5 Ex. D. 264.

(*l*) *Scoones v. Morrell* (1839), 1 Beav. 251. In *Hoare & Co. v. Lewisham Borough Council* (1902), 87 L. T. 464, it was found as a fact, upon the evidence adduced, that the "draw-up" in front of a publichouse adjoining a highway was not part of the highway. As to waste lands which form and which do not form part of the highway, see *ante*, pp. 52 *et seq.*

(*m*) *Steel v. Prickett* (1819), 2 Stark, 463.

(*n*) *White v. Hill* (1844), 6 Q. B. 478.

(*o*) *Doe d. Pring v. Pearsey* (1827), 7 B. & C. 304.

"The rule is founded on a supposition, that the proprietor of the adjoining land at some former period gave up to the public for passage all the land between his inclosure and the middle of the road" (p), or that, when inclosing his land from the road, he left an open space at the side of the road over which the public might deviate, if necessary, to avoid the liability to repair which would otherwise have fallen upon him (q).

The presumption may be rebutted by evidence of acts of ownership exercised over the land by the lord or persons claiming under him; as where the strip of land adjoined a common and had long been used by persons in the next village as a common for cattle (r). If the strip communicates with, or is contiguous to, an open common or large portion of land, the presumption is either done away with, or considerably narrowed; for the evidence of ownership which applies to the large portions applies also to the narrow strip which communicates with them (s). When evidence is tendered of acts of ownership done in places other than the place in dispute, it is for the judge to decide, in the first instance, whether there is such a unity of character in the different parts, as to render evidence, affecting a part not in dispute, admissible with reference to the part in dispute (t). Where evidence is given of acts of ownership, or of adverse occupation, it is a question for the jury whether such evidence is sufficient to rebut the presumption of law (u). And evidence of user by the owner of the inclosure may be given in answer to the presumption arising in favour of the lord from acts of ownership done by him on other parts of the waste of the manor similarly situated (x).

In one case it was to the interest of the adjoining owner, by reason of adverse possession and the Statute of Limitations, that the original presumption in his favour should be rebutted; and the acquiescence of his predecessor in an inclosure award, whereby two strips of land between his inclosures and the highway were allotted to him as part of the waste lands of the manor, was held to be admissible in evidence as an admission by a deceased person

(p) *Doe d. Pring v. Pearsey* (1827), 7 B. & C. 304, per BAYLEY, J.

(q) ABBOTT, C.J.: *Steel v. Prickett* (1819), 2 Stark, 463; *post*, pp. 94 and 96.

(r) *Headlam v. Hedley* (1816), Holt, 463.

(s) *Grose v. West* (1816), 7 Taunt. 39.

(t) *Stanley v. White* (1811), 14 East, 332; *Doe d. Barrett v. Kemp* (1831), 7 Bing. 332; *S. C.* (1835), 2 Bing. N. C. 102; *cf. Hollis v. Goldfinch* (1823), 1 B. & C. 205; *Coats v. Herefordshire County Council*, [1909] 2 Ch. 579. But, in order to make evidence of similarity of character applicable within the rule laid down in *Doe d. Barrett v. Kemp*, *supra*, the land in dispute must be proved to be within the owner's manor (*Leeke v. Portsmouth Corporation* (1912), 107 L. T. 260).

(u) *Doe d. Harrison v. Hampson* (1847), 4 C. B. 267.

(x) *Simpson v. Dendy* (1860), 8 C. B. (N.S.) 433.

against interest, which established that the title of the adjoining owner to such strips commenced from the date of the award (y).

An award under an Inclosure Act passed in the year 1774 allotted certain lands and set out certain roads as public highways. From a short time after the passing of this Act the pasturage of one of the roads set out was let annually by the inhabitants of the parish in vestry assembled without interference from the lord of the manor. There was no evidence in whom the soil of the road was vested before the passing of the Inclosure Act, and there was no evidence of any grant or of its enrolment. It was held that a lawful origin must be presumed from the long usage; that a presumption might be made either that the grant of the road had been enrolled or that the grant had been made for some purpose which has since been lost sight of, but which did not require that the deed should be enrolled, and that the churchwardens and overseers (z) as trustees under 59 Geo. 3, c. 12, s. 17, of lands belonging to the parish, had gained a title to the road under the Statute of Limitations, subject to the public right of way (a).

**Rights of Owner of Highway.**—The owner of the soil is entitled to use and enjoy his property in every way not inconsistent with the public right of passage. “The king has nothing but the passage for himself and his people; but the freehold and all profits belong to the owner of the soil” (b). Ejectment would lie at the instance of the owner to recover the land or any part of it inclosed or encroached on by the defendant (c).

The public right is an easement over the surface, and the user of the surface by the owner is accordingly limited by the public right. But where the owner of the highway was also the owner of certain adjoining premises, and the magistrate found as facts—(1) that the premises in question could not be reasonably enjoyed without access across the paved footway, and (2) that the rights of ownership and those of the public might be jointly exercised consistently with the general welfare, it was held that the owner was not liable to be convicted under the Highway Act, 1835, s. 72, for doing damage to a highway by carrying heavy machinery in trolleys across the pavement and so crushing and injuring the flags. In this case, the highway authority had refused to permit him to take up the flagged pavement and make a proper paved carriage access

(y) *Gery v. Redman* (1875), 1 Q. B. D. 161.

(z) Now the parish council (The Local Government Act, 1894, s. 6).

(a) *Haigh v. West*, [1893] 2 Q. B. 19. But see also *Neaverson v. Peterborough Rural District Council*, *post*, p. 67, note (n).

(b) 1 Roll. Abr. 392.

(c) *Goodtitle d. Chester v. Alker* (1757), 1 Burr. 133.

across the footway to his premises (*d*). "The owner who dedicates to public use as a highway a portion of his land, parts with no other right than a right of passage to the public over the land so dedicated, and may exercise all other rights of ownership not inconsistent therewith; and the appropriation, made to and adopted by the public, of a part of the street to one kind of passage, and another part to another, does not deprive him of any rights, as owner of the land, which are inconsistent with the right of passage by the public" (*e*). Where conservators of a river navigation claimed an injunction to restrain an adjoining owner from using the towing path for the passage of horses and carts, and the carriage of goods and merchandise, but failed to prove that they had acquired the property in the soil of the towing path, it was held that they were only entitled to an injunction to restrain the adjoining owner (who was presumptively the owner of the soil) from damaging or obstructing the towing path, or using the same in any manner which interfered with its free use for the navigation of the river (*f*).

Where for more than 100 years a fee farm rent had been paid to the trustees of a charity in respect of a piece of land acquired for the widening of a turnpike road and since forming part of the road, but no conveyance to the turnpike trustees could be discovered, and the rent-charge was paid first by the turnpike trustees, who had statutory power to buy land for widening the roads under their control, and afterwards, on the expiration of the turnpike trust in 1871, by the defendant corporation, in whom, as the highway authority, the road had become vested under the Public Health Act, 1875, the court held that they ought to presume that the land had been granted to the turnpike trustees as land subject to a perpetual rent-charge, and that the defendant corporation were liable as *terre tenants* for the payment of the rent-charge (*g*).

The owner of the soil has a right to prevent the surface being used for any purpose or in any manner not justified by the public easement. He may remove anything on the highway not justified by the easement, whereas one of the public has no right to remove an incumbrance unless it is a nuisance to the way (*h*). A person who goes upon the highway for the purpose of searching for game may be convicted of trespassing in search of game upon land "in the possession and occupation" of the owner of the soil (*i*). So,

(*d*) *Vestry of St. Mary, Newington v. Jacobs* (1871), L. R. 7 Q. B. 47. As to this case, see the Highway Act, 1835, s. 72, *post*, note.

(*e*) *Per cur.*, *ibid*.

(*f*) *Conservators of River Lea Navigation v. Button* (1881), 6 App. Cas. 685.

(*g*) *Foley's Charity Trustees v. Dudley Corporation* (1910), 74 J. P. 41.

(*h*) BYLES, J.: *R. v. Mathias* (1861), 2 F. & F. 570.

(*i*) *R. v. Pratt* (1855), 4 El. & Bl. 860; *Maghew v. Wardley* (1863), 8 L. T.

cattle are not lawfully on the highway for any other purpose than that of passing and repassing (*k*); and the owner of the soil may maintain trespass against a person who depastures cattle upon a highway, the herbage of which is vested in him (*l*).

Trees (*m*) and herbage (*n*) growing on a highway in general belong to the owner of the soil.

The owner of the soil may maintain trespass for anything unlawfully put on the highway; as, for example, where the owner of adjoining land built a bridge over an intervening ditch, to connect

(*n.s.*) 504; *Harrison v. Duke of Rutland*, [1893] 1 Q. B. 142; *Hickman v. Maisey*, [1900] 1 Q. B. 752. In the American case of *Adams v. Rivers* (1851), 11 Barb. (N. Y.) 390, it was held that a person is a trespasser who, instead of passing along, stops on the highway in front of the house of a man who is the owner of that part of the highway, and remains there using towards him abusive and insulting language.

(*k*) *Dovaston v. Payne* (1795), 2 H. Bl. 527.

(*l*) *Stevens v. Whistler* (1809), 11 East, 51. See also *Cox v. Burbidge* (1863), 13 C. B. (*n.s.*) 430; *Hadwell v. Righton*, [1907] 2 K. B. 345; *Higgins v. Searle* (1909), 73 J. P. 185.

(*m*) 1 Roll. Abr. 392; 3 Salk. 182 (1); Lord MANSFIELD, in *Goodtitle v. Alker* (1757), 1 Burr. 143; *Turner v. Ringwood Highway Board* (1870), L. R. 9 Eq. 418; *Nicol v. Beaumont* (1884), 53 L. J. Ch. 853.

(*n*) *Coverdale v. Charlton* (1879), 4 Q. B. D. 104. In *Curtis v. Kesteven County Council* (1890), 45 Ch. D. 504, an owner of land adjoining a main road and his tenant obtained an injunction against a county council restraining them from removing the grass, timber and other growths from the sides of the main road. It may sometimes arise that the right of pasturage is in the highway or other public authority as in *Haigh v. West*, *ante*, p. 65, where the overseers as trustees for the parish had acquired the right, or as in one of the points raised in *Coverdale v. Charlton*, *supra*, where the highway, being a street, was vested in the urban authority. Inclosure Acts frequently contain provisions as to the herbage on both public and private roads. In *Neaverson v. Peterborough Rural District Council*, [1901] 1 Ch. 22, the herbage of a private road was, by an inclosure award made in 1822, allotted to the surveyor of highways to be let for depasturing sheep in aid of rates. For more than fifty years the surveyor had let the pasturage for cattle and horses. The court presumed an enlargement of the right to depasture by grant or release from the owners of the soil to the surveyor. In the Court of Appeal, however, this decision was reversed. It was held that, upon the true construction of the Act and award, the prohibition of the pasturage on the roads of stock other than sheep was intended to be a permanent provision; that it was meant, not merely for the protection of allottees of land under the Act, but also for the preservation of the drainage system in the public interest; that it was therefore not competent for the allottees or any body of persons to make a grant or release in favour of the surveyor of highways, so as to extend the right of pasturage to stock other than sheep; and that consequently a legal origin could not be presumed in order to support the above-mentioned practice of the surveyors of highways ([1902] 1 Ch. 557). In *Att.-Gen. v. Garner*, [1907] 2 K. B. 480, by an award made in 1801 under an Inclosure Act, the grass and herbage growing in a private road was to be let yearly by the surveyor of highways or by such other person as the parishioners in vestry assembled should appoint, and the money arising therefrom was to be expended in the repair of the public and private roads in the parish, and it was held that the right of property in the grass and herbage was vested in the parish council and not in the district council.

his land with the highway, and rested the end of the bridge upon the highway (o). He may even maintain trespass against a surveyor of highways, who, under colour of repairing the highway, puts material upon it in excess of what is required to render it safe and fit for traffic (p). Apart from statutory authority he cannot improve a highway into a totally different kind of highway or into a more commodious one than it used to be; his duty is to repair it (q). Thus, it has been held to be an act of trespass against the owner of the soil if the surveyor, by way of repairing a public footpath, erects a bridge across a stream which has formerly been crossed by means of stepping-stones (r). And where a public footway has been dedicated subject to the right of ploughing, it is a trespass against the owner or occupier of the soil to place materials on it for the purpose of making it a hard causeway (s).

The owner is entitled to the subsoil absolutely, though "he cannot use the soil, or deal with it by breaking it open, or in any other manner so as to interfere with the use of it by the public for the purpose of a highway" (t). Dedication, as between the owner of the soil and the controlling authority (i.e. a rural district council), involves not merely the occupation by the public of the surface, but also the dedication of so much of the subjacent soil as is necessary for the proper maintenance of the surface as a highway (u). His consent, therefore, is necessary to laying, for example, water pipes in the subsoil of a highway, where not done under statutory authority (u). If a water company duly authorised to lay pipes under streets in connection with the undertaking authorised by their special Acts, proceed to lay pipes in connection with unauthorised

(o) *Lade v. Shepherd* (1735), 2 Stra. 1004.

(p) Cf. LINDLEY, J.: *Burgess v. Northwich Local Board* (1880), 6 Q. B. D. 264.

(q) *Rudcliffe v. Marsden Urban District Council* (1908), 72 J. P. 475. As to improving a highway under statute, see, for example, the Highway Act, 1864, ss. 47, 48, the Public Health Act, 1875, s. 149, the Local Government Act, 1888, s. 11, and the Development and Road Improvement Funds Act, 1909.

(r) *Sutcliffe v. Sowerby* (1859), 1 L. T. (N.S.) 7; *Campbell Davys v. Lloyd*, [1901] 2 Ch. 518; *Radcliffe v. Marsden Urban District Council*, *supra*.

(s) *Arnold v. Blaker* (1871), L. R. 6 Q. B. 433.

(t) Lord SELBORNE, L.C.: *Goodson v. Richardson* (1874), L. R. 9 Ch. 221; *Benfieldside Local Board v. Consett Iron Co.* (1877), 3 Ex. D. 54.

(u) *Schweder v. Worthing Gas Light Co.* (No. 2), [1913] 1 Ch. 118. Comparison might be made with the cases on the next page decided in connection with the vesting of roads in the councils of urban districts.

(u) *Goodson v. Richardson*, *supra*; *Tunbridge Wells (Mayor) v. Baird*, [1896] A. C. 434; *Salt Union, Limited, and Droitwich Salt Co., Limited v. Harvey* (1897), 13 T. L. R. 297. For the purposes of statutory gas or water undertakings no part of a road (i.e. no part of the subsoil) can be properly held to be land "not dedicated to public use" (*Schweder v. Worthing Gas Co.* (No. 2), *supra*).

works he may sue the company in trespass (*x*). The fact that the damage is small is immaterial (*y*). If he owns land on both sides of the highway he has a right to make a tunnel through his soil under the road, provided he does not interfere with the road above him or with any subsisting rights therein (*z*). A railway company who are authorised by statute to make a tunnel under a highway must make compensation to the owner of the soil, and are not entitled to enter on the land until such compensation has been paid (*a*). Where a person, with the permission of the highway authority, but without the consent of the owner of the soil, laid waterpipes in the soil of a highway, the court granted an injunction to restrain him from allowing them to remain there (*b*). A gas or water company, authorised by statute to lay pipes under a highway, are entitled to support for their pipes from the subjacent soil; and the landowner is entitled to compensation for the limitation which this burden imposes on his user of the land, as by taking from him the free power of getting valuable minerals (*c*).

The owner of the land is entitled to the space above the land *usque ad cælum*, and it is, therefore, a trespass against him, unless authorised by statute, to carry telegraph wires or to erect any incumbrance in the air above the highway without his consent (*d*).

**Rating, etc. of Highways.**—Highways are not in general rateable, because the owner has not a profitable or beneficial occupation of the land. For the same reason the owner is not liable to

(*x*) *Marriott v. East Grinstead Gas and Water Co.*, [1909] 1 Ch. 70. As to what are unauthorised works, *cf. Att.-Gen. v. Frimley and Farnborough District Water Co.*, [1908] 1 Ch. 727; *Att.-Gen. v. Barnet District Gas and Water Co.*, [1910] 102 L. T. 546, H. L.

(*y*) *Goodson v. Richardson*, *supra*; *Marriott v. East Grinstead Gas and Water Co.*, *supra*.

(*z*) *Cattle v. Stockton Waterworks Co.* (1875), L. R. 10 Q. B. 453; *Cunliffe v. Whalley* (1851), 13 Beav. 411. A person may obtain a property in a tunnel under a highway by adverse possession (*Bevan v. London Portland Cement Co.* (1892), 67 L. T. 615). In an urban district it is an offence to cause any vault, arch or cellar to be newly built or constructed under the carriageway of any street, without the consent of the urban authority (The Public Health Act, 1875, s. 26). In *Walker Urban District Council v. Wigham, Richardson & Co.* (1902), 66 J. P. 152, an urban council were granted a declaration that they were entitled to alter, pull down, or otherwise deal with a tunnel which had been constructed across a street without their consent.

(*a*) *Ramsden v. Manchester, etc. Rail. Co.* (1848), 1 Ex. 723; *Northam Bridge Proprietors v. South Stoneham Rural District Council* (1907), 71 J. P. 345, where a rural district council were held liable to pay compensation to the owner for laying a sewer in a road.

(*b*) Lord SELBORNE, L.C.: *Goodson v. Richardson* (1874), L. R. 9 Ch. 221; *Benfieldside Local Board v. Consett Iron Co.* (1877), 3 Ex. D. 54.

(*c*) *Normanton Gas Co. v. Pope and Pearson* (1883), 52 L. J. Q. B. 629. See *In re Corporation of Dudley* (1881), 8 Q. B. D. 86.

(*d*) *Semble, Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 901.

contribute to the expenses of paving a new street on which the highway abuts under the Metropolis Management Acts (*e*). Tolls thorough are not rateable as such because they are not connected with the occupation of land (*f*).

But if a highway is a source of profit to the owner of the soil, for example, by the receipt of toll traverse for its use, he may be rated in respect of the occupation of land; and it is immaterial whether the tolls are actually received in the parish where the rate is made if any part of the land in respect of which they are received is situated there (*g*). Similarly, the owner of a private or an occupation road, the use of which is part of the consideration in respect of which his tenants pay rent, is liable to contribute under the Metropolis Management Acts to the cost of paving a new street into which the occupation road leads (*h*).

**Ownership of Way under Statutes.**—By the Public Health Act, 1875, it is enacted that all streets, being highways repairable by the inhabitants at large, and within any urban district, shall vest in and be under the control of the urban authority (*i*). Similar enactments are contained in the Metropolis Management Act, 1855 (*k*), and, with regard to main roads, in the Local Government Act, 1888 (*l*), and also with regard to certain roads constructed under the Development and Road Improvement Funds Act, 1909 (*ll*).

The effect of these enactments is to transfer to the urban or other authority the property in the surface of the street, and in the zone or area of ordinary user of the street *quod* street, both above and below the surface; and to this extent the property and possession are divested from the former owner (*m*). The urban authority have vested in them “only the surface, and with the surface such right below the surface as is essential to the maintenance, occupation, exclusive possession of the street and the making and maintaining the street for the use of the public” (*n*). “It seems to me

(*e*) *Plumstead Board of Works v. British Land Co.* (1875), L. R. 10 Q. B. 203.

(*f*) *Rex v. Nicholson* (1810), 12 East, 330.

(*g*) *Rex v. Barnes* (1830), 1 B. & Ad. 113; *R. v. Marquis of Salisbury* (1838), 8 A. & E. 716.

(*h*) *Lord Northbrook v. Plumstead Board of Works* (1871), L. R. 7 Q. B. 183.

(*i*) 38 & 39 Vict. c. 55, s. 149. Highways are not vested in rural district councils.

(*k*) 18 & 19 Vict. c. 120, s. 96.

(*l*) 51 & 52 Vict. c. 41, s. 11.

(*ll*) 9 Edw. 7, c. 47.

(*m*) *Burgess v. Northwich Local Board* (1880), 6 Q. B. D. 264; *Battersea Vestry v. County of London and Brush Provincial Electric Lighting Co.*, [1899] 1 Ch. 474.

(*n*) JAMES, L.J.: *Rolls v. Vestry of St. George the Martyr* (1880), 14 Ch. D., p. 796.

that the vesting of the street vests in the urban authority such property, and such property only, as is necessary for the control, protection and maintenance of the street as a highway for public use" (o). "It is intelligible enough that Parliament should have vested the street *quod* street, and, indeed, so much of the actual soil of the street as might be necessary for the purpose of preserving and maintaining and using it as a street" (p). "With regard to the air above the 'street,' the Board of Works have not any proprietary interest above the 'street,' except what is necessary to protect the street and the traffic from interruption or danger, or to enable them to exercise their powers in the 'street'" (q). "That which is vested in the local authority is what is called the area of user. . . . All the stratum of air above the surface, and all the stratum of soil below the surface which in any reasonable sense can be required for the purposes of the street as street, vest in and belong to the local authority" (r). What is vested in them is the property in the street, not a mere easement (s), although the soil or land is not vested in them as the owners (t).

The urban authority have, therefore, such a property in the surface as enables them to demise the right of pasturage thereon (u), or to grant a licence to a gas company to open the surface for the purpose of laying down their pipes (x), or to prevent a tramway company laying electric feeders under the footways of the streets without statutory authority (y). In the metropolis, the borough councils have vested in them the subsoil of

(o) Lord HERSCHELL: *Mayor of Tunbridge Wells v. Baird*, [1896] A. C., p. 442; *Poplar Corporation v. Millwall Dock Co.* (1904), 68 J. P. 339.

(p) Lord HALSBURY, L.C.: *Mayor of Tunbridge Wells v. Baird*, *supra*, at p. 437. See also *Salt Union, Limited, and Droitwich Salt Co., Limited v. Harvey & Co.* (1897), 13 T. L. R. 297; and notes to s. 149 of the Public Health Act, 1875, *post*.

(q) BOWEN, L.J.: *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 904.

(r) COLLINS, M.R., in *Finchley Electric Lighting Co. v. Finchley Urban Council*, [1903] 1 Ch., p. 441. See also RUSSELL, C.J., in *Bradford v. Eastbourne Corporation*, [1896] 2 Q. B., p. 442.

(s) *Westminster Corporation v. Johnson*; *Same v. Fuller*, [1904] 2 K. B. 737; *Ystradyfodwg and Pontypridd Main Sewerage Board v. Bensted*, [1907] 1 K. B. 490.

(t) *Municipal Council of Sydney v. Young*, [1898] A. C. 457; so that where a tramway was laid in a street vested in the local authority, it was held by the Privy Council that they were not entitled to compensation as for land taken for the purposes of the tramway.

(u) *Coverdale v. Charlton* (1878), 4 Q. B. D. 104.

(x) *Edgware Highway Board v. Harrow District Gas Co.* (1874), L. R. 10 Q. B. 92.

(y) *Mayor, etc., of Hyde v. Oldham, etc. Electric Tramway Co., Limited* (1900), 64 J. P. 596.

the street in which they may construct underground lavatories (z). But outside the metropolis local authorities have not vested in them the subsoil of the street to such a depth as to enable them to construct lavatories under the street (a), unless they have adopted s. 47 of the Public Health, etc. Act, 1907, nor have they any power to grant a licence to lay pipes used for trading purposes by traders (b). They do not acquire any right to minerals below the street (c), nor can they, as statutory owners of the soil, complain of the erection of a telephone wire (d) or an electric lighting wire (e) across the street at a great height, and causing no appreciable danger to the public or obstruction to the traffic in the street, nor after a wire is laid in the street can they obtain a mandatory injunction to remove the wire (f), nor without statutory authority can they break open any street outside the district for the purpose of laying or repairing water pipes (g).

Hence, where the site of a street which ultimately vested in the urban authority under the Public Health Act, 1875, s. 149, was originally conveyed to turnpike trustees in fee simple for the purpose of making a road under the Turnpike Acts, the property of the urban authority in the site is not thereby enlarged, so as to enable them to prevent electric wires being carried over the street at a height above the area required for the user of the street (h). Where an electric lighting company had illegally broken up the surface of a street vested in a metropolitan vestry under the Metropolis Management Act, 1855, and placed their pipes and wires at a depth of about two feet below the surface, the vestry could not maintain an action for a mandatory injunction to compel the company to remove their pipes and wires although the company had acted illegally in breaking up the street, there being no continuing trespass upon or interference with any right of the

(z) The Public Health (London) Act, 1891, s. 44; *Westminster Corporation v. London and North Western Rail Co.*, [1905] A. C. 426. Even in the metropolis the local authority have no power as against the owner of the soil to construct subways under a street, unless it be as an approach to a lavatory (*ibid*).

(a) *Mayor, etc. of Tunbridge Wells v. Baird*, [1896] A. C. 434.

(b) *Salt Union, Limited, etc. v. Harvey* (1897), 13 T. L. R. 297.

(c) Minerals are expressly saved by the Highways and Locomotives (Amendment) Act, 1878, s. 27, passed after the decision of the Divisional Court in *Coverdale v. Charlton* (1878), 3 Q. B. D. 376.

(d) *Wandsworth Board of Works v. United Telephone Co.* (1884), 13 Q. B. D. 904.

(e) *Finchley Electric Light Co. v. Finchley Urban Council*, [1903] 1 Ch. 437.

(f) *Battersea Vestry v. County of London and Brush Provincial Electric Lighting Co.*, [1899] 1 Ch. 474.

(g) *Preston Corporation v. Fullwood Local Board* (1886), 53 L. T. 718.

(h) *Finchley Electric Light Co. v. Finchley Urban Council*, *supra*, reversing, [1902] 1 Ch. 866.

vestry (i). Where land was vested in a company for the purpose of their undertaking and under a private Act a road running over this land had been transferred to and vested in a local authority, for which they gave no consideration, and the company proposed to make a tunnel under the road, it was held that the road was vested in the local authority only for the purposes of a road, that they had no right to the subsoil other than as local authority, and that, therefore, they were not entitled to restrain the company from making the tunnel (k).

As against the owner of the soil a local authority, or a person or company under contract with the local authority, has the right to place posts in and electric lighting wires along or across their streets for the purpose of lighting their district (l). Poles and wires for such a purpose are within the zone or area of user vested in the local authority.

Telegraph or telephone wires may not be placed under any street within the limits of the district of the London County Council, or of any borough, or of any town having a population of 30,000 inhabitants or upwards (according to the latest census) except with the consent of the body having the control of the streets within such respective limits (m), nor may they be placed over, along, or across a street or public road without the consent of the highway authority (n). The local authority can only raise objections or

(i) *Battersea Vestry v. County of London and Brush Provincial Electric Lighting Co.*, *supra*; followed in *Walker Urban District Council v. Wigham, Richardson & Co., Limited* (1902), 66 J. P. 152.

(k) *Poplar Corporation v. Millwall Dock Co.* (1904), 68 J. P. 339.

(l) *Fareham Local Board v. Smith* (1891), 7 T. L. R. 443.

(m) The Telegraph Act, 1863 (26 & 27 Vict. c. 112), ss. 9, 10. Powers are also given to place wires under, over, along or across streets and highways (*ibid.*, s. 6). As to constructing telegraph or telephone wires overhead or under ground, see *P.M.-G. v. Tottenham Urban District Council* (1910), 8 L. G. R. 791; *Croydon Corporation v. P.M.-G.* (1910), 74 J. P. 424; 8 L. G. R. 1005.

(n) *Ibid.*, s. 12. In *Postmaster-General v. Hendon Urban District Council*, [1914] 1 K. B. 564, the highway in question under s. 12 was a "street" which the defendant council could require the frontagers to make good under s. 150 of the Public Health Act, 1875 (*post*). The Court of Appeal held that the council, not being liable to repair the road, were not the body "having the control of" it within s. 12; and that streets which have not been taken over by the local authority remain under the control of the owners of the soil over which they are made. In *Postmaster-General v. Hutchings*, [1916] 1 K. B. 774, roads which had been dedicated to the public, but had not been taken over by the local authority were held public roads within the meaning of the Telegraphs Acts, and the owner of the estate traversed by the roads was held to be the person to give or withhold consent. (Decision of the Railway and Canal Commission.) Where a public road passes through or by the side of any park or pleasure grounds, and where it crosses by means of a bridge or viaduct, or abuts on any ornamental water belonging to any park or pleasure grounds, and where it crosses or abuts on a private drive through any park

impose conditions as to matters which concern them as road authority; they cannot, for example, impose conditions as to the mode in which the service is to be carried on, or as to the reasonableness of the charges (o).

The statutory title conferred by the above enactments lasts only so long as the street is a highway, and if it ceases to be a highway by being legally stopped up or diverted the statutory title ceases (p). "If it is competent to limit the extent of the right of property by reference to the general purview of the Act of Parliament, and the purposes for which the thing is vested in and given to the public authority, it seems to me it is equally competent, equally right, and equally reasonable to limit that right in point of duration" (q). When the interest of the local board ceases, the "street" reverts in the former owner in whom the subsoil below, and the column of air above, the zone or area of ordinary user were all along vested.

A highway may be "property" of the highway authority for the purposes of a contract relating, *inter alia*, to the carriage of materials over it, and damage to such "property" may entitle one of the contracting parties to be indemnified against the expenses of the highway authority incurred by reason of the extraordinary traffic thereon (r).

or pleasure grounds, or to any mansion house, the company (telegraph or telephone) [now the Postmaster-General] shall not, otherwise than in accordance with the consent of the owner, lessee and occupier of such park, pleasure grounds, or mansion house, place any work above ground on such public road (s. 12, *supra*).

(o) *Postmaster-General v. Corporation of London* (1898), 62 J. P. 890.

(p) *Rolls v. St. George's, Southwark* (1880), 14 Ch. D. 785.

(q) JAMES, L.J.: *Rolls v. St. George's, Southwark*, *ibid.*, at p. 796.

(r) *Croydon Rural District Council v. Sutton District Waterworks Co. (Ewart, Third Party)* (1908), 72 J. P. 217.