HOUSE OF LORDS SESSION 2006-07
[2007] UKHL 28
*on appeal from: [2005] EWCA Civ 1597*

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

# R (on the application of Godmanchester Town Council) (Appellants) v Secretary of State for the Environment, Food and Rural Affairs (Respondent) and one other action

# R (on the application of Drain) (Appellant) v Secretary of State for the Environment, Food and Rural Affairs (Respondent) and one other action

*Appellate Committee*
Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Baroness Hale of Richmond
Lord Neuberger of Abbotsbury

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*Appellants*:
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*Respondents*:
Timothy Mould QC and David Blundell (Instructed by Treasury Solicitor)

*Interveners*
Edwin Simpson (Instructed by Blandy & Blandy, Reading)

*Hearing dates:*
8, 9 and 10 May 2007

ON

WEDNESDAY 20 JUNE 2007

**LORD HOFFMANN**

My Lords,

1. 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 (approved as a "remarkable judgment" by the House of Lords in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, per Lord Browne-Wilkinson at p. 432):

> "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."

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 parte 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, 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 Corporation v Brockman* [1914] AC 338 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 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 Prescription Act 1832 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 twenty 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 twenty 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) and (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 and borough or rural district 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 and the borough, urban district or rural district 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 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 10 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 Car & 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 Ad & 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 shewn it by putting up a gate, or by some other act."

15. In *Regina 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 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 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 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* (1885) 10 App Cas 378, 386. Such evidence may consist, as in the leading case of *Poole v Huskinson* (1843) 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."

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 forty 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, Walton J in *R v Secretary of State for the Environment, ex parte 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 twenty 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 parte 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 parte 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* (31 July 1996, unreported) 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 parte 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 parte 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:

> "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 parte Dorset County Council* [2000] JPL 396 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 said ([2006] QB 727, 740) 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 thought (at p. 753) 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* (1885) 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 *Billson's* case) 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 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 Schedule 6, paragraph 4 of 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.

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 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 QC for the appellants, 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, Walton J in *R v Secretary of State for the Environment, ex parte 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 sections 31(3), (5) and (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 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 of the Wildlife and Countryside Act 1981 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 the *Billson* case and Sullivan J in the *Dorset* case, 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 applicant 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 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 appellants 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 paragraph 10A of Schedule 15 to the Wildlife and Countryside Act 1981) 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**

My Lords,

51. 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 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: *Journal of the Commons, Open Spaces and Footpaths Preservation Society* (October 1932), vol 2, 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* (1885) 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*, 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 ten 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, 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 Auld LJ said that the proviso is concerned with intention and its proof, not with communication of that intention to members of the public [2006] QB 727, 752, para 63. 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 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 para 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* (1885) 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." 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 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**

My Lords,

60. 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" (s.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 AER 237 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 (see pages 244-245). 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 twenty 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 twenty 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 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 Prescription Act 1832 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*, ie 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 Corporation 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 a passage from Lord Blackburn's speech in *Mann v Brodie* 10 App Cas 378 at 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 find that fact may find that there was a dedication by the owner, whoever he was".

Lord Kinnear then continued, at 352:

> "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."

At 354 after emphasising that "… the question is whether the facts are sufficient to raise the presumption …", he said:

> "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 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 356:

> "The question is one of fact, turning upon probabilities of conduct".

65. Lord Atkinson, at 361, summed up the argument for a dedication that had been put forward by counsel for the respondent 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 Corporation 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 Corporation v Brockman.* The Act, in effect, accepted the arguments of counsel for the respondent, 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 Prescription Act 1832 but the meaning of "as of right" must be interpreted in the context of dedication, not prescription. If the first 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 Corporation* 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, eg. 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 Corporation* case had referred to "the probabilities of conduct" ([1914] AC at 356) 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 (as he then was) 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 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 twenty 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, eg. allowing a stile to fall into 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**

My Lords,

72. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend, 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.

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 him deciding in accordance with the statutory procedures as well as with the opinions of the House.

**LORD NEUBERGER OF ABBOTSBURY**

My Lords,

77. I have had the benefit of reading in draft the opinions of my noble and learned friends, 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 appellants 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 twenty 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 at 353B-E. In my opinion, if a landowner can say, after twenty 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

QC, for the Secretary of State, accepted, if a landowner could simply rely, after the expiry of the twenty 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 at [2006] QB 727 at paragraph 64). Why should that be so? It would not be justified by the statutory wording, even if it had the meaning that the respondents allege. 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 respondents' 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 at 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 forty 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 respondents 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 QC, for the appellants, raised the spectre of a landowner being able to defeat a claim under section 31(1), if the respondents are correct, by sending such a letter, and only some time thereafter 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 appellants argued, or "at some point during that period", as was contended by the respondents. 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 twenty 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 twenty 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 UDC* [1937] 2 KB 77 at 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] KB 438. Whatever the position, it is clear that, to be effective, the interruption need not last long in the context of twenty 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 twenty 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 twenty years relied on in any particular case. It is conceivable that one day in twenty 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*.

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 twenty years 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 appellants' 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.