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A public interest in the soil of commons, wastes and moors

Colin Seymour examines statutes and case law that suggest a wider-than-acknowledged bundle of rights exists in common land.

Since time immemorial travellers have passed freely along ancient tracks and ways crossing unfenced commons, wastes and moors. The common law holds that such ways are open to all manner of user. Lord Abinger observed in *Cowling v. Higginson* (1838) 4 M & W 245 that if a road led through a park, the jury might naturally infer the right to be limited, but if it went over a common, they might infer a right for all purposes. However, such all-purpose rights were subject to the state of the ground and the season of the year. Nevertheless, such commons, wastes and moors clearly served a wider public purpose over-and-above the local interests of the manor, parish or township, as an examination of old maps showing ancient highways will confirm.

It was often the case in the late 18th and early 19th centuries that commons, wastes and moors were included within the land to be inclosed and divided under a local inclosure act. In such circumstances, the lord of the manor (or any other person having a legal interest in the soil) was required by the act to be compensated for his interests.

Parliament, however, took a different view when part of a common or waste was needed for a public purpose such as the construction of a canal or railway. In such circumstances the lord of the manor was required to convey his interest in the soil to the proprietors, but the compensation was to be paid to the vestry to be applied for public purposes. I have identified five such statutes between 1793 and 1830, all of which are stated in the margin note to the final clause to be a 'Public Act'.

Regarding canals, these are: 33 Geo 3 c.117 Stainforth and Keadby Canal Act(1793) s.19; 1 Geo 4 c.39 Aire and Calder Navigation Act 820) s.13; 9 Geo 4 c.98 Aire and Calder Navigation Act (1828) s.19. Regarding railways, these are 9 Geo 4 c.61 Billingham to Heighington (i.e. Stockton and Darlington Railway Ext) (1828) s.14; 11 Geo 4 c.59 Leeds to Selby Railway (1830) s.28.

S.19 of the Stainforth Canal Act (1793) required that "the purchase money for the several commons and waste lands… shall be paid to the surveyors of the highways… and to be applied… to the repairs of the highways… in such manner as shall be directed by any order of vestry or majority of rated inhabitants at a towns meeting… made for that purpose."

S.14 of the Billingham Railway Act (1828) in a margin note states, "Waste Lands to be conveyed by Lords of Manors." The section recites that any commons or waste grounds shall be conveyed by the lords of the manor and "Compensation shall be… tendered to the Surveyors of the Highways… and applied towards the Repairs of the Highways… and in no other Manner."

S.28 of the Selby Railway Act carried the same margin note as above. The section recites that the common or waste land shall be conveyed by the lords of the manors and, "Compensation… shall be paid by the said Company to the Churchwardens… and applied for such general or public purposes within the said Parish as a Vestry thereof, to be convened by such Churchwardens for that purpose, shall direct."

Parliament also allowed commons and wastes to be taken for the construction of turnpike roads but compensation was payable to owners rather than to the vestry. It was clearly the intention of Parliament at that time to ensure that where commons and wastes were taken for the construction of railways and canals the local inhabitants were fully compensated for their loss and such compensation "was to be applied for a public purpose within the parish."

At the same time as these public acts were being passed, hundreds of private acts were being enacted to inclose other commons and wastes. New 'private roads' were being awarded over these waste lands, roads which were 'in lieu' of the ancient common and customary ways which previously ran over them. As the above statutes confirm, the waste lands of each parish were, in effect, the 'private possessions' of that parish or township. Every parcel of waste land fell within a particular area of local administration: an administration, which, at that time was a 'private and unique' administration governed by local common and customary law.

In 1983, Ronald Swinden (now deceased) wrote "A private road in an inclosure award was dedicated by the lord of the manor usually pursuant to an Act of Parliament for the public as a whole to have access." (*Solicitors Journal* (1983) Vol. 102 No 9). Ronald Swinden proved many times, in a succession of cases against the former West Yorkshire Metropolitan County Council (1974-1986) that private roads were highways maintainable at the public expense. The courts referred to "the Swinden Theory". However, I know that when he wrote the above article he was not aware of the requirements within the above railway and canal acts.

The inference therefore arises that in lieu of the compensation which he received for his interests in the waste lands at inclosure, the lord of the manor may be presumed to have dedicated the soil of the new private roads (awarded over the former waste) for the use of all the inhabitants. This would be in accord with the above 'public purpose within the parish'. It is now well-accepted law that the inhabitants of a village or township constitute the public *per se*. If this is the case, it may therefore be assumed that Parliament was reflecting, and confirming by statute, the practice of the existing common law when it made the payment of compensation to the vestry compulsory.

The two railway acts of 1828 and 1830 (above) reflect an important principle of law at that time. The margin notes to s.69 (1828) and s.135 (1830) state "Passage upon Railway to be free on Payment of Tonnage." In other words, Parliament was, in effect, granting consent for the construction of a unique form of highway. Both clauses state "That all persons shall have free Liberty to use, with Carriages, all Roads, Ways, and Passages for the Purpose of conveying Goods... or Passengers, or Cattle, to and from the said Railway and every Part thereof, and also to pass along and upon and use the said Railway with Waggons or other Carriages properly constructed as by this Act directed, upon Payment only of such Rates, Tolls and Sums."

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REPORT

R (oao Connaughton) v. West Dorset District Council
25 March 2002, no. CO/2988/2001.

This was an application for judicial review against the decision of West Dorset District Council not to make a Highways Act diversion order in respect of footpath 32, running through the claimant's property and which, he alleged, "diminished the private enjoyment of his property." Mr Justice Crane referred to a plan that showed FP32 starting at a point A, then to B, then across the claimant's land, then to C on an unclassified road, then starting again on the opposite side of the road, then to D, and beyond. The claimant wished for an alternative route AGHJD, which would still allow a walker to make a journey from A to B, but which incorporated part of existing FP29.

The decision of the council had been criticised by the claimant on the ground that it had taken into account whether the proposed diversion would or would not be substantially less convenient to the public – a consideration relevant under s.119(6) – i.e. a question for the Secretary of State on determination of an opposed order, but not a question for the OMA – but not relevant under s.119(1). This matter had been the subject of exchanges between the claimant and the council in light of the decision in *Cowl v. Plymouth City Council* [2001] EWCA civ. 1935, and the council had offered to consider a new application. Crane J therefore had to consider only two issues:

(a) On the proper construction of the Highways Act 1980, and in particular ss.328 and 329, and for the purposes of s.119(2), is a point of termination of a footpath fixed at each and every point which it transcends a highway or bridleway (or indeed any other way carrying greater or different rights to pass)?

(b) On the proper construction of s.119, having regard to the decision in *R v. Lake District Special Planning Board ex p. Bernstein*, 29 January 1982, was the defendant entitled to refuse the claimant's application on the basis that the proposed diversion would alter part of the right of FP 32 to run co-extensively with FP29?

On point (a): the defendant council argued that, because of the definition of a footpath in s.329, there must be a termination where a footpath meets a 'higher right', then a short gap, then the footpath starts again as a 'new footpath' on the other side. Numbering of paths, even if the same number is used both sides of such a 'break' is merely a "matter of administrative convenience." This view has merit, says Crane J, in that establishing a 'point of termination' for the purposes of s.119 would be "clear from a brief examination of the definitive map."

Counsel for the claimant argued that the points of termination are always a question of fact in each case, and the numbering system employed is merely one factor to be considered. If each portion of path 'severed' by roads is a separate legal entity, then to divert what is in effect a single footpath would require a number of separate diversion orders. S119(1) speaks of the 'line' of the path …'

Crane J prefers the claimant's argument: "It seems to me that if one looks at s.119 as a whole it envisages in the case of a public path diversion order a single order rather than a series of orders for what is, in reality, a single diversion. In my view, the purpose of s.119(2) is to ensure that a walker between two points of termination is not left wholly unable to reach his destination… It is, in my view, for the council and, if necessary, the Secretary of State to consider what is the length of a footpath that is in issue and therefore what its two points of termination are for the purpose of s.119(2). That question is a question of fact. The numbering of the path or paths is not conclusive but is a relevant factor. Other factors will include the geography of the footpath generally and the destination which those using the footpath can be expected to be seeking to reach… These are matters of fact to be considered in each case."

On issue (b): The matter had been settled by agreement with the defendant council admitting it was wrong. Crane J considered the *Bernstein* judgment and said that, "the words of Mr Justice Hodgson are ones I agree with, but are of limited assistance in deciding the point which arises under issue (b)."

At Hartside, Cumbria. What exactly *is* a 'public way'?

A public interest in the soil of commons, wastes and moors
continued

Where railway lines, or branches leading to them, have been closed, the public may still use the surface of the "permanent way" if the enabling act states that the railway was dedicated to public use with carriages. In the matter of "The Aberford Flyline" (*Seymour v Leeds City Council*, Leeds Crown Court 1987) one of the reasons why the council agreed to a consent order was because the line was constructed under the powers granted by the Leeds–Selby Railway Act(1830) and therefore s.135 applied.

Readers may care to consider whether 'private carriage roads' set out over former wastes, and leading to the next township, can lawfully be taken to exclude public user.

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