

Surface, 'spits' and toilets, or Who Owns The Public Paths?

Many people, including path users, believe that public paths normally belong to the landholders whose land they pass over. Are they right?

Let's start with the joint words of the **National Farmers' Union the Country Landowners' Association**, and the **Countryside Commission** as printed in CCP450, Managing Public Access:-

In simple terms, the surface of a highway, whether a public right of way or a road, is owned by the Highway Authority rather than the owner of the land over which it passes.

So is this real ownership? And what is this 'surface'? Is it just a thin top layer?

Let's start with the underlying law:

"... every highway maintainable at the public expense together with the materials and scrapings of it, vests in the..highway authority.."

Highways Act 1980 Section 263 is quoted here but similar words have been used since 1855.

What on earth does 'vests in' mean?

The legally well respected book Halsbury's Statutes says that 'vests in' means the Highway Authority has ownership in fee simple but determinable if the path ceases to be a public highway (for example by diversion or stopping-up orders). Others have said it is fee simple absolute in possession, which is another term for freehold, but with

the freehold ceasing if the path ceases to be a highway. That's virtually the same as Halsbury. This 'vesting' is more than leasehold (though that too is a form of ownership) since a lease is only for an agreed time span, whereas a public way, once created, continues forever unless legally stopped up: 'once a highway, always a highway' [*Dawes v Hawkins (1860)*] reaffirmed frequently eg *Loder v Gaden (1999)*].

"Every highway, with the materials and scrapings of it" -
What constitutes the highway?
What constitutes the materials and scrapings?

Well in *Finchley Electric Lighting Co. v. Finchley Urban Council (1903)* the judge, Collins M.R. said that the following vest in and belong to the Authority:

'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.'

More recently Lord Denning in *Tithe Redemption Commissioners V. Runcorn U D.C* suggested that the 'top two spits' of the land were vested, spits apparently meaning spade depths.

What isn't included?

In *Tunbridge Wells Corporation v. Baird [1896]* The Corporation tried to build public toilets under the street, on the basis it seems of their

ownership of the highway. The court decided the ownership was only such property as is necessary for the control, protection and maintenance of the street as a highway for public use. This prevented them from building these subterranean toilets.

Note that neither the Highways Act nor the three cases above support the view held by some that the ownership is just the 'right' or is just the surface in the sense of a thin notional layer.

Historically only the stones or setts or other materials of value were vested, the so called 'materials and scrapings' (eg Highways Act 1835). But from the Public Health Act 1875 at least, a string of statutes vested not only those materials and scrapings but the highway itself.

The ownership gives powers that follow the freehold, for example highway authorities can sue for trespass *Wiltshire CC V. Frazer (1984)*. They also can take direct action under the common law which can sometimes be the quickest and easiest approach.

Comment is welcome on this paper, e-mail to chris@beney.org or phone 01923-211113

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[BADFA website 2003-2010]

Acknowledgement is made to *Highways and sub-soil ownership and Existence and vesting of highways* by Professor Keith Davies (Rights of way Law Review 2.1) and to Halsbury's Statutes. And of course to the Blue Book. [Whoowns May2003.cdr 05/03]

Why does ownership matter?

If the local 'landowners' understood that they do not own the paths then they might not feel such a sense of personal possession of these little public highways. And then they might treat them more like they treat the public roads which cross their holdings, and be less concerned at public use and less likely to try to move or disturb these little highways.

If Highway Authority officers fully understood that the paths are their property then that would help to direct their actions when local 'landowners' plough up their paths or obstruct them.

It would also help towards understanding that it is the interests of the users of their paths, rather than the interests of the owners of the land under the paths, which the Highway Authority normally has a duty to protect.