

## SECTION 5 DEDICATION / USER EVIDENCE

### REFERENCE MATERIAL

#### Statutes

Law of Property Act 1925 section 193

Rights of Way Act 1932

National Trust Act 1939

Countryside Act 1968 section 30

Highways Act 1980 section 31

Wildlife and Countryside Act 1981 sections 53(3)(b), 53(3)(c) and 66(1)

Road Traffic Act 1988

Charities Act 1993 section 36

#### Case Law

*Poole v Huskinson (1843) 11 M & W 827* - common law dedication – intention to dedicate – interruption – limited dedication

*Hollins v Verney 1854* - sufficiency of user

*Dawes v Hawkins [1860] 8 CB (NS) 848* - no time limit on dedication – once a highway etc

*Mann v Brodie 1885* - common law dedication – sufficiency of user – presumption – Scottish law – (Lord Blackburn on the difference of English law)

*R v Residents of Southampton 1887* – ‘the public’

*Sherrington UDC v Holsey 1904* - physical character of a way

*Thornhill v Weekes (1914) 78 JP 154* - physical character of a way

*Moser v Ambleside RDC (1925) 89 JP 59* - effect of ancient maps, modern – culs-de-sac surveys, interruptions, noticeboards – pleasure user

*Hue v Whiteley [1929] 1 Ch 440* - ‘as of right’

*Merstham Manor v Coulsdon and Purley UDC [1937] 2 KB 77* – ROW Act 1932 – ‘as of right’ – ‘without interruptions’

*Jones v Bates [1938] 2 All ER 237* - dedication at common law – meaning of as of right (ROW Act 1932) – burden of proof – bringing into question

*Lewis v Thomas 1950 1 KB 438* - interruption – intention to dedicate

*Fairey v Southampton County Council [1956] 2 QB 439* – whether ROW Act 1932 is retrospective – intention to dedicate – differentiation between common law/statute law dedication – burden of proof

*Davis v Whitby [1974] 1 All ER 806* - 20 years user

*Dyfed County Council v SSW (1989) 58 P & CR 68* – use of foreshore for recreational activities

*British Transport Commission v Westmorland County Council [1957] 2 All ER 353* – dedication must be compatible with purpose of land held

*R v SSE ex parte Cowell [1993] JPEL 851* - Toll – annual manifestation of non-dedication

*Jaques v SSE [1995] JPEL 1031* - common law dedication – true construction of S31 HA80 – no intention to dedicate – burden of proof – effect of requisitioning

*Robinson v Adair (1995) Times 2 March 1995* -illegal vehicular user post 1930 – effect in relation to s31(1) HA80

*Stevens v SSETR (1998) 76 P & CR 503* - rights along RUPPs – effect of Road Traffic Act 1930 on vehicular user evidence

*R v SSE ex parte Billson [1998] 2 All ER 587* - duration of no intention to dedicate - rights over common land

*R v Isle of Wight CC ex parte O'Keefe 1997 unreported (QBCOF 94/1223/D)* – evidence of intention – meaning of as of right

*R v Wiltshire CC ex parte Nettlecombe [1998] JPEL 707* – definition of BOAT – current user

*Masters v SSE [2000] 4 All ER 458 (CA)* - definition of BOAT – balance of predominant user - 1929 Handover map – OS maps

*R v Oxfordshire CC ex parte Sunningwell PC [1999] 3 All ER 385* – history of prescription of dedication – belief element of as of right

*R v SSETR ex parte Dorset CC [1999] NPC.72* - bringing into question – no intention to dedicate

*Buckland and Capel v SSETR [2000] 3 All ER 205* - meaning of BOAT – discourse on *Nettlecombe* and *Masters* judgments

*Masters v SSETR [2001] QB 151 (CA)* - Court of Appeal judgment on meaning of BOAT

*R v Planning Inspectorate Cardiff ex parte Howell (2000) unreported – vehicular use post 1930 (see also Robinson v Adair; and Stevens v SSETR)*

*Rowley and Cannock Gates Ltd v SSTR [2002] EWHC (Admin) – positive actions of a tenant*

*R v City of Sunderland ex parte Beresford 2003 UKHL 60 – the proposition that use pursuant to permission given by the landowner is always precario is not correct. Also toleration equates with acquiescence; not permission*

*Bakewell Management Ltd v Brandwood [2004] UKHL 14 – presumed dedication of a public vehicular right of way*

*R (on the Application of Godmanchester Town Council) (Appellants) v SSEFRA and R (on the application of Drain) (Appellant) v SSEFRA [2007] UKHL 28 – lack of intention to dedicate – overt acts by the landowner to be directed at users of the way – duration of no intention to dedicate*

*Ramblers' Association v SSEFRA (2008) a cul-de-sac is capable of being dedicated as a highway*

## **Planning Inspectorate Guidance**

Rights of Way Advice Note No.12 – Wildlife and Countryside Act 1981 – Vehicles and Rights of Way

## **Other Publications**

Halsbury's Laws of England Vol.21 paragraphs 65-86

'Rights of Way: A guide to law and practice' by John Riddall and John Trevelyan (published by the Open Spaces Society and the Ramblers' Association)

The following, articles which are of interest, have appeared in the RWLR

'Section 31 of the Highways Act 1980' - David Braham - Oct 1990 (Section 6.3)

'Section 31: update' - David Braham - April 1998 (Section 6.3)

'Dedication: the common law approach' - David Braham - Oct 1991 (Section 6.2)

'Public Access to Common Land' - Gerard Ryan – Jan 1995 (Section 15.4)

## GUIDANCE

### Introduction

- 5.1 Dedication of rights of way to the public can arise under statute law (s31 HA80) and under common law. The references above provide a good basis for understanding a subject which continues to arouse controversy. There has been frequent recourse to the Courts, which has provided a rich seam of judicial interpretations. Inevitably some of the dicta contained in earlier judgments have been superseded. The cases recommended for full reading reflect current judgments of which '*Sunningwell*' is a particularly helpful history of the prescription of dedication; *Godmanchester and Drain* [2007] provides the leading judgement on the operation of the proviso to HA80 s31 (1). These judgments will generally lead Inspectors to the other relevant case law listed (see Section 3 'Case Law').
- 5.2 These guidelines initially concentrate on issues affecting the interpretation of s31 HA80 then recommend rigorous testing of the user evidence forms, which almost invariably feature in claims for dedication under statute law. Finally, they address some aspects of deemed dedication at common law. Comment on specific topics is found later on in this section.

### 'The Public'

- 5.3 There appears to be no legal interpretation of the term *the public* as used in s31. The dictionary definition of the term is *the people as a whole, or the community in general*. Hence, arguably, use should be by a number of people who together may sensibly be taken to represent the people as a whole/the community in general. However, Coleridge LJ in *R v Residents of Southampton 1887* said that *user by the public must not be taken in its widest sense ... for it is common knowledge that in many cases only the local residents ever use a particular road or bridge*. Consequently, use wholly or largely by local people may be use by the public, as, depending on the circumstances of the case, that use could be by a number of people who may sensibly be taken to represent the local people as a whole/the local community.
- 5.4 It was held in *Poole v Huskinson (1843)* that *there may be a dedication to the public for a limited purpose ... but there cannot be a dedication to a limited part of the public*.

### Currency and Balance

- 5.5 Dedication of a highway of a particular status will depend, amongst other things, on the type of public user. In this matter the definitions of minor highways in s66(1) WCA 81 are particularly relevant. The definition of a BOAT has proved troublesome.

5.6 However, the Court of Appeal settled the matter in *Masters v SSETR* (2000). Roch LJ held: *It is in my judgment clear that Parliament did not contemplate that ways shown in definitive maps and statements as RUPPs should disappear altogether from the maps and statements simply because no current use could be shown, or that such current use of the way as could be established by evidence did not meet the literal meaning of s66(1) and that Parliament did not intend that highways, over which the public have rights for vehicular and other types of traffic, should be omitted from definitive maps and statements because they had fallen into disuse if their character made them more likely to be used by walkers and horse riders than vehicular traffic.*

5.7 Thus for reclassification of RUPPs to BOATs under section 54 of the WCA 81, the position seems clear: the decision depends solely on the test of whether public vehicular rights exist and does not require current vehicular (or any other) use. For orders recording BOATs under section 53, public vehicular rights must be shown to exist but to satisfy the description BOAT as defined in s66(1) of the Act, the question of its use should still be addressed but in the light of Roch LJ's interpretation in the *Masters* judgment.

### **Duration**

5.8 Use of a way by different persons, each for periods of less than 20 years, will suffice if, taken together, they total a continuous period of 20 years or more (*Davis v Whitby (1974)*). However, use of a way by tradespeople, postmen, estate workers, etc., generally cannot be taken to establish public rights. Wandering at will (roaming) over an area including the foreshore (*Dyfed CC v SSW 1989*), cannot establish a public right (Halsbury's Laws of England, Vol.21, paras 2 and 4 refer), and use of an area for recreational activities cannot give rise in itself to a presumption of dedication of a public right over a specific route (see RWLR article 'Dedication – the Common Law Approach').

### **Sufficiency**

5.9 There is no statutory minimum level of user required for the purpose, and the matter does not appear to have been tested in the courts. However, it is clear that Inspectors must be satisfied that there was a sufficient level of use for the landowner to have been aware of it, and have had the opportunity to resist it if he chose. In *Hollins v Verney (1884)* it was said that: *No user can be sufficient which does not raise a reasonable inference of such a continuous enjoyment and that no actual user can be sufficient to satisfy the statute ... unless the user is enough to carry to the mind of a reasonable person (owner, etc.) the fact that a continuous right of enjoyment is being asserted and ought to be resisted.....* It follows then that use of a way is less cogent evidence of dedication if the landowner is non-resident – at any rate, if the owner had no agent on the spot – than if he is resident. If the landowner did not know that the way was being used, no inference can fairly be drawn from his non-interference.

- 5.10 Use of the way should also have been by a sufficient number of people to show that it was use by the public – representative of the people as a whole, or the community in general (see ‘The Public’ above) – and this may well vary from case to case. Very often the quantity of valid user evidence (see ‘User evidence,’ below) is less important in meeting these sufficiency tests than the quality (i.e. its cogency, honesty, accuracy, credibility and consistency with other evidence, etc.).
- 5.11 It was held in *Mann v Brodie 1885* that the number of users must be such as might reasonably have been expected, if the way had been unquestionably a public highway. Watson J said: *If twenty witnesses had merely repeated the statements made by the six old men who gave evidence, that would not have strengthened the respondents’ case. On the other hand the testimony of a smaller number of witnesses each speaking to persons using and occasions of user other than those observed by these six witnesses, might have been a very material addition to the evidence.* Arguably, therefore, the evidence contained in a few forms may be as cogent - or more cogent – evidence than that in many. However, Dyson J in *Dorset 1999* did not question that the Inspector had found the evidence contained in five user statements insufficient to satisfy the statutory test, even though the truth of what was contained in them had been accepted.

### **Subjective Belief**

- 5.12 For many years before 1999, it was held that use as of right entailed use that was open, not by force and not by permission (*‘nec vi, nec clam, nec precario’*); furthermore, users had to have an honest belief that there was a public right of passage. Hence, it was necessary to prove that users believed that they had a right to use the way.
- 5.13 However, in *Sunningwell 1999* it was held that there is no requirement to prove any such belief, but only that the use was without force, without stealth and without permission. Hoffman LJ said: *To require an enquiry into the subjective state of mind of the users would be contrary to the whole English theory of prescription, which depends upon acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose the actual state of mind of the road user is plainly irrelevant ..... in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J in Hue and Whiteley (1929) has led the courts into imposing upon the time-honoured expression ‘as of right’ a new and additional requirement of subjective belief for which there is no previous authority and which I consider to be contrary to the principles of English prescription ... user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not.*
- 5.14 However, if a user admits to private knowledge that no right exists, it could be that the explanation may have an important bearing on the second limb of the statutory test, the intention of the owner not to dedicate. Inspectors should investigate where appropriate.

## Landowner's Toleration

- 5.15 In the same judgment, and in the context of a call not to be too ready to allow tolerated trespasses to ripen into rights, Hoffman LJ also held that toleration by the landowner of use of a way is not inconsistent with user as of right. In effect it is not fatal to a finding that use had been as of right. In *R (Beresford) v Sunderland CC [2003]*, Lord Bingham stated that a licence to use land could not be implied from mere inaction of a landowner with knowledge of the use to which his land was being put. Although the *Sunningwell* judgment is silent on the relationship between claimed toleration and acquiescence, Lord Scott stated in the *Beresford* case *I believe this rigid distinction between express permission and implied permission to be unacceptable. It is clear enough that merely standing by, with knowledge of the use, and doing nothing about it, i.e. toleration or acquiescence, is consistent with the use being "as of right".*
- 5.16 However, it is clear that permission may be implied from the conduct of a landowner in the absence of express words. Lord Bingham, in the same judgment stated that *a landowner may so conduct himself as to make clear, even in the absence of any express statement, notice, record, that the inhabitants' use of the land is pursuant to his permission.* But encouragement to use a way may not equate with permission: As Lord Rodgers put it in *Beresford*, *the mere fact that a landowner encourages an activity on his land does not indicate ... that it takes place only by virtue of his revocable permission.* In the same case, Lords Bingham and Walker gave some examples of conduct that might amount to permission, but the correct inference to be drawn will depend on any evidence of overt and contemporaneous acts that is presented. (see also 'No Intention to Dedicate' below).

## 'Bringing into Question'

- 5.17 *R v SSETR ex parte Dorset County Council 1999* is the most recent case addressing the meaning of s31(2) HA80; specifically what act or acts constitute 'bringing into question.'
- 5.18 Dyson J was not satisfied that the unusual circumstances pertaining, a landowner's letter to DoE subsequently passed to the OMA but not communicated to the users, satisfied the spirit of s31(2). Inspectors may be perplexed at the fine line drawn between these circumstances and those instanced in s31(6), but the principle emanating from the judgment is clear. The test to be applied is that enunciated by Denning LJ in *Fairey v Southampton County Council 1956*. Dyson J's interpretation of that judgment is that: *Whatever means are employed to bring a claimed right into question they must be sufficient at least to make it likely that some of the users are made aware that the owner has challenged their right to use the way as a highway.*
- 5.19 However, an action which of itself is insufficient to bring a right into question may well be sufficient to demonstrate an intention not to dedicate (see later paragraphs).

- 5.20 There is no rule of law that the “bringing into question” has to result from the action of the owner of the land or on their behalf. This issue was considered in *Applegarth v Secretary of State for Environment, Transport and the Regions* [2001] EWHC Admin 487 (28 June 2001). The owner of a property whose means of access was via a track claimed to be a public bridleway, challenged the public use of the track even though he was not the owner of it. In this case, Munby J stated: “Whether someone or something has “brought into question” the “right of the public to use the way” is, as it seems to me, a question of fact and degree in every case.” Thus any action which raises the issue would seem to be sufficient. In this context the application for or making of a modification order under WCA81 s53 would not normally by itself constitute a “bringing into question” for the purposes of s31. However, where there is no identifiable event which has brought into question the use of a path or way, s31 ss (7A) and (7B) of HA80 (as amended by s69 of NERC06) provides that the date of an application for a modification order under WCA81 s53 can be used as the date at which use was brought into question.
- 5.21 The Inspectorate considers that the non-existence or disappearance of the landowner is not sufficient to defeat a presumption of dedication. Once use is established as of right and without interruption, the presumption arises. If there is no contradictory evidence in accordance with the proviso to s31(1) deemed dedication is made out and the Order should be confirmed. This is so whether there is an owner who cannot provide sufficient evidence of lack of intention or whether there is no owner available to produce such evidence.

#### **‘No Intention to Dedicate’**

- 5.22 Section 31 expressly provides for methods by which to show that during the period over which the presumption has arisen there was in fact no intention on the landowner’s part to dedicate the land as a highway. For instance, under section 31(3) a landowner may erect a notice inconsistent with the dedication of a highway, and if that notice is defaced or torn down, can give notice to the appropriate council under section 31(5). Under section 31(6), an owner of land may deposit a map and statement of admitted rights of way with “the appropriate council”. Provided the necessary declaration is made at ten yearly intervals thereafter, the documents are (in the absence of evidence to the contrary) “sufficient evidence to negative the intention of the owner or his successors in title to dedicate any additional ways as highways”. This is for the period between declarations, or between first deposit of the map and first declaration.
- 5.23 The interpretation of the phrase “intention to dedicate” was considered by the House of Lords in *R (on the application of Godmanchester and Drain) v SSEFRA* [2007] and is the authoritative case which deals with the proviso to HA80 s31. The House of Lords reversed the earlier judgement of the Court of Appeal and rejected the judgements of Sullivan J in *R v SSE ex parte Billson* [1999] and Dyson J in *R v SSETR ex parte Dorset CC* [1999] which had held that a landowner did not need to publicise his lack



of intention to dedicate to users of the way. In his leading judgement, Hoffmann LJ approved the obiter dicta of Denning LJ (as he then was) in *Fairey v Southampton County Council* [1956] who held "in order for there to be 'sufficient evidence 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 people who use the path...that he had no intention to dedicate".

- 5.24 Hoffmann LJ held 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 owner's intention to be. The test is ... 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), to 'disabuse' [him]' of the notion that the way was a public highway".
- 5.25 In both *Godmanchester* and *Drain*, evidence in the form of letters between the landowner and the planning authority, and the terms of a tenancy agreement were held by the House of Lords to be insufficient evidence of a lack of intention to dedicate. As these documents had not been brought to the attention of the public the users could not have understood what the owner's intention had been.
- 5.26 For a landowner to be able to benefit from the proviso to s31(1) there must be 'sufficient evidence' that there was no such intention to dedicate. The evidence must be inconsistent with an intention to dedicate, it must be contemporaneous and it must have been brought to the attention of those people concerned with using the way. Although s31 ss (3), (5) and (6) specify actions which will be regarded as "sufficient evidence", they are not exhaustive; s31 (2) speaks of the right being brought into question by notice "or otherwise".
- 5.27 *Godmanchester and Drain* upheld the earlier decision of Sullivan J in *Billson* that the phrase "*during that period*" found in s31 (1) did not mean that a lack of intention had to be demonstrated "*during the whole of that period*". The House of Lords did not specify the period of time that the lack of intention had to be demonstrated for it to be considered sufficient; what would be considered sufficient would depend upon the facts of a particular case.
- 5.28 However, if the evidence shows that the period is very short, questions of whether it is sufficiently long (*'de minimis'*) may well arise, and would have to be resolved on the facts.
- 5.29 In the Court of Appeal case *Lewis v Thomas* 1949, Cohen LJ quoted with approval the judgment of MacKinnon J in *Moser v Ambleside UDC* 1925:

*It was said, very truly, in the passage of Parke, B in Poole v Huskinson (1843) that a single act of interruption by the owner was of much more weight upon the question of intention than many acts of enjoyment. If you bear quite clearly in mind what is meant by an act of interruption by the owner, if it is an effective act of*

*interruption by the owner – I mean the owner himself – and is effective in the sense that it is acquiesced in, then I agree that a single act is of very much greater weight than a quantity of evidence of user by one or other members of the public who may use the path when the owner is not there and without his knowledge.*

*The fact that the owner, as is so constantly done, locks the gates once a year and that sort of thing is, or may be, a periodic intimation by the owner that he is not intending to dedicate a highway, but it must be an effective interruption; it must be by the owner himself, because if you have evidence of an interruption which is not effective in the sense that members of the public resent the interruption and break down the gate, or whatever it is, and that defiance of his supposed rights is then acquiesced in by the owner, or again, if it is an attempted interruption by a tenant without the assent or authority of the owner and is also an interruption that is ineffective and a failure because the public refuse to acquiesce in it, then, as it seems to me such an ineffective interruption, either by the owner or by the tenant, so far from being proof that there is no dedication, rather works the other way as showing that there has been an effective dedication.*

This judgment established a number of principles that still endure.

- 5.30 However, in the subsequent case *Rowley v SSTLR & Shropshire County Council May 2002*, Elias J held that the acquiescence of a tenant may bind the landowner on the issue of dedication of a public right of way (for example in the case of long public user), but also that in the absence of evidence to the contrary, there is no automatic distinction to be drawn between the actions of a tenant acting in accordance with his/her rights over the property and that of the landowner in determining matters under s31HA80.

*...seemed acquiescence of the tenant was the basis of the case for the assertion that there was user as of right...it would surely be implied that the tenant would have the right to decide who should be entitled to go on to his land and whom he may forbid. I find it difficult to see why the tenant's acquiescence should bind the landlord, but not positive acts taken by the tenant in accordance with the exercise of his rights over the property, to exclude strangers.*

Elias J continued:

*the conclusion...that there was no evidence that any turning back had in any event been authorised by the freeholder involved an error of law. A similar argument was advanced in *Lewis v Thomas* [[1950] 1 K.B 438] and rejected, the court apparently taking the view that if it is alleged that the freeholder has a different intention to the tenant, there should at least be evidence establishing that.*

## **No intention to dedicate**

In cases where a claimed right of way is in more than one ownership and only one of the owners has demonstrated a lack of intention to dedicate it for public use, the Inspector should explicitly consider whether it is possible that public rights have been acquired over sections of the way in other ownerships, even if this would result in cul de sac ways being recorded in the Definitive Map and Statement.

## **User Evidence**

- 5.31 Claims for dedication having occurred under s31 HA80 will usually be supported by a number of user evidence forms.
- 5.32 The Inspector's own analysis of the forms is vital, so that omissions, lack of clarity, serious inconsistencies, possible collusion between witnesses and other anomalies may be identified. The analysis also allows the Inspector to reject invalid claims (e.g. no signature, no clear description of the way or of how it was being used) and to note the questions to raise at the inquiry. A similar analysis should be made of other types of user evidence that may be tendered, such as sworn statements, letters and the landowner's evidence. It should also be noted that user evidence forms are not standardised, and pose differing questions of varying pertinence and precision. Some are better than others in terms of specifying the evidence required.
- 5.33 If the potential value of user evidence forms is to be realised in full they must be completed with due diligence. All questions should be answered as accurately and as fully as possible. If questions which, from the claimed duration and extent of use, appear capable of being answered yet are not, it is open to the Inspector to assume that the respondent's recall was insufficient to provide this information. The Inspector may then question whether the claimed use is accurately recalled and the evidential weight of the form may well be reduced.
- 5.34 Similarly if an overall picture emerges from a variety of sources which differs significantly from the respondents' recollections, or if a particular difficulty which must have been encountered during claimed user is not mentioned, the Inspector may well wonder whether the claimed use is accurately and honestly recalled.
- 5.35 It is sometimes the case that objectors do not seek to challenge user evidence in cross-examination. If so, the Inspector needs to do so, in order to be in a position to decide what evidential weight to place on the witnesses' claims. If few, or none, of the users attends the inquiry, the Inspector should pose questions to the party presenting the evidence, so that the evidential weight can be determined. As with other evidence, user evidence tested in cross-examination generally carries significantly more weight than untested evidence. While questioning of witnesses needs to be incisive and thorough, Inspectors should be aware that members of the public giving evidence may be nervous or anxious and should deal with them accordingly.

## Dedication at Common Law

- 5.36 'Rights of Way: A guide to law and practice' is a useful source of information. The referenced RWLR article 'Dedication: the common law approach' discusses the relevant principles, and shows how they were applied in practice by giving detailed consideration to the salient facts in reported cases.
- 5.37 The common law position was described by Farwell J, and Slessor and Scott LJ in *Jones v Bates 1938*, both quoted with approval by Laws J in *Jaques v SSE 1994*, who described the former's summary as *a full and convenient description of the common law*. Other leading cases that speak to dedication at common law are *Fairey v Southampton CC 1956*, *Mann v Brodie 1885* and *Poole v Huskinson 1843*. *Jaques* is a particularly helpful exposition on the differences between dedication at common law and under statute.
- 5.38 Halsbury states – "*Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance. And - An intention to dedicate land as a highway may only be inferred against a person who was at the material time in a position to make an effective dedication, that is, as a rule, a person who is absolute owner in fee simple; and At common law, the question of dedication is one of fact to be determined from the evidence. User by the public is no more than evidence, and is not conclusive evidence ... any presumption raised by that user may be rebutted. Where there is satisfactory evidence of user by the public, dedication may be inferred even though there is no evidence to show who was the owner at the time or that he had the capacity to dedicate. The onus of proving that there was no one who could have dedicated the way lies on the person who denies the alleged dedication*".
- 5.39 Sometimes dedication at common law will be argued as an alternative, in case the s31 claim fails. In any event, the Inspector should consider common law dedication where a s31 claim fails. Whilst the above principles affecting dedication by landowners and acceptance by user will normally apply in both situations (even though there is no defined minimum period of continuous user in common law), there is an important difference in the burden of proof. As Denning LJ made clear in *Fairey v Southampton County Council 1956* *The Rights of Way Act 1932 has introduced a new means by which the public may acquire a right of way, in addition to the old means of dedication, which, be it noted, is still preserved...* In later describing the effect of the 1932 Act he said: *It reverses the burden of proof; for whereas previously the legal burden of proving dedication was on the public who asserted the right... now after 20 years user the legal burden is on the landowner to refute it.*
- 5.40 From these comments it follows that, in a claim for dedication at common law, the burden of proving the owner's intentions remains with the claimant. For the reasons given by Scott LJ in *Jones v Bates 1938*, this is a heavy burden and, in practice, even quite a formidable body of evidence may not suffice. However, should it be asserted in rebuttal that

there was no one who could have dedicated the way, the burden of proof on this issue would rest with the asserting party (Halsbury, above, refers).

- 5.41 The principles established in *Rowley* (see paragraph 5.24) may, arguably, apply to equivalent issues arising under common law.

### **Land Held in Trust or Mortgaged**

- 5.42 Halsbury gives useful guidance; Volume 21 para 73 states: *Where a mortgagor (borrower) is still in possession of the mortgaged land it would seem that the mortgagee's (lender's) assent to a dedication is necessary, and that a dedication cannot be inferred from user unless the mortgagee can be shown or presumed to have had knowledge of it.* Trustees of land held on trust for sale generally have power to dedicate on their own provided that no incompatibility is introduced (Halsbury Vol.21 para 74 refers). For leaseholds and copyholds the consent of both landlord and lessee or copyholder would usually be required for dedication. However, Inspectors should always check the detailed wording and provisions of the trust or mortgage document pertaining to the case before them, in case there are specific requirements for enabling powers. A public body can in general create a right of way, provided that the public use would not be incompatible with the purpose of the body. (See also 'Legal capacity to dedicate' in the referenced RWLR articles 'Section 31 of the Highways Act 1980' and 'Section 31: update' and note the provisions of HA80 s31(8)).

### **Vehicular use post 1930**

- 5.43 Use without lawful authority of mechanically propelled vehicles adapted or intended for use on the roads on footpaths, bridleways and elsewhere than on roads became a criminal offence in 1930. The Countryside and Rights of Way Act 2000 extended this provision to all mechanically propelled vehicles.
- 5.44 However, lawful authority may be granted by a landowner, and Lord Scott, in *Bakewell Management Ltd v Brandwood* [2004] (in the context of the acquisition of an easement to drive over common land) held that if such a grant could have been lawfully made, the grant should be presumed so that long de facto enjoyment should not be disturbed. In overruling *Robinson v Adair* (1995), in which it had been held that no presumption of dedication could arise following long illegal user by motor vehicles, Lord Scott stated that

*However, it was, so I assume for there is nothing to suggest the contrary, open to Mr Adair or his predecessors in title to have dedicated the road as a public highway. Such a dedication would have constituted 'lawful authority' for section 24(1) [of the Road Traffic Act 1988] purposes. The dedication would have been effective. That being so, I can see no reason why public policy would prevent a presumption of dedication arising from long use.*

- 5.45 A grant would not be lawful if, for example, it gave rise to a public nuisance. The granting of vehicular rights over an existing footpath might constitute a public nuisance to pedestrians using that path.
- 5.46 Whilst it is therefore possible for long use of bicycles on a footpath or bridleway (subject to paragraph 5.43 below) to give rise to a claim for a BOAT, Inspectors will need to consider whether vehicular use of the way in question has given rise to or is likely to give rise to, a public nuisance i.e. if the use of bicycles has given rise to, or the use in the future of bicycles and/or any other vehicles on the way is likely to give rise to, a public nuisance, the claim for a BOAT must fail. The public nuisance issue is one to be determined by Inspectors by reference to the particular facts before them.
- 5.47 Use of bicycles on a public bridleway after 3<sup>rd</sup> August 1968 (the date on which section 30 of the Countryside Act 1968 came into force) cannot give rise to a claim, or be used to support a claim for vehicular rights.

### **Crown Land**

- 5.48 The Highways Act 1980 does not apply to land belonging to (or held in trust for) the Crown, except under a special agreement as described in HA80 s327. Consequently, there cannot be a presumption of dedication of such land under s31.
- 5.49 It seems likely that s31 does not apply to land leased to the Crown, because the existence of the lease would take the land outside its scope. Furthermore, the creation of a right of way would adversely affect the Crown's leasehold interest. These arguments do not appear to have been tested in the courts, but, even if they were accepted, they would not prevent an effective presumption of dedication under s31 for a period before or after the Crown's ownership or leasehold of land.
- 5.50 Under common law, there can be a presumption of dedication of a way over Crown Land. However, there cannot be such a presumption over land requisitioned by the Crown, as there would be no one with power to dedicate (*Jaques 1994*).

### **Common Land**

- 5.51 Public rights of way over defined routes can and do exist on common land and can be established by deemed dedication through user over a number of years. However, the effect of s193 of the Law of Property Act 1925, which creates (often restricted or conditional) public *rights of access for air and exercise*, may sometimes have to be considered, since it is believed to apply to a substantial number of commons. This issue is addressed in detail in *R v SSE ex parte Billson 1998*, and useful background information can be found in the RWLR article 'Public Access to Commons' (particularly pages 5,6).

### **The National Trust**

- 5.52 The Trust has power to dedicate highways by virtue of s12 of the National Trust Act 1939. However, Trust bylaws may be in place and operate as a conditional permission to use the land. Such bylaws prevent a presumed dedication under s31, whether users were aware of them or not. Useful reference can be made to *National Trust v SSE* [1999] JPL 697, holding that the permissive nature of the use of NT land precluded user as of right.

### **Charities**

- 5.53 Dedication requires the consent of the Charity Commissioners under s36 of the Charities Act 1993, unless the charity is within an exemption granted by or under that section.

### **Physical Characteristics of a Claimed Way**

- 5.54 In some circumstances the physical characteristics of a way can prevent a highway coming into existence through deemed or inferred dedication. In *Sheringham UDC v Holsey 1904* it was held that use by wheeled traffic of a public footway appointed by an Inclosure Award at 6 feet wide had always been an illegal public nuisance in view of the obstruction and danger to pedestrians, and no length of time could legalise it. Furthermore, there was no one with power to dedicate. Hence there could not have been any dedication of the way as a vehicular highway. In *Thornhill v Weeks 1914*, Astbury J observed that: *it seems impossible that a lady who resided there would at once start dedicating a way through her stable yard ... In trying to form an opinion whether an intention to dedicate has existed, one must have some regard to the locality through which the alleged path goes. The fact that it goes through the stable yard [close to the house] is strong enough to raise a presumption against an intention to dedicate.*
- 5.55 Where physical suitability of a route is argued by parties, referring to gradient, width, surface, drainage, etc., Inspectors should be aware that what may now be regarded as extremely difficult conditions may well have been relatively commonplace and frequently met by stagecoaches, hauliers and drovers in times past, and that special arrangements were often in place to negotiate them.