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Highway Verges

A revised version of Roadside
Wastes by the late W R Hornby
Steer MA LLB (first published
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Origin and Importance

1. Along many of the highways of England and Wales are to be found strips of land open to the public, running between the metalled road and the fences inclosing the adjoining land. Such strips are often irregular in character and sometimes of considerable width.
2. A reason for their origin is to be found in the judgment of Abbot, LCJ in *Steel v Prickett* (1819) 2 Stark 463 NP, where he used these words:

In remote and ancient times when roads were frequently made through uninclosed lands, and when the same labour and expense was not employed upon roads, and they were not formed with that exactness which the exigencies of society now require, it was part of the law, that the public, when the road was out of repair, might pass along by the side of the road. This right on the part of the public was attended with this consequence that although the parishioners were bound to repair the road, yet, if an owner excluded the public from using the adjoining land, he cast upon himself the onus of repairing the road ... hence it followed as a natural consequence that when a person inclosed his land from the road he did not make his fence close to the road, but left an open space at the side of the road to be used by the public when occasion required ... the object was to leave a sufficiency of land for passage by the side of the road when it was out of repair.

3. When an owner has left such a strip alongside the road, with the intention that the public should be able to use it for passage, and the public has so used it, there is a presumption that he intended to dedicate the strip as part of the highway, and such strips must in many cases be deemed to have been so dedicated. In that event, the strip alongside the road, is just as much part of the 'highway' as the metalled road itself.
4. Sometimes the roadside strips belong, not to the owner of the adjoining property, but to the lord of the manor, and are part of the manorial waste. In such cases they may or may not be subject to rights of common, but in either event they may be held to have been dedicated to public passage, in which case also they are part of the highway. See *East v Berkshire County Council* (1911) 76 JP 35; and *Evelyn v Mirrielees* (1900), 17 TLR 152, CA; 65 JP 131n).

5. These 'roadside strips' are now more commonly referred to as 'roadside verges'. It is important that strips of roadside verge should be safeguarded from any illegal attempts to inclose them for the following reasons.
6. In cases where no footway has been constructed alongside the metalled road, the verge enables pedestrians to proceed with greater safety than they would on the metalled road.
7. Verges often provide a soft turf surface of value to equestrians who would otherwise be limited to using a metalled road which is often unsafe and sometimes of a character unsuitable for horses.
8. With the loss of most of our traditional meadow land through agricultural change, our largest nature reserve is now represented by roadside verges, an important habitat which extends to perhaps half a million acres. They are a vital reservoir of wildlife, especially of wild flowers. (Soil Association 1992).
9. If the inclosure of roadside verges is permitted, any necessary widening of the metalled highway will be more costly by reason of the consequent compensation to the owners of the adjoining lands, and perhaps some much-needed road improvement may thereby be prevented.
10. The increased popularity of walking and riding and the increasing need for wide traffic-routes make it especially important that the public should not lose the advantages to be obtained from keeping such strips free from any illegal inclosure.

Ownership of the soil

11. The general principle of law relating to the ownership of the soil of such strips was stated by Gibbs CJ in *Grose v West* (1816) 7 Taunt 39, in the following words:
Prima facie, the presumption is, that a strip of land lying between a highway and the adjoining close, belongs to the owner of the close; as the presumption also is that the highway itself to the centre line of the road does. But the presumption is to be confined to that extent; for if the narrow strip be contiguous to or communicate with open commons, or larger portions of land, the presumption is either done away or considerably narrowed; for the evidence of ownership which applies to the larger portions, applies also to the narrow strip which communicates with them.
12. It is to be borne in mind that the questions who owns the soil of the roadside verge, and whether it is part of the highway, are quite distinct. Regardless of who owns the soil, the public may have a right of passage over it, ie it may be part of the highway. Consequently, if a public right of passage over such a verge is claimed, it is no answer for the adjoining owner to say 'the land belongs to me' since even if it does, it may still be part of the highway.
13. Where the highway authority acquired the site of the road by purchase, but has only metalled the centre, it has the same legal interest in the verges as any other freeholder has in his own land. It owns the surface and all the soil beneath.
14. Roads taken over by highway authorities vest in them together with the verges. This results in the appropriate authority becoming the fee-simple estate owners in respect of the surface of the road and so much of the subsoil as is essential to the maintenance of the highway for the public use. *Tithe Redemption Commission v Runcorn Urban District Council* [1954] 1 All ER 653.

Width of Highway

15. The general rule of law relating to the extent of the space subject to the public right of passage was stated in *Regina v United Kingdom Electric Telegraph Co Ltd* (1862) 26 JP 390, by Martin B, as follows:

In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences on each side, the right of passage or way prima facie, unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not confined to the part which may be metalled ... a permanent obstruction erected on a highway, placed there without lawful authority, which renders the way less commodious than before to the public, is an unlawful act and a public nuisance at common law . . .

16. This presumption that a highway extends over the whole space between fences may however be rebutted by proof of facts from which it may be inferred that the fences were not put up as boundaries of the highway; thus they may be part of the original boundary of a close of land through which the highway had been made. *AG and Croydon RDC v Moorson-Roberts* (1908) 72 JP 123.
17. Or they may be the boundary between the inclosed land and a strip of manorial waste alongside the highway which has not been dedicated as part of it. Thus the presumption of dedication arising from the public user of greens along the side of a highway between the fences was rebutted in one instance by evidence of an entry in the court rolls of the manor that the greens were waste belonging to the manor, and of the greens being treated by the lord of the manor as his private property. *Friern Barnet UDC v Richardson* (1898) 62 JP 547 CA.
18. The question as to the extent of the space subject to the public right of passage depends upon the evidence in each particular case as to the nature of the district, the width and level of the margins, the regularity of the lines of the fences and other relevant circumstances. *Countess of Belmore v Kent County Council* [1901] 1 Ch 873.
19. Sometimes a road does not run between fences, but across open common or manorial waste; and in that case the presumption of dedication between fences does not apply. *Neeld v Hendon UDC* (1899) 63 JP 724.
20. The cases cited above were considered in *Harvey v Truro Rural Council* [1903] 2 Ch 638 by Joyce J who in his judgment said:

In the case of an ordinary highway running between fences, although it may be of a varying and unequal width, the right of passage or way prima facie, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the entire of it as a highway, and are not confined to the part which may be metalled. All the ground that is between the fences is presumably dedicated as highway unless the nature of the ground or other circumstances rebut that presumption ... It is an established maxim that 'once a highway, always a highway'. The public cannot release their rights. Mere disuse of a highway cannot deprive the public of their rights. Where there has once been a highway no length of time during which it may not have been used will preclude the public from resuming the exercise of the right to use it if and when they think proper. Even if the highway authority had actually consented to any obstruction or encroachment upon the strip being part of the highway, such consent could not legalise that which was otherwise illegal...

21. In *Attorney General v Beynon* [1969] 2 WLR 1447, the verge was of considerable width and irregular in shape. The highway authority claimed that the verge was part of the highway and that the keeping of vehicles there by the defendant was an obstruction of the highway. Goff J said:

It is clear that the mere fact that a road runs between fences, which of course include hedges, does not per se give rise to any presumption. It is necessary to decide the preliminary question whether those fences were put up by reference to the highway, that is, to separate the adjoining closes from the highway or for some other reason. When that has been decided then a rebuttable presumption of law arises, supplying any lack of evidence of dedication in fact, or inferred from user, that the public right of passage, and therefore the highway, extends to the whole space between the fences and is not confined to such part as may have been made up. It seems clear to me however as the principle has developed, that one is to decide the preliminary question in the sense that the fences do mark the limit of the highway unless there is something in the condition of the road or the circumstances to the contrary.

22. It was held that the presumption of law which arose had not been rebutted by the defendant's alleged acts of ownership and the verge was held to be part of the highway and the keeping of vehicles there by the defendant to be an actionable obstruction.

23. In *Vanderpant v Mayfair Hotel Co* [1930] 1 Ch 138 at 152 it was said:

An encroachment on a highway is by common law a public nuisance. It is no defence that the obstruction is made on a part of the highway which is not habitually or ordinarily used for passage. It is no defence that the obstruction is in other ways productive of public benefit, and however reasonable may be the use of a highway by an owner of adjoining premises the public right is a higher right than his and he must yield to the public right.

Powers and duties of local authorities

24. **S71 (1) Highways Act 1980.** *It is the duty of a highway authority to provide in or by the side of a highway maintainable at the public expense by them which consists of or comprises a made-up carriageway adequate grass or other margins as part of the highway in any case where they consider the provision of margins necessary or desirable for the safety or accommodation of ridden horses and driven livestock; and a highway authority may light a margin provided by them under this section.*

25. **S130 (1) Highways Act 1980.** *It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it.*

(2) Any council may assert and protect the rights of the public to the use and enjoyment of any highway in their area for which they are not the highway authority, including any roadside waste which forms part of it.

(4) it is the duty of a local highway authority to prevent any unlawful encroachment on any roadside waste for which they are the highway authority.

(6) If the council of a parish represent to a local highway authority ... (b) that an unlawful encroachment has taken place on a roadside waste comprised in a highway for which they are the highway authority, it is the duty of the local highway authority, unless satisfied that the representations are incorrect to take proceedings accordingly and they may do so in their own name.

26. **S96 Highways Act 1980** authorises the highway authority to plant trees in the highway verge but not to obstruct it.
27. **S96 (6)**. *No tree, shrub, grass verge, guard or fence shall be planted, laid out or erected under this section, or, if planted, laid out or erected under this section, allowed to remain, in such a situation as to hinder the reasonable use of the highway by any person entitled to use it ...*
28. **S142 (1) Highways Act 1980**. *The highway authority for a highway may by a licence granted under this section permit the occupier or the owner of any premises adjoining the highway to plant and maintain, or to retain and maintain, trees, shrubs, plants or grass in such part of the highway as may be specified in the licence.*

(5) A highway authority may attach to any such licence such conditions as they consider necessary to ensure the safety and convenience of passengers in the highway and to prevent traffic [‘traffic’ includes pedestrians and animals, s329 Highways Act 1980] therein being delayed, to prevent any nuisance or annoyance being caused to the owners or occupiers of other premises adjoining the highway.
29. **Town and Country Planning Act 1990**. Where planning permission is given under Part III of the act for the change of use from highway verge to private use, the highway right is not extinguished until the Secretary of State for Transport authorises the stopping-up of the highway by an order under s247 of the act. The order is made to enable the ‘development’ to be carried out.
30. Where the change of use takes place before the highway right is extinguished, the highway right can only be stopped up by an order made by a magistrates’ court. (**S116 & 117 Highways Act 1980.**)
31. **Local Acts of Parliament** Some local authorities have their own private acts that give them powers to control or manage roadside verges and restrict the right of passage by certain categories of user. Ask the legal department of your county authority if such an act exists for your area.
32. The legal remedies available to local authorities are described in *Rights of Way – a guide to law and practice* (John Riddall and John Trevelyan, 4th edition, 2007).

Revised by the late **Gordon Hands**

While the Open Spaces Society has made every effort to ensure the information obtained in this factsheet is an accurate summary of the subject as at the date of publication, it is unable to accept liability for any misinterpretation of the law or any other error or omission in the advice in this paper.

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