*221 Regina (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs
Regina (Drain) v Same

Positive/Neutral Judicial Consideration

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House of Lords

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House of Lords

Lord Hoffmann , Lord Hope of Craighead , Lord Scott of Foscote ,
Baroness Hale of Richmond and Lord Neuberger of Abbotsbury

2007 May 8, 9, 10; June 20

Highway—Right of way—Dedication—Application for modification order adding footpath to definitive map and statement—Whether overt acts required as sufficient evidence of intention not to dedicate footpath—Whether necessary for evidence of intention not to dedicate to have been brought to users' notice throughout whole of relevant period— Highways Act 1980 (c 66), s 31(1)

In each of two cases, an application by the claimant to the surveying authority for a modification order under section 53 of the Wildlife and Countryside Act 1981 adding a public footpath to the definitive map and statement of the local area was refused but, following a successful appeal, the Secretary of State for the Environment, Food and Rural Affairs directed the making of the order. The landowner objected, the order was submitted for confirmation to the Secretary of State and a public local inquiry was held. The inspector concluded that there was sufficient evidence, within section 31(1) of the Highways Act 1980 [1] , of a lack of intention on the part of the landowner to dedicate a footpath during the relevant 20-year period and that the order should not be confirmed. The claimants sought judicial review of the inspector's decisions. The Divisional Court of the Queen's Bench Division dismissed the claims, and its decision was affirmed by the Court of Appeal.

On the claimants' appeals—

Held , allowing the appeals, that on the true construction of section 31(1) of the 1980 Act a landowner's intention not to dedicate a way as a highway had to be objectively established and "intention" meant what users of the way would reasonably have understood his intention to be; that "sufficient evidence" that there had been no intention to dedicate required evidence of some overt acts on the part of the landowner such as to come to the attention of the public who used the way and demonstrate to them that he had no such intention, and it was not sufficient for him simply to give evidence that he had not so intended; that although the landowner's intention did not have to be continuously manifested "during" the whole of the 20-year period, but merely at some point during that period, the inspector had been wrong in principle to take into account in the first case

a letter written by the landowner to the local planning authority complaining of pedestrian trespass and in the second case a clause in a tenancy agreement by which the tenant had agreed not to allow any footpaths to be created; and that the decisions should be quashed and the cases remitted to the Secretary of State for decision (post, paras 20, 32, 39, 42, 47, 57, 59, 68–71, 72, 77–78, 87).

Dicta of Denning LJ in *Fairey v Southampton County Council [1956] 2 QB 439, 458, CA applied* .

R v Secretary of State for the Environment, Ex p Billson [1999] QB 374 and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396 disapproved* .

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Decision of the *Court of Appeal [2005] EWCA Civ 1597* ; *[2006] QB 727* ; *[2006] 2 WLR 1179* ; *[2006] 2 All ER 960 reversed* .

The following cases are referred to in the opinions:

Barraclough v Johnson (1838) 8 A & E 99
British Museum (Trustees of the) v Finnis (1833) 5 C & P 460
Bryant v Foot (1867) LR 2 QB 161
Fairey v Southampton County Council [1956] 2 QB 439; [1956] 2 WLR 517; [1956] 1 All ER 419, DC; [1956] 2 QB 439; [1956] 3 WLR 354; [1956] 2 All ER 843, CA
Folkestone Corpn v Brockman [1914] AC 338, HL(E)
Jaques v Secretary of State for the Environment [1995] JPL 1031
Jones v Bates [1938] 2 All ER 237, CA
Lewis v Thomas [1950] 1 KB 438; [1950] 1 All ER 116, CA
Mann v Brodie (1885) 10 App Cas 378, HL(Sc)
Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77; [1936] 2 All ER 422
O'Keefe v Secretary of State for the Environment [1996] JPL 42
Poole v Huskinson (1843) 11 M & W 827
Powell v McFarlane (1977) 38 P & CR 452
Pye (J A) (Oxford) Ltd v Graham [2002] UKHL 30; [2003] 1 AC 419; [2002] 3 WLR 221; [2002] 3 All ER 865, HL(E)
R v Broke (1859) 1 F & F 514
R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385, HL(E)
R v Secretary of State for the Environment, Ex p Billson [1999] QB 374; [1998] 3 WLR 1240; [1998] 2 All ER 587
R v Secretary of State for the Environment, Ex p Blake [1984] JPL 101
R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851, CA
R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396
Secretary of State for the Environment v Beresford Trustees (unreported) 31 July 1996; Court of Appeal (Civil Division) Transcript No 1031 of 1996, CA

The following additional cases were cited in argument:

Applegarth v Secretary of State for the Environment, Transport and the Regions [2001] EWHC Admin 487; [2001] EGCS 134
Associated Provencial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223; [1947] 2 All ER 680, CA
Attorney General ex rel Yorkshire Derwent Trust Ltd v Brotherton [1992] 1 AC 425; [1991] 3 WLR 1126; [1992] 1 All ER 230, HL(E)
Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SC 357; 1992SLT 1035
Gloucestershire County Council v Farrow [1985] 1 WLR 741; [1985] 1 All ER 878, CA

Leckhampton Quarries Co Ltd v Ballinger (1904) 20 TLR 559
Mills v Silver [1991] Ch 271; [1991] 2 WLR 324; [1991] 1 All ER 449, CA
Newnham v Willison (1987) 56 P & CR 8, CA
Norman v Secretary of State for the Environment, Food and Rural Affairs [2006] EWHC 1881 (Admin); [2007] EWCA Civ 334, CA
R v Lloyd (1808) 1 Camp 260
R (Beresford) v Sunderland City Council [2003] UKHL 60; [2004] 1 AC 889; [2003] 3 WLR 1306; [2004] 1 All ER 160, HL(E)
Shearburn v Chertsey Rural District Council (1914) 78 JP 289
Turner v Walsh (1881) 6 App Cas 636, PC
Ward v Durham County Council (1994) 70 P & CR 585, CA ***223**

APPEALS from the Court of Appeal

R (Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs

This was an appeal by the claimant, Godmanchester Town Council, by leave of the House of Lords (Lord Hoffmann, Lord Scott of Foscote and Lord Rodger of Earlsferry) given on 14 March 2006 from the decision of the Court of Appeal (Auld and Arden LJJ and Bennett J) on 19 December 2005 dismissing the claimant's appeal from the Divisional Court of the Queen's Bench Division (Maurice Kay LJ and Richards J) *[2005] 1 WLR 926* on 22 July 2004. The Divisional Court had dismissed the claimant's claim for judicial review of a decision contained in a letter dated 21 March 2003 of Helen Slade, an inspector appointed by the Secretary of State for the Environment, Food and Rural Affairs, by which she had refused to confirm the Cambridgeshire County Council (Public Footpath No 15 Godmanchester) Definitive Map Modification Order 2002 made on 20 March 2002.

R (Drain) v Secretary of State for the Environment, Food and Rural Affairs

This was an appeal by the claimant, Leslie Ernest Drain, acting on behalf of the Ramblers' Association, by leave of the House of Lords granted on 14 March 2006 from the decision of the Court of Appeal on 19 December 2005 dismissing his appeal from the decision of the Divisional Court on 22 July 2004. The Divisional Court had dismissed his claim for judicial review of a decision contained in a letter of the inspector, Helen Slade, dated 9 June 2003 refusing to confirm the West Berkshire District Council Definitive Map and Statement Footpath 25, 25a and 25b Aldworth/17 Streatley Modification Order 2000 made on 4 September 2000.

The appeals were consolidated. The facts are stated in the opinions.

George Laurence QC and *Ross Crail* for the claimants. The questions (a) of what counts as "sufficient evidence" and (b) of what "during" means cannot be considered or answered independently of one another. The proviso has to be construed as a whole, and the interplay between the answers is part of that process. The combined effect of the Court of Appeal's rulings on both questions is to render the section ineffective. If the claimants' submissions on question (a) are rejected, the argument for their proposed answer to question (b) is all the stronger, and vice versa.

The approach to the interpretation and application of the proviso to section 31(1) of the Highways Act 1980 endorsed by the Court of Appeal has only been adopted by the courts relatively recently and represents a significant departure in favour of landowners from what had previously been understood to be, and acted on as being, the law. That interpretation does not strike the balance between the interests of landowners and the public interest in the preservation of rights of way that have been in de facto use for many years where Parliament in enacting the Rights of Way Act 1932 and its successor provisions in the Highways Act 1959 and the 1980 Act intended it to be struck but tilts it overwhelmingly too far in favour of landowners. [Reference was made to *Fairey v Southampton County Council [1956] 2 QB 439* ; *R v Secretary of State for the Environment, Ex p Blake [1984] JPL 101* ; ***224** *R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851* ; *Ward v Durham County Council (1994) 70 P & CR 585* ; *O'Keefe v Secretary of State for the Environment [1996] JPL 42* and *Jaques v Secretary of State for the Environment [1995] JPL 1031* .]

The decision of the Court of Appeal as to the meaning of the proviso in Secretary of State for the Environment v Beresford Trustees (unreported) 31 July 1996; Court of Appeal (Civil Division) Transcript No 1031 of 1996 was clearly part of the ratio, because to evaluate the inspector's treatment of the evidence going to the satisfaction of the proviso and decide whether or not it had been irrational it was necessary first to decide what the test for the application of the proviso was. The court did not simply

assume the correctness of the test in *Fairey v Southampton County Council [1956] 2 QB 439* , 458. That could be seen from the novelty of the "subjective"/"objective" terminology, which did not derive from Fairey's case, and Hobhouse LJ's reference to section 31(3)(5) , which shows that the court gave thought to the interplay between those provisions and the proviso and concluded that the section as a whole was supportive of Denning LJ's construction of it.

As to the observations of Sullivan J, obiter, in *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374* , 394–396, first, the Beresford Trustees case was not drawn to his attention; secondly, he wrongly interpreted the authorities as doing no more than establishing the proposition that evidence of the landowner's intention had to be overt, in the sense of not being locked in his own mind, and contemporaneous, as opposed to a retrospective assertion. [Reference was made to Norman v Secretary of State for the Environment, Food and Rural Affairs [2006] EWHC 1881 (Admin) at [16] and [26]; [2007] EWCA Civ 334 .]

Adopting the "pure" construction of the proviso and rejecting the existence of any "overt acts rule" (as Dyson J, going further than Sullivan J, had done in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* , 404–408) leads inexorably to the position that all that a landowner need do to defeat a section 31 claim is to lead oral evidence, which the court or tribunal hearing it accepts as truthful, that he (and/or his predecessors in title) did not intend to dedicate the way in question. There is no warrant for saying, as the *Divisional Court said [2005] 1 WLR 926* , para 29(3), that "in the absence of something overt and contemporaneous, a landowner will generally find it difficult to point to 'sufficient evidence' of a negative—a lack of intention to dedicate". If the only issue is as to his subjective state of mind, he is in the best position to say what it was. In the nature of things, the public will be unable to lead any directly contrary evidence. One cannot have it both ways and reject the existence of any rule of law or evidence that there should have been overt and contemporaneous acts while at the same time positively encouraging the fact-finder to look for them in most if not all cases. That approach is unworkable: see Norman's case [2006] EWHC 1881 at [26]. The judicial instinct that bare retrospective assertions of no intention to dedicate should not be enough to satisfy the proviso is correct, is in tune with the legislative intention and can and should be given effect in interpreting the statute. However, as soon as the pure construction is abandoned, the proviso must, guided by what must ultimately be policy considerations, be construed by drawing a line, and the question is where it is to be drawn. ***225** Considerations of the legislative policy and purpose point towards drawing it not where Sullivan J in Ex p Billson was inclined to draw it but more where the judges in earlier cases were inclined to draw it. At the very least, it should be construed so as to exclude from satisfying the proviso purely private acts or statements that the public have no reasonable chance of discovering. In the Divisional Court and the Court of Appeal the claimants contended that there had to be evidence of acts that were overt in the sense that they came or were likely to come to the attention of users. The proviso should be interpreted no more favourably to landowners than that.

As to the position at common law prior to 1932, see the principles stated in Mann v Brodie (1885) 10 App Cas 378 , 386, per Lord Blackburn; *Folkestone Corpn v Brockman [1914] AC 338* , especially per Lord Kinnear, at pp 352–358, Lord Atkinson, at pp 361–367, and Lord Dunedin, at p 375; *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , per Lord Hoffmann, at pp 349 (referring to the distinction between Scottish and English law), 351 h –353 e (referring to Mann v Brodie) and 358 f – g ; *Jones v Bates [1938] 2 All ER 237* , 244 a –245 a , 247 c – g ; *Attorney General ex rel Yorkshire Derwent Trust Ltd v Brotherton [1992] 1 AC 425* , 432 b , 438 a , 447 a – b and Trustees of the British Museum v Finnis (1833) 5 C & P 460 . Long-standing public user did not give rise to any presumption of dedication at common law. An inference of dedication could be drawn, but did not have to be; the landowner's inaction could be attributed to toleration instead. The Court of Appeal's interpretation of the proviso fails to recognise and give effect to the legislative policy and intent underlying section 31 and its statutory predecessors beginning with the 1932 Act and is incompatible with Parliament's objectives of facilitating the establishment of public rights of way, simplifying the law relating to the proof of their acquisition and making the outcome of disputes less unpredictable. It cannot have been the intention of Parliament in enacting the 1932 Act or its successor provisions to create an alternative statutory method of establishing public rights of way that was so easily circumvented, throwing the public back on to the common law with all the inherent difficulties of which it was, according to previous decisions of the House of Lords, an object of the legislation to relieve them.

The Court of Appeal's rejection of the "overt acts rule" means that a section 31 claim, based on however long a period of uninterrupted as of right user, can be defeated by the landowner or a predecessor in title coming forward and saying that he did not intend to dedicate the way but was merely tolerating its use by the public. Its interpretation of "during" means that such evidence need only pertain to a small proportion of the 20-year period preceding the "bringing into question". Parliament would not have replaced the situation postulated by Lord Blackburn in Mann v Brodie 10 App Cas 378 , 386, with one no less unsatisfactory. The legislative intention would have been that, once the public had used a way as of right and uninterruptedly for 20 years or more (without any manifestation of an intention that they should not acquire a right by so doing, sufficient to disabuse them of the belief that that was what would happen), they should be entitled to assume that they had acquired that right,

not have to proceed on the uncertain basis that the fruits of their user might at any time be snatched from them. The landowner should have to show his hand openly at the time of the user, just as the users show their hand openly by using the **226* route. The evidence of no intention to dedicate should be sufficient for that purpose, not just sufficient to satisfy a tribunal after the event. Moreover, Parliament cannot have intended the reference to evidence in the proviso to be a reference to evidence that was not reasonably discoverable by members of the public at a time when they were deciding whether or not to apply for a definitive map modification order or otherwise assert the existence of a right but was in the sole knowledge of the landowner or a predecessor in title and might be brought out as a trump card only at a late stage of the relevant proceedings. That is unfair to the public. Arden LJ's suggestion *[2006] QB 727* , para 95 (see also per Auld LJ, para 63) that the fact-finder should weigh the landowner's evidence about his intentions against his omission to take steps to publicise them, taking into account other factors such as the location and features of the way and the extent of user, sounds very well (and is not something that the inspector did in either of the instant cases) but calls for a complex analysis of the subjective state(s) of mind over a period of at least 20 years of at least one landowner, perhaps a series of successive landowners. That is hardly a simplification of the law. Moreover, the exercise of inferring the landowner's true state of mind from his actions (or, rather, inaction) in all the circumstances would be virtually indistinguishable from the exercise at common law of deciding whether or not to infer the existence of an intention to dedicate. [Reference was made to J G Riddall, "'Umm …', Said the Solicitor" [2006] Conv 285 and the *Sunningwell case [2000] 1 AC 335* , 356.]

Honestly and openly challenging the public's right to use a way (by, e g, erecting a gate or notice) would bring it into question, crystallise it and enable the public to establish and enforce it by an application for a definitive map modification order or appropriate legal proceedings. If the Court of Appeal is right, the landowner can avoid that result and defeat the public's inchoate claim by doing some (perfectly genuine) private act, such as writing and sending a letter declaring that he has no intention of allowing the way to become a highway, waiting for a few days or weeks and then openly challenging the public's right to use it by, e g, barring the entrance. The writing and sending of an appropriately worded letter would satisfy the fact-finder of the presence of a genuine intention, albeit one only just conceived, not to dedicate at a point in the relevant 20-year period. Parliament cannot have intended the section to be so easily circumvented, and one or other, if not both, of the Court of Appeal's rulings must be flawed. The Divisional Court's only answer to this point *[2005] 1 WLR 926* , para 43 was that even if a claim under the statute could be defeated by such a device it might well still be possible to infer a dedication at common law. But that is cold comfort for the public, since whether the decision-maker would actually do so is a very different matter. The alternative inference of toleration could just as easily be drawn.

The adoption of criteria for assessing what is "sufficient evidence" is not inconsistent with its being a question of fact in each individual case whether those criteria are satisfied (per Rose LJ in *R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851* , 855). Although there are in section 31(1) no words that expressly require proof of overt acts on the part of the landowner (in any sense of the word "overt") to satisfy the proviso, neither are there any that would prevent it being given a purposive construction that achieves the objects of the section by imposing a **227* requirement for overt acts that come or are likely to come to the attention of users.

Subsections (3), (5) and (6) , which all entail acts of a public nature, are clear positive indicators of a legislative intention that acts satisfying the proviso have to be in the public domain and involve an element of continuity throughout the 20-year period. Deposit of a declaration under subsection (6) is statutorily deemed to be sufficient evidence. One would expect such a deeming provision to offer the landowner an alternative course of action less, not more, onerous than he would otherwise have to take to satisfy the proviso. If the Court of Appeal is right, however, he need not go to the trouble of drawing up a formal document and depositing it with the local authority and renewing it at intervals thereafter; he can just write a letter to friends, or do nothing. If that is the case, Parliament need not have enacted these subsections. Likewise, in the 1932 Act (and its successors) Parliament gave landlords specific means of rebutting the presumption of dedication that could otherwise have arisen from user that their tenants did nothing to prevent. Those means involved directly and openly intervening so that everyone might know their position: see section 31(4) as well as subsections (5) and (6) , and compare sections 1(5) and 4 of the 1932 Act. That is another pointer to the legislative intention, and Parliament did not contemplate the same result being achieved by the insertion of a covenant in the lease that the tenant proceeded with impunity to breach and the landlord made no attempt to enforce, while users remained in ignorance, as in Dr Drain's case (a fortiori where, as in that case, the covenant had been inserted 22 years before the 20-year user period began and there had been a change of landlord in the interim). It would be paradoxical if a landowner who went to the trouble of erecting a notice or making a deposit should have to comply with strict conditions as to form and content, positioning, legibility and maintenance (in the case of notices) and renewal (in the case of deposits), whereas another landowner could achieve the same effect by doing something much less formal, or nothing.

Further or alternatively, the "throughout" construction of "during" (see the *Concise Oxford Dictionary*) is implicit in section 31(3) and (6) . The erection of a notice complying with subsection (3)(a) is not given retrospective effect, neither will it have any prospective effect unless it is "maintained". It is effective to satisfy the proviso only if and for so long as it is maintained in position. Similarly, the initial subsection (6) deposit is given no retrospective effect and, once made, its efficacy depends on continuity achieved by regular renewals. It would be anomalous if a one-off, temporary episode of intention not to dedicate were to stand on an equal footing with the fulfillment of these strict requirements. The structure of section 31(1) , in particular the positioning within the proviso of the words "during that period", is more consistent with "during" meaning "throughout" than its meaning "at some or other point in". The words "at any time", which appear in section 1(1) of the 1932 Act but not in section 31(1) of the 1980 Act, are also significant.

The Court of Appeal overestimated the difficulties that adopting the claimants' construction of the proviso in either or both respects would pose for landowners. First, if there is not much public use of a way, so that the landowner could not reasonably become aware of it, there will not be enough use to count for the purposes of section 31 : see the passages from ***228** *Mills v Silver [1991] Ch 271* and *Cumbernauld and Kilsyth District Council v Dollar Land (Cumbernauld) Ltd 1992 SLT 1035* quoted in *R (Beresford) v Sunderland City Council [2004] 1 AC 889* , paras 6, 67, 77 and 78. Secondly, a landowner who neither troubles to inform himself of what is going on on his land nor takes precautionary measures to protect himself in case it is being used in an adverse manner has only himself to blame. Any purchaser of land takes the risk that it is subject to adverse rights, claims or usage of which the vendor (deliberately or otherwise) fails to warn him. Tracks that are or may be being used in the manner of a highway should be detectable on inspection, and appropriate inquiries can be made of the vendor as to what use has been made of them and what the vendor has done by way of evincing no intention to dedicate them. Thirdly, a landowner does not have to worry about erecting notices, fences or gates. All that he needs to do is to take advantage of the mechanism in section 31(6) , which has been available since 1932. That does not involve seeking "officiously to exclude" members of the public, who can be left to carry on using the route without any confrontation but will acquire no right by doing so. The "notice" route in section 31(3) also allows the public to enjoy the route while retaining for the landowner or his successors the right to bring such use to an end at some time in the future should he or they wish to do so. Fourthly, the statutory means of negativing the intention to dedicate are proactive, not reactive. The owner of a large estate can cover the whole of it for ten years by using the subsection (6) procedure. He does not have to wait until the use of the way has started; he can act pre-emptively. Fifthly, the acts relied on as evidencing no intention to dedicate (other than the statutorily prescribed methods) would not have to be repeated every day in order to have the continuing effect that the "throughout" construction of "during" requires. Recurrent but discontinuous acts such as the annual charging of a toll (*R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851)* , or turning users back (*Fairey v Southampton County Council [1956] 2 QB 439*) might manifest a continuous intention not to dedicate. The "throughout" construction requires only that, taking such acts together, the effect properly to be attributed to them covers the whole period.

As to the concern expressed by the Court of Appeal and the Divisional Court that interpreting "sufficient evidence" as requiring acts or declarations in the public domain would leave no scope for the proviso to operate because such acts or declarations would amount to a "bringing into question" or render use not "as of right" or constitute an "interruption" to use so as to prevent the presumption of dedication arising in the first place, user can be "as of right" and "without interruption" even if and while the landowner is manifesting no intention to dedicate. The concept "as of right" does not entail a subjective belief on the part of the public in their right to use the way: *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* . The Divisional Court's reasoning in dismissing *Sunningwell* as irrelevant and adopting Dyson J's reasoning in its entirety stemmed in part from the passage of Laws J's judgment in *Jaques v Secretary of State for the Environment [1995] JPL 1031* , 1037 that was based on the misapprehension corrected in the Sunningwell case and to that extent can no longer hold good in the light of the Sunningwell case. The relationship between the two parts of section 31(1) does not demand that in disproving an intention to dedicate the owner must not indicate to the users that there is no right to use the way. ***229** What troubled Laws J in Jaques's case as being "not a very satisfactory state of affairs" does not exist. As to "interruption", see *Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77* . It is possible for a landowner publicly to manifest an intention not to dedicate, e g, by erecting a notice, without physically interfering with the use of the way. Not all acts manifesting an intention not to dedicate that come or are likely to come to users' attention would suffice to bring it home to the public that their right to use the way is being challenged so as to satisfy section 31(2) . A landowner's turning back some users, putting an advertisement in the local newspaper or posting a notice on the Internet might all satisfy the proviso (so construed) without becoming so widely known as to stop time running. In any event, if there is, as Auld LJ acknowledged, an inevitable overlap between the notions of interruption, evidence of intention not to dedicate and bringing into question, an interpretation of the section that leaves little scope for the operation of the proviso would be less unsatisfactory than one that leaves little scope for the operation of the section. Requiring an act or acts likely to have come to the attention of users would not deprive the proviso of its function.

The Court of Appeal's interpretation fails to take account of what kinds of evidence were regarded at common law as "sufficient to negative" (or rebut) "any intention to dedicate" (Leckhampton Quarries Co Ltd v Ballinger (1904) 20 TLR 559 , 560) and the way in which those expressions were used and understood at common law. When the 1932 Act was drafted, the choice and meaning of the expressions "sufficient evidence that there was no intention … to dedicate" (section 1(1)(2)) and "sufficient evidence to negative the intention of the owner of the land to dedicate" (section 1(3)) would have been conditioned by the way in which those expressions were used and understood at common law. That was as meaning (and meaning only) overt acts directed at users, such as the erection of gates or notices or turning people back. The Court of Appeal was referred to a number of authorities and textbooks antedating, and contemporaneous with, the 1932 Act to support that proposition. Two of the cases are alluded to in Arden LJ's judgment, at para 95: Trustees of the British Museum v Finnis 5 C & P 460 and Barraclough v Johnson (1838) 8 A & E 99 . However, others are not referred to or dealt with in the *Court of Appeal's judgments, notably R v Broke (1859) 1 F & F 514* and Leckhampton Quarries Co Ltd v Ballinger 20 TLR 559 . The latter is significant because it contains an exposition by Swinfen Eady J, at p 560, of what acts were at common law "sufficient to negative any intention to dedicate". There is no suggestion that a private act or statement would be so regarded. In R v Broke , Pollock CB rejected evidence that the landowner's predecessor in title had given instructions to his servants to turn back certain classes of persons, on the basis that such evidence, taken alone (i e in the absence of evidence of communication to users of the path), would not be relevant, by which he presumably meant that it would be insufficient in law to defeat the claim. No case is cited in the books, and the claimants have found none, in which acts or statements by a landowner that were not directed at users were held sufficient to rebut an inference of dedication at common law. (Of course, at common law, in contrast to under the statute, a landowner's failure to rebut the inference by such evidence was not the end of the matter because the fact-finder then had a choice between inferring an intention to dedicate ***230*** (dedication) and inferring mere tolerance (no dedication): see Mann v Brodie 10 App Cas 378 , 386.) The emphasis was entirely on acts directed at the public: see Trustees of the British Museum v Finnis 5 C & P 460 , 465 and *R v Lloyd (1808) 1 Camp 260* , 262. Leaving aside R v Broke , the claimants have not even been able to find a case in which an attempt was made by the landowner to bolster, let alone establish, a lack of intention to dedicate by evidence of private acts and statements. It would appear to have been taken for granted that only evidence of acts directed at users would suffice to rebut (negative) the inference (or, as it is often called in the older case reports, presumption) of dedication. Nor have the claimants been able to find a case in which a landowner's evidence that he did not intend to dedicate a way has been held, or even been relied on, to rebut an inference of dedication at common law. That is not because such evidence was technically inadmissible before 1932. The evidence of parties has been admissible since the Evidence Act 1851 (14 & 15 Vict c 99) (amending the Evidence Act 1843 (6 & 7 Vict c 45), which rendered admissible the evidence of persons with an interest). It was accepted that intention could be proved by the direct testimony of the party whose intention was in question, as well as by proof of his declarations made out of court at the time such intention was material: see *Halsbury's Laws of England* , 2nd ed, vol XIII (1934) ("Evidence"), p 566. The reason must, therefore, have been that such evidence would not have been regarded as relevant for the purpose. The only judicial discussion that the claimants have found on the subject of the admissibility of weight to be given to a landowner's own declarations as to intention to dedicate in the common law context is in Barraclough v Johnson 8 A & E 99 , 104–105, per Littledale J (obiter). There is some ambiguity in the passage, in that the judge might have been saying that no regard at all should be had to the landowner's declaration, or that regard could be had to it but it would not suffice to rebut the inference of dedication; he would have to have done something at the time to evince his lack of intention to dedicate to users. The Court of Appeal was referred to the editions of *Halsbury's Laws of England* on "Highways" and of *Pratt & Mackenzie's Law of Highways* that respectively preceded and post-dated the 1932 Act. There is nothing in the 1st edition of *Halsbury's Laws of England* , vol XVI (1911), paras 51–57 or the 18th edition (1932) of *Pratt & Mackenzie's Law of Highways* , pp 37–3 8, to suggest that at common law private acts or statements, or the landowner's retrospective assertions that he had no intention to dedicate, would suffice as evidence rebutting an inference of dedication. Nor is there anything in *Halsbury's Laws of England* , 2nd ed, vol XVI (1935), para 269, or the of *Pratt & Mackenzie's Law of Highways* , 19th ed (1935), pp 610–6 12, 630), or *Halsbury's Statutes of England* , vol 25 (1932), pp 191–193, to indicate a contemporaneous perception on the part of the editors or authors that (the statutorily prescribed methods apart), anything less than acts or statements directed at users would do for the purpose of satisfying the first proviso to section 1(1) or the proviso to section 1(2) of the 1932 Act. Both commentaries on the 1932 Act refer back to the passages on rebutting the inference of dedication at common law.

It has hitherto been universally assumed that the methods prescribed by Parliament for negativing the intention to dedicate now embodied in section 31(3), (5) and (6) of the 1980 Act were not intended by Parliament to be exhaustive. Rather, it has been taken for granted that those methods were ***231*** intended to qualify as "sufficient evidence that there was no intention during that period to dedicate it" along with an unlimited range of unspecified other methods. The claimants have not until now sought to disturb that common assumption. They seek now to do so. The contrary has never been argued, and there is no reasoned authority for the proposition at any level. The House of Lords is invited to approach the question de novo. There is nothing in section 31 , as there was nothing in section 1 of the 1932 Act, to preclude these subsections from being read as exhaustive

and giving the complete answer to the question of what is sufficient evidence. Section 31(1) (compare section 1(1) and (2) of the 1932 Act) does not close with the words

> "unless there is sufficient evidence that there was no intention during that period to dedicate it, whether in the form of a notice such as is mentioned in subsection (3) below or a notice such as is mentioned in subsection (5) below or a statutory declaration such as is mentioned in subsection (6) below or otherwise";

contrast the closing words of subsection (2), or of section 1(6) of the 1932 Act. Subsections (3), (5), and (6) state clearly what "is [are] sufficient evidence to negative the intention to dedicate the way as a highway", as did subsections (3) and (4)(b) of section 1 of the 1932 Act, except that they used the expression "shall be" rather than "is" or "are". All the difficulties that have been experienced in trying to interpret "sufficient evidence" in the proviso may be resolved by reading those subsections instead of looking outside the section for some alternative answer. The simple solution of treating section 31 as a comprehensive, self-contained code would enable everyone (users and landowners alike) to know exactly where they stand, both during and after the relevant 20-year period. It would make the outcome of claims more predictable and simplify and facilitate them. It would be equally fair to users and landowners and eliminate the need to make findings or draw inferences as to the subjective state of mind of the landowner: a clear distinction from the common law. It could not be objected to on the ground that it would run counter to the operation of section 31 read as a whole or leave no scope for the operation of the proviso. The circumstances in which the proviso would operate, on this construction, are those in which the section itself says in terms that it does. More traditional methods of evincing an intention not to dedicate would still serve a purpose. The landowner who closed a gate across the way one day a year would establish that the use was permissive (precario), and so not as of right: see the analysis in *R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851* , especially per Balcombe LJ, at p 858 (and see per Rose LJ, at p 856), and *R (Beresford) v Sunderland City Council [2004] 1 AC 889* , per Lord Bingham of Cornhill, para 5, and Lord Walker of Gestingthorpe, para 83; cf Trustees of the British Museum v Finnis 5 C & P 460 , 465. The landowner who challenges or turns back users can claim that he thereby rendered use contentious and so vi and not as of right: see, e g, *Newnham v Willison (1987) 56 P & CR 8* , 19. It is appropriate that such conduct should not come under the umbrella of the proviso, because the proviso only comes into play when the presumption of dedication has been raised by proof of 20 years' use that was, inter alia, as of right.

As to "bringing into question", see *Fairey v Southampton County Council [1956] 2 QB 439* , 456–458; ***232** *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* , 401–403; David Braham QC, " Section 31(2) : 'bringing into question'", Rights of Way Law Review, February 2002, section 6.3, p 75, referring to *Gloucestershire County Council v Farrow [1985] 1 WLR 741* and Applegarth v Secretary of State for the Environment, Transport and the Regions [2001] EGCS 134 . If a challenge is sufficiently clear and unambiguous to stop time running, a fortiori it will be sufficient evidence of absence of intention to dedicate.

Crail following. As to the subsidiary issue in Dr Drain's appeal, on a proper reading of the Aldworth decision letter, the inspector's finding that the proviso was satisfied by the existence of clause 17 in the 1950 tenancy agreement between 1972 and 1986 involved an error of law and/or a conclusion that could not reasonably be reached.

The only fair reading of the inspector's finding in relation to clause 17 is as a bare finding on the legal consequences of succession and continued existence of the tenancy agreement. So read, her finding is unsustainable in law. It is clear from the context that she treated the evidential effect of the 1950 tenancy agreement, in particular clause 17, as a new, separate and self-contained topic. She was looking at whether the agreement in isolation satisfied the proviso. Clearly, too, she was turning to it as a last resort, having found nothing else that in her view was capable of constituting sufficient evidence of no intention to dedicate by itself or in combination with other factors. She did not make a positive finding that the company "took over" the agreement, including the covenant, with the same intention as Lord Iliffe had had in entering into the agreement. It does not follow, as she thought, merely from the intervener having inherited from Lord Iliffe the benefit of all rights and the burden of all obligations in the 1950 tenancy agreement as a package that it could point to clause 17 as an expression of its intentions with regard to the Aldworth footpath. No evidence was given that the intervener had applied its corporate mind in any way to the provisions of clause 17 at the time of "taking it over" in 1955 or at any other time, and the inspector made no finding that it had. The intervener was not an original party to the 1950 tenancy agreement and was not even formed until 1955. Accordingly, the original inclusion in the 1950 tenancy agreement of clause 17 could not have been evidence of any intention on the part of the intervener, only of Lord Iliffe as the then freeholder. The intervener's not determining the 1950 tenancy agreement during the period 1955 to 1986 cannot be taken as evidence of an intention not to dedicate the Aldworth footpath. It could not in any event have done so save on the restricted grounds permitted by sections 23–25 of the Agricultural Holdings Act 1948 . Nor can its not varying the tenancy agreement so as to exempt the Aldworth footpath from clause 17 be taken as evidence for the purposes of the proviso.

Such an omission is equivocal. On the inspector's findings, the intervener took no steps to enforce clause 17 during the period 1972–1986, notwithstanding the considerable volume of public use that the tenant did nothing to prevent.

As a matter of construction of section 31 of the 1980 Act, the intentions of a landowner cannot be attributed to his successor(s) in title save in the case of the limited exception expressly provided for by subsection (6) , and in that instance for a maximum of only six (or, now, ten) years. What the section is **233* concerned with is the intentions of the person(s) who owned the land during the 20-year period in question; they cannot pray in aid the intentions of others who owned it before that period began, and it would be an error of law for the fact-finding tribunal to attribute such intentions to them.

As to remedy, the inspector's decisions should be quashed. There is no purpose to be served by remitting either matter to the Secretary of State for reconsideration. The inspector considered all the evidence, oral and written, which the parties wished to present, and made all necessary findings. The only decision that could properly be reached in each case on her findings is to confirm the modification order in question. The Secretary of State should be directed to confirm the orders (subject, in the case of the Aldworth order, to the modifications proposed by the inspector); alternatively, it should be declared that they should be confirmed.

Timothy Mould QC and *David Blundell* for the Secretary of State. The conclusions of the Court of Appeal on both issues are correct and should be upheld. Far from rendering the section ineffectual, its approach is firmly rooted in the statutory language, gives effect to the policy of section 31 and enables a sensible and balanced decision to be made by the tribunal on the facts of the case.

(1) The proviso to section 31 , both on its terms and in the context of the section as a whole, is concerned with intention and its proof, not with communication of intention to users of the way. (2) To construe section 31(1) as requiring such communication in every case to give effect to the proviso would be to read words into it that would have been expressed if that had been the legislative intention and would be inconsistent with section 31 read as a whole. (3) The jurisprudence on the meaning and operation of the proviso supports the approach of the Court of Appeal that, subject to *Wednesbury* principles (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223)* , it is for the fact-finding tribunal to determine whether the act or acts relied on by the landowner are sufficient evidence of his lack of intention to dedicate the way as a highway. (4) That approach, free from any gloss on the plain words of the proviso and the section, gives effect to the legislative policy, which is that the landowner should be able to rebut the statutory presumption of his dedication of the way as a highway by bringing before the fact-finding tribunal evidence that is, in that tribunal's judgment, sufficient to demonstrate that he lacked any intention to dedicate the way. (5) Such evidence must demonstrate that he lacked the intention to dedicate the way as a highway during the relevant 20-year period of its use by the public but need not, as a matter of law, establish that lack of intention to have been continuous throughout that period.

As to section 31(1) , Dyson J's analysis of the statutory language and its import in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* , 406 is correct. The language of the proviso is to be given its straightforward meaning within the context of section 31(1) . Neither section 31(1) nor section 31 read as a whole give any guidance as to what will be taken to be “sufficient”, or as to what will amount to “evidence”.

As to the proviso, (i) it relates to *intention to dedicate* . (ii) No express mention is made of the communication of that intention. (iii) The state of **234* mind of the users of the way is not in issue. (iv) What is in issue is the *sufficiency* of the evidence relied on by the landowner to demonstrate that he lacked the *intention to dedicate* . Had Parliament intended to circumscribe the fact-finding tribunal's consideration of and judgment on those matters in the way that the claimants contend, it plainly could have done so by express words, but it did not. On the contrary, the simplicity of the language strongly supports the conclusion that it intended the fact-finding tribunal to be the sole judge of the sufficiency of the evidence relied on by the landowner, subject to *Wednesbury* considerations and supervision by the court applying public law principles. That, rather than the judicial gloss on the statutory language for which the claimants contend, is the appropriate limit of judicial control over the operation of section 31(1) . The decision-maker will have regard to all the available evidence and the surrounding circumstances.

The claimants' argument effectively equates communication with intention to dedicate. That cannot be correct. The intention to dedicate or lack of it is logically formed independently of its communication. Communication may, and in many cases will, enable the landowner to prove that he lacked the intention to dedicate, but it is a logically distinct, evidentiary consideration. The fact that it will serve to strengthen the landowner's case for the operation of the proviso does not lead to the proposition that it is a necessary legal prerequisite for its operation in every case. Moreover, the claimants' contention that the act or acts relied on by the landowner must at least be shown to have come or have been likely to have come to the attention of users of

the way entails the fact-finding tribunal examining the question of intention and its demonstration only from the perspective of users of the way, rather than that of the landowner whose intention is under scrutiny.

In most cases, for the reasons given by Auld LJ *[2006] QB 727* , paras 63 and 64, the fact-finding tribunal will look for proof by the landowner of some overt and contemporaneous act or acts. That requirement is not, however, necessarily inherent in section 31 . The clear implication of section 31(1) and section 31 as a whole is that Parliament acknowledged that there might be cases, albeit rare, where a landowner might not have demonstrated his lack of intention overtly but none the less is able to produce sufficient evidence that he never intended that a way should be dedicated to the public at large: see the reasoning of Sir Donald Nicholls V-C in Ward v Durham County Council 70 P & CR 585 , 590 and of Dyson J in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* , 406. The more exiguous the landowner's evidence is, the less likely it is that the fact-finding tribunal will be in a position rationally to conclude that it suffices to rebut the statutory presumption. Thus a bare, retrospective assertion by a landowner that he never intended to dedicate will be wholly insufficient as evidence of that fact when considered against a background of clear, consistent public user of the way, of which he was fully aware, over the 20-year period. The landowner's "device" suggested by the claimants (see ante, p 226 e–g) would thus be defeated. "No intention to dedicate" means the same as "intention not to dedicate".

A private expression of intention is unlikely to be sufficient unless the landowner can point to an overt act: for example, a lease making it clear that ***235*** the landowner and the leaseholder would take action to turn away members of the public. Declarations of intention carry such weight as the fact-finding tribunal considers appropriate.

The claimants' proposed interpretation of the proviso does not accord with the meaning of section 31 read as a whole. It would remove any meaningful distinction between the operation of the proviso and section 31(2) : see per Auld LJ *[2006] QB 727* , para 62. It would deprive the proviso of any practical significance in the operation of section 31 . Hilbery J's observations in *Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77* were not intended to provide an exhaustive list of the means whereby a landowner may effectively interrupt public enjoyment of a way over his land: see per Denning LJ in *Fairey v Southampton County Council [1956] 2 QB 439* , 456–457. Section 31(2) expressly identifies the erection of a notice under subsection (3) as one means whereby the right of the public to use the way may be brought into question. [Reference was also made to Paul Baker, "Beating the Bounds at Lincoln's Inn" (1970) 86 LQR 158 .]

The claimants' fundamental contentions are inconsistent with subsections (3) to (6) , which identify specific acts stated by the Act to be sufficient evidence in their own right of a landowner's lack of intention. They do not purport to be an exhaustive list of the actions that may suffice for that purpose on the facts of any given case: see per Rose LJ in *R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851* , 855 and Walton J in *R v Secretary of State for the Environment, Ex p Blake [1984] JPL 101* . As the claimants acknowledge, it has long been established that a landowner may rebut any inference that he intends to dedicate a way across his land as a highway by closing the way to the public for one day a year: see, e g, Trustees of the British Museum v Finnis 5 C & P 460 , 465. Likewise, it is well established that the levying of a toll may suffice: per Rose LJ in *Ex p Cowell [1993] JPL 851* , 856. Neither of these established means of demonstrating the lack of an intention to dedicate is expressly acknowledged in section 31 of the 1980 Act, neither were they expressly acknowledged in its statutory predecessors, the 1932 and 1959 Acts, yet it cannot have been the purpose or effect of the 1932 Act to have so changed the established position at common law that such acts are no longer capable of being sufficient evidence of such lack of intention.

The alternative methods in subsections (3) to (6) of section 31 do not assist the claimants' principal contentions. A notice erected by the landowner following the procedure in subsection (3) may have been "torn down or defaced" very soon afterwards, and very few users of the way may have had any knowledge of its existence before that, yet a notice thereafter given by the landowner to the appropriate council under subsection (5) will suffice in itself to negative his intention to dedicate. Similarly, documents deposited under the procedure in subsection (6) are required to be kept available for public inspection under section 228 of the Local Government Act 1972 . They are not, however, required to be drawn to the attention of users of the way, nor does it follow from the fact that they are kept available for public inspection that they are likely to come to their attention.

Auld LJ's analysis of the jurisprudence in paras 19–28 of his judgment *[2006] QB 727* is correct. Denning LJ's comments in *Fairey v Southampton County Council [1956] 2 QB 439* , 458 were obiter. He neither needed nor ***236*** purported to analyse in any detail the particular question raised by the claimants in the present cases, i e the need for communication (or the likelihood of communication) of the landowner's lack of intention. There is no reason to read his dictum as having been intended to provide a comprehensive judicial account of the various means whereby a landowner may, in the particular circumstances of any case, give sufficient evidence of such lack of intention. The question whether communication or its likelihood is necessary did not arise for Walton J's consideration in *R v Secretary of State for the Environment, Ex p Blake [1984] JPL 101* , and his observations,

at p 102, must be read with that point in mind. Sir Donald Nicholls V-C's description in Ward v Durham County Council 70 P & CR 585 , 590 (see also at p 591) of the correct approach of a decision-maker to the proviso is accurate and completely consistent with the approach of the Court of Appeal in the present case. It would establish the following propositions. (i) The best evidence of intention not to dedicate will be overt acts. (ii) In the absence of such evidence, the decision-maker will rarely be persuaded that there is sufficient evidence of an intention not to dedicate based on an unexpressed intention. (iii) There is, however, no legal bar to a finding of sufficient evidence in such circumstances. Sir Donald Nicholls V-C's fact-sensitive approach to the construction and application of the proviso is correct and fully reflected in the approach of the Court of Appeal in the present case. The observations of Laws J in *Jaques v Secretary of State for the Environment [1995] JPL 1031* , 1037 in relation to the interrelationship between the proviso and section 31(2) bear out the problems identified by the Court of Appeal in the practical operation of section 31 on the claimants' approach. Laws J clearly acknowledged that something less than communication of the landowner's lack of intention to dedicate to the public using the way would suffice as evidence for the purpose of the proviso. Taken as a whole, the approach of Pill J in *O'Keefe v Secretary of State for the Environment [1996] JPL 42* , 59 is consistent with that of Sir Donald Nicholls V-C in Ward's case and with that taken by the Court of Appeal in the present appeals. The question whether, to satisfy the proviso in any case, it is necessary at least to provide evidence that the landowner's lack of intention to dedicate did or was likely to have come to the notice of the public using the way did not arise for consideration in Secretary of State for the Environment v Beresford Trustees (unreported) 31 July 1996 . The fact-finding tribunal must reach its own judgment as to the sufficiency of the evidence relied on to establish the landowner's lack of intention to dedicate. The reasoning of Dyson J in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* , 406–408 is correct and should be accepted. It is properly founded on the words of section 31(1) when considered in the context of section 31 as a whole and based on a correct analysis of the principles that can be derived from the previous cases and properly reflects the policy of the legislation. [Reference was also made to *R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851* , 855–857 and *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374* , 395.]

At common law, the creation of a highway has always depended on the landowner being shown to have had the necessary intention to dedicate the way as a highway: see *Poole v Huskinson (1843) 11 M & W 827* , 830, per Parke B, cited with approval in *Folkestone Corpn v Brockman [1914] AC 338* , ***237*** 352, and Turner v Walsh (1881) 6 App Cas 636 , 642. His intention might be inferred from evidence of uninterrupted public user as of right of the way in question. This gave rise to unpredictable results: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 352–353, 358; see also *Jones v Bates [1938] 2 All ER 237* , 244–245 and *Fairey v Southampton County Council [1956] 2 QB 439* , 449, 459, 460. Rejection of the claimants' contention that, to give effect to the proviso, the landowner must in every case produce evidence of an act or acts likely to have come to the notice of users of the way does not result in the risk of a return to the evidential difficulties that the 1932 Act was enacted to avoid. The legislative purpose, of relieving those asserting the existence of a public right of way based on long user of the need to prove actual dedication of the way to the public by the landowner, is unaffected by the Court of Appeal's approach to the construction and operation of the proviso. Unless the landowner places evidence before the fact-finding tribunal sufficient to demonstrate his lack of intention to dedicate, the tribunal will have no proper basis in law to do other than give effect to the statutory presumption of dedication. The decisions in *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374* and *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* do not represent a “significant departure” (in favour of landowners) (see ante, p 223 g) “from what had previously been understood to be, and acted upon as being, the law”: claimants' written case. At common law, it was always open to the landowner to adduce evidence to rebut any inference that might otherwise be drawn from the fact of the public's use of a way across his land that he intended to dedicate the way as a highway: see Barraclough v Johnson 8 A & E 99 , 104–105. The Secretary of State has found no case in which the court has been called on to consider whether an act or acts relied on by the landowner but not communicated to users of the alleged way were nevertheless sufficient to rebut the inference of intention to dedicate. The claimants cite a number of old cases in which reference is made to well established means of rebutting any inference of dedication drawn from proof of actual use by the public. Those references are of no significant assistance in relation to the fundamental questions raised by the claimants. The correctness of R v Broke 1 F & F 514 , from which the claimants seek to derive some support, was doubted in the first edition of *Halsbury's Laws of England* , vol XVI (1911), p 41, para 55. That commentary indicates the author's opinion that there was no reason in principle at common law why a landowner should not rely successfully on his private act to rebut the inference of dedication from public use of the way, albeit that users of the way lacked any actual notice of that act. At least, the author appears not to have “taken it for granted”, as the claimants suggest, that only evidence of acts directed at users would suffice to rebut the inference of dedication. The observations of Littledale J in Barraclough v Johnson are the closest that the old cases come to providing any judicial consideration of the issues raised in these appeals. It is to be noted that, in the passage cited by the claimants, at pp 104–105 (ante, p 230 d), Littledale J was apparently considering the weight to be attached to the landowner's declaration alone as evidence to rebut the inference to be drawn from very substantial evidence of public user. Moreover, he emphasised that the question was one for the jury to decide in the light of all the evidence, rather than simply giving effect to the ***238*** landowner's declaration. There is a need

for caution in approaching the old cases at common law. They are an uncertain guide to the principles on which section 31 operates. [Reference was made to Ward v Durham County Council 70 P & CR 585 and Sir Lawrence Chubb, "The Rights of Way Act 1932 . Its History and Meaning", Journal of the Commons, Open Spaces and Footpaths Preservation Society, vol II, no 8 (October 1932), pp 256–257.]

Whether there was sufficient evidence to rebut the statutory presumption of intention to dedicate (i e whether the proviso applied) did not arise for consideration in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* . The Court of Appeal's approach is consistent with the Sunningwell case; indeed, it is arguable that the position is a fortiori in the light of that case. The actual state of mind or belief of the actual users of the claimed public right of way during the relevant period is immaterial in itself to the question whether the right has come into existence by virtue of long use by the public: the Sunningwell case, at p 356. That being the law, there appears to be no logic in the claimants' contention that, to bring the proviso into operation, the policy of the legislation requires the landowner necessarily to prove that the act or acts on which he relies as evidence of his lack of intention to dedicate came, or were likely to have come, to the notice of the public using the way.

The *Court of Appeal [2006] QB 727* was correct in its approach to the meaning and effect of the phrase "during that period" in section 31(1) . A single act during the relevant period of 20 years demonstrating that the landowner lacked intention to dedicate may suffice. The reasoning of Auld LJ, at paras 74–78, and Arden LJ, at paras 96–97 is adopted. Moreover, the proviso must be construed as a whole and the two main issues raised by the claimants cannot be considered or answered independently of one another. If the Secretary of State's submissions as to the correct approach to the consideration of whether there is sufficient evidence of the landowner's lack of intention to dedicate are accepted, it would follow that the words "during that period" should not be read as necessarily requiring that lack of intention to have been demonstrated throughout the full period of 20 years, though the extent to which the landowner's lack of intention was evident during the course of that period will be a relevant factor for the fact-finding body to consider in reaching its decision as to whether he has adduced sufficient evidence of such lack and so satisfied the proviso. The more exiguous that evidence, or the more limited its duration, the less likely it is that it will be capable of founding a finding of lack of intention to dedicate. There is support for the Secretary of State's approach in the second proviso to section 1(1) of the 1932 Act as originally enacted, now repealed (by section 58(1) of the National Parks and Access to the Countryside Act 1949). The use of the words "at any time" contrasts sharply with the absence of such words in the first proviso. They were clearly intended to indicate that, for the purposes of the second proviso, "during" meant "throughout" the 20-year period.

The claimants' alternative approach, construing section 31 of the 1980 Act as a self-contained code and reading the means of negativing intention to dedicate stated in subsections (3), (5) and (6) as exhaustive, is unsustainable. As the claimants themselves point out, at common law there were in Victorian times a number of well established, practical methods, such as turning back users, charging a toll or erecting a gate across the way, whereby ***239** a landowner could avoid any inference being drawn, from the fact of public use of a way over his land, that he intended to dedicate the way as a highway. By no means all those long-established methods are prescribed in section 31 of the 1980 Act as being sufficient evidence to negative the statutory presumption of dedication. There is no substantial difference between the 1980 Act and the 1932 Act on this point. In the result, if the claimants were correct, the effect of the 1932 Act, maintained by the 1980 Act, would have been very significantly to circumscribe the landowner's opportunity to rebut the presumption of dedication by comparison with the position previously established at common law. It would be surprising if such a major legislative change had gone without any judicial notice hitherto in any of the many cases that have considered the operation of section 31 of the 1980 Act and its statutory predecessors. The claimants' contention that such acts go to the question of whether the public's use of the way has been shown to be uninterrupted or as of right is no answer to the Secretary of State's submission. In practice, there will be many cases where the fact-finder reasonably concludes that the evidence shows that the public has enjoyed uninterrupted use of the way as of right for 20 years notwithstanding that there is also evidence that, on occasions, users were turned back, or a gate was in place, or certain persons used the way by permission. In such a case, the question then arises whether those acts were nevertheless sufficient evidence of the landowner's lack of intention to dedicate the way: see per Denning LJ in *Fairey v Southampton County Council [1956] 2 QB 439* and Rose LJ in *R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851* . [Reference was also made to Leckhampton Quarries Co Ltd v Ballinger 20 TLR 559 , 560.]

On the subsidiary issue in Dr Drain's case, the evidence on which the inspector based her conclusion that she should give effect to the proviso was, in all the circumstances, capable of constituting sufficient evidence of the landowner's lack of any intention to dedicate. It was primarily for her to consider the particular significance of the 1950 tenancy agreement and of the fact that it subsisted, following the conveyance of the freehold reversion to the intervener, until well into the 20-year period. Contrary to the claimants' contention, she did find that the tenancy agreement continued to be the expression of the intervener's wishes in relation to its tenant's management of the property until 1986. That was a finding that she was entitled to make having heard and

considered the evidence. If the Secretary of State is right that there is no need for intention to be communicated, any objection on the basis that the users of the way were not aware of the terms of the tenancy agreement could not be upheld. It is difficult to see what objection can realistically be maintained on the ground that the intervener in Dr Drain's case obtained the benefit of clause 17 of the tenancy agreement by operation of law. The law (sections 141 and 142 of the Law of Property Act 1925) makes specific provision for the passing of the benefit and burden of the covenants in the event of the disposition of the freehold estate. There is no reason why a landowner, who for all other purposes is entitled to rely on the benefit of those covenants, should not be taken positively to rely on that benefit for the purpose of controlling or regulating the public's access to the land subject to those covenants.

In Dr Drain's case, the intervener in its skeleton argument in the High Court expressed particular concerns about the fairness of the approach to ***240** relief argued for by the claimants. In the circumstances, if the claimants' appeals were to be allowed, the correct course would be to quash each decision and remit each case to the Secretary of State for redetermination in accordance with your Lordships' opinions.

Edwin Simpson for Yattendon Estates Ltd, intervener in the second appeal. The intervener adopts the written submissions of the Secretary of State on the issues concerning the operation of the proviso. On the subsidiary issue, the inspector's conclusion in the second decision letter that the proviso was satisfied by the existence of clause 17 of the tenancy agreement, either alone or interpreted in conjunction with the evidence of Mr Petter (the intervener's land agent) and the evidence of challenges and notices, was a matter of fact for her and in any event correct in law.

The claimant seeks to persuade the House of Lords (i) of a particular construction of the inspector's decision letter, viz that “the bare fact of succession” was all that was relied on in holding that the intervener had satisfied the proviso (ante, p 232 c), and (ii) that such a conclusion is unsustainable in law.

As to (i), paras 48–51 of the decision letter, read fairly as a whole, show that in fact her approach was to consider the effect of clause 17 in the context of the evidence given by Mr Petter that “the estate [i e the intervener] never had any intention of dedicating this track as a public path” and in the context of the evidence reviewed by her of challenges and notices. Although the overt steps taken on behalf of the intervener were found by her not *alone* to have been sufficient evidence of a lack of intention to dedicate, she clearly concluded that, in conjunction with the existence of clause 17 and the evidence of Mr Petter, there was sufficient evidence to satisfy the proviso. In this case, the landowner's intention not to dedicate *was* likely to come to the attention of the public.

As to (ii), it was, alternatively, properly open to the inspector to conclude that the proviso was satisfied solely on the basis of the existence of clause 17. The claimant's argument here is, essentially, that there was no evidence before the inspector of a lack of intention to dedicate that could properly be attributed to the intervener. There is nothing in the point that the intervener did not exist at the time when the original 1950 tenancy agreement was entered into. The position of a successor in title would be no different if the successor were an individual who was unborn at the time of the original tenancy. Such non-existence at the earlier date has no effect on the passing of the benefit of covenants at the time of the transfer of the freehold title; neither should it on the extent to which the passing of the benefit of such a covenant can be relied on as an expression of continuing intention by the successor in title concerned. The claimant accepts that the intervener was entitled to the benefit of the covenant contained in clause 17 from 1955 to 1986, including the 14 years from 1972 to 1986 within the relevant 20-year period for the purposes of section 31 . Even if, which is not admitted, no steps were taken during that period to enforce the covenant, or to bring to the attention of the public the continuing lack of intention to dedicate, or to confirm the continuing lack of any such intention without bringing such to the attention of the public, the lack of any such steps could not affect the enforceability of the covenant. It is equally the case that the continuing existence of an enforceable covenant must be taken as a continuing ***241** expression of the intentions (or lack of intentions) reflected in its terms. Accordingly, the intervener can rely on the continuing force of clause 17 as an expression of its lack of intention to dedicate precisely because it can rely on its continuing right to enforce the covenant without any further steps on its behalf and without any element of legal fiction. There is no suggestion that clause 17 was a sham in 1950, nor that it became a sham in 1955. Accordingly, an element of legal fiction would only exist if the covenant remained enforceable but could not be regarded as evidence of the intervener's intention. The inspector was therefore correct to regard this piece of evidence, contained in a “legal document” and so creative of legal rights and obligations, as a fortiori a sufficient expression of the intervener's intention.

On the wider issue, the intervener relies on the simple words of the proviso, which mean precisely what they say. Otherwise, one has either to read words in or to have regard to the pre-1932 position. It was not the case pre-1932 that the landowner's action had to be overt. It was sufficient that it was nec vi, etc, and that there had been no interruption, unless it could be said to

have been the result of tolerance. As to the reason for the words "sufficient evidence that", see R v Broke 1 F & F 514 . There is no authority for any overt requirement prior to 1932: Barraclough v Johnson 8 A & E 99 . Although there are many examples given in *Pratt & Mackenzie's Law of Highways* , 21st ed (1967) (see at pp 34–35) of rebutting evidence, there is no case that says that a bare assertion is insufficient, although it may be unlikely that the landowner would be believed. There being no overt act is far from the usual position. It is a matter of the landowner's subjective, rather than objective, intention.

As to "brought into question" (section 31(2)), three views have been put forward as to what is needed: (i) an act done that brings home to the public the landowner's lack of intention to dedicate (the Secretary of State's contention); (ii) anything capable of satisfying the proviso should also be regarded as bringing the right of the public to use the way into question; (iii) a suggestion put forward by Lord Hoffmann in the course of argument that it might require a causal connection of some kind between the acts done and the subsequent litigation. The intervener opposes (ii), which restricts the operation of the proviso. As to (iii), a composite act, e g, writing a letter followed six months later by locking the gate, would be sufficient.

Should the claimant succeed on either the main or the subsidiary issues, relief going further than quashing the inspector's decision letter would be inappropriate. This is not a case where it can properly be said, on the basis of the other findings of the (second) inspector, that the only decision that could properly have been reached would have been to confirm the order. On the contrary, each fact-finding tribunal that has considered the matter has resolved those facts against the existence of the right of way claimed by Dr Drain. It cannot be maintained, on the facts of this case, that, had the inspector not reached the view that she did of clause 17, she would have had no alternative but to deny the intervener the benefit of having satisfied the proviso. Both inspectors who have heard evidence on this matter have held that the intervener did so, the first without reliance on the terms of clause 17. Although his decision was quashed for error of law, it was for an error that cast no doubt on his conclusions of fact.
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Further, it would be wrong to do other than quash the second inspector's decision given the approach adopted by her to the record of the first inquiry contained in the first decision letter, in particular, her conclusion that she "would not be taking into account the previous order decision" (i e the decision of the first inspector) "in terms of the views expressed in it with regard to the evidence, as a record of the previous inquiry or for any reason". As she correctly records, the intervener was concerned (i) that she should not risk falling into the same trap as the first had done; (ii) that she should be aware of evidence presented at the first inquiry that, for whatever reason (most obviously the quite understandable non-availability of particular witnesses), was not available to the second inquiry and (iii) that she should be astute to observe for herself where testimony had changed from the first inquiry to the second. Accordingly, it ought to have been permissible at the second inquiry for the inspector to have had regard to the first decision letter as a record of the evidence as recorded by the first inspector, given that his record of that evidence was not affected by the ground of the quashing by consent of his decision. The fact that the intervener's submissions on this point were rejected necessarily removed from the process of the second inquiry the primary record of what had been given in evidence at the first inquiry and of the view taken of that evidence by the first inspector. The second inspector was free to reach her own evaluation of the evidence available to the Secretary of State as a whole, but she ought not artificially to have restricted that evaluation by "not … taking into account the previous order decision". This mistaken approach is a further reason why this is not an appropriate case for the House of Lords to conclude that there is no purpose to be served by remitting the matter to the Secretary of State for reconsideration.

Further, were the claimant to succeed on the main, rather than the subsidiary, issues (that is on the proper interpretation of the proviso), then it is even more apparent that the matter would need to be reconsidered at a further public inquiry, rather than finally resolved by the House of Lords. If the law were to develop in the way argued for by the claimant, the intervener's consistent view of the evidence in this case (that is, that there has never been a period of sufficient user "as of right" for any "bringing into question" to have been possible) will demand more careful consideration than it has yet received. On this hypothesis, the House of Lords will have concluded that landowners can only rely on actions directed towards, or coming or likely to come to the attention, of users, or some such, to satisfy the proviso. It will be very much more likely than under the existing law that such facts will also have operated to bring a 20-year period to an end. The distinction proposed by the claimant between "bringing home to users" (as bringing into question for the purposes of section 31(2)) and "coming or likely to come to the attention of users" (for the operation of the proviso) will be a very fine one. Inspectors in such circumstances will then (as the first inspector ought, it appears, to have done) be required to consider an earlier 20-year period ending with the events satisfying the "bringing home to users" test; but then, in cases where challenges and notices are alleged, the very same fine distinction would simply arise once, and possibly many times, more. The better analysis of such facts may be, as the intervener has consistently argued, that, in cases of regular challenge by one means or another, a sufficient period of "as of right" user simply never begins, so that
***243** there can be no question of any relevant "bringing into question" and so no question of the application of section 31(1) .

Given all these circumstances, it would not be safe for the House of Lords to conclude that there is only one decision that can be reached on the facts of this case. The only appropriate remedy will be for the decision of the second inspector to be quashed and for the House of Lords to give guidance as to how the (on this hypothesis) two quashed decision letters should be treated by an inspector at any consequent inquiry. [Reference was made to Schedule 15 to the Wildlife and Countryside Act 1981 and *R v Secretary of State for the Environment, Ex p Blake [1984] JPL 101* .]

Laurence QC in reply. As to "contrary intention", see The Commons, Open Spaces and Footpaths Preservation Society, "The Rights of Way Act 1932 : An Explanation of the Act as affecting the Proof of Dedication of Highways with special reference to the Powers and Duties of Local Authorities", pp 4–5. [Reference was also made to *R (Beresford) v Sunderland City Council [2004] 1 AC 889* , para 77 and section 31A of the 1980 Act.]

Crail , following, referred to Shearburn v Chertsey Rural District Council (1914) 78 JP 289 , 290; Barraclough v Johnson 8 A & E 99 and Leckhampton Quarries Co Ltd v Ballinger 20 TLR 559 , 560 (regarding negativing "intention to dedicate").

On the subsidiary issue, the Secretary of State conceded in argument that a provision in a lease would not be sufficient to satisfy the proviso if for 20 or more years no action was taken to turn away members of the public. That was the case here, where no act was done by the landowner between 1972 and 1992.

The inspector's conclusion that the proviso was satified was based on clause 17 of the tenancy agreement in isolation, and not in conjunction with Mr Petter's statement or the evidence of notices and challenges. She had found there to be no notices or challenges evidencing lack of intention to dedicate during the 20-year period in question.

The inspector's treatment of the first inspector's decision was correct in law. As indicated by the inspector in para 14 of the Aldworth decision letter, where a party's witness gave evidence to her that was inconsistent with the record of the evidence that he or she had given to the first inspector embodied in the first decision letter, the relevant passage of the first decision letter could be, and was, put to that witness in cross-examination. Where the evidence presented to her was consistent with the evidence given at the first inquiry, it was neither necessary nor appropriate for such reference to be made, and the intervener was not disadvantaged by its not being made. As for the intervener's suggestion that the inspector ought to have taken account of the first inspector's views of the evidence, for her to have done so would have been wrong in principle and potentially prejudicial to both parties. It was for the inspector to form her own impressions of the witnesses whom she saw and heard, to make her own assessment of their credibility and to make her own findings of fact, uncoloured by the first inspector's impressions and views.

The minimum relief to which the claimants are entitled, if successful, is an order quashing the inspector's decision to refuse to confirm the modification orders. There is a precedent for the House of Lords to go further and ***244*** direct that they be confirmed. In *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 359 g –360 a , after holding that its sole reason for rejecting the application for registration of the glebe as a town or village green had been wrong in law, the House of Lords directed the registration authority to register the land. These appeals are directly comparable. But for the inspector's legal error in applying a wrong interpretation of the proviso, she would have confirmed the Godmanchester and Aldworth orders.

The Committee took time for consideration.

20 June. LORD HOFFMANN

1. My Lords, these two appeals are test cases brought before the House for a ruling on the effect of the presumption in section 31(1) of the Highways Act 1980 :

> "Where a way over any land … has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."

2. The main issue in both appeals is over the nature of the evidence which will be sufficient to demonstrate that there was no intention to dedicate. Although the point can be put in a variety of ways, it seems to me to turn in the end on the meaning of the word "intention". The respondent landowners say that intention is a state of mind, with all the subjectivity which that implies. In principle, the owner himself is the person best qualified to give evidence about his own state of mind. Such evidence

could be confirmed by acts done during the relevant period, such as putting up notices or barriers or recording his intentions in letters or memoranda. In evaluating such acts, no distinction can be drawn between those which would have come to the attention of users of the way and those which would not. What matters is the owner's state of mind and not what users of the way would have thought about it.

3. The contrary view is that the term intention is being used in an objective sense. It means what users of the way would reasonably have thought to be the owner's state of mind, which may or may not coincide with his actual state of mind. Similarly when one speaks of the intention of the parties to a contract, one means what a reasonable person, possessed of the background knowledge available to the parties, would have understood what they meant by using the language in which they expressed their agreement. Likewise, adverse possession by a squatter is said to require an animus possidendi, an intention to possess. But, as Slade J said in the leading case of *Powell v McFarlane (1977) 38 P & CR 452* , 472 (approved as a "remarkable judgment" by the *House of Lords in J A Pye (Oxford) Ltd v Graham [2003] 1 AC 419* , 432, per Lord Browne-Wilkinson):

> "In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world."

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4. Before I say anything about the facts of this appeal, I must put section 31(1) into its wider setting. It is derived from section 1(1) of the Rights of Way Act 1932 , which in turn built upon foundations laid by the common law. As has often been explained, English law differs from civilian systems such as the law of Scotland by having no doctrine of acquisition of rights, public or private, by long user: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 349. Instead, it treats user since time immemorial, that is to say, since 1189, as raising an irrebuttable presumption that the right had a lawful origin in grant to a predecessor in title or dedication to the public at large. As the reign of Richard I slipped further into the remote past, that presumption had to be supplemented by the judicial invention of others. In the case of claims to private easements such as rights of way, juries were told that user since time immemorial could be inferred from evidence of user for a long time, but that this could be rebutted by evidence that the easement could not have existed in 1189. As that was often quite easy to prove, the presumption had to be further supplemented by directions that the jury could in such a case infer the existence of a more recent grant which had been lost. This remained the law until it was reformed by the Prescription Act 1832 (2 & 3 Will 4, c 71), to which I shall return later.

5. In the case of a public right of way, a lawful origin had to be found in dedication by the landowner at some unknown date in the past. Such dedication was analogous to the lost modern grant of a private easement. Juries were told that they could find such a dedication on evidence of user openly and as of right by members of the public and were often encouraged to do so. The reason for juries and judges being willing to make and accept findings that there had been a dedication or a lost modern grant was of course the unfairness of disturbing rights which had been exercised without objection for a long time. In Scottish law, this policy was given effect by the more logical method of allowing such user to create the right. But in England the policy of the law was not openly acknowledged. Instead, juries were told that in order to uphold the public right, they had to find as a fact that there had been an act of dedication accompanied by the necessary animus dedicandi on the part of the landowner: see *Poole v Huskinson (1843) 11 M & W 827* .

6. As a matter of experience and common sense, however, dedication is not usually the most likely explanation for long user by the public, any more than a lost modern grant is the most likely explanation for long user of a private right of way. People do dedicate land as public highways, particularly in laying out building schemes. It is however hard to believe that many of the cartways, bridle paths and footpaths in rural areas owe their origin to a conscious act of dedication. Tolerance, good nature, ignorance or inertia on the part of landowners over many years are more likely explanations. In *Jones v Bates [1938] 2 All ER 237* , 244 Scott LJ said that actual dedication was "often a pure legal fiction [which] put on the affirmant of the public right an artificial onus which was often fatal to his success". In *Jaques v Secretary of State for the Environment [1995] JPL 1031* , 1037 Laws J called it an "Alice in Wonderland requirement".

7. Nevertheless, juries and other tribunals of fact did frequently find that such acts of dedication had taken place, no doubt for the reason I have suggested. So much so that in *Folkestone Corpn v Brockman [1914] AC 338* ***246** it was argued that, in the absence of evidence of facts inconsistent with such a dedication, they were obliged to make such a finding. But this submission was rejected by the House of Lords and it became settled that user was no more than evidence from which dedication could be inferred. It was open to the jury to ascribe the user to toleration or some other cause. Since, as I have said, some other cause

was in real life more likely, it became difficult to predict when or for what reason a jury would have sufficient sympathy with the users of the highway to find that there had been a dedication.

8. English judges were embarrassed by the fictions of lost modern grant, animus dedicandi and the like ("a bad and mischievous law, and one which is discreditable to us as a civilized and enlightened people", said Cockburn CJ in Bryant v Foot (1867) LR 2 QB 161 , 179) and looked enviously north of the border: see per Lord Blackburn in Mann v Brodie (1885) 10 App Cas 378 , 386. The law of private rights of way and certain other easements was reformed by the 1832 Act and since this provided a model for the 1932 Act, it is helpful to see how it worked. Starting from the common law, namely that user since 1189 would establish the easement, it provided in section 2 that a claim to such an easement which had been "actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years" should not be defeated by evidence which showed that it had arisen at some earlier date. This meant that it could no longer be defeated by showing that it had arisen after 1189.

9. Section 4 provided that the "full period of 20 years" should be taken to be the period next before the proceedings in which the claim shall have been "brought into question". If the statute had said no more, it would have been possible for a landowner to defeat a claim under the Act by the simple expedient of interrupting the enjoyment of the easement. The time which had necessarily to elapse between the interruption and the commencement of proceedings by the dominant owner to vindicate his right would automatically have prevented the latter from proving enjoyment without interruption for the 20 years "next before" the proceedings. Section 4 therefore went on to provide that "no act or other matter shall be deemed to be an interruption" unless it had been submitted to or acquiesced in for one year after the party interrupted had had notice thereof. That meant that if the servient owner barred the way, the dominant owner had a year within which to commence proceedings and claim the benefit of the statute.

10. The 1932 Act followed the same pattern, but with two important variations. First, section 1(1) contained the proviso which allowed the presumption of dedication to be rebutted by "sufficient evidence that there was no intention during that period to dedicate such way". There was no such proviso in the 1832 Act. Other subsections in section 1 of the 1932 Act provided that specific acts would be treated as sufficient evidence to negative the intention to dedicate. By section 1(3) (now section 31(3)(5) of the 1980 Act), a notice inconsistent with dedication, placed and maintained "in such a manner as to be visible to those using the way" will be sufficient. If the notice is torn down, notice in writing to the county, metropolitan district or London borough council that the way is not dedicated to the public will be sufficient. By section 1(4) (now section 31(6) of the 1980 Act) a landowner may deposit with the county council, metropolitan district or London borough councils a map of his land and a statement indicating which ways he admits to have been dedicated as highways. He may then at any time ***247** within the next 10 years make a statutory declaration that he has not dedicated any additional ways and that will be sufficient evidence to negative his intention to have dedicated any such ways. The process may be repeated by further statutory declarations at intervals of not more than ten years.

11. The other difference was that the 20-year retrospective period did not, as in the 1832 Act, run from the commencement of the proceedings contesting the highway, with a year's grace period which did not count as an interruption. Instead, it ran from when the right to the way was "brought into question", without any grace period. That suggests that the draftsman, with the example of section 4 of the 1832 Act before him, thought that if he ran the period back from the date when the right was brought into question, no grace period would be needed.

12. That, my Lords, is the common law and statutory background against which the dispute over the meaning of the term "sufficient evidence that there was no intention … to dedicate" in section 31(1) must be resolved. The help which may be obtained from the pre-1932 cases is limited. As the onus was on the claimant to prove dedication and there was no need for the landowner to prove facts inconsistent with dedication, the courts were not concerned to pin down very precisely what would be sufficient to show inconsistency. There are, however, some indications that the judges were looking at how the matter would have appeared to users of the way.

13. In Trustees of the British Museum v Finnis (1833) 5 C & P 460 , 465, Patteson J told a jury:

> "If a man opens his land, so that the public pass over it continually, the public, after a user of very few years, would be entitled to pass over it, and use it as a way; and if the party does not mean to dedicate it as a way, but only to give a licence, he should do some act to show that he gives a licence only. The common course is, to shut it up one day in every year, which I believe is the case at Lincoln's Inn."

14. This suggests that what matters is the impression given to members of the public. Likewise in Barraclough v Johnson (1838) 8 A & E 99 , 105, Littledale J said:

> "A man may say that he does not mean to dedicate a way to the public, and yet, if he had allowed them to pass every day for a length of time, his declaration alone would not be regarded, but it would be for a jury to say whether he had intended to dedicate it or not. The facts may warrant them in believing that the way was dedicated, though he has said that he did not so intend: and, if his intention be insisted upon, it may be answered that he should have shown it by putting up a gate, or by some other act."

15. In *R v Broke (1859) 1 F & F 514* , 515, a trial on indictment for stopping up a highway, the landowner claimed to have instructed his servants to allow only seafaring men and pilots to use the path and to turn back anyone else. Pollock CB said:

> "Even supposing these instructions to have been given and acted on, yet, unless it can be proved that they were communicated to the persons ***248*** who used the path, and that they did so by virtue thereof, and not of right, their user was a user by the public, and the right of way has been gained, if the user has been continued long enough."

16. It is true that there is no express statement that intention had to be negatived by overt and notorious acts. But then, as I have said, intention did not have to be negatived at all. And there is no case in which a jury was directed to have regard to an act which one might call private, in the sense of something which would not have come to the attention of users of the way.

17. The first consideration of the matter after 1932 was the decision of the Court of Appeal in *Fairey v Southampton County Council [1956] 2 QB 439* . This was an application to quarter sessions (under section 31 of the National Parks and Access to the Countryside Act 1949) by the owner of Bossington House in Hampshire for a declaration that a footpath over his land was not a public highway. The evidence was that it had been used uninterruptedly from 1885 to 1931 by inhabitants of the nearby villages of Bossington, Houghton and Horsebridge. As from that date, a new owner of the estate had challenged users who were not near neighbours and turned them back. Quarter sessions found that the challenges had brought the public right to use the path into question and that the relevant 20-year period for the purposes of the Act was therefore 1911 to 1931. As there had been qualifying user during this period, the public right of way was established.

18. The landowner appealed by case stated to the Divisional Court. One ground of appeal, which is not relevant to this case, was that if quarter sessions were right about the relevant 20-year period, the Act could not apply because it was not retrospective. The other ground was that the challenges did not bring the right to use the path into question. The landowner said that it was not brought into question until he objected in 1953 to the inclusion of the path in the definitive map. But he relied on the challenges as evidence to negative an intention to dedicate during the 20 years ending in 1953.

19. The Divisional Court rejected both arguments and the landowner appealed to the Court of Appeal. The leading judgment was given by Denning LJ. He dealt first with what amounted to bringing the right into question. Although the passage, at pp 456–458, is a long one, I think that it should (with one or two excisions) be quoted in full:

> "… I think that in order for the right of the public to have been 'brought into question', the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance, by putting a barrier across the path or putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. Some village Hampden may push down the barrier or tear down the notice: the local council may bring an action in the name of the Attorney General against the landowner in the courts claiming that there is a public right of way: or no one may do anything, in which case the acquiescence of the public tends to show that they have no right of way. But whatever the public do, whether they oppose the landowner's action or not, their right is 'brought into question' as soon ***249*** as the landowner puts up a notice or in some other way makes it clear to the public that he is challenging their right to use the way. Applying this test, I ask myself: when did the landowner here make it clear to the public that he was challenging their right to use the way? Quarter sessions held that he did so in 1931, when he objected to the use of the path by persons who were not local residents. We do not know what evidence was before them on that point. If the landowner merely turned back one stranger on an isolated occasion, that would not, I think, be sufficient to make it clear to 'the public' that they had no right to use it. He ought at least to make it clear to the villagers of Bossington,

> Houghton and Horsebridge. They were the members of the public most concerned to assert the right, because they were the persons who used the path. They knew—better than the landowner himself—how long they had used it. They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it … I think we ought to assume that quarter sessions had sufficient evidence before them to support their finding. We ought to assume that in 1931 when the landowner turned back strangers, he did it in so open and notorious a fashion that it was made clear, not only to strangers, that they had no right to use the path, but also to local residents, that they only used it by tolerance of the owner."

20. That was sufficient to dispose of the case, since there was no dispute that there had been qualifying user in the 20 years before 1931. As a statement of what amounts to bringing the right into question, it has always been treated as authoritative and was applied by the inspectors and the Court of Appeal in these cases. But Denning LJ then went on to consider the finding of quarter sessions that the landowner's conduct in 1931 and thereafter had demonstrated an intention not to dedicate the path as a highway:

> "In this connection I would also mention the finding of quarter sessions that in and from 1931 the landowner, by turning off strangers, showed an intention not to dedicate the path as a highway for the use of members of the public at large. This raises the same point. In my opinion a landowner cannot escape the effect of 20 years' prescription by saying that, locked in his own mind, he had no intention to dedicate … In order for there to be 'sufficient evidence that there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large—the public who used the path, in this case the villagers—that he had no intention to dedicate. He must, in Lord Blackburn's words, take steps to disabuse those persons of any belief that there was a public right: see Mann v Brodie 10 App Cas 378 , 386. Such evidence may consist, as in the leading case of Poole v Huskinson 11 M & W 827 , of notices or a barrier: or the common method of closing the way one day a year. That was not done here; but we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it. On that footing there was sufficient evidence to show that there was no intention to dedicate."

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21. These observations on the meaning of "evidence that there was no intention to dedicate" were obiter dicta. They were not necessary for the decision and the other two members of the court (Birkett and Parker LJJ) did not mention the point. But there are obiter dicta and obiter dicta. These were no throw-away lines. This was a learned and carefully prepared reserved judgment (including reference to authorities which had not been cited by counsel) by one of the greatest English judges on a matter close to his heart: a village dispute in his own county of Hampshire.

22. For over 40 years, Denning LJ's statement of the law remained unchallenged. It was cited in text books and applied in judgments of lower courts (see, for example, per Walton J in *R v Secretary of State for the Environment, Ex p Blake [1984] JPL 101* , 102, Pill J in *O'Keefe v Secretary of State for the Environment [1996] JPL 42* , 58–59 and Laws J in *Jaques v Secretary of State for the Environment [1995] JPL 1031* , 1035–1037). This last case, although following the Fairey case, contains some puzzling dicta. Laws J said that the effect of the proviso was that " *even if* use of the required quality was proved, the status of right of way would not be established if the landowner demonstrated an intention not to dedicate".

23. That is plainly true. But the judge then went on:

> "The logical relationship between the two parts of the subsection entailed that proof of an intention not to dedicate could be constituted by something less than proof of facts which had to have made it clear to the public that they had *no* right to use the way: otherwise, once the interested public had established their case under the first part of the subsection, there would be no room for the operation of the second part."

24. This, I am afraid, I do not follow at all. The evidence which will satisfy the proviso is not something less than enjoyment as of right but something different. For example, there may be a notice which says "No right of way. Trespassers will be prosecuted". Nevertheless, for upwards of 20 years members of the public may have ignored the notice and used the way, openly and apparently in the assertion of a right to do so. Their user will satisfy section 31(1) but the landowner, even on the most

objective test, will have satisfied the proviso. (It may be that putting up the notice also brought the right to use the way into question, in which case, as in the Fairey case, the public would succeed if they could prove another 20 years' user before the notice went up. But that is another matter.) The potential contradiction imagined by Laws J may be due to the view held, at the time of his judgment, that enjoyment as of right required a subjective belief by the users that they had the relevant right—a view which was rejected in *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* . Even so, there need not be any contradiction. The users and the landowner may simply differ in their opinions as to whether the right exists or not.

25. In *R v Secretary of State for the Environment, Ex p Cowell [1993] JPL 851* , 857 Staughton LJ, after noting that Denning LJ's requirements of overt and notorious acts were dicta, went on to say that although "that was not said in the section itself", it "seemed a sensible rule". If that might seem less than wholehearted assent, Staughton LJ's view had become firmer three years later when he presided in the Court of Appeal in Secretary of State for the Environment v Beresford Trustees (unreported) 31 July 1996; Court of Appeal (Civil Division) Transcript No 1031 of 1996 ***251*** and concurred in the judgment of Hobhouse LJ. With characteristic precision, Hobhouse LJ said of the phrase "sufficient evidence that there was no intention during that period to dedicate it": "This is not a subjective test. The absence of intention must be objectively established by overt acts of the landowner."

26. He went on to cite the passage in the Fairey case as authority. This time, the application of the objective test was undoubtedly ratio decidendi. The issue was whether the proviso had been satisfied and the inspector who conducted the inquiry had found that there was not "sufficient evidence of overt acts by the owners to show the public at large that there was no intention to dedicate". This finding had been set aside by the judge but was restored by the Court of Appeal. The case was not reported, presumably because the law reporters thought that it laid down no new principle.

27. The first sign of dissent was in *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374* , 395, where Sullivan J said that the dicta of Denning LJ went too far. In his opinion, all that was required was that evidence of the owner's intention be "overt and contemporaneous". But he was not required to "publicise his intention to users of the way". A purely private act would do. Writing a letter to oneself and putting it in a locked drawer was described as a "far-fetched hypothetical example" but there is no suggestion that it would not in principle be sufficient. The judge was not referred to the Beresford case, no doubt because it had not been reported.

28. In *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* , Dyson J took the new doctrine to its logical conclusion. After examining the authorities (again, without citation of the unreported Beresford case) he said, at p 406:

> "On the face of it, the language of the proviso is straightforward. All that is required is that there be sufficient evidence of lack of intention to dedicate. Coming to the matter untutored by previous authority, one may be forgiven for thinking that what Parliament intended was that the tribunal of fact simply decide as a matter of fact whether there is or is not sufficient evidence of intention to dedicate … I accept that as a matter of fact the tribunal of fact will rarely, if ever, find that there is sufficient evidence of lack of intention to dedicate in the absence of overt and contemporaneous acts on the part of the owner. I do not, however, think that such a requirement can be spelled out of section 31(1) as a matter of construction."

29. I do not understand why, if Dyson J is right in saying that "intention" in section 31(1) refers to the landowner's actual state of mind, it would be rare for a tribunal of fact to find evidence of lack of intention unless there was proof of overt and contemporaneous acts. Who better to give evidence of the owner's state of mind than the owner himself? It is true that if he was asserting some improbable state of mind, one might look for corroboration. But there is nothing improbable in not having an intention to dedicate. It is the conclusion that the owner did intend to dedicate which is improbable: a "pure legal fiction", an "Alice in Wonderland requirement".

30. In these appeals, the Divisional Court and Court of Appeal followed the construction given to section 31(1) by Dyson J in *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* ***252*** and disapproved of Denning LJ's statement of the law in the Fairey case. This time, the unreported *Beresford case was cited, but Auld LJ [2006] QB 727* , 740, para 26, said that it was "not a reasoned decision as to the meaning of the proviso so as to bind this court". Like Dyson J, Auld LJ, at p 753, para 64 thought that in practice overt and contemporaneous acts evidencing lack of intention to dedicate would be required:

> "In most cases, no doubt, the fact-finder will look for overt, in the sense of objectively identifiable, contemporaneous acts or declarations, if only to guard against any risk of abuse by landowners who might seek to rely on retrospective acts or declarations after the expiration of the relevant 20-year period."

31. Again, I cannot see why it should be an abuse for a landowner to say, after the expiry of the 20-year period, that although he did nothing to stop the public from using the way, this was due to tolerance, ignorance or inertia and without any intention to dedicate it as a highway. Such evidence would be an inherently plausible account of his state of mind. The only objection is that allowing the presumption to be defeated by such evidence would make nonsense of the Act.

32. My Lords, in my opinion the law as stated by Denning LJ in the Fairey case and by Hobhouse LJ in the Beresford case was correct and the Court of Appeal was wrong. I think that upon the true construction of section 31(1) , "intention" means what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be. The test is, as Hobhouse LJ said, objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in Mann v Brodie 10 App Cas 378 , 386, to "disabuse [him]" of the notion that the way was a public highway. The Court of Appeal said that this would involve reading words into the Act; placing a gloss on the statute. But, outside the criminal law and parts of the law of torts, it is common to use the word intention in an objective sense, as in the intention of Parliament, the intention of the parties to a contract and, even in Latin, the animus possidendi which a squatter must have to acquire a title by limitation.

33. It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be any difficulty in satisfying such a requirement without any evidence at all. It requires "sufficient evidence" that there was no such intention. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner's consciousness, rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J in *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374*) it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience.

34. Such a construction is in my view supported by reading section 31 as a whole. The primary example of an act which would negative an intention to dedicate is the erection and maintenance of a notice inconsistent with ***253** dedication "in such manner as to be visible to persons using the way": section 31(3) . If the notice is torn down or defaced, notice to "the appropriate council" will have the same effect: section 31(5) . If any overt act would do, why should the notice have to be given to "the appropriate council"? A notice to an inappropriate council, or to the landowner's solicitor or friend, would be just as good. In the Court of Appeal, Auld LJ said that a notice to the appropriate council would be unlikely to come to the attention of the public using the way and this was an indication that, in general, the landowner's intention did not have to be communicated to users of the way. I disagree. A notice to the council under section 31(5) is plainly regarded as second best and is only allowed when the original notice has been torn down or defaced, just as substituted service is allowed only when there is good reason to dispense with personal service. It is true that users of the way are not very likely to call at the county council offices to ask whether any notices under section 31(5) have been lodged, but a well-advised defender of rights of way, such as the Ramblers' Association, will know where to look and be able to draw such notices to the attention of users. The fact that in certain defined circumstances one can resort to a method less likely to come to the attention of users of the way is no basis for concluding that in general it does not matter whether the landowner's intention can come to their attention or not.

35. The same point may be made about the elaborate provision for maps, statements and statutory declarations in section 31(6) . What would be the point of all this if Parliament was using the word "intention" in a subjective sense which could be proved by any relevant evidence? And why did Parliament, by section 57 of and Schedule 6, Part I, paragraph 4 to the Countryside and Rights of Way Act 2000 , insert a new section 31A (not yet in force in England) into the 1980 Act to establish a register of the maps and statements deposited under section 31(6) and require that it should be available for inspection free of charge? Surely to make such alternative methods of rebutting the presumption available to the public, so as to approximate as far as possible to the primary method of rebuttal.

36. Then there is the problem of the interruption of continuous user before the commencement of proceedings which, as we saw, the 1832 Act for private rights of way solved by providing a year's grace in which to bring the proceedings. The 1932 Act dispensed with a grace period by calculating the 20 years back from the date on which the right was called into question. The scheme contemplated by Parliament was that once users of the way were made aware that their right to use the way was

challenged, they should not be able to gain an advantage from subsequent use of the way and the landowner should not be able to gain an advantage by subsequent prevention of use. What happened after the way was called into question was irrelevant to the operation of the Act. On the Court of Appeal's construction, however, the well-advised landowner, facing the possibility of a claim to a right of way based on many years' enjoyment, will make a private declaration that he has no intention to dedicate and will lodge it in a safe place. Only afterwards will he close the way or otherwise call the right into question. The effect will be to make it impossible for the claimants to prove the full 20 years' user ending when the way was closed, because the owner will be able to satisfy the proviso in respect of the final period after he made his declaration.
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37. My Lords, I think it is most unlikely that Parliament intended that the 1932 Act could be capable of being defeated by so simple a device, leaving the claimants to the arbitrary and illogical rules of common law, preserved by section 31(9) . In the *Fairey case [1956] 2 QB 439* , 458 Denning LJ, turning to the proviso after his discussion of bringing the right into question, said that it raised the same point. In general, that seems to me to be right. I do not say that all acts which count as negativing an intention to dedicate will also inevitably bring the right into question. For example, I would leave open the question of whether notices or declarations under section 31(5) or (6) will always have this effect. I should think that they probably would, because their purpose is to give notice to the public that no right of way is acknowledged. But we need not decide the point. I do not even say that acts which would indicate to reasonable users of the way that the owner did not intend to dedicate will inevitably bring the right into question, because one cannot foresee all cases. But the Act clearly contemplates that there will ordinarily be symmetry between the two concepts. Thus section 31(3) provides that an appropriate notice will be sufficient evidence to negative the intention to dedicate and section 31(2) provides that the right may be brought into question "by a notice such as is mentioned in subsection (3) below or otherwise". The notice will therefore both negative intention to dedicate and bring the right into question, while the words "or otherwise" contemplate other ways of bringing the right into question (like barring the way, permanently or once a year) which would also in my view be sufficient to negative an intention to dedicate.

38. I am not particularly troubled by the thought that this would leave little scope for the operation of the proviso. It is true that acts negativing an intention to dedicate would also, by calling the right into question, throw the inquiry back into an earlier period. If there was no rebutting evidence during that period, the right would be established (as in the Fairey case) and the proviso would not apply. But the 1932 Act began as a private member's bill in the House of Commons which underwent considerable amendment in the House of Lords, including the insertion of the provision for calculating time backwards. I would not expect such an Act to be particularly elegant in the way its parts meshed together, but the general purpose seems to me clear enough and was given effect by the construction adopted by Denning LJ in the Fairey case.

39. My Lords, that leaves two alternative submissions put forward by Mr Laurence for the appellant claimants, with which I can deal very shortly. The first was that "during that period" in the proviso meant during the whole of that period. The intention not to dedicate had to be continuously manifested. There is authority against this construction (see, for example, per Walton J in *R v Secretary of State for the Environment, Ex p Blake [1984] JPL 101* , 104, saying that proof of lack of intention to dedicate for 17 of the 20 years would be "fatal to the applicant's case") and I do not think that it can possibly be right. The proviso negatives the effect of the enjoyment of the right for the period during which there was no intention to dedicate. If that leaves less than 20 years of unrebutted enjoyment, the claim fails.

40. The other submission was that notices under section 31(3)(5)(6) are an exhaustive statement of the way in which an intention to dedicate may be rebutted. But section 31(2) speaks of the right being called into ***255** question by a notice "or otherwise" and it is hard to imagine an act which called the right into question and did not also evidence an intention not to dedicate.

41. That brings me to the facts of the two appeals. Both arise out of applications to the surveying authority under section 53 of the Wildlife and Countryside Act 1981 to modify the definitive map and statement by adding a right of way not shown on the map. One application was by Godmanchester Town Council to add a public footpath around three sides of the perimeter of Monk's Pit, Godmanchester. This was a former gravel pit, rectangular in form, which had become a small lake. The map already showed a footpath along one of its sides and the application was to add a path which completed a circuit round the lake. The other was to add a footpath across land belonging to the Yattendon estate at Aldworth in Berkshire. In both cases an inspector appointed under Schedule 15 to the 1981 Act found that there had been qualifying user for upwards of 20 years before the right had been called into question. The chief issue in each case was whether the proviso had been satisfied.

42. In the Godmanchester case, the Church Commissioners, as landowners, relied upon the erection of a sign and works done on the footpath as evidence of lack of intention to dedicate. The inspector rejected these as ambiguous or insufficient. But the owners also produced a letter to the local planning authority, written during the 20-year period, in which they complained of

pedestrian trespass "around those parts of the pit which are not designated as a public footpath". Such a letter would not have come to the attention of users of the path or satisfied any of the alternative methods of negativing intention to dedicate in section 31 . The inspector, following Dyson J in *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374* and Sullivan J in *R v Secretary of State for the Environment, Transport and the Regions v Dorset County Council [2000] JPL 396* , nevertheless held that the letter was sufficient and her decision was upheld by the Court of Appeal. For the reasons I have given, I think that this was wrong and the decision must be quashed.

43. In the Yattendon case there were two inquiries. The first inspector found that the right of way was brought into question by the erection of signs in 1992. The estate owner relied upon three kinds of evidence as negativing an intention to dedicate before that date. They were, first, an earlier sign nailed to a beech tree, secondly, challenges by estate employees to people using the way and thirdly, a clause in an agreement granting an agricultural tenancy of the relevant land, by which the tenant covenanted to warn and keep off unauthorised persons from trespassing, to give notice to the owner of any continued acts or trespass and not to allow any footpaths to be created. The inspector accepted the first two categories as sufficient evidence of lack of intention to dedicate and said nothing about the effect of the tenancy agreement. He therefore refused to confirm the county council's order adding the footpath to the map.

44. The claimant then applied for judicial review to quash the inspector's decision on the ground that he did not address his mind to the question of whether the notices and challenges, which he had treated as evidence of lack of intention to dedicate, had also brought the right into question, requiring an investigation of an earlier 20-year period. The ***256*** Secretary of State conceded that the decision could not stand and by consent it was quashed and a new inquiry ordered.

45. At the second inquiry, another inspector also found that the right of way was brought into question by the erection of signs in 1992. The earlier notice or notices had been insufficient for this purpose. The same was true of the challenges.

46. When she came to consider whether there was lack of intention to dedicate, she rejected the signs as insufficient and said nothing about the challenges. This may be because she took the view that if they were insufficient to bring the right into question, they would also be insufficient to be sufficient evidence of lack of an intention to dedicate. That would, in my opinion, be a consistent view to take. But, again following the Billson and Dorset cases, she said that the clause in the tenancy agreement was sufficient.

47. I rather doubt whether, even on the principle applied by the Court of Appeal, the clause could be regarded as sufficient. The fact that landlord and tenant have signed a common form agreement containing such a clause says very little about their actual states of mind. But I think that it was wrong in principle to take the tenancy agreement into account, because it would not have been available to users of the right of way. The Yattendon decision must therefore also be quashed.

48. The claimants ask that both cases be remitted to the Secretary of State with a direction to confirm the orders adding the footpaths. In each case, the only ground upon which the inspector held the presumption under section 31(1) to be rebutted was inadmissible. But I do not think that this would be fair. In the Yattendon case the first inspector held the presumption rebutted on other, admissible grounds and both landowners may have conducted their cases on the assumption that little other rebutting evidence was needed because, on the law stated by Dyson J and Sullivan J, their private declarations were sufficient. The Secretary of State, or an inspector appointed by him, is the statutory decision-making authority and I do not think that the House should substitute its own decision.

49. Nevertheless, the landowners may consider, in the light of the opinions of your Lordships and the evidence which they have adduced at the earlier inquiries, that it would serve no purpose to demand a further inquiry and I draw attention to the power of the inspector under section 250(5) of the Local Government Act 1972 (as applied by section 53 of the 1981 Act and paragraph 10A of Schedule 15 inserted by section 51 of and Schedule 5, Part I, paragraph 11(1)(8) to the 2000 Act) to award costs.

50. In the result, I would quash both decisions and remit the cases to the Secretary of State to decide in accordance with the opinions of the House. Since writing this opinion, I have had the opportunity of reading in draft the opinion to be delivered by my noble and learned friend, Lord Hope of Craighead, and I entirely agree with his observations on the public dialogue by which users and landowners may respectively assert and deny the existence of a right of way.

LORD HOPE OF CRAIGHEAD

51. My Lords, commenting on the history and meaning of the Rights of Way Act 1932 , Sir Lawrence Chubb, who was an environmental campaigner all his life and was knighted for his services to the English countryside, observed that in legal theory all highways, including public footpaths and *257 bridleways, must have originated by one of two methods. They must either have been created under some statutory authority or have been dedicated by some owner. He conceded however that relatively few footpaths or bridleways have ever been deliberately or expressly granted by any definite act or deed on the part of a landowner: "The Rights of Way Act 1932 . Its History and Meaning", Journal of the Commons, Open Spaces and Footpaths Preservation Society, vol II, no 8 (October 1932), p 244, 247. Such altruistic acts are not unknown. But, almost without exception, English landowners are jealous of their right to exclude the public from their private property. Given the numbers a public way may attract, and the tendency of some members of the public to drop litter wherever they go, who can blame them? For completeness, it should be added that a public way may be acquired by prescription. But in Mann v Brodie 10 App Cas 378 , 386, Lord Blackburn said that in England it is in practice never necessary to rely on prescription since time immemorial. Deemed dedication is all that is needed to achieve this.

52. Deemed dedication may be relied upon at common law where there has been evidence of a user by the public for so long and in such a manner that the owner of the fee, whoever he is, must have been aware that the public were acting under the belief that the way has been dedicated, and the owner has taken no steps to disabuse them of that belief. The 1932 Act, which the Highways Act 1980 replaced, was enacted to clarify the law. No definite time was required at common law for a dedication to be inferred. In Mann v Brodie , at p 386, Lord Blackburn observed that a very short period of public user would often satisfy a jury. For the statutory presumption to apply, however, a full period of 20 years is required: section 31(1) . Unlike the period which is needed for prescription, which can be measured between any dates however long ago for which evidence is available, this period must be calculated retrospectively from the date when the right of the public is brought into question: section 31(2) .

53. The common law has not laid down fixed rules as to what the owner may do to disabuse the public of the belief that the way has been dedicated for use by the public. The statute clarifies the law in this respect too. The erection and maintenance of a notice which is inconsistent with the dedication of the way as a highway which is visible to persons using it will, in the absence of proof of a contrary intention, be sufficient evidence: section 31(3) . If it is torn down or defaced, a notice to the appropriate council that the way is not dedicated as a highway will have the same effect: section 31(5) . So too will the deposit with the council by the owner of a map and a statement indicating which ways, if any, he admits to have been dedicated as highways, so long as this is backed up every 10 years by a declaration that no additional way has been dedicated in the meantime: section 31(6) . The appropriate council is, in effect, the guardian of the public interest in these matters. In country areas, it is the council of the county in which the way or the land is situated: section 31(7) .

54. Thus a balance is struck between the interests of the public and those of the landowner. The landowner knows that he can resist claims that a way across his land is a public way so long as he takes the steps that are mentioned in these subsections. But erecting a notice or lodging the relevant documents with the council may come too late if there is sufficient evidence of inaction on the landowner's part for a period of 20 years, *258 calculated retrospectively from the date when he takes this step, to bring about the public right by presumed dedication. This is because the date as from which the calculation is to be made is the date when the right of the public is brought into question. If no one seeks to assert that the way is a public way, cadit quaestio. But if there is a challenge, the right of the public to use the way will be taken to have been brought into question as soon as the landowner seeks in the ways the statute mentions to negative the intention to dedicate. The same will be true of other acts, or of some other course of conduct, by which the landowner seeks to exclude the public. The steps which the statute mentions are not to be taken as exhaustive of those that may be taken for this purpose: see the words "or otherwise" at the end of section 31(2) . Whatever he does, time will have begun to run against the landowner from the beginning of the period of 20 years calculated backwards from the first such act or from the start of that course of conduct.

55. On the other hand, for so long as the landowner takes his first step to exclude the public within the 20-year period and keeps doing this in a way that continues to negative his intention to do so, he will be protected from presumed dedication under the statute. There will, in terms of the proviso to section 31(1) , be "sufficient evidence that there was no intention during that period to dedicate it". It will be sufficient for this purpose that the situation which the proviso contemplates has arisen at any time within the 20-year period. Time ceases to run against the landowner as from that point. Irrespective of when this occurs, the period that the statutory presumption requires will have been interrupted. If it starts running again, a full 20 years will be needed thereafter before the requirement will be satisfied. So all the landowner need do is ensure that no 20-year period goes by without his taking overt acts to challenge the use of the way by the public.

56. The central question in these appeals is how that intention is to be demonstrated. Mr Simpson said that the words of the statute should be taken literally. An absence of intention was enough. So it was not necessary for the landowner to reveal his

intention to anybody. In other words, contrary to what Denning LJ said in *Fairey v Southampton County Council [1956] 2 QB 439* , 458, he could keep his intention locked up in his own mind. I do not think that this extreme view finds any support in the authorities. But in *R v Secretary of State for the Environment, Ex p Billson [1999] QB 374* , 395, Sullivan J said that the proviso did not require the landowner to publicise his intention *to users* of the way (my emphasis). In *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council [2000] JPL 396* , 407, Dyson J went further. He said that he would not place any gloss on the proviso at all and that, in disproving an intention to dedicate, the owner need not bring home to the users that there was no right to use the way. Their approach was adopted in this case by both the Divisional Court and the Court of Appeal. In the *Court of Appeal [2006] QB 727* , 752, para 63, Auld LJ said that the proviso is concerned with intention and its proof, not with communication of that intention to members of the public. He added this explanation:

> "To construe it as requiring the latter or even proof of overt and contemporaneous acts falling short of such communication would be to ***259*** read words into it which would have been clearly included if that had been intended, and which would run counter to the operation of section 31 read as a whole."

In paragraph 64 he said that there was no statutory threshold as to sufficiency of evidence for the purpose of the proviso.

57. In my opinion this is to take too narrow a view of the purpose and effect of the proviso. Like the whole of the subsection of which it forms part, it was drafted against the background of the common law. The express exclusion of a way "of such a character that use of it by the public could not give rise at common law to any presumption of dedication" demonstrates this point. So too does the use of the phrase "actually enjoyed by the public as of right and without interruption", which can only be understood by referring to what is required for this purpose by the common law. As for the proviso, the essential point is that the presumption of dedication at common law involves a dialogue between the landowner and the public. It is conducted by acts on the part of the public which indicate an assertion of its right to use the way and, if he wishes to deny the public that right, by acts on the part of the landowner to indicate the contrary. As Lord Blackburn said in Mann v Brodie 10 App Cas 378 , 386, he must take steps to disabuse the public of the belief that the way has been dedicated to public use. Whether the steps that he has taken to communicate this fact to the public are sufficient for that purpose is, of course, a question of fact for the inspector. But the landowner must communicate his intention to the public in some way if he is to satisfy the requirements of the proviso. That was the position prior to the 1932 Act, and I can find nothing in that Act or in the 1980 Act to indicate that it was Parliament's intention that such a fundamental rule should be departed from.

58. Scott LJ in *Jones v Bates [1938] 2 All ER 237* , 247, saw this point, as did Denning LJ in *Fairey v Southampton County Council [1956] 2 QB 439* , 457. Scott LJ said that the main object of the 1932 Act was to get rid of the onerous fiction of proving an actual dedication. There is no indication in his opinion that he thought that it was its intention to alter the nature of the evidence that would be relevant to show whether there was an intention to dedicate or not to dedicate, as the case may be. Denning LJ said that the landowner must make his position clear to the members of the public most concerned to assert the right: "They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it." There are indications elsewhere in section 31 that support this view. The notice referred to in section 31(3) must be "visible to persons using the way": paragraph (a). A notice which is put up somewhere else, or which remains in the landowner's workshop, will not do. This is because it will not be effective to communicate the landowner's intention to those who wish to assert the right to use the way unless they can see it. The elaborate process of depositing a map and other documents with the appropriate authority that section 31(6) describes would be a pointless exercise if all that was needed was for the landowner to send a letter which gave expression to his intention to his estate agent or his solicitor.

59. For these reasons, as well as those given by my noble and learned friend, Lord Hoffmann, whose speech I have had the advantage of reading in ***260*** draft and with which I am in full agreement, I would allow the appeals and make the orders that he proposes.

LORD SCOTT OF FOSCOTE

60. My Lords, the issue in these two appeals, as my noble and learned friend, Lord Hoffmann, has said, is whether the respective landowners, respondents in the two appeals, have shown "sufficient evidence" (section 31(1) of the Highways Act 1980) that they had no intention during the relevant 20-year period to dedicate as public footpaths the paths over their land claimed by the appellants to have achieved that status by 20 years' public user. Section 31(1) speaks of a "deemed" dedication brought about by the requisite 20 years' user unless there is "sufficient evidence" that there was "no intention during that period to dedicate." The emphasis in section 31(1) , regarding the means whereby a path may achieve the status of a public path, is on dedication.

Dedication by the landowner was the common law means whereby a public right of way could be created. Scott LJ in *Jones v Bates [1938] 2 All ER 237* , 244–245, was very scornful about common law dedication. He described dedication as "usually quite imaginary", "often a pure legal fiction", and expressed a clear preference for prescription on the Scottish model where public user of the requisite quality for the requisite period would impel the legal conclusion that the path was public whatever the landowner might say or prove about his intention. He was not, however, joined in these strictures by his Court of Appeal colleagues and, for good or ill, dedication by the landowner remains the basis on which paths used by the public can attain the status of public paths. What section 1(1) of the Rights of Way Act 1932 , now section 31(1) of the 1980 Act, did was to provide a means whereby the insufficiency of positive evidence of the intention of the landowner to dedicate a path as a public way could be sidestepped. If the path had been used by the public as of right and without interruption for 20 years before the right of the public to use the path had been "brought into question", it was to be "deemed" to have been dedicated unless the landowner could show "sufficient evidence that there was no intention" to dedicate. The onus was shifted to the landowner. But the basis of the public status bestowed on a path by public user remained after 1932, and remains, dedication. Prescriptive user alone is not necessarily enough.

61. The particular issue in each of these appeals, where there has been the requisite quality of public user of the path in question for the requisite period, concerns the nature of the evidence about his intentions that the landowner must show in order to displace the deemed dedication brought about by the 20 years' user. Section 31(1) simply speaks of "sufficient evidence" and the Act contains no guide as to what might be sufficient. There are two questions. First, can an intention held in pectore by the landowner and disclosed to no one ever constitute "sufficient evidence" for section 31(1) purposes? If the answer is "no", must "sufficient evidence" (other than evidence made sufficient by subsections (3), (5) or (6) of section 31) consist of acts which, objectively viewed from the standpoint of the users of the path, demonstrate the intention of the landowner that they should not use the path?

62. To answer these questions one must, in my opinion, start with the law about dedication of highways as it stood immediately before the ***261** enactment of the 1932 Act. It is said that the Prescription Act 1832 provided a model for the 1932 Act. This is no doubt correct but analogies drawn from the rules about prescription of private easements can, if applied to dedication of paths as public rights of way, go astray. For example, private easements, under common law, are private rights in rem and can only be created by grant. Hence the need, until statutory intervention came to assist, for the fiction of a lost modern grant to be invented. The creation of a public right of way, by contrast, is brought about by dedication of the way as a public way by the landowner. The dedication need not be formal. Sufficiently unequivocal conduct by the landowner evincing his intention to dedicate will suffice. There must also be acceptance of the dedication by the public, evidenced by their use of the path. So long user of the path by the public with the owner standing by and acquiescing in the user is consistent with there having been a dedication and its acceptance by the public. It can be taken, in the absence of evidence to the contrary, to justify the inference of the requisite dedication.

63. These very different approaches to the creation of private rights of way on the one hand and public rights of way on the other hand lead, post the advent of the 1832 Act enabling private easements to be acquired by 20 years' use as of right, to two important differences between them. First, user for the acquisition by prescription of private rights of way has to be, among other things, nec precario, i e as of right, not by permission of the landowner. User to justify the inference of dedication of a public right of way, on the other hand, has to be user of such a character and in such circumstances as to justify the inference that the landowner *had* given permission, not merely temporarily but on a permanent basis, for the user. Second, the inference of dedication brought about by long public user is not conclusive. Where private rights are concerned, however, sufficiently long user of a sufficient quality creates, by prescription, the right. Where public rights are concerned, the user is no more than evidence from which the dedication can be, but does not always have to be, inferred.

64. The merely evidential character of long public use was emphatically confirmed by this House in *Folkestone Corpn v Brockman [1914] AC 338* . The issue was whether a particular roadway had been dedicated as a public highway. The evidence was that from 1827 or thereabouts the roadway had been used by members of the public on foot without interruption, openly and to the knowledge of the landowner or his agents. But the justices, dealing with objections by local householders to being required to meet the expenses of certain street works—objections based on their contention that a dedication of the roadway should be inferred, in which case the costs would fall on the inhabitants at large—had held that there had been no dedication. The decision had been upheld by the Divisional Court but reversed in the Court of Appeal. Lord Kinnear, giving the first speech in the House, cited, at p 352, a passage from Lord Blackburn's speech in Mann v Brodie 10 App Cas 378 , 386:

> "where there has been evidence of a user by the public so long and in such manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no

> steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to *262 find that fact may find that there was a dedication by the owner, whoever he was."

Lord Kinnear then continued:

> "The points to be noted are, first, that the thing to be proved is intention to dedicate, and secondly, that while public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee."

After emphasising that "the question is whether the facts are sufficient to raise the presumption", he said, at p 354:

> "I think it fallacious to assume dedication on a partial view of the evidence, and only after that has been done to inquire whether conflicting facts are strong enough to dislodge a conclusion already reached."

And, at p 355: "the presumption cannot be held to be established in law at any intermediate stage of the proof, or until the whole facts and circumstances have been fully considered." And, at p 356: "The question is one of fact, turning upon probabilities of conduct."

65. Lord Atkinson, at p 361, summed up the argument for a dedication that had been put forward by counsel for the respondent owners and occupiers thus:

> "Proof of open, uninterrupted, and continuous user raises a praesumptio juris in favour of dedication. If evidence be not produced to rebut this presumption, it must prevail … In the present case there was such evidence of user, no rebutting evidence was produced, the justices were therefore bound in law to find that this way was dedicated to the public, and their decision to the contrary was a decision made without any evidence to support it, and consequently invalid in point of law."

This argument was rejected. The House held that the inference of intention to dedicate drawn from long and uninterrupted user as of right was an inference of fact and that the justices were not bound to draw the affirmative inference. The House allowed the appeal.

66. My Lords, the state of the law as explained by the House in Folkestone Corpn v Brockman was the law addressed by the 1932 Act and I do not believe that the remedial provisions introduced by that Act can be properly understood otherwise than against the background of the pre-Act state of the law.

67. Section 1(1) of the 1932 Act seems to me to have set itself firmly to reverse Folkestone Corpn v Brockman . The Act, in effect, accepted the arguments of counsel for the owners and occupiers, as recorded by Lord Atkinson, that the House had rejected. Under section 1(1) , and now its successor, section 31(1) of the 1980 Act, there are two questions of fact, not, as the House held in 1914, only one. The first question is whether the way has been "actually enjoyed by the public as of right and without interruption for a full period of 20 years". The language was plainly borrowed from section 2 of the 1832 Act but the meaning of "as of right" must be interpreted in the context of dedication, not prescription. If the first *263 question can be given the answer "yes", there will be a "deemed" dedication, something more, in my opinion, than the pre-1932 evidentiary presumption of an intention to dedicate referred to by Lord Kinnear and Lord Atkinson in the Folkestone Corpn case. The statutory conclusion, the "deemed" dedication, stands unless the specified statutory condition of escape, "sufficient evidence that there was no intention to dedicate", is satisfied. That is the second question of fact.

68. Evidence merely that the landowner lacked any intention to dedicate, e g that he had never given dedication a moment's thought, will not suffice. Counsel on both sides accepted that that was so and that the statutory requirement was not simply for evidence of the absence of an intention to dedicate but was for evidence of a positive intention not to dedicate. I think that must be right. Evidence "sufficient" to displace the statutory deemed conclusion of dedication should at least establish a positive intention. Lord Kinnear in the Folkestone Corpn case had referred, at p 356, to "the probabilities of conduct" on which the question would turn. If that was so in the pre-1932 Act days—and counsel accepted that there was no pre-1932 case that suggested the contrary—a fortiori it must have remained a requirement under the Act.

69. The issue on which these appeals turn, therefore, is whether evidence of an intention not to dedicate can ever (unless it be evidence made sufficient under subsections (3), (5) or (6) of section 31) be sufficient unless it demonstrates the intention to

the public at large or, at least, to the users of the path in question. Acts blocking passage along the path by, for example, the padlocking of gates would be likely to be sufficient. Regular challenges to users of the path might suffice. But expressions of intention never disclosed or circulated privately would not, in my opinion, be "sufficient". The reason they would not is that they would do nothing to curb the public user of the path, or to disabuse users of the path of any belief that they had a right to use it, or to make clear to those users who did not care or give a thought to whether or not they had a right to use the path that they were trespassers. In *Fairey v Southampton County Council [1956] 2 QB 439* Lord Goddard CJ in the Divisional Court and Denning LJ in the Court of Appeal referred to various ways in which a landowner might demonstrate his opposition to the use by the public of the path over his land. Denning LJ referred, at p 458, to "evidence of some overt acts on the part of the landowner such as to show the public at large—the public who used the path, in this case the villagers—that he had no intention to dedicate". This requirement of overt acts such as to demonstrate to the public that the landowner had no intention to dedicate seems to me consistent with the nature and quality of the "sufficient evidence" required by the Act to rebut a deemed dedication brought about by 20 years' uninterrupted public user.

70. Lord Hoffmann has discussed in his opinion what, for section 31(2) purposes, would constitute bringing the right of the public into question. I am in respectful agreement with what he has said and would only add that the bringing of the public right into question could, in my opinion, be done not only by the landowner but also by a member of the public or by the local authority. A member of the public might apply to the court for relief of some sort that would bring the right into question, or a prosecution brought by a local authority against the landowner for, e g allowing a stile to fall into ***264** disrepair, might, if the landowner disputed that there was any public right of way, be similarly regarded. There is, in my opinion, no necessary symmetry between acts that bring the public right into question and acts of the landowner to demonstrate that he does not intend dedication.

71. For these reasons, supplemental to those of Lord Hoffmann with which I am in full agreement, I would allow these appeals and make the orders that he proposes. Having had the advantage of reading the opinions of my noble and learned friends, Lord Hope of Craighead and Lord Neuberger of Abbotsbury, I want to express also my agreement with the reasons they have given for coming to the same conclusions.

BARONESS HALE OF RICHMOND

72. My Lords, I have had the advantage of reading in draft the opinion prepared by Lord Hoffmann. I agree with it so completely that it is a work of supererogation for me to add anything more. On the main issue, two points have weighed most heavily with me.

73. One is the wording of the so-called proviso itself: "unless there is sufficient evidence that there was no intention during that period to dedicate it". If the private thoughts of the landowner were enough, the section need only have read "unless there was no intention". The section is calling for sufficient manifestation of the landowner's intention during the relevant time.

74. The other point is that the section tells us what the landowner's intention is deemed to have been unless he shows us to the contrary. There are many contexts in which references to the intentions of the parties are to their intentions as objectively understood by an informed but impartial outsider. If the public enjoy the way as of right and without interruption for 20 years, the statute tells us what an objective outsider is to assume—that the landowner intends to dedicate it as a highway. To rebut that, the landowner has to do something which the objective outsider would understand to mean that he had no such intention. I agree that (leaving aside the specific means provided for in the section) the objective outsider would not so understand unless the landowner did something to bring his intention to the notice of the public who might use the way. But I also agree that it is what the public should reasonably understand from the landowner's actions which count, rather than their subjective wishful thinking or belief.

75. In agreeing that both these cases should be remitted to the Secretary of State to decide, I am remembering only too well that the reasons given when one is reaching one result on the facts may be quite different from the reasons given when one is reaching another. Points which have been discarded in the former case may assume more importance in the latter and vice versa. Facts which were not considered in one context, because they did not have to be, may deserve further and better consideration in the light of the law as it has now been explained. Much of the evidence in these cases is relevant to more than one point—to whether the user is "as of right", to whether it was "without interruption", to whether the right has been "brought into question" and to whether there is "sufficient evidence that there was no intention". All the relevant evidence should be considered as a

whole, rather than allocated to one issue or another. I would not myself feel confident that there can be only one answer in either of these cases.

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76. I agree, therefore, that these appeals should be allowed, the decisions quashed and the cases remitted to the Secretary of State for him to decide. This will, of course, include deciding in accordance with the statutory procedures as well as with the opinions of the House.

LORD NEUBERGER OF ABBOTSBURY

77. My Lords, I have had the benefit of reading in draft the opinions of Lord Hoffmann and Lord Hope of Craighead. For the reasons they give, I too would allow these appeals and remit the cases to the Secretary of State. The issues raised are of some significance, and I will therefore briefly explain my reasons.

The main issue: the meaning of "intention"

78. The main issue in these appeals is whether, as the claimants contend, the intention referred to in what I will call the proviso to section 31(1) of the Highways Act 1980 has to be communicated contemporaneously (i e during the 20 years referred to in the section) to members of the public using the way. For a combination of reasons, I am clearly of the view that the answer is yes.

79. First, the whole tenor of section 31 , whether it is dealing with establishing presumed dedication (enjoyment "as of right"), or rebutting presumed dedication ("without interruption" and the provisions of subsections (3) to (6)) is directed towards observable actions from which presumptions may be made or rebutted. It is true that communications with the local authority under sections 31(5) and (6) are not with members of the public, but a local authority would be obliged to retain the documents there referred to, and to permit members of the public to inspect them.

80. Secondly, one of the purposes of section 1 of the Rights of Way Act 1932 (the original ancestor of section 31 of the 1980 Act) was to get rid of a landowner's ability to rely on the argument that he treated the users of the way as "tolerated trespassers" to defeat a claim of presumed dedication based on long user: see *R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335* , 353 b – e . In my opinion, if a landowner can say, after 20 years' public use of a way as of right, that he had no subjective intention to dedicate, although there was no contemporaneous communication of that intention, this purpose would be effectively neutralised.

81. Thirdly, as Lord Hoffmann's analysis of the cases prior to the 1932 Act shows, the common law appears to have required some form of act or statement communicated to users of the way, so that evidence of the subjective uncommunicated intention of the landowner would not have been enough (or even admissible) to rebut a presumption of dedication. It would be surprising if section 31(1) of the 1980 Act, which uses the language and concepts of the common law relating to highways, changed the law radically, and in a direction inconsistent with its purpose, so as to enable a landowner to rely on an intention of which the users of the way were not merely unaware, but could have no means of becoming aware.

82. Fourthly, the notion that a subjective intention is enough to defeat a presumed dedication under section 31(1) leads to difficulties. Despite the submission of Mr Simpson, for the interveners, Yattendon Estates Ltd, to the contrary, it would be unattractive and surprising, as Mr Mould, for *266 the Secretary of State, accepted, if a landowner could simply rely, after the expiry of the 20 years, on his statement (e g at an inquiry such as those held in the present cases) that he had no intention to dedicate. To meet that point, the courts have developed a theory which appears to me to be unjustified, whether it is a principle of law or a practical rule. That theory is that, in the absence of some contemporary overt act or statement, a fact-finding tribunal cannot, or is unlikely to, find a sufficient intention not to dedicate merely on the basis of the landowner's subsequent statement to that effect: see e g, per Auld LJ in this case in the *Court of Appeal [2006] QB 727* , para 64. Why should that be so? It would not be justified by the statutory wording, even if it had the meaning that the Secretary of State alleges. In many, I suspect most, cases it would be easy to believe that a landowner would not want to have a highway, even it is only a public footpath, over his land. Further, in the light of the way the proviso to section 31(1) is expressed ("sufficient evidence that there was no intention"), it appears to me that, on the Secretary of State's case, a landowner could defeat a claim simply on the basis that he was unaware of the effect of the main part of section 31(1) .

83. Fifthly, the cogent and clear analysis of Denning LJ in *Fairey v Southampton County Council [1956] 2 QB 439* , 458, quoted by Lord Hoffmann, clearly indicates that the intention referred to in the proviso to section 1(1) of the 1932 Act was intended to be a communicated intention. That analysis was accepted and recorded in textbooks, and it was followed and applied in cases identified by Lord Hoffmann by High Court judges and by the Court of Appeal for the subsequent 40 years. Further, it appears to have been an analysis which was acceptable to the legislature, given that section 1(1) of the 1932 Act was re-enacted in section 34(1) of the Highways Act 1959 and again in section 31(1) of the 1980 Act.

84. Sixthly, I turn to the crucial question of the effect of the words of the proviso to section 31(1) . I do not agree with the Court of Appeal that construing the word "intention" in the section as carrying with it the notion of communication involves placing an unjustifiable gloss on the statutory wording. At least outside the criminal law, the word is often used by lawyers in a way which carries with it a requirement to communicate, as well as to possess, the relevant intention. Indeed, sometimes, an uncommunicated intention is irrelevant, as when one speaks of the intention of the parties when construing a contract. Further, the proviso does not require "no intention" but "sufficient evidence that there was no intention". If the Secretary of State were correct, there would have been no need for that longer phrase. The notion that the "evidence" referred to in the proviso must be contemporaneous and communicated is further supported by the fact that a very similar phrase (including both "evidence" and "intention") is used at the end of section 31(3) to describe the effect of a notice erected on the way.

85. Seventhly, the provisions of section 31(3) to 31(6) seem pretty extraordinary if an uncommunicated intention suffices to satisfy the proviso. Why bother with such potentially time-consuming and expensive procedures if, for instance, a simple and clear letter from the landowner to his solicitor, confirming that he has no intention to dedicate, will do?

86. Eighthly, Mr Laurence, for the claimants, raised the spectre of a landowner being able to defeat a claim under section 31(1) , if the Secretary of State is correct, by sending such a letter, and only some time thereafter ***267** calling the right into question by challenging its use. If such a device worked, it would be another reason for allowing this appeal. It may be that the point can be answered by the letter being treated as an act calling the right into question under section 31(2) . However, to treat such a private declaration as having that effect seems to me to fly in the face of the natural meaning of the expression "brought into question".

Other issues: the meaning of "during", and manifesting the intention

87. The second question is whether the phrase "during that period" in the proviso to section 31(1) means "during the whole of that period", as the claimants argued, or "at some point during that period", as was contended by the Secretary of State. As a matter of ordinary language, it is clear that the phrase could easily bear either meaning. In the present context, it appears to me clear that it has the latter meaning.

88. First, the former interpretation would lead to wholly unrealistic results. It would mean that signs referred to in section 31(3) (combined, where appropriate, with the documents referred to in section 31(5)), and the documents referred to in section 31(6) , would be ineffective unless they were in place for the whole of the 20-year period. Mr Laurence was forced to concede that it would therefore be necessary to imply some sort of period of grace, based on reasonableness, but that is not warranted by the wording of the section, and it would be a recipe for uncertainty and dispute.

89. Secondly, it is clear that an interruption of the user at some point during the relevant 20-year period, such as the landowner locking a gate and preventing access, will defeat an argument based on user "as of right" under section 31(1) during that period. Traditionally, one day a year is the norm: see for instance *Merstham Manor Ltd v Coulsdon and Purley Urban District Council [1937] 2 KB 77* , 85. However, it may depend on the facts of the particular case whether this is enough to amount to a sufficient interruption; that was the view taken by the *Court of Appeal in Lewis v Thomas [1950] 1 KB 438* . Whatever the position, it is clear that, to be effective, the interruption need not last long in the context of 20 years in order to defeat user as of right. It would be inconsistent if the sign contemplated by section 31(3) , or any other action or communication invoked as evidence of lack of intention, had to be in place for the whole of the 20 years.

90. This is not the occasion to discuss how long a sign would have to be present, or when the documents referred to in sections 31(5) and (6) would have to be lodged, during the 20 years relied on in any particular case. It is conceivable that one day in 20 years would be enough in a particular case, and it even may be the case, I suppose, that it would be enough as a matter of principle, but it may well be that what constitutes a sufficient period will depend on the facts of the particular case: see the discussion in Lewis v Thomas .

91. It is fair to add that this conclusion can, at any rate at first sight, be said to sit a little uneasily with the procedures set out in sections 31(5) and (6) . They appear to contain somewhat elaborate requirements if all that is needed is, for instance, the erection of a notice for a relatively short period under section 31(3) . The answer, I think, is this. A landowner who wishes to protect his position over many decades may be concerned that he or his successors will forget to keep checking that a section 31(3) notice remains intact, and that, following a defacing of a notice, he may let 20 years' ***268*** uninterrupted use occur. Such a landowner may be glad to be able to protect his position by taking advantage of section 31(5) . As to section 31(6) , it appears to be aimed primarily at large estates, and enables a landowner to protect himself, inter alia, in relation to potential rights of way which he may not even know are in the process of being acquired under section 31(1) .

92. Finally, there is the claimants' argument that the only means by which a landowner can bring himself within the proviso are those contained in section 31(3) to (6) . That is simply not what section 31 provides as a matter of language, it is inconsistent with the words “or otherwise” in section 31(2) , and it does not seem to me to lead to a sensible result. I can see no reason why a landowner who has made his objections sufficiently clear orally to those using the way should be debarred from contending that he has thereby sufficiently manifested his lack of intention to dedicate to bring himself within the proviso. Again, this is not the occasion to consider how often or to how many people or with what words the objection would have to be made to bring the case within the proviso.

Appeals allowed .

Question of costs adjourned for written submissions within 14 days .

Representation

Solicitors: Winckworth Sherwood for Zermansky & Partners, Leeds; Treasury Solicitor; Blandy & Blandy, Reading .

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Footnotes

1 Highways Act 1980, s 31(1) :
see post, para 1.