CHAPTER II.

DEDICATION OF HIGHWAYS.

Creation of Highways by or under Statute.—A road which is already in existence may be directly created a highway by Act of Parliament, and no act on the part of the public is needed to supplement the force of the statute (*a*). And any persons, who are empowered by Act of Parliament, may make a highway, as was commonly the case when roads were constructed by trustees under a Turnpike Act (*b*), or set out by commissioners under an Inclosure Act, or as now constructed by the Minister of Transport (*c*) or a local authority (*d*). The conditions which must be complied with before the public right to the new way is perfected, depend on the construction of the particular statute.

Where a statute authorises but does not compel the making of a road or system of roads for the benefit of the public, and contemplates the possibility that all the works may not be executed, the completion of the entirety is not a condition precedent to any part becoming a highway (*e*). Where a road had been set out under an Inclosure Act, and fenced, but had never been formed and completed so as to satisfy the requirements of the General Inclosure Act, 1801 (41 Geo. 3, c. 109), ss. 8, 9, and the jury expressly found that the public had never used or taken to the road as a highway, it was held that the road had not become a highway (*f*). In this case it was argued that the suspensory condition had reference to the obligation of repair only, and that the right of passage enured whenever the road was set out; but the court declined to adopt this view, though apparently thinking that if the evidence had shown actual user of the unfinished road by the public it would have made a difference. "Where, therefore, the intended road has never been taken to by the public,

(*a*) *Rex* v. *Lyon* (1825), 5 D. & R. 497.

(*b*) *R.* v. *Lordsmere* (1850), 15 Q. B. 689; *Sutcliffe* v. *Greenwood* (1820), 8 Price, 535.

(*c*) The Development and Road Improvement Funds Act, 1909; Roads Act, 1920, *post*.

(*d*) The Housing, Town Planning, etc. Acts, 1909 and 1919, and other Acts.

(*e*) *R.* v. *French* (1879), 4 Q. B. D. 507, overruling *Rex* v. *Cumberworth* (1832), 3 B. & Ad. 108; (1836), 4 Ad. & E. 731; *Rex* v. *Edge Lane* (1836), 4 Ad. & E. 723. See also *Roberts* v. *Roberts* (1862), 3 B. & S. 183, and *R.* v. *W. Riding of Yorks JJ.* (1834), 5 B. & Ad. 1003.

(*f*) *Cubitt* v. *Maxse* (1873), L. R. 8 C. P. 704.

before it can be considered as a common and public highway, it must have been completely formed in the manner prescribed by the Act. It may be that, if the public take a road before it is completed, they cannot afterwards on account of its incompleteness say it is not a highway" (*g*).

Dedication and Acceptance.—With the foregoing exceptions, no highway can be created except by the dedication, express or presumed, by the owner of land, of a right of passage over it to the public at large, and the acceptance of that right by the public. "It is necessary to show, in order that there may be a right of way established, that it has been used openly as of right, and for so long a time that it must have come to the knowledge of the owners of the fee that the public were so using it as of right, and from this apparent acquiescence of the owners a jury might fairly draw the inference that they chose to consent, in which case there would be a dedication" (*h*). "The public can only acquire a right over the lands of an individual by dedication on the part of that individual, and user is only valuable as evidence of the dedication by the private owner" (*i*). An owner may dedicate without the assent of an adjoining owner in whom there is a statutory right of pre-emption (*k*).

A highway cannot be dedicated to a limited part of the public, such as a parish; and if the owner attempts to make such a partial dedication it will not operate in favour of the whole public, but will be simply void (*l*).

Nor can a highway be dedicated for a limited time, although by statute (*e.g.*, a Turnpike Act) a highway may be created to last only for a limited period. But a lessee, or a limited owner, if he cannot dedicate in the strict sense, may probably confer on the public a right which will be enforceable against him either by way of estoppel or contract during the continuance of his interest (*m*).

The acceptance of the right of passage by the public is generally

(*g*) *Ibid*, *per* BRETT, J.; *cf. R.* v. *Lordsmere*, *ubi supra*, where the road was not completed under the local Act yet the public took to it, and it was held that it was a highway repairable by the parish.

(*h*) BLACKBURN, J., in *Greenwich Board of Works* v. *Maudslay* (1870), L. R. 5 Q. B., p. 404.

(*i*) NEVILLE, J., in *Holloway* v. *Egham Urban District Council* (1908), 72 J. P., at p. 434. And see *Muhammad Rustam Ali Khan* v. *Karnal City Municipal Committee*, L. R. 48, Ind. App. 25, P. C.

(*k*) *Coats* v. *Hereford County Council*, [1909] 2 Ch. 579.

(*l*) *Poole* v. *Huskisson* (1843), 11 M. & W. 827; *Vestry of Bermondsey* v. *Brown* (1865), L. R. 1 Eq. 204; *Hildreth* v. *Adamson* (1860), 8 C. B. (N.S.) 587. And see *Farquhar* v. *Newbury Rural District Council*, [1909] 1 Ch. 12.

(*m*) *Corsellis* v. *London County Council*, [1908] 1 Ch., at p. 21. And it may be that a road recognised as impassable in winter may be dedicated for use in summer only. *R.* v. *Brailsford* (1860), 2 L. T. 508.

indicated by user of the way; and lapse of time is not essential to the acquisition of the right, though it is often a material ingredient as regards evidence of dedication and acceptance. No act of adoption by the parish was at common law necessary, either to complete the title of the public to the right of passage, or to charge the parish with the duty of repairing the way as a public highway (*n*); and the Highway Act, 1835 (*o*), which altered the law in the latter respect, did not effect any change in the former (*p*).

Restrictions on Dedication and Acceptance.—A dedicating owner may impose restrictions on his gift, and the public in accepting the right offered them must take subject to such restrictions, *secundum formam doni*. The principle on which such restrictions have been treated as valid, was explained by BLACKBURN, J., delivering the judgment of the Court of Queen's Bench (*q*), as follows:

"It is, of course, not obligatory on the owner of the land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circumstances, the owner of the soil should be held bound to alter the state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention. More especially would this be the case when public rights of way have been acquired by mere user. For instance, the owner of the bank of a canal or sewer may, without considering the effect of what he is doing, permit passengers to pass along until the public have acquired a right of way there. It is often hard upon him that the public right should have been thus acquired: it would be doubly so if the consequences were that he was bound to fill up or fence off his canal."

In one case, where the owner of the soil claimed the right to make tram roads across the highway for the convenient carriage of coal from pits on his land, Lord CAMPBELL, C.J., expressed the opinion that if this would be a nuisance no such right could be reserved (*r*).

(*n*) *R.* v. *Leake* (1833), 5 B. & Ad. 469.
(*o*) 5 & 6 Will. 4, c. 50, s. 23.
(*p*) *Roberts* v. *Hunt* (1850), 15 Q. B. 17.
(*q*) *Fisher* v. *Prouse* (1862), 2 B. & S. 770.
(*r*) *R.* v. *Charlesworth* (1851), 16 Q. B. 1012.

This dictum, which was perhaps wider than the facts of the case required, is inconsistent with *Fisher* v. *Prowse* (*s*), and other authorities (*t*). But it does not necessarily follow that every restriction which the whim of a dedicating owner can invent will be treated as valid. If an owner, while unambiguously dedicating a highway to the public, attempted to impose, or subsequently claimed the benefit of, a restriction which was obviously unreasonable or merely capricious, there is no decided case which would preclude the courts from refusing to enforce it as repugnant to the right actually granted (*u*). The following are the leading restrictions which have been upheld by the English courts:

(1) *Subsisting Erections and Excavations.*—Where an erection or excavation lawfully exists upon land, and the land on which it exists, or to which it is immediately contiguous, is dedicated to the public as a way, the erection or excavation does not thereby become unlawful, but the dedication must be taken to be made to the public, and accepted by them, subject to the inconvenience or risk arising from the existing state of things (*x*). Where a cellar opened directly upon the footway of a street, and was covered by a flap which, when closed, projected a little above the footway, the court held the projecting flap lawful on this ground (*y*). Stone steps leading from the street to the outer door of a house, and partially obstructing the way, have also been supported as lawful; and where the level of the street was lowered by the vestry, and the old steps were removed and replaced by new steps, which caused no greater obstruction or inconvenience, it was held that the new steps were equally lawful with the old (*z*). Where a road is constructed and dedicated so as to leave a gulf or hole underneath or near to it, a person who occupies such space as an area or cellar is not liable for nuisance, though he would have been liable if the gulf or hole had been made by him under or near to an old highway (*a*). Where a highway is dedicated along the side of an

(*s*) (1862), 2 B. & S. 770.

(*t*) *Per* BLACKBURN, J.: *Mercer* v. *Woodgate* (1869), L. R. 5 Q. B. 26, at p. 31.

(*u*) *Cf.* the observations of KELLY, C.B., in *Arnold* v. *Blaker* (1870), L. R. 6 Q. B. 433; *Harrison* v. *Danby* (1870), 34 J. P. 759. As to the possible restriction of the meaning of a statutory award of a road as a "public way or road," see *R.* v. *Aldborough* (1853), 17 J. P. 648.

(*x*) *Fisher* v. *Prowse* (1862), 2 B. & S. 770. "If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is. If I dig a pit in it I may be liable for the consequences; but if I do nothing, I am not": WILLES, J., in *Gautret* v. *Egerton* (1867), L. R. 2 C. P., p. 373.

(*y*) *Fisher* v. *Prowse*, *ubi supra*.

(*z*) *Cooper* v. *Walker* (1862), 2 B. & S. 770. And see *Brackley* v. *Midland Railway Co.* (1916), 85 L. J. K. B. 1596.

(*a*) *Robbins* v. *Jones* (1863), 15 C. B. (N.S.) 224; *cf.* *Barnes* v. *Ward* (1850), 9 C. B. 392.

ancient tidal ditch used as a sewer, the public have only a right to the highway subject to the sewer, and the Commissioners of Sewers are under no obligation to fence off the sewer for the protection of passengers (*b*). If a highway is dedicated which is crossed by a bridge so low as to be dangerous to persons driving a carriage under it, the highway authority is not bound to go to the expense of removing the obstruction, and a person who suffers personal injuries by reason of the insufficient height of the bridge has no cause of action (*c*). Where the defendant, the owner of land on both sides of a highway which was only ten feet wide, widened it by thirty-four feet, but left the side of the widened part a deep declivity unfenced, and the plaintiff, who was leading his horse up the highway drew it across the widened part to rest it and it staggered and fell over the embankment, it was held that the defendant was not liable (*d*). Gates and stiles may be lawful; but no one has a right to enhance them, or to remove a stile and erect a gate which causes greater hindrance to the public (*e*). Trees growing on the way may also be lawful; they belong to the owner of the soil (*f*), and the owner on dedicating the way is not bound, and the highway authority is neither bound, nor, as against him, entitled, to remove them (*g*).

(2) *Existing Rights over the Way.*—The owner of land in dedicating it to the public cannot derogate from any rights previously granted by him or his predecessors over the land, and therefore a dedication by him must be subject to such rights, unless the persons entitled thereto abandon or release them (*h*). Streets may be dedicated to the public, subject to the exercise of market rights,

(*b*) *Cornwall* v. *Metropolitan Commissioners of Sewers* (1855), 10 Ex. 771.

(*c*) *Warner* v. *Wandsworth District Board of Works* (1889), 53 J. P. 471.

(*d*) *Owen* v. *De Winton* (1894), 58 J. P. 833.

(*e*) *Bateman* v. *Burge* (1834), 6 C. & P. 391. *Att.-Gen.* (*Acthwy Rural District Council*) v. *Meyrick* (*Sir George*) *and Jones* (*John*) (1915), 79 J. P. 515.

(*f*) 1 Roll. Abr. 392; Lord MANSFIELD in *Goodtitle* v. *Alker* (1757), 1 Burr. 143; *cf. Turner* v. *Ringwood Highway Board* (1870), L. R. 9 Eq. 418.

(*g*) The power given by s. 65 of the Highway Act, 1835, *post*, to remove obstructions "caused in any carriageway or cartway by any hedge or tree" would seem to apply only where such obstructions have been so caused after the carriageway or cartway became a highway. In urban districts where the Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), has been adopted, the urban authority may plant trees in a street (s. 43), and, it may be added, may place in any street refuges, cabmen's shelters, statues or monuments (ss. 39, 40, 42). But if that Act has not been adopted, the urban authority do not appear to have any power to plant trees or place such obstructions. In *R.* v. *Lewes* (*Corporation*), Times, March 9th, 1886, the Lewes Corporation were indicted and convicted of a nuisance to the highway by planting trees in the street.

(*h*) As to the abandonment or release of such existing rights by conduct, see *R.* v. *Chorley* (1848), 12 Q. B. 515; *Crossley* v. *Lightowler* (1867), L. R. 2 Ch. 478; *Rogers* v. *Great Northern Rail. Co.* (1889), 53 J. P. 484.

whether the owner of the soil was or was not himself the lord of the market (*i*); and even if dedicated by statute they may be subject to the exercise of such rights (*k*). The market owner will not be restrained from exercising them, though the burden of proof is upon him to establish the reservation in competition with the public right (*i*). An immemorial custom to erect booths for the sale of goods in a highway during a fair, leaving sufficient space for free passage along the highway, was upheld as good in law, the dedication of the highway being taken to have been subject to partial interruption by virtue of the custom. "It is not a general and total obstruction of a public right, but a partial or limited one, both as to extent and duration, the public, during such limited obstruction, deriving a benefit which may well be considered as an equivalent" (*l*). A way may be dedicated to the public, subject to the right of the occupiers of the adjoining premises to deposit goods upon the soil in front of their premises (*m*). And where in a public road in the metropolis there was a space of ground on each side of the carriageway, intermediate between the carriageway and the footway (one of these spaces being thirty-three, and the other fifty-eight feet wide), and the occupants of the houses on either side of the road had always been accustomed to use the space opposite their respective houses for the purposes of their trade, paying a yearly rent therefor to the owner of the soil, the court thought that there had been a dedication to the public of such spaces, subject to the rights of the owner and his tenants so to use them (*n*). If the public, by dedication, acquire a right of footway

(*i*) *Att.-Gen.* v. *Horner* (1885), 11 App. Cas. 66; *Goldsmith* v. *Great Eastern Rail Co.* (1883), 25 Ch. D. 511; 9 App. Cas. 927.

(*k*) *Gingell* v. *Stepney Borough Council*, [1908] 1 K. B. 115; [1909] A. C. 245.

(*l*) *Elwood* v. *Bullock* (1844), 6 Q. B. 411. As to the requisites of such a custom, *cf. Simpson* v. *Wells* (1872), L. R. 7 Q. B. 214; *Rogers* v. *Great Northern Rail. Co.* (1889), 53 J. P. 484. And see *R.* v. *Justices of County Cork*, [1913] 2 I. R. 391.

(*m*) *Morant* v. *Chamberlin* (1861), 6 H. & N. 541. *Gerring* v. *Barfield* (1864), 16 C. B. (N.S.) 597; *Spice* v. *Peacock* (1875), 39 J. P. 581; *Whitlaker* v. *Rhodes* (1881), 46 J. P. 182.

(*n*) *Le Neve* v. *Mile End Old Town* (1858), 8 E. & B. 1054. The court held that such a space was not part of a "street" within the meaning of the Metropolis Management Act, 1855; but this was not necessary to the decision, and there seems to be no reason why the vestry should not be able, under their statutory powers, to remove an erection placed there by a stranger, who could not justify under the custom. A somewhat similar question arose on the pleadings in *Elwood* v. *Bullock* (1844), 6 Q. B. 411, and the court there held that the party could not safely traverse the allegation of a highway over the ground occupied by his booth, but was right in setting up the custom by way of confession and avoidance. In that case, however, the custom relied on was not confined to a definite and limited area, but extended to every part of the way, if only sufficient room were left for passengers; and the right was, in fact, at different times exercised over different parts of the way.

along the towing-path of a canal or a navigable river, "they must be taken to accept it as a limited dedication, and cannot set up a right to prevent or limit the user of the towing-path. If the horse or the tow-rope and the foot passengers are in one another's way, the foot passenger must look out for himself, and get out of the way" (*o*).

Where a private right of way already exists, and the public subsequently acquire a right of passage over the same course, the public must take subject to the private right; and a public right of footway may accordingly be limited by a pre-existing private right of carriageway (*p*). If the public and private rights are similar in extent and kind, it is perhaps better to consider the private right as co-ordinate with, than as a restriction upon, the public right. But it is not merged in the public right; and the party entitled to it may rest upon his private title, "and need not resort to a general right which may possibly be disputed by conflicting evidence" (*q*). He may, therefore, maintain an action for the obstruction of his right of way, and will not be compelled to proceed by indictment as one of the public, or to prove that he has sustained special damage by reason of the obstruction (*r*). And if an Act of Parliament gives power to extinguish the public right, the private right will not be affected thereby, but will continue to subsist (*s*).

An obligation incident to the existence of a private way does not necessarily cease upon the subsequent dedication thereof to the public. Accordingly, a rent-charge in fee issuing from lands adjoining certain private occupation roads, and granted in respect of the use of such roads and of a sewer laid in one of them, was held not to be determined by the fact that the roads had become highways repairable by the inhabitants at large, and the sewer had vested in and been discontinued by the local authority, and it made no difference that the grantee of the rent-charge had covenanted in the grant to keep the road and sewer in repair (*t*).

The existence of a right paramount to the public right of way may be evidenced by the apparent character of the way. Thus

It would appear from *Chelsea (Vestry)* v. *Stoddard* (1879), 43 J. P. 782, that an occupier may obstruct a mews for the purpose of washing carriages, etc. therein.

(*o*) *Per* Lord ESHER, M.R.: *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D. 273.

(*p*) *R.* v. *Chorley* (1848), 12 Q. B. 515; PATTESON, J., in *Duncan* v. *Louch* (1845), 6 Q. B. 915.

(*q*) *Allen* v. *Ormond* (1806), 8 East, 4.

(*r*) *Allen* v. *Ormond, ubi supra*; *Duncan* v. *Louch* (1845), 6 Q. B. 915.

(*s*) *Wells* v. *London, Tilbury and Southend Rail Co.* (1877), 5 Ch. D. 126.

(*t*) *Merrett* v. *Bridges* (1883), 47 J. P. 775.

the public may have a right of way along the surface of an ancient sea-wall or embankment erected as a protection against the sea, but the powers of the Commissioners of Sewers, who are entrusted with the control of the embankment, are paramount to the public right (*u*). And if a swing-bridge across the entrance to a dock is dedicated to the public, it is obvious that the public right is limited by the right to interrupt the user of the way when ships are entering or leaving the dock (*x*).

(3) *Conditions as to Mode and Time of Public User.*—Conditions restrictive of the mode of enjoyment are necessarily involved in the dedication of a bridleway, *i.e.*, a way not to be used with carts and carriages; or of a footway, *i.e.*, a way not to be used with horses, carts, or carriages (*y*). Particular uses may also be specifically excepted from the right conferred on the public. Thus, though a public highway is presumptively open to cattle, "otherwise cattle could not be driven from one part of the kingdom to another," there may be a public carriageway in which there is no driftway (*z*). And where a proprietor made a road and threw it open to the public, but prohibited the carriage over it of coals belonging to other proprietors, the court thought this a valid restriction (*a*).

A bridge over a river, close to a ford, may be dedicated to the public, to be used by them on foot and with horses at all times, but with carriages only in time of flood or frost, when the ford is dangerous or impassable (*b*).

(4) *Special Rights Reserved by Owner.*—There may be a dedication of a way subject to the right of the owner of the soil to plough it up periodically in due course of husbandry (*c*). So an owner may reserve the right of putting up gates, if reasonably necessary

(*u*) *Greenwich Board of Works* v. *Maudslay* (1870), L. R. 5 Q. B. 397; *cf.* also *Tyne Improvement Commissioners* v. *Imrie*, *Att.-Gen.* v. *Tyne Improvement Commissioners* (1899), 81 L. T. 174.

(*x*) *Cf. per* COCKBURN, C.J.: *Mercer* v. *Woodgate* (1869), L. R. 5 Q. B. 26.

(*y*) In *Roberts* v. *Karr* (1808), 1 Camp. 262 n., HEATH, J., expressed the opinion that there could not be a limited dedication, though there might be a grant, of a footway; but this view is inconsistent with later authorities. See, *e.g.*, *per* PARKE, B., in *Poole* v. *Huskisson* (1843), 11 M. & W. 827; and *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D. 273.

(*z*) Sir J. MANSFIELD, C.J., in *Ballard* v. *Dyson* (1808), 1 Taunt. 279.

(*a*) *Marquis of Stafford* v. *Coyney* (1827), 7 B. & C. 257. The actual decision was that there was either a limited dedication, or no dedication at all, but only a licence revocable; but the possibility of a limited dedication is not now open to doubt.

(*b*) *Rex* v. *Northampton* (1814), 2 M. & S. 262; *cf. Rex* v. *Marquis of Buckingham* (1815), 4 Camp. 189.

(*c*) *Mercer* v. *Woodgate* (1869), L. R. 5 Q. B. 26: *Arnold* v. *Blaker* (1870), L. R. 6 Q. B. 433; *Harrison* v. *Danby*, *post*, p. 57.

for the use of his farm (*d*). And it seems that a right might be reserved to cut a channel across a highway in time of flood (*e*).

There is a preponderance of authority against the opinion that an owner can, without a Royal grant or legislative authority, dedicate a road to the public, subject to the right of charging tolls for the user. The doubts expressed on this point in *Austerberry* v. *Corporation of Oldham* (*f*), appear to be in full agreement with the older authorities. But in a later case (*g*), where the facts were very similar, Lord ESHER, M.R., thought there must have been a dedication of some sort, and that the owners of the road, after long user, could not legally close it to the public. This view clearly makes for the public convenience in particular cases, and the question may now be considered in some degree open (*h*).

(*d*) *Davies* v. *Stephens* (1836), 7 C. & P. 570; *cf. Sutherland* v. *Thomson* (1876), 3 Ct. Sess. Cas. 485.

(*e*) KELLY, C.B., in *Arnold* v. *Blaker, ubi supra.* In *Rex.* v. *Leake* (1833), 5 B. & Ad. 469, PARKE, J., seems to have thought that such a reservation would be inconsistent with dedication, but this is hardly reconcilable with later decisions.

(*f*) (1885), 29 Ch. D. 750.

(*g*) *Midland Rail Co.* v. *Watton* (1886), 17 Q. B. D. 30.

(*h*) Tolls may be created by statute, as was commonly the case under Turnpike Acts, and Acts appointing conservators or trustees of canal or river navigation; such tolls and the exemptions therefrom, and the remedies appropriate thereto, are regulated by the terms of the particular statute. Apart from statute, tolls, in the strict sense, can only originate, like other franchises, by prescription, charter, or Royal grant. A right granted or acquired by a lower title may be merged in and extinguished by a higher title. "If a man has franchises by prescription, and the King grants the same liberties to him by charter, he cannot afterwards claim them by prescription" (Com. Dig. tit. Prescription G). "I hold it to be an indisputable proposition of law that where an Act of Parliament has according to its true construction to use the language of LITTLEDALE, J. (*Islington Market Bill* (1835), 3 Cl. & F., p. 518), 'embraced and confirmed' a right which had previously existed by custom or prescription, that right becomes henceforward a statutory right, and that the lower title by custom or prescription is merged in and extinguished by the higher title derived from the Act of Parliament" (Lord DAVEY: *New Windsor Corporation* v. *Taylor*, [1899] A. C., p. 49). Accordingly, where a municipal corporation having a prescriptive right to take certain customary tolls for the passage of carriages, cattle, etc. over a bridge belonging to them, obtained in 1734 a local Act which, after reciting their right to take the customary tolls, enacted that the said customary tolls should be and remain vested in them and empowered them to take the said tolls with a variation as to the exemption of freemen of the borough, and in 1819 the corporation obtained another local Act which repealed the former Act and empowered them to take down the old bridge and build a new one, and to take tolls which varied from the old tolls in amount and subject matter, the latter Act being temporary and having expired, it was held that the prescriptive right to take tolls had been merged in and extinguished by the statutory right given in 1734, and neither had nor could have been revived by the later Act, and that the right to take tolls expired with the later Act (*New Windsor Corporation* v. *Taylor*, [1899] A. C. 41). See also *Mayor, etc. of Manchester* v. *Lyons* (1882), 22 Ch. D. 287.

Who may Dedicate.—The question of capacity to dedicate may arise in connection with either express or presumed dedication.

A sufficient consideration is necessary to support the grant of tolls, the exaction of toll without such consideration being against common right. "The King cannot charge his subjects by an imposition, unless it be for the benefit of the subjects charged, and where they have a *quid pro quo*" (2 Roll. Abr. 172, Prerogative, F. 20). The nature of the consideration is the basis for the distinction between toll thorough and toll traverse. See *Brecon Markets Co.* v. *Neath and Brecon Rail. Co.* (1872), L. R. 7 C. P. 555. *Toll thorough* is granted in consideration of the performance of a continuing beneficial service, such as the repair of a road, the paving of streets, or the maintenance of a bridge or ferry. *Toll traverse* is granted in consideration of permitting the public at large to pass over the land of the grantee; it can, therefore, only be granted to the owner of the land, though, once validly granted, the toll may be severed from the ownership of the land. "Toll traverse arises when the owner of the soil dedicates the road to the use of the public, but reserves toll at the time of dedication" (Lord TENTERDEN, C. J.: *Brett* v. *Beales* (1829), 1 Mood. & M. 416, at p. 428). In *Hammerton* v. *Dysart* (*Earl*), [1916] 1 A. C. 57, Lord PARKER of Waddington put the distinction thus, at p. 78: "If, apart from the franchise, no one would have had a right to do that for which the toll is charged, the toll is a toll traverse. If, apart from the franchise, any one would have had the right to do that for which the toll is charged, the toll is a toll thorough. In the former case, the consideration moving to the public may be found in the right conferred on the public by the franchise. For example, if before the creation of the franchise the road for the use of which toll is charged was a private road, the consideration may be the dedication of the road to the public. In the latter case the consideration moving to the public cannot be the dedication of the road, for the road was *ex hypothesi* at the time of the creation of the franchise already a public road. It must be found elsewhere, for example, in an obligation to keep the road in repair." When toll thorough is claimed, a continuing consideration must be alleged and proved, and the consideration must be commensurate with the toll claimed: thus, the repair of some streets in a town is not sufficient consideration to support a claim of toll thorough in all parts of the town (*Brett* v. *Beales* (1830), 10 B. & C. 508). But in claiming toll traverse it is not necessary to state a consideration, the nature of the consideration sufficiently appearing from the allegation that it is a toll traverse (*Brecon Markets Co.* v. *Neath and Brecon Rail. Co.*, *ubi supra*). Where a way has been used and toll paid, from time immemorial, and the evidence shows that before the time of legal memory the property in the soil and the toll were in the same hands, the court will infer a legal origin for the toll, there being no evidence to show that the public had a right of passage before the toll was claimed (*Pelham* v. *Pickersgill* (1787), 1 T. R. 660; see also *Rickards* v. *Bennett* (1823), 1 B. & C. 223; *Laurence* v. *Hitch* (1868), L. R. 3 Q. B. 521). An exemption from toll, in favour of the inhabitants of a town or district, may be proved by immemorial usage (*Payne* v. *Partridge* (2 W. & M.), 1 Shower, 231). The remedy by distress seems to have generally attended the right of toll; "a distress is incident to every toll" (Viner Abr. Toll. I. 1; Cro. Eliz. 558, 710).

The exemption from payment of toll in passing along a turnpike road or over a bridge, contained in s. 143 of the Army Act, 1881 (44 & 45 Vict. c. 58), in favour of carriages "employed" in the military services of the Crown and conveying officers or soldiers in the regular forces on duty, does not extend to the private carriage of an officer used by him for his own convenience while on duty (*Craig* v. *Nicholas*, [1900] 2 Q. B. 444), but applies where a regular officer employed on duty uses his private motor car for the purpose with the authority of the military authorities, receiving an allowance in respect thereof (*Att.-Gen.* v. *Selby Bridge Proprietors*, [1921] 3 K. B. 31, distinguishing *Craig* v. *Nicholas*, *supra*).

In the former case, the question is whether a person is capable of giving legal effect to an intention to dedicate. In the latter case, the question is whether the state of the title to land is such as to negative an adverse presumption of dedication.

The general principle is that no one but the owner of the fee simple can dedicate, because the right given to the public is a right in perpetuity, and persons entitled to preceding estates and interests must concur. But the strictness of this principle is very largely qualified by the rules relating to presumed dedication.

The Crown.—The Crown may dedicate a way over Crown lands, and the evidence required to establish dedication by the Crown is the same as in the case of a private owner (*i*).

Public Trustees and Corporate Bodies.—Trustees in whom land is vested for public purposes, and statutory corporations holding land for the purposes of their undertaking, may dedicate the surface to the use of the public as a highway, provided such use is not incompatible with the present or future execution of the purposes for which the land is vested in them (*k*). Commissioners appointed for draining fen lands were held entitled to dedicate to the public a way along an embankment formed on land purchased by them for the purposes of the Act (*l*). A canal company or a railway company may dedicate to the public bridges crossing the canal (*m*) or railway (*n*), and a railway company may dedicate a

For similar exemptions see the Ferries (Acquisition by Local Authorities) Act, 1919 (9 & 10 Geo. 5, c. 75), s. 4, and the Post Office Act, 1908 (8 Ed. 7, c. 48), s. 79.

In *Conway Bridge Commissioners* v. *Jones* (1910), 102 L. T. 92, a lessee of tolls was held not entitled to increase them by virtue of his lease which demised to him at an annual rent the tolls which were, or could be, demanded and taken.

A private road which was the subject of a toll having been purchased by an urban district council, they continued the charging of tolls for a time. The council were informed, however, by the Local Government Board that the Board were not aware of any authority under which tolls could be levied by them.

(*i*) *Harper* v. *Charlesworth* (1825), 4 B. & C. 574; *R.* v. *East Mark* (1848), 11 Q. B. 877; *Turner* v. *Walsh* (1881), 6 App. Cas. 636.

(*k*) This sentence was cited with approval by JOYCE, J., in *Great Central Rail. Co., Ltd.* v. *Balby-with-Hexthorpe Urban District Council—Att.-Gen.* v. *Great Central Rail. Co., Ltd,* [1912] 2 Ch. 110; 28 T. L. R. 268, where it was held that a railway company cannot dedicate a perpetual right of way over and across their railway or land which may come to be used as a railway. See *Rex* v. *Leake* (1833), 5 B. & Ad. 469, 478; *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D. 273; *Stretford Urban District Council* v. *Manchester South Junction and Altrincham Rail. Co.* (1903), 68 J. P. 59; *Foster* v. *London, Chatham and Dover Rail. Co.,* [1895] 1 Q. B. 711.

(*l*) *Rex* v. *Leake, supra.*

(*m*) *Grand Surrey Canal Co.* v. *Hall* (1840), 1 M. & G. 392.

(*n*) *North London Rail. Co.* v. *Vestry of St. Mary, Islington* (1873), 27 L. T. 672.

footpath over a level crossing (*o*) or even along their railway line (*oo*) or over the embankment of a reservoir (*p*). A canal company which has acquired and uses land for the purposes of a towing-path may dedicate it as a public footpath or highway subject to its use by them as a towing-path, unless there is evidence to show that the dedication is inconsistent with such use (*q*). Where a strip of land running alongside a highway and forming the site of a tramway, the user of which as such had been discontinued, was vested in a railway company, with power for the company at any time to use the strip for the purpose of their undertaking or to sell it, subject in the latter event to a right of pre-emption to the adjoining owner, it was held that the strip was capable of being dedicated by the company as a highway, and that the company, so long as they did nothing incompatible with the statutory objects, were in a position to dedicate it for the purposes of a public right of way along it and were not incapacitated from doing so by the right of pre-emption vested in the adjoining owner (*r*). A local authority may dedicate works vested in them, such as a quay, but such dedication is a limited one in the sense that they do not prejudice or affect any statutory powers they may have of altering and improving from time to time the works vested in them (*s*).

On the other hand, if the purposes for which the land is vested in the trustees or corporation are incompatible with its public use as a highway, the trustees or corporation are in law incapable of dedicating (*t*). Thus, where the magistrates of a burgh held land subject to an obligation to preserve it for the purposes of the game of golf, and for the recreation and amusement of the inhabitants, the House of Lords held that they could not consistently with that obligation create a public easement over it by dedicating to the public a road along the outer boundary of the land, thereby abdicating their powers of administration and control, although the road itself was physically not a substantial interference with such purposes (*u*).

(*o*) *Att.-Gen.* v. *London and South Western Rail. Co.* (1905), 69 J. P. 110. If the railway is in a deep cutting and fenced off, there may be no evidence of dedication. See NEVILLE, J., in *Holloway* v. *Egham Urban District Council* (1908), 72 J. P., at p. 435.

(*oo*) *Arnold* v. *Morgan* (1910), 103 L. T. 763.

(*p*) *Lancashire and Yorkshire Rail. Co.* v. *Davenport* (1906), 70 J. P. 129. See also article in (1912), J. P. Jo., p. 170.

(*q*) *Grand Junction Canal Co.* v. *Petty* (1888), 21 Q. B. D. 273.

(*r*) *Coats* v. *Herefordshire County Council*, [1909] 2 Ch. 579.

(*s*) *Arnott* v. *Whitby Urban District Council* (1909), 73 J. P. 369.

(*t*) *Rex* v. *Leake, supra*; *cf. Ayr Harbour Trustees* v. *Oswald* (1883), 8 App Cas. 623; *Stretford Urban District Council* v. *Manchester South Junction and Altrincham Rail. Co.* (1903), 68 J. P. 59.

(*u*) *Paterson* v. *Provost of St. Andrews* (1881), 6 App. Cas. 833. And see *Att.-Gen.* v. *Blackpool Corporation* (1907), 71 J. P. 478.

Whether the use of land as a highway is or is not compatible with the purposes for which it is vested in the trustees or corporation, is a question of fact, and if the point is raised, ought to be expressly found by the jury (*x*).

If a company created by Act of Parliament purports to dedicate a highway, and the incompatibility appears subsequently, the company may resume the full enjoyment of the land on the ground of such incompatibility. In *Mulliner* v. *Midland Rail. Co.* (*y*), where a railway company had built a station on arches, and afterwards purported to grant to a third party without consideration a right of way under one of the arches, it was held that another company which had statutory powers of managing and working the railway was entitled four years after to treat the conveyance as *ultra vires* and void (*z*). In *Great Western Rail. Co.* v. *Solihull Rural District Council* (*a*), a canal company was created by statute for the purpose of making and maintaining a canal with all the works necessary and incident for that purpose, and a public right of way was claimed to exist along the embankments of one of the reservoirs; but on it being proved that the user by the public of such a right of way would ultimately lead to the destruction of the embankments of the reservoirs and consequent damage to the public unless considerable expense was incurred by the company to prevent that result, it was held that the company as a statutory body had in such a case no power to dedicate a right of way over the embankment. In *Taff Vale Rail. Co.* v. *Pontypridd Urban Council* (*b*), a railway company built and maintained a private accommodation bridge over its lines for the convenience of a landowner whose lands had been severed by the railway. In course of time the bridge came to be much used by the public, and the acts done by the company in connection with the roadway over the bridge were such that if done by a private owner would have constituted a dedication of the roadway to the public. Gas pipes were laid by the defendants in the roadway over the bridge in purported

(*x*) *Rex* v. *Leake*, *supra*. The passage in the text was cited with approval in *Great Central Rail. Co.* v. *Balby-with-Hexthorpe Urban District Council*, [1912] 2 Ch. 110; 28 T. L. R. 268.

(*y*) (1879), 11 Ch. D. 611.

(*z*) See, *e.g.*, Lord SELBORNE, L.C., in *Paterson* v. *Provost of St. Andrews*, *supra*, at p. 844: "It is not only inconsistent with the duty of the corporation to grant such rights, but also part of their duty to prevent their being acquired from any neglect on their part"; *Great Western Rail. Co.* v. *Talbot*, [1902] 2 Ch. 759.

(*a*) (1902), 66 J. P. 772.

(*b*) (1905), 69 J. P. 351. See *Lancashire and Yorkshire Rail. Co.* v. *Davenport*, *supra*, where the jury found that the upkeep and maintenance of the embankment to a reservoir was not materially increased by the erection of a public footpath over it, and it was held that the company had power to dedicate.

exercise of s. 6 of the Gasworks Clauses Act, 1847 (*c*), *e.g.*, on the assumption that the road over the bridge was a public road. The railway company wished to widen their track and alter the bridge, and requested the defendants to remove their gas pipes, and it was held that the railway company had, under the circumstances, no power to dedicate the roadway to the public (*d*).

It is, of course, necessary that the land should be vested in the trustees or corporation, but whether it was acquired compulsorily or by agreement is immaterial (*dd*). Turnpike trustees, inclosure commissioners, or conservators of navigation, if expressly authorised by statute, may create a highway over land which does not belong to them. But a railway company, which is empowered by the Railways Clauses Consolidation Act, 1845, to divert public footpaths, is not thereby empowered to place the new or substituted footpath upon land belonging to others; and if the power is put in force, the company must acquire the ownership of the necessary land and make compensation to the owner on that footing (*e*).

Settled Land.—When land is in strict settlement there is, in general, no one who can dedicate, unless under an express power contained in the settlement. The Settled Land Act, 1882, now confers on a tenant for life a power which is wide enough to include the power of dedicating a highway, but which is also hedged in by stringent conditions (*f*). It is only to be exercised for the general

(*c*) 10 & 11 Vict, c. 15.

(*d*) And see *Thames Conservators* v. *Kent*, [1918] 2 K. B. 272. Cases of this kind are distinguishable from such cases as *Rex* v. *Leake* (an embankment); *Grand Junction Canal Co.* v. *Petty* (towing-path); *Greenwich Board of Works* v. *Maudslay* (sea-wall); *Att.-Gen.* v. *Tyne Improvement Commissioners* (pier); *Att.-Gen.* v. *London and South Western Rail. Co.* (level crossing); and *Lancashire and Yorkshire Rail. Co.* v. *Davenport* (embankment), *supra*, as in these cases it was not shown that the existence of a public way was incompatible with the user under the statute to which the *locus in quo* was put. See also *Sandgate Urban District Council* v. *Kent County Council*, *ante*, p. 2, note (*b*) (esplanade).

(*dd*) *Edinburgh Magistrates* v. *North British Rail. Co.* (1904), 6 F. (Ct. of Sess.), 620.

(*e*) *Rangeley* v. *Midland Rail. Co.* (1867), L. R. 3 Ch. 310.

(*f*) The Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 16:

"On or in connection with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

"(i) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connection therewith; and

"(ii) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation

benefit of the residents on the settled land or some part thereof. It can only be exercised on or in connection with a sale or grant for building purposes or a building lease. An act of dedication by a tenant for life, which fails in these conditions, will not be good against persons entitled in remainder or reversion. The section proceeds to give directions for (though it does not compel) the preservation of evidence of the terms and conditions on which the power is exercised; and the probable inference is that, although dedication by a tenant for life is now possible under this power, no general presumption of dedication can arise while lands are proved to be under settlement (*g*).

Copyholds.—If copyhold lands are in the hands of the lord of the manor, as by forfeiture, or escheat, or even perhaps in the interval between a surrender and admittance, the lord may dedicate; if not, it is necessary, since the freehold is in him, that he should concur with the owner or owners of the customary fee (*h*).

Leaseholds.—A lessee for years cannot dedicate without the consent of the owner of the fee (*i*); and during the lease public

> thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and
>
> "(iii) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted."

Section 21 (amended by 11 & 12 Geo. 5, c. 20, s. 2) authorises the application of capital trust money to pay for improvements authorised by the Act. A liability of occupiers and owners of a settled estate to repair a highway *ratione tenuræ* is probably not an "incumbrance affecting the inheritance of the settled land" which the trustees have power to redeem or discharge out of capital monies in their hands under sub-sec. (ii) of sec. 21. This point was raised in *In re Earl of Stamford and Warrington, Payne* v. *Grey* (No. 2), [1911] 1 Ch. 648; 27 T. L. R. 356, but was not decided, as the trustees had the power under their extensive powers of management; see note (*b*) to s. 148 of the Public Health Act, 1875, *post*. S. 25, which defines the improvements intended, includes (*inter alia*):

> "(viii) Farm roads; private roads; roads or streets in villages or towns:"
>
> "(xvii) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land;"

and by the Settled Land Act, 1890 (53 & 54 Vict. c. 69), s. 13 (bridges).

(*g*) *R.* v. *Petrie* (1855), 4 El. & Bl. 737. See *post*, p. 47.

(*h*) See *Powers* v. *Bathurst* (1880), 49 L. J. Ch. 294; and *post*, p. 48.

(*i*) *Wood* v. *Veal* (1822), 5 B. & A. 454; *Corsellis* v. *London County Council* [1908] 1 Ch. 14, affirming NEVILLE, J., [1907] 1 Ch. 704; and cases cited *post* pp. 47 and 48.

user alone will not raise a presumption of dedication against the freeholder unless there are circumstances from which his assent may reasonably be inferred. "If property is under lease, of course, there can be no dedication by the lessee to bind the freehold" (*k*). This rule is closely connected with the principle that, as a bare trespass to land is not necessarily injurious to the reversion, the reversioner cannot during the demise maintain trespass against any one claiming a right of way over the land (*l*).

It has not been decided what is the exact legal effect of conduct on the part of a lessee which if done by the freeholder would amount to an unequivocal dedication; it may be a good dedication, but limited in time, or it may be a licence which is irrevocable and valid by way of estoppel against the lessee and his assignees with notice. The point was raised, but not decided, in a case where a lessee had entered into a contract with the vestry to form a road across the land occupied by him and to dedicate it to the public (*m*). FRY, J., expressed the opinion that this contract would have been enforced against the lessee himself and also against any person who became entitled to the land with notice of the contract. The Court of Appeal thought it an open question in law whether the lessee could not dedicate "at least as against himself and his assignees," irrespective of notice. Probably if the road had been formed and used the two views would practically coincide, the existence of a defined made and visible road used by the public being sufficient of itself to bind the assignees, as the like fact would suffice to pass an easement without express words in a conveyance of the servient tenement (*n*).

(*k*) PATTESON, J., in *R.* v. *East Mark* (1848), 11 Q. B. 877.

(*l*) See *Baxter* v. *Taylor* (1832), 4 B. & Ad. 72. As to the effect of the Prescription Act on the acquisition of private rights of way while land is under lease, see *Palk* v. *Shinner* (1852), 18 Q. B. 568. The Prescription Act has no application to highways.

(*m*) *Att.-Gen.* v. *Biphosphated Guano Co.* (1879), 11 Ch. D. 327, 341. BAYLEY, J., in *Wood* v. *Veal* (1822), 5 B. & Ald., p. 456, speaks of the right given by an individual having a limited right continuing only for a limited period. In Selwyn's Nisi Prius, 12 ed., p. 1317, it is said that "there may be a dedication for a limited time, as by a termor during his term." BYLES, J., in *Dawes* v. *Hawkins* (1860), 8 C. B. (N.S.), p. 858, states that it is clear that there can be no dedication of a way to the public for a limited time, certain or uncertain; if dedicated at all it must be dedicated in perpetuity. In *Att.-Gen.* v. *Biphosphated Guano Co.*, *supra*, FRY, J., and the Court of Appeal expressed the view mentioned in the text. In *Corsellis* v. *London County Council*, [1907] 1 Ch., at p. 713, NEVILLE, J., expressed the opinion that there was no such thing known to the law as dedication of a way for a term. The Court of Appeal in *Corsellis* v. *London County Council*, [1908] 1 Ch. 13, affirmed the decision of NEVILLE, J., that there was no evidence that the lessee had dedicated even had he been the owner of the strip of land in question, and pointed out that, as against the lessee, the highway authority might have been in a position to insist that the strip should be given up to the use of the public during his term either on the ground of estoppel or of actual contract.

(*n*) FRY, L.J.: *Bayley* v. *Great Western Rail. Co.* (1884), 26 Ch. D. 434; *Thomas* v. *Owen* (1887), 20 Q. B. D. 225.

On either view, it would seem to follow that the public right in the road would expire with the normal determination of the lease, although an earlier determination thereof (*e.g.*, by surrender), due to the act of the lessor and lessee or their representatives, would probably be effectual to destroy the public right. But such a limited dedication or licence might be perfected at any time if the freeholder by word or act acceded to the dedication (*o*).

Express Dedication.—The question of express dedication can arise only when the history of the formation of the road or of the commencement of the public user is known; and the question then is, whether the acts and conduct of the owner or owners, with reference to the public user, are such as indicate an *animus dedicandi*, or intention to dedicate the way to the public at large, or whether they are to be explained in a different manner. This is generally a question of fact, but in some cases it turns on the construction and effect of an agreement, deed of settlement, or the like.

The mere intention to dedicate, however clearly proved, cannot establish an actual dedication unless the road has been in fact thrown open to the public and used by them (*p*). The rule is the same if the owners have entered into a covenant, *e.g.*, in a lease of the land, to make and dedicate a road or street; if the intention embodied in the covenant is not carried out, and the parties to the covenant tacitly agree to abandon it, the covenant itself creates no right in favour of the public (*q*). The partial execution of the intention to dedicate is not decisive, because until the public right is complete the owner may change his mind and abandon his intention. Thus, where a lessee of building land laid out part of a proposed road across it, and built six houses on one side thereof, but afterwards abandoned her intention of making the road and demised the rest of the land, including the site of the proposed road, as a timber yard, BACON, V.-C., held that the mere setting-out of the intended road was not an irrevocable act of dedication (*r*).

On the other hand, any act which unequivocally indicates an intention on the part of the owner of land to abandon to the public a right of passage over it, will be effectual as a dedication. "If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it

(*o*) See Lord DAVEY in *Simpson* v. *Att.-Gen.*, [1904] A. C., at p. 507.

(*p*) *Att.-Gen.* v. *Biphosphated Guano Co.* (1879), 11 Ch. D. 327.

(*q*) *Healey* v. *Corporation of Batley* (1875), L. R. 19 Eq. 375.

(*r*) *Hall* v. *Corporation of Bootle* (1881), 44 L. T. 873. See also *Mackett* v. *Herne Bay Commissioners* (1876), 35 L. T. (N.S.) 202.

to the public" (*s*). "If the act of dedication be unequivocal, it may take place immediately: for instance, if a man builds a row of houses opening into an ancient street at each end, making a street, and sells or lets the houses, that is instantly a highway" (*t*). And the acts of the owners in throwing open a passage to the public may be so clear and unequivocal as to prevail in spite of contemporaneous declarations by them that a dedication to the public was not intended. "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" (*u*).

Conduct of the owner which comes short of dedication may operate simply as a licence revocable at will or on breach of a condition, or it may amount to a grant of a private or occupation way (*x*).

Licence.—The owners of land agreed to open a road on their land to carriages; a certain iron company agreed to supply cinders for the repair of the road, and the inhabitants of the hamlet, by their surveyors, undertook to carry and spread them; the company also agreed to pay to the owners an acknowledgment of five shillings a year. This arrangement was carried out for nineteen years, when disputes arose and the owners closed the road and excluded the public. It was held that, the user being referable to and explained by the agreement, there was no dedication, but a mere licence which the owners were entitled to revoke on breach of the agreement (*y*). Similarly where the owners of lands projected the formation of a new road, and by deed of settlement declared that the road was to be open to the use of the public at large for all manner of purposes in all respect as a common turnpike road, but under reservation of a power to levy tolls and to vary such tolls from time to time, the Court of Appeal were of opinion that this was not a dedication, but only a licence (*z*).

Private or Occupation Way.—Occupation roads laid out through an estate for the use and convenience of the inhabitants

(*s*) Lord ELLENBOROUGH, C.J., in *Rex* v. *Lloyd* (1808), 1 Camp. 260.

(*t*) CHAMBRE, J., in *Woodyer* v. *Hadden* (1813), 5 Taunt. 124.

(*u*) LITTLEDALE, J., in *Barraclough* v. *Johnson* (1838), 8 A. & E. 99.

(*x*) Where a path was used for forty years by persons when working at the quarries, but not at other times, it was held that no public right of way was established (*Leckhampton Quarries Co., Limited* v. *Ballinger and Cheltenham Rural District Council* (1904), 68 J. P. 464.

(*y*) *Barraclough* v. *Johnson* (1838), 8 A. & E. 99.

(*z*) *Austerberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 750. But *cf. Midland Rail. Co.* v. *Watton* (1886), 17 Q. B. D. 30, *ante*, p. 25.

are not thereby dedicated to the public (*a*). So, private roads may be set out by Inclosure Commissioners, and bridges may be built by a canal company for the accommodation of the occupiers of particular lands, without any right being conferred on the public generally.

Supervening Dedication. — But evidence that the road was originally an occupation road only, or that the public user originated under a revocable licence, is not necessarily conclusive after a lapse of time; for in either case there may be a supervening dedication, either express or presumed, from the fact of more extensive user than is accounted for by the initial licence or grant. Thus, where Inclosure Commissioners in 1789 had set out a road as a private road, but there was ample evidence of long public user, the Court of Queen's Bench held that there was nothing to prevent the presumption of dedication to the public arising in the case of such an occupation road (*b*). In another case, a canal company, under a statutory obligation, erected in 1804 a swivel bridge for public use as a foot and bridle way, but as a carriageway for the exclusive use of the tenants of a certain estate. The public used it occasionally with carriages from 1810 to 1822. From the latter year, when the neighbourhood became very populous, the public used the bridge as a carriageway, without interruption until 1832, when the company began to exact a toll from persons other than tenants of the estate crossing the bridge with carriages. In 1834 they removed the swivel bridge, and built a stone bridge in its stead. It was held that it was a proper question for the jury whether or not the company had intended to dedicate the bridge to the public as a carriageway (*c*). "The circumstance of the bridge being originally erected as a carriageway, for the accommodation of a considerable number of individuals, inasmuch as the company must either have permitted the bridge to be used indiscriminately, or have put themselves to great expense in employing some person to see that those passing had a right to do so, furnishes a strong reason why they should have intended to dedicate the bridge to the public" (*d*). So, if a bar or a gate

(*a*) *Selby* v. *Crystal Palace District Gas Co.* (1862), 30 Beav. 606; *Cowling* v. *Higginson* (1838), 4 M. & W. 256; *Wimbledon and Putney Commons Conservators* v. *Dixon* (1875), 1 Ch. D., at p. 368. In *Cowling* v. *Higginson*, Lord ABINGER, C.B., said: "If a way has been used for several purposes, there may be a ground for inferring that there is a right of way for all purposes; but if the evidence shows a user for one purpose, or particular purposes only, an inference of a general right would hardly be presumed." See *Holloway* v. *Egham Urban District Council* (1908), 72 J. P. 433.

(*b*) *R.* v. *Bradfield* (1874), L. R. 9 Q. B. 552, in which *Rex* v. *St. Benedict* (1821), 4 B. & Ald. 447, is discussed.

(*c*) *Grand Surrey Canal Co.* v. *Hall* (1840), 1 M. & G. 392.

(*d*) MAULE, J., *ibid.*

is erected across a new road, to show that there is no public right of passage, and the bar or gate is soon afterwards knocked down or removed, and the public subsequently use the road without obstruction, it is a question for the jury whether the acquiescence of the owner in the removal of the bar or gate amounts to a complete dedication (*e*).

It may be that from the nature of the *locus in quo* a dedication could not reasonably be presumed. Where a strip of land about six feet wide had been awarded as a footway and for a period of forty or fifty years it had been used without interruption for the passage of barrows and handcarts, some of which were pulled by ponies, JOYCE, J., held that having regard to the width of the lane, the user by wheeled traffic was in its inception illegal and so continued, and that there had been no dedication for such traffic (*f*).

It is desirable that an owner who does not mean to dedicate should preserve evidence of his intention. "The Duke of Bedford preserves his right in Southampton Street, Covent Garden, by a bar set across the street, which is shut at pleasure, and shows the limited right of the public" (*g*). "If a man opens his land, so that the public pass over it continually, the public, after a user of a 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" (*h*). If the intention not to dedicate be insisted upon, "it may be answered that he should have shown it by putting up a gate, or by some other act" (*i*).

Presumption of Dedication.—When there is no direct evidence as to the intention of the owner, an *animus dedicandi* may be presumed, either from the fact that a way has been maintained and repaired by a public body, or from the fact of public user without interruption. The presumption of dedication is called a question

(*e*) *Cf. Roberts* v. *Karr* (1808), 1 Camp. 262 n., and *Lethbridge* v. *Winter* (1808), 1 Camp. 263 n.

(*f*) *Sheringham Urban District Council* v. *Halsey* (1904), 68 J. P. 395.

(*g*) Lord KENYON, C.J., in *Rugby Charity Trustees* v. *Merryweather* (1790), 11 East, 375 n.

(*h*) PATTESON, J., in *British Museum Trustees* v. *Finnis* (1833), 5 C. & P. 460.

(*i*) LITTLEDALE, J., in *Barraclough* v. *Johnson* (1838), 8 A. & E. 99. But *cf.* Lord DENMAN, C.J.: "A gate being kept across it is also a circumstance tending to show that it is no public road, but not a conclusive one; for a road may have originally been granted to the public, reserving the right of keeping a gate across it to prevent cattle straying" (*Davies* v. *Stephens* (1836), 7 C. & P. 570).

of fact, and is left to the jury as such; but in some cases it bears a close resemblance to the fiction of a lost grant, by which the courts formerly quieted long enjoyment of private easements. For practical purposes it has superseded prescription with reference to highways (*k*); for, though a highway may still exist by prescription, the Prescription Act does not apply to highways, and a prescriptive highway strictly means a highway which has existed from the beginning of legal memory, *i.e.*, from the time of Richard I.

Where there is a public footway and adjacent land along the same line as the footway, but increasing in width, is laid out by the owner of the soil as a way for carriage traffic, even for private carriage traffic, the presumption of law, in the absence of evidence to the contrary, is that the owner has dedicated to public use as a footway all the space that he has in fact devoted to traffic (*l*). Where there was a lane of irregular shape, varying in width from 20 to 60 feet, used as an occupation road, and over which there was a public footpath, and there was at one end of the lane a gate, and a stile by the side of the gate 3½ feet wide, and a similar gate and stile at the other end, and a similar gate and stile also about the middle of the lane, and at one part timber was deposited, and at another manure, it was held that although the public had walked over the whole lane between the fences, they did so by permission, and not as of right, and that the public right was limited to a footpath about 4½ feet wide (*m*).

The presumption of dedication from user must not be confused with the gradual acquisition of a right. "It is not correct to say that the early user established an inchoate right capable of being subsequently matured. . . . The proper way of regarding these cases is to look at the whole of the evidence together, to see whether there has been such a continuous and connected user as is sufficient

(*k*) Lord BLACKBURN, in *Mann* v. *Brodie* (1885), 10 App. Cas. 386.

(*l*) *Att.-Gen.* v. *Esher Linoleum Co., Limited*, [1901] 2 Ch. 647; applied in *Att.-Gen.* v. *Hemingway* (1916), 81 J. P. 112.

(*m*) *Ford* v. *Harrow Urban District Council* (1903), 88 L. T. 394. RIDLEY, J., before whom the case was tried, did not think that there was any presumption that the public right extended between the fences. "It is argued that under these circumstances, with an occupation road varying its tracks for the needs of the farmer down this irregular lane, if there is also a public footpath passing through that lane, there is a presumption that the public footpath extends between the fences. I think there is not such a presumption, and I think also that the old principle which has been applied to such presumptions in the case of public highways need not be altered in the slightest degree" (*ibid.*, p. 397).

In *Hoare* v. *Lewisham Borough Council* (1901), 17 T. L. R. 774; affirmed, Court of Appeal (1902), 87 L. T. 464, and 18 T. L. R. 816, it was found as a fact that a "draw-up" in front of a publichouse never formed part of a highway, and never was dedicated to the public. And see *King's Lynn Rural District Council* v. *Blade* (1914), 136 L. T. Jo. 564.

to raise the presumption of dedication; and the presumption, if it can be made, then is of a complete dedication, coeval with the early user. You refer the whole of the user to a lawful origin rather than to a series of trespasses" (*n*).

Presumption from Maintenance and Repair.—The fact that a way is maintained and repaired at the public expense raises a presumption that the public have a right over it, and supports the presumption arising from public user. "I think that if places are lighted by public bodies, this is strong evidence of the public having a right of way over them" (*o*). Where a mews or court, which was not a thoroughfare, had been for seventy or eighty years lighted, cleansed, and paved by the parish, and the owners of the soil were not shown to have offered any obstruction to the free use of the mews by the public, MALINS, V.-C., thought that these were overwhelming reasons for considering that there had been a complete dedication of the site of the mews to the public (*p*). A road was made under a Turnpike Act which expired in 1818 (the whole line of road authorised by the Act never having been completed), and was used by the public and repaired by the parish both before and after the expiration of the Act; the court held there was evidence that the road in question had become a highway, and was repairable by the parish (*q*).

On the other hand, absence of repair by the parish has been held admissible, as a fact tending to show that there is no public right. "The fact of no repairs having been ever known to be done to the road by the parish, is a circumstance from which you may infer that it is not a public road, inasmuch as the parish is bound to repair all public roads" (*r*). So the fact that repairs have been done by private individuals is admissible, as tending to show that the way is not public. "Repairs done by an individual are primâ facie rather to be ascribed to motives of private interest in

(*n*) Jud. Com., *Turner* v. *Walsh* (1881), 6 App. Cas. 636; *Sheringham Urban District Council* v. *Halsey*, *ante*, p. 36. Herein English law and Scots law differ. See *Mann* v. *Brodie* (1885), 10 A. C. 378, and *Folkestone Corporation* v. *Brockman* (1914), A. C. 338, *per* Lord KINNEAR, at p. 353.

(*o*) Lord ELLENBOROUGH, C.J., in *Rex* v. *Lloyd* (1808), 1 Camp. 260. In this connection, however, it must be remembered that local authorities have now power under the Public Health Act, 1875, to light "streets," an expression which embraces places in which the public have no rights whatever. The fact of lighting is therefore now less cogent.

(*p*) *Vernon* v. *Vestry of St. James, Westminster* (1880), 16 Ch. D. 449. See also *Att.-Gen.* v. *Chandos Land and Building Society*, *ante*, p. 8.

(*q*) *R.* v. *Thomas* (1857), 7 El. & Bl. 399. See also *Thomas* v. *Williams* (1860), 24 J. P. 821; *Att.-Gen.* v. *Mayor, etc of Richmond*, *ante*, p 8.

(*r*) Lord DENMAN, C.J., in *Davies* v. *Stephens* (1836), 7 C. &. P. 570 *cf.* ERLE, C.J., in *Mildred* v. *Weaver* (1862), 3 F. & F. 34.

his own property, than as done for the public benefit" (*s*). These facts are now somewhat less cogent, because, in consequence of the operation of the Highway Act, 1835, s. 23, a road may now be dedicated to the public without any liability to repair it being cast on the parish, but they are still admissible in evidence.

Further, evidence as to repair by the parish may be rebutted by any facts which explain such repairs in a manner inconsistent with the inference of the public right. Thus, where a road led from a highway to the gates of a park, through which there was a public bridlepath, terminating at another highway, and was used by the public, but only for the purpose of seeking admission to the park, and the parish had repaired it from time immemorial, the court held that there was no sufficient evidence of dedication of the road as a carriageway. "The repair of the road by the parish is a strong fact, but that is weakened by the fact that there was a bridlepath through the park which would require some amount of repair to the road" (*t*). Where the defendant in an action of trespass relied on acts of repair done by the surveyor of the township as proving a public right of way over the plaintiff's land, and the plaintiff tendered evidence of an agreement between his steward and the township surveyor that the latter should repair the road in consideration of repayment by the steward, the court held the evidence admissible, as tending to prove that the road was not repaired as a township road (*u*). But the mere fact that there is no evidence that the inhabitants have ever repaired the way, though relevant on the question whether the way is a public way or not, does not rebut the inference based on public user (*uu*).

Presumption from User.—The presumption arising from long uninterrupted user of a way by the public is so strong as to dispense with all inquiry into the actual intention of the owner of the soil, and it is not even material to inquire who the owner of the soil was. A road, originally set out as a private road by Inclosure Commissioners, had been used by the public without interruption for fifty years. The jury were asked whether the user by the public was sufficient to show an intention on the part of the owner, whoever he might be, to dedicate. The court thought this a proper question, and Lord DENMAN, C.J., said: "The law, as lately laid down, has led the courts into unimportant inquiries as to there being an intention to dedicate a road to the public. It

(*s*) Lord ELLENBOROUGH, C.J., in *Rex* v. *Northampton* (1814), 2 M. & S. 262.

(*t*) WIGHTMAN, J., in *R.* v. *Hawkhurst* (1862), 7 L. T. (N.S.) 268.

(*u*) *Ferrand* v. *Milligan* (1845), 7 Q. B. 730.

(*uu*) *Att.-Gen.* v. *Watford Rural District Council*, [1912] 1 Ch. 417, *per* PARKER, J., at p. 433.

seems to me that if the jury find that there has been a long user as a public road, I am not at liberty to inquire into the question whether there was such an intention or not. . . . If persons have found a road used as public, and have built a town by it, are we to enter into the question of whether it was intended to dedicate the road or not? On the contrary, I think that the mere fact of the enjoyment of a public road, for a great length of time, ought to be perfectly conclusive of such an intention, and it is immaterial to inquire in whom the soil was vested as owner" (*x*). "The law is clear that if there has been a public uninterrupted user of a road for such a length of time as to satisfy the jury that the owner of the soil, whoever he might be, intended to dedicate it to the public, this is sufficient to prove the existence of a highway, though it cannot be ascertained who the owner of it has been during the time the road has been used by the public" (*y*). In *Att.-Gen.* v. *Hemingway* (*yy*), SARGANT, J., said: "The test is put by MAULE, J., whether they (the persons who own land) had so acted as to induce a reasonable belief on the part of the public that the road in question was a highway."

But proof of such long and uninterrupted public user, though it is evidence from which dedication may be inferred, does not create a *praesumptio juris* in favour of dedication, which, unless rebutted, must prevail (*z*). The decisive question is "whether such use as has been proved is to be ascribed to tolerance or right" (*zz*).

The length of time during which the user must exist in order to raise the presumption varies with circumstances. In a case mentioned by Lord KENYON, C.J. (*zzz*), a period of six years was held sufficient. Where a new street, which was neither paved nor lighted, had been used as a public road for four or five years, the court thought the jury were warranted in presuming that it was used with the full assent of the owners of the soil (*a*). "User by the public over land belonging to a non-resident owner is less cogent evidence of dedication than where the user is necessarily brought to his personal knowledge; and further, the weight to be attached to user must depend somewhat upon the nature of the

(*x*) *R.* v. *East Mark* (1848), 11 Q. B. 877.

(*y*) WILLIAMS, J., in *Dawes* v. *Hawkins* (1860), 8 C. B. (N.S.) 848. In thinly populated districts slight user may be sufficient (*Macpherson* v. *Scottish Rights of Way, etc. Society* (1888), 13 App. Cas. 744).

(*yy*) (1917), 81 J. P. 112, at p. 115.

(*z*) *Folkestone Corporation* v. *Brockman*, [1914] A. C. 338, *per* Lord ATKINSON, at p. 366.

(*zz*) *Macpherson* v. *Scottish Rights of Way, etc. Society* (1888), 13 A. C. 744, at p. 747, and *Att.-Gen.* v. *Sewell* (1918), 35 T. L. R. 193.

(*zzz*) *Rugby Charity Trustees* v. *Merryweather* (1790), 11 East, 375 n.

(*a*) *Jarvis* v. *Dean* (1826), 3 Bing. 447.

land itself, whether it is cultivated land or rough and unproductive land" (*b*). "The use and enjoyment from which it (dedication) can be inferred must be use and enjoyment as of right known to the owner and acquiesced in by him" (*bb*). User which is in its inception illegal is not legalised by lapse of time (*c*).

In *R.* v. *Petrie* (*d*) the evidence showed that a street had been laid out and *de facto* used as a highway for six or eight years, when the defendants obstructed and partially inclosed it for more than sixteen years; the jury were directed that they might infer a dedication from the evidence of user, and the Court of Queen's Bench upheld the direction. COLERIDGE, J., said: "I take the principle to be that when there is satisfactory evidence of such a user of the road, as to time, manner, and circumstances, as would lead to the inference that there was a dedication by the owner of the fee, if it was shown who he was, it is not necessary to inquire who the individual was from whom the dedication, necessarily inferred from such a user, first proceeded. It must frequently happen that a prosecutor is in entire ignorance of the state of the title to lands over which a right of way exists. All that he knows, and all that he can reasonably be asked to prove, is that the right has been enjoyed by the public; if he does give satisfactory evidence of a sufficient user, the proper inference is that there was a dedication from a person who could dedicate."

Where the facts of evidence of an intention to dedicate are as consistent with the hypothesis of a dedication as with that of no dedication, then, as there is no balance of probability in favour of dedication, it must be taken that there is no dedication (*e*).

Hearsay evidence is admissible to prove by reputation matters of public interest, as, for example, to prove that a particular road is a public highway (*f*), but not to prove particular facts as to the boundaries of the highway. Where, therefore, a question of public

(*b*) COZENS-HARDY, J., in *Chinnock* v. *Hartley Wintney Rural District Council* (1899), 63 J. P. 328.

(*bb*) *Webb* v. *Baldwin* (1911), 75 J. P. 564, *per* PARKER, J., at p. 565. And see *Folkestone Corporation* v. *Brockman*, *supra*.

(*c*) *Sheringham Urban District Council* v. *Halsey* (1904), 68 J. P. 395.

(*d*) (1855), 4 El. & Bl. 737.

(*e*) BYLES, J., in *Dawes* v. *Hawkins* (1860), 8 C. B. (N.S.) 860; BRUCE, J., in *Piggott* v. *Goldstraw* (1901), 65 J. P., p. 261.

(*f*) "In a matter in which all are concerned, reputation from any one appears to be receivable; but of course it would be almost worthless unless it came from persons who were shown to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. In the case of public rights, in the strict sense, the want of proof of the persons from whom the hearsay evidence is derived being connected with the subject in question appears to affect the value and not the admissibility of the evidence" (PARKE, B., delivering the judgment of the Court of Exchequer in *Crease* v. *Barrett* (1835), 1 C. M. & R., at p. 929).

way was in issue, the declarations of a deceased occupier of land made whilst planting a tree, stating that he planted it to show the boundary of a road, are not evidence of the public right, for it is not a statement of general reputation but of particular fact (*g*). A map attached to an old inclosure award, showing an ancient highway in existence when the award was made is good evidence of reputation that there was a public highway in the direction shown on the map, but it is not good evidence of the boundaries of the highway (*h*). A public meeting called for the purpose of considering

(*g*) *R.* v. *Bliss* (1837), 7 Ad. & E. 550.

(*h*) *R.* v. *Berger*, [1894] 1 Q. B. 823. The admissibility in evidence of a map showing the direction of a highway depends upon the manner in which the map was prepared, and what is in fact shown on the map, as to which see *Pollard* v. *Scott* (1790), Peake, 26; *Pipe* v. *Fulcher* (1858), 1 E. & E. 111; *Vyner* v. *Wirral Rural District Council* (1909), 73 J. P. 242; *Rex* v. *Norfolk County Council* (1910), 26 T. L. R. 269. In *Vyner* v. *Wirral Rural District Council*, Lord ALVERSTONE, C.J., said: "Although the judgment in the case of *Pipe* v. *Fulcher*, *supra*, was that the map was held to be inadmissible, it was really held to be inadmissible because it was not evidence of reputation at all. Of course, there is the point to be considered as to whether the maps were made by a person who knew anything about the matter. That goes more to the weight of the evidence than to its admissibility, except that if there was no evidence that a map was made by a person of any responsibility at all, it would be inadmissible. But taking these maps to be maps which have been in proper custody for a long time, and have been regarded as being truthful maps by the persons who have been making use of them, if it is proved that they have been used, I do not think that they are inadmissible simply on the ground that the proper person did not make them. I think the proper way of dealing with this part of the case is that the maps ought to be before the court for what they are worth." WALTON, J., said: "It appears to me that the maps, to be evidence, must amount to declarations by a deceased person or persons as to a matter of public interest, that is to say, as to the existence in this particular case of a highway, which means, of course, a public highway." A tithe map and an award (*Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 188; *Fuller* v. *Chippenham Rural District Council* (1914), 79 J. P. 4); an ordnance map (*ibid.*); the deposited plans and book of reference of a proposed railway (*ibid.*; *Vyner* v. *Wirral Rural District Council*, *supra*); and maps made by the King's geographer, or persons of repute, produced from proper custody (*Rex* v. *Norfolk County Council*, *supra*; *Trafford* v. *St. Faith's Rural District Council* (1910), 74 J. P. 297; *Vyner* v. *Wirral Rural District Council*, *supra*), have been admitted. As to the tithe map, see 6 & 7 Will. 4, c. 71, s. 64; it is not admissible in a case of disputed boundaries between private owners (*Wilberforce* v. *Hearfield* (1877), 5 Ch. D. 709); nor as evidence of the exact extent of a public right of way, though it may be evidence that certain lands were not, at the time when it was made, inclosed or used for such purposes as to make them tithable (*Copestake* v. *West Sussex County Council* (1911), 75 J. P. 465). An ordnance map was admitted in *Att.-Gen.* (*Aethwy Rural District Council*) v. *Meyrick* (*Sir George*) *and Jones* (*John*) (1915), 79 J. P. 515, as indicating what physical features its makers did or did not see at the time. Similarly in *Att.-Gen. and Croydon Rural District Council* v. *Moorsom-Roberts* (1908), 72 J. P. 123. And see *North Staffs Rail. Co.* v. *Hanley Corporation* (1909), 8 L. G. R. 375; *Giant's Causeway, Ltd.* v. *Att.-Gen.* (1905), 118 L. T. Jo. 544; *Collis* v. *Amphlett*, [1918] 1 Ch. 232; [1920] A. C. 271. See further hereon *Att.-Gen.* v. *Horner* (No. 2), [1913] 2 Ch. 140, where part of the above dictum of Lord ALVERSTONE in *Vyner's case*, *supra*, was questioned, and the decision in *Trafford's case*, *supra*, was doubted; and see *Clode* v. *L. C. C.*, [1914] 3 K. B. 852.; [1915] A. C. 947.

about repairing a way, at which several persons present signed a paper that it was not a public way, is evidence, though slight, against the right, there being at the time no litigation on the subject (*i*). And an indictment against an adjoining township for non-repair of a portion of highway in continuation of the way in question, either submitted to or prosecuted to conviction, is admissible evidence for the purpose of proving that the way in question is a highway (*j*).

Rebutting Evidence. — *Permission or interruption.* — Evidence of public user may be rebutted by showing that the user was not of right but merely by permission or licence of the owner, or, on the other hand, that the owner resisted and interrupted such user, either fact being relevant to negative the presumption of an *animus dedicandi*. In appreciating the true effect of acts of ownership as rebutting an intention to dedicate, it is important to observe whether they are referable to the ownership of the soil rather than to an intention to exclude the passage of the public. In the former case they may tend to confirm the owner's general acquiescence in the continuous user of the surface by the public for highway purposes (*k*).

Where a person using the way makes a payment to the owner for leave to use it, it is a strong piece of evidence against the right, though not necessarily conclusive, for "it might be that a man was not in a position to enter into litigation to enforce the right" (*l*). But where an owner allows a particular class of persons to use a way, user by them may be operative as user by the public, unless he takes care to communicate to such persons the fact that the user is only by his permission (*m*).

"A single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment" (*n*). Where there was evidence that many persons were in the habit of going diagonally across the defendant's garden for the purpose of making a short cut from a street to the main road, and the defendant swore that they had no right to go there, and that he had repeatedly sent persons back, the court held there was no evidence for the jury of a public footway (*o*).

(*i*) *Barraclough* v. *Johnson* (1838), 8 Ad. & E. 99.

(*j*) *R.* v. *Brightside Bierlow* (1849), 13 Q. B. 933. And see *Petrie* v. *Nuttall* (1856), 11 Exch. 569.

(*k*) *Coats* v. *Herefordshire County Council*, [1909] 2 Ch. 579.

(*l*) ERLE, C.J., in *Mildred* v. *Weaver* (1862), 3 F. & F. 30.

(*m*) *R.* v. *Broke* (1859), 1 F. & F. 514.

(*n*) PARKE, B., in *Poole* v. *Huskisson* (1843), 11 M. & W. 827; COZENS-HARDY, J., in *Chinnock* v. *Hartley Wintney Rural District Council* (1899), 63 J. P. 327.

(*o*) *Stone* v. *Jackson* (1855), 16 C. B. 199.

In another case, where evidence had been given of public user, BACON, V.-C., expressed the opinion that the obstruction of a locked gate, post, and chains, which could not be passed even by foot passengers otherwise than by getting under them, a notice board, and the active personal turning back and threat of prosecution, rebutted any presumption of dedication to the public (*p*). Where notice boards had been affixed in a lane, cautioning persons against using it as a public carriage road, Lord ABINGER, C.B., thought it might be presumed that this had been done with the consent of the owners of the soil (*q*).

Rebutting Evidence.—*Character of the* Locus in quo.—Evidence of user may be rebutted, or at least weakened in some cases, by evidence of the character of the *locus in quo*.

The fact that a path goes through a stable-yard is strong to raise a presumption against an intention to dedicate (*qq*).

Where a claim is set up to an ancient public footpath through a wood, it may be shown that the public have merely wandered about the wood as they pleased; that there is no made path, but only a track, never repaired, and in wet weather hardly passable (*r*). Similarly, if there is no definite enduring trackway, but merely temporary and transitory tracks, this is strong evidence against a public right of way (*s*). In each of these cases the question was left to the jury. Where there was an open tract of land on the seashore above mean high-water mark, and persons going along the foreshore habitually walked over it as they pleased when the tide was in, a Divisional Court thought there was no evidence on which a jury could find that it was a highway (*t*). Similarly where rough tracks led to the seashore in an unfrequented part of the coast, the evidence was held insufficient to establish a dedication (*u*). Mere user by the public of an open space is not sufficient evidence of an intention by the owner to dedicate the whole surface of the open space to the public (*x*). In 1869 a building, erected

(*p*) *Healey* v. *Corporation of Batley* (1875), L. R. 19 Eq. 375.

(*q*) *Poole* v. *Huskisson* (1843), 11 M. & W. 827.

(*qq*) *Thornhill* v. *Weeks* (1914), 78 J. P. 154, *per* ASTBURY, J., at p. 156.

(*r*) *Chapman* v. *Cripps* (1862), 2 F. & F. 864.

(*s*) *Schwinge* v. *Dowell* (1862), 2 F. & F. 849.

(*t*) *Maddock* v. *Wallasey Local Board* (1886), 55 L. J. Q. B. 267.

(*u*) *Behrens* v. *Richards*, [1905] 2 Ch. 614.

(*x*) *Robinson* v. *Cowpen Local Board* (1893), 62 L. J. Q. B. 619; 63 L. J. Q. B. 235; *Tyne Improvement Commissioners* v. *Imrie* (1899), 81 L. T. 174. See also ABBOT, C.J., in *Blundell* v. *Catterall* (1821), 5 B. & Ald., p. 315; "Many of those persons who reside in the vicinity of wastes and commons walk or ride on horseback, in all directions over them, for their health or recreation, and sometimes, even in carriages, deviate from the public paths into those parts which may be so traversed with safety. In the neighbourhood of some frequented watering-places this practice prevails to a very

upon land leased from a corporation, owners of the freehold, was built with recessed windows or embayments on the ground floor, and the main wall of the building on either side projected beyond the embayments and overhung them above the windows, being some five feet in length and ten or eleven inches deep. In 1899 the tenant of the house reconstructed these windows so as to cause them to project three inches beyond the main wall and so as to fill up the embayments. From 1869 until the reconstruction in 1899 the paving of the embayments was not distinguishable or marked off from the footway, and had been cleaned and repaired by the corporation as highway authority, and the embayments were used by the public, without objection by the lessee, in passing in and out of the embayments. The tenant filled up the embayments by building. It was held that neither the user by the public nor the fact that the paving of the embayments was not marked off from the paving of the footway and was cleaned and repaired by the corporation, was any evidence of the dedication of the embayments to the public use as part of the highway (*y*). "If the owner of a piece of land leaves a portion of it unbuilt upon for the purpose of his own convenience and for the use of his customers, the user of the land by his customers is no evidence of dedication to the public, and if he is not able to exclude the public without at the same time excluding his customers or those whom he hopes to attract as customers, the user by the public does not necessarily raise a presumption of dedication" (*z*).

The user may be explained as a mere deviation by the public from an adjoining highway. "If a person lets people go over his land, and use it as a way, that is one thing; but if there is an old way near my land, and, by my fences decaying, the public come on my land, that is no dedication" (*a*).

great degree, yet no one ever thought that any right existed in favour of this enjoyment, or that any justification could be pleaded to an action at the suit of the owner of the soil." COZENS-HARDY, J., in *Llandudno Urban District Council* v. *Woods*, [1899] 2 Ch., p. 708; "The public have no right at common law to enter upon the foreshore, where dry, except for the purposes of navigation or fishing. . . . The public are not entitled to cross the shore even for purposes of bathing or amusement. The sands on the seashore are not to be regarded as, in the full sense of the word, a highway." A right to use the foreshore for bathing or amusement may, however, be gained by prescription or custom. In many watering-places rights have been acquired over the foreshore by local Acts, leases and other instruments, and byelaws are in force for better regulating the user. *Cf., e.g., Gray* v. *Sylvester* (1897), 61 J. P. 807; *Parker* v. *Bournemouth Corporation* (1902), 66 J. P. 440; *Williams* v. *Weston-super-Mare Urban District Council* (1908), 72 J. P. 54; *Moorman* v. *Tordoff* (1908), 72 J. P. 142.

(*y*) *Piggott* v. *Goldstraw* (1901), 65 J. P. 259.

(*z*) BRUCE, J., *ibid.*, p. 261; *Hoare* v. *Lewisham Borough Council*, *ante* p. 37.

(*a*) PATTESON, J., in *British Museum Trustees* v. *Finnis* (1833), 5 C. & P. 460.

In a leading case, where a highway was claimed over the plaintiff's land, it appeared that there had been a highway over land adjoining the *locus in quo*, the whole being an open common; for many years the highway was obstructed, and part of it enclosed, and during twenty years of that time the public had deviated over the plaintiff's land. Subsequently, an entirely new road was laid out by an adjoining proprietor, and the use of the substituted track over the plaintiff's land was discontinued; and afterwards the obstruction to the old road was removed and the original line of way was reopened to the public. On these facts the court held that the user being explained as mere deviation on account of the obstruction, there was no reasonable evidence on which a jury could infer that a highway had been dedicated over the *locus in quo* (*b*). WILLIAMS, J., however, dissented, thinking that if the owner of the soil had himself obstructed the old highway, he must have intended to dedicate the substituted way, and that in any case the acquiescence of the owner of the soil in the continuance of the obstruction, and the uninterrupted public user of the substituted road, afforded evidence of an intention to dedicate, which should have been laid before the jury.

When the way claimed is an artificial structure, manifestly designed for another purpose, such as an embankment erected as a protection against inundation, stronger evidence of user than in the case of ordinary roads is required to establish the public right (*c*).

The fact that the road was formerly a private or occupation road makes it necessary "that the degree of user by the public should be more narrowly watched than in a case where the way had never been private" (*d*). "No doubt the fact that the origin of the way was that it had been set out under an award, and that certain private persons had the right to use it, would have been of great weight with the jury in leading them to the conclusion that there had been no dedication to the public" (*e*). On the other hand, the fact that so many people are entitled to use the way that it would hardly be worth the owner's while to discriminate, may be an argument in favour of the inference that he intended to dedicate (*f*).

(*b*) *Dawes* v. *Hawkins* (1860), 8 C. B. (N.S.) 848; *R.* v. *Oldreeve* (1868), 32 J. P. 271.

(*c*) *Cf.* BLACKBURN, J., in *Greenwich Board of Works* v. *Maudslay* (1870), L. R. 5 Q. B. 397; PHILLIMORE, J., in *Tyne Improvement Commissioners* v. *Imrie* (1899), 81 L. T. 174.

(*d*) BLACKBURN, J., in *R.* v. *Bradfield* (1874), L. R. 9 Q. B. 552. And see *Holloway* v. *Egham Urban District Council* (1908), 72 J. P. 433; and *Fuller* v. *Chippenham Rural District Council* (1914), 79 J. P. 4.

(*e*) MELLOR, J., in *R.* v. *Bradfield*, *supra*.

(*f*) MAULE, J., in *Grand Surrey Canal Co.* v. *Hall* (1840), 1 M. & G. 392.

Where a lane originally formed part of the waste of a manor, and was in 1817 set out as a private occupation road under an Inclosure Award, and in 1855 a railway was constructed across the lane, since when the railway line had been permanently fenced on both sides, and there was some evidence of user of the lane by the public for all purposes prior to 1855, and since that date as a footway, NEVILLE, J., held that this user prior to 1855 was insufficient to raise the presumption of dedication to the public, that the construction of the railway line across the lane was strong evidence against any intention to dedicate, and that the subsequent user was immaterial (*g*).

Rebutting Evidence of Title.—The evidence of user may be rebutted by evidence of the title to the land.

Settled Land.—If evidence is given that during the whole course of the user the land has been in strict settlement, so that there never was an owner of the fee capable of dedicating, the inference of an intention to dedicate cannot be made. "The onus lies on the person who seeks to deny the inference from such user to show negatively that the state of the title was such that dedication was impossible, and that no one capable of dedicating existed" (*h*). But if, in answer to such evidence, it is shown that at any time during the continuance of the user, the land was, for however short a time, out of settlement, the presumption as to dedication is again let in, and the jury may find that there was a dedication by whoever was the owner of the fee at that time: it is not necessary to inquire who was, in fact, the owner of the fee. In one case, public user was proved from 1827 or 1828 to 1836, when it was interrupted by the defendants for more than sixteen years; it was shown that the land had been settled in 1823 in strict settlement on a tenant for life with power to grant building leases, and for the trustees of the settlement to sell with consent of the tenant for life, and that the first tenant in tail was still an infant at the time of the trial. The tenant for life, however, who was called as a witness, stated that the property had been sold in 1828 by the trustees of the settlement, and the defendants admitted that they had acquired the fee in 1853. It was, therefore, at least possible that there was in 1829 an owner of the fee capable of dedicating; and the jury were directed that they might infer a dedication in 1829, by such owner, whoever he was (*i*). Land was in settlement from 1810 down to the commencement of the

(*g*) *Holloway* v. *Egham Urban District Council* (1908), 72 J. P. 433.

(*h*) CROMPTON, J., in *R.* v. *Petrie*, *infra*; WILLS, J., in *Eyre* v. *New Forest Highway Board* (1892), 56 J. P. 517. And see *Paris* v. *Lymington Rural District Council* (1911), 75 J. P. Jo. 88.

(*i*) *R.* v. *Petrie* (1855), 4 El. & Bl. 737.

action. The evidence as to user of a public right of way went back to 1836; but the judge upon the evidence before him refused to draw the inference that there was a dedication before 1810 (*k*). A county council, after an inquiry under s. 10 of the Highways and Locomotives (Amendment) Act, 1878, found as a fact that a footpath was a highway in 1851, but declined to order its repair, because there had been no formal adoption since 1835 and they were not satisfied that it was a highway in 1835. The council also found that the land had been in strict settlement since 1628 under a private Act of Parliament. The Divisional Court held that as the council had found as a fact that the footpath was a highway in 1851, and as the successive owners of the land across which the footpath ran were debarred by the private Act from dedicating highways across it from 1628 to the present day, the footpath must have been dedicated before 1628 and therefore before 1835, and therefore the rural district council were liable to repair it (*kk*). A tenant for life and remainderman, both of whom are *sui juris*, may together dedicate (*l*). Accordingly, where land was settled and was under the control and management of the remainderman, and a new road was laid out by him across the land and was treated by him as a public road, and the road had been used by the public for more than sixty years in such a way as would have compelled the court, as against the owner of the fee, to infer dedication, but there was no evidence that the tenant for life, who had been dead for fifty years, had any knowledge of the user of the road by the public, the court inferred from the facts that there had been dedication to the public by the tenant for life and remainderman (*l*).

Copyholds.—Where a public right of way is claimed over copyhold land, it does not lie on the persons asserting such right to give evidence that the lord has had possession; and the inference of dedication from user will be raised against the lord, unless he succeeds in rebutting it. "It is evident in many cases that the copyhold land may, for a certain space of time, be in the hands of the lord. It may be in his hands during an interval between a surrender and an admission. It may be in his hands by means of seizure *quousque;* and the plaintiff on whom rests, according to *R.* v. *Petrie* (*i*), and according to my view of the law, the burden of showing that dedication could not have been made, has offered no evidence to that effect" (*m*).

(*k*) WALTON, J., in *Roberts* v. *James* (1902), 18 T. L. R. 777, affirmed C. A. (1903), 89 L. T. 282; *cf. Winterbottom* v. *Lord Derby, infra; Att.-Gen.* v. *Antrobus*, [1905] 2 Ch. 188.

(*kk*) *R.* v. *West Sussex County Council; ex parte Arundel Corporation* (1921), 85 J. P. 162.

(*l*) *Farquhar* v. *Newbury Rural District Council*, [1909] 1 Ch. 12.

(*m*) FRY, J.: *Powers* v. *Bathurst* (1880), 49 L. J. Ch. 294.

Leasehold.—A lessee may make a valid dedication with the acquiescence of his lessor (*n*). Where there had been public user of a way for nearly seventy years, during the whole of which period the land had been under lease, and the reversioner contended that from such user dedication could not be presumed against him or his ancestors, the jury were directed that they might infer a dedication by his ancestor at a time antecedent to the lease (*o*). Where there had been user, as far back as living memory went, of a street which was not a thoroughfare, but the land had been under lease from 1719 to 1818, and the reversioner, in 1820, entered and erected a fence to exclude the public, it was held that the proper question for the jury was whether there had been a dedication to the public before 1719, or subsequently to that period, with the consent of the owner of the fee (*p*). But the reversioner, on the expiration of the lease, must assert his right without delay. Thus, when it appeared that there had been user for fifty years prior to 1788, the land having been under a long lease till 1780, Lord KENYON, C.J., thought that as the freeholders had permitted the public to use the way during the eight years after the expiry of the lease, it was too late in 1788 to assert their right by putting up a bar (*q*). Where certain courts were in lease or trust without power to dedicate from 1782 to 1887, and the owner from the later year down to the dispute in the action had done nothing to exclude the public, and the courts had been repaired, lighted, and cleansed, in some cases for over 100 years, and others about 80 or 90 years, by the local authority, WARRINGTON, J., held that there had been a dedication since 1887 (*qq*).

If the land has been in the occupation of a succession of tenants during the period of user, the assent of the freeholder may be presumed. "After a long lapse of time, and a frequent change of tenants, from the notorious and uninterrupted use of a way by the public, I should presume that the landlord had notice of the way being used, and that it was so used with his concurrence" (*r*). "All the acts of user seem to have taken place during the occupation of tenants, and their submitting to them cannot bind the owner of the land without proof of his also having been aware of it; but still, if you think that such acts of user went on for a great length of time, you may presume that the owner had been made aware of them" (*s*).

(*n*) Lord DAVEY: *Simpson* v. *Att.-Gen.*, [1904] A. C. at p. 507.

(*o*) *Winterbottom* v. *Lord Derby* (1867), L. R. 2 Ex. 316; *Shearburn* v. *Chertsey Rural District Council* (1914), 78 J. P. 289.

(*p*) *Wood* v. *Veal* (1822), 5 B. & A. 454.

(*q*) *Rugby Charity Trustees* v. *Merryweather* (1790), 11 East, 375 n.

(*qq*) *Att.-Gen.* v. *Chandos Land and Building Society*, *ante*, p. 8.

(*r*) Lord ELLENBOROUGH, C.J., in *Rex* v. *Barr* (1814), 4 Camp. 16.

(*s*) Lord DENMAN, C.J., in *Davies* v. *Stephens* (1836), 7 C. & P. 570.

In the case of a building lease, assent on the part of the freeholders to the making of new streets, and the dedication of them to the public, will readily be presumed (*t*), though the intention to make new streets, as shown, for instance, on a plan endorsed on a lease, does not necessarily mean that they are to be streets dedicated to the public in contradistinction to private streets for the exclusive use of the lessees of the houses to be built upon the lands demised (*u*).

Where a lease gave authority to the lessee to build an arch over the way, Sir J. ROMILLY, M.R., thought that while this lease remained in existence no dedication from user could be presumed against the owner of the property (*x*).

Mortgages—It is doubtful whether public user while a mortgagor is in possession can justify the inference of dedication unless the consent of the mortgagee is shown or can be presumed (*xx*).

Scope of Right inferred from User.—Several other points require to be noticed in connection with the inference drawn from public user.

Width of Highway.—The width of the way which has been dedicated, or is presumed to have been dedicated, is a question of fact. All the ground that is between the fences is presumably dedicated as highway unless the presumption is rebutted by the nature of the ground or other circumstances. "In the case of an ordinary highway, although it may be of a varying and unequal width, running between fences, one on each side, the right of passage or way, primâ facie, and unless there be evidence to the contrary, extends to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers." This proposition, laid down by MARTIN, B., was characterised by the Court of Queen's Bench as a very proper direction (*y*). "The

(*t*) BACON, V.-C., in *Pryor* v. *Pryor* (1872), 26 L. T. (N.S.) 758. On appeal, the lords justices decided that the court had no jurisdiction to decide the question of a right of way, either public or private, on a motion in a partition suit ((1873), 27 L. T. (N.S.) 257).

(*u*) *Espley* v. *Wilkes* (1872), L. R. 7 Ex. 298.

(*x*) *Vestry of Bermondsey* v. *Brown* (1865), L. R. 1 Eq. 204.

(*xx*) In *Smith* v. *Wilson*, [1903] 2 I. R. 45, it was suggested that the assent of the owner of a fee farm rent was not essential to dedication by the fee farm grantee.

(*y*) *R.* v. *United Kingdom Electric Telegraph Co.* (1862), 31 L. J. M. C. 166; COCKBURN, C.J., in *Hulton* v. *Hambro* (1860), 2 F. & F., p. 219; JOYCE, J., in *Harvey* v. *Truro Rural District Council*, [1903] 2 Ch., at p. 643; *cf.* also *Nicol* v. *Beaumont* (1884), 53 L. J. Ch. 853. A person on foot has a right to walk on or across any part of the way between the fences (*Boss* v. *Litton* (1832), 5 C. & P. 407; *Cotterill* v. *Starkey* (1838), 8 C. & P. 694; *Pullin v.*

presumption is that, primâ facie, if there be nothing to the contrary, the public right of way extends over the whole space of ground between the fences on either side of the road; that is to say, that the fences may, primâ facie, be taken to have been originally put up for the purpose of separating land dedicated as a highway from land not so dedicated" (*z*). When a public road has been laid down by Inclosure Commissioners, of a width of fifty feet, but only twenty-five feet in the centre had become a *via trita* by usage, the spaces on each side having become overgrown with furze, heath, and fir trees, JAMES, V.-C., held that the right of the public was to have the whole width of the road kept free from obstructions (*a*). Even where a road had been described in an inclosure award as a private road twenty-four feet wide, but had actually been set out sixty feet wide, and the centre of it only had been used by the public as a carriageway, it was held to be a question for the jury whether the road, though originally intended to be private, had been dedicated to and adopted by the public; and Lord TENTERDEN, C.J., expressed a strong opinion that the presumption of dedication ought to extend, primâ facie, to the whole width of sixty feet between the inclosures (*b*). A plan for the laying out of a building estate showed a proposed road bounded on the north by the boundary fence of a park belonging to the district council and having on either side of it dotted lines indicating intended footpaths forming part of the road, which in accordance with the byelaws was of the total width of forty feet. The owner of the estate built houses on the south side of the road overlooking the council's boundary fence, and made up and metalled the road for one half of its width next to the houses. The north half of the road was left unmetalled and untouched. For some three years before action brought the road, which connected two highways, had been uninterruptedly used as a thoroughfare by pedestrians, cyclists and carts, the metalled part being used in preference to the unmetalled part. The House of Lords declined to disturb the decision of the Court of Appeal (affirming JOYCE, J.) that on the evidence there had been a dedication of the whole width of the road as a highway (*bb*).

Where a highway is of varying width and not straight, and

Deffel, post, p. 54. All persons, paralytic as well as others, have a right to walk in the road, and are entitled to the exercise of reasonable care on the part of persons driving carriages along it (Lord DENMAN, C.J., in *Boss* v. *Litton*, *supra*).

(*z*) VAUGHAN WILLIAMS, L.J., in *Neeld* v. *Hendon Urban District Council* (1899), 81 L. T. 405.

(*a*) *Turner* v. *Ringwood Highway Board* (1870), L. R. 9 Eq. 418, and see *Harris* v. *Northants County Council* (1897), 61 J. P. 599.

(*b*) *Rex* v. *Wright* (1832), 3 B. & Ad. 681.

(*bb*) *Rowley* v. *Tottenham Urban District Council*, [1914] A. C. 95.

there are disputes between the highway authority and the adjoining owner as to the boundary of the highway, they (the highway authority and the adjoining owner) may lawfully agree to a straight give-and-take line making the highway of uniform width (*c*).

Where there was a strip about 150 yards long, varying in breadth from a point to which it gradually narrowed at each end to about twenty-two feet at its broadest part, the entire space between the ancient fences, including both the metalled road and the strip, varying from thirty to forty-three feet, and the highway authority had, as far back as living memory extended, used a portion of the strip for the purpose of depositing stone or other material for the repair of the roads, and there was some evidence that the hard road ran at one time on part of the strip, and that not long before 1870 the metalled portion of the road was widened by taking in part of the strip without any objection from the owner of the adjoining land, the court held that the strip formed part of the highway, although the owner had been in possession of part of the strip for the past eighteen years (*d*). A special Act of Parliament empowering a company to purchase and sell strips of land adjacent to a highway (the strips being described in the schedule to the Act as waste or common land) is not evidence that the strips were, in fact, part of the waste so as to rebut the presumption (*e*). Where a highway across the edge of the waste of a manor was separated on one side by a fence from the adjoining land, and on the other side was open to the waste or common, and below the metalled road and the fence was a narrow strip of grass land, the Court of Appeal held that the presumption prevailed that the lord of the manor had dedicated the land up to the fence as part of the highway (*f*). Where there was a triangular piece of land about 1,600 square yards in extent, the distance from the metalled part to the apex of the triangle being about 90 feet and on practically the same level as the highway, it was held that the presumption was not rebutted by the owner of the adjoining land showing that his tenant had from time to time with considerable regularity placed on the piece of land clamps of manure, grazed it with sheep and cattle, used it as a means of passage to the adjoining land, and on one occasion thrashed corn on it and stacked on it the resulting straw, and placed a house on wheels on it for a few days for the accommodation of steam ploughmen, such acts not being inconsistent with the public right of user (*g*). Where

(*c*) *Portsmouth Corporation* v. *Hall* (1907), 71 J. P. 564. See also *R.* v. *Burrell* (1867), 10 Cox C. C. 462.

(*d*) *Harvey* v. *Truro Rural District Council*, [1903] 2 Ch. 638.

(*e*) *Locke-King* v. *Woking Urban District Council* (1898), 62 J. P. 167.

(*f*) *Evelyn* v. *Mirrielees* (1900), 17 T. L. R. 152.

(*g*) *Offin* v. *Rochford Rural District Council*, [1906] 1 Ch. 342.

a tramway had been constructed on a strip of land adjoining a highway in 1811 under an Act of Parliament, and the tramway was regularly used until 1865, and there was evidence by a large number of witnesses going back to 1860 and 1861, and in some cases to dates more remote, that the tramway track had been used where it adjoined the highway by themselves and other members of the public for all highway purposes, except that of driving carts and vehicles; that this had been done openly and continuously without let or hindrance, interference or remonstrances; and that so far as their observation and information went, no distinction had ever been made in user between the tramway track and the grass margin lying by the side of the metalled road, and that since 1865, when the tramway was discontinued, portions had been used for the storage and breaking of stones for highway repairs without protest, it was held that the strip had been dedicated as part of the highway. In this case the owner proved various acts since 1865 over the strip, such as preventing an adjoining owner inclosing a piece of the land, preventing the removal of ballast from the centre of the old track, letting the herbage, and permitting persons at other times to cut the grass, but those were held not to be inconsistent with the public right (*h*).

Circumstances may, however, rebut the presumption or show that it never existed. In *Neeld* v. *Hendon Urban District Council* (*i*), the presumption was rebutted by evidence of acts of ownership, such as permission to inclose the strip followed by inclosure, and a licence to remove soil followed by removal, openly and without interruption. In *Friern Barnet Urban District Council* v. *Richardson* (*k*), it was rebutted by evidence of an entry in the court rolls of the manor that the strips were waste belonging to the manor, and that a tenant was admitted in 1862 subject to fines, and between 1862 and 1869 there were several dealings with the strips and in each case they were treated as private property. In *Countess of Belmore* v. *Kent County Council* (*l*), there was evidence that, as far back as living memory went, the adjoining owners or their predecessors in title used and enjoyed the strip in such a manner and to such an extent as the nature of the strip permitted, and exercised acts of ownership over it, such as grazing cattle over it, placing hurdles on it to protect cattle from a boggy part, raising the level of a private road across it, and ordering gipsies off it, while there was no single act done on the strip by the highway authority until

(*h*) *Coats* v. *Herefordshire County Council*, [1909] 2 Ch. 579. The owner had also let a small piece of the land, 20 feet by 10 feet, for the erection of a parish pound, but this was considered too insignificant an injury to call for active interference.

(*i*) (1899), 81 L. T. 405.

(*k*) (1898), 62 J. P. 547.

(*l*) [1901] 1 Ch. 873.

the acts complained of in the action, and it was held that there was no presumption of dedication of the strip as part of the highway, or, if there was, it was rebutted. In *Plumbley* v. *Lock* (*m*) the presumption was held to be rebutted, when the defendant produced two maps dated respectively 1789 and 1818, both of which showed the length of the road in question (being a road in the New Forest) as part of the open waste, and a deed showing that since 1818 the Crown had granted to private individuals two portions of the uninclosed waste of the forest near to the road, and proved that the grass and herbage were closely cropped throughout the length of the road, and that it communicated at each end with open commons from which it was cut off by gates. But in *East* v. *Berkshire County Council* (*mm*), where there was a strip of land varying from twelve to thirty-three feet in width at the side of the road and separated from the main land of the manor by an ancient fence, and there was evidence both of public user of the whole width including the strip and also of certain acts of ownership by the lord of the manor, it was held that in the circumstances those acts of ownership were not sufficient to rebut the presumption that the highway included the strip. In *Att.-Gen.* v. *Moorsom-Roberts* (*n*) the highway came into existence upon the surface of an already existing close; the presumption did not therefore exist. The fence was not the boundary of the highway, but the boundary separating the two closes (*o*).

A public bridle road and footway fifteen feet wide had been set out by an award which provided that the same should also be used as a private carriage and drift way by the owners of certain adjoining allotments. The owners of the allotments put up a bar across eleven and a half feet of the width of the way in order to preserve their exclusive right to the use of the way as a carriage and drift way. ROMER, J., held that the public had the right to the use of the whole length and breadth as a bridle road and footway, and the owners were wrong in putting up the bar (*p*). If the way runs over open uninclosed country, the space over which the right of passage

(*m*) (1903), 67 J. P. 237.

(*mm*) (1912), 106 L. T. 65.

(*n*) (1908), 72 J. P. 123. Evidence was tendered in this case of acts of public user from which dedication of this strip might be inferred, but the court held the evidence insufficient.

(*o*) See also *Att.-Gen.* v. *Lindsay-Hogg* (1912), 76 J. P. 450; *Hoare* v. *Lewisham Borough Council*, *ante*, p. 37, the case of a "draw-up" to a publichouse; *King's College Cambridge* v. *Uxbridge Rural District Council* (1901), 70 L. J. Ch. 844; *Att.-Gen.* v. *Perry*, [1904] 1 I. R. 247. As to the ownership of waste land adjoining a highway, see *post*, p. 63. As to how far and when the site of a ditch by the side of a highway may form part of it, see the cases collected in the notes to s. 51 of the Highway Act, 1864, *post*.

(*p*) *Pullin* v. *Deffel* (1891), 64 L. T. 134.

extends may not be visibly indicated. "When a highway passes through an inclosed country, it is not the formed road merely, whether pavement, gravel, or other material, but the whole space from fence to fence is the highway; and an obstruction in any part is equally the subject of an indictment. The extent of a highway, when it passes over a common, is frequently still more undefined to the right and left of what may be the ordinary passage" (*q*). It is a question for the jury whether the portions of land in question are part of the highway, and have been used by the public as such (*r*). In a case where a metalled road, eight feet wide, crossed a village green, and there was no difference between the grass immediately adjoining the metalled road and the rest of the green, the public having been accustomed to ride and walk or take carts across any part of the green where sufficiently level, without interruption, the lord of the manor built walls on each side of the road, leaving a space of sixteen feet between wall and wall; the question was, whether this was an encroachment on the space dedicated as highways; and the Court of Queen's Bench thought there was nothing in the facts to show that any part of the green, other than the metalled road, had been dedicated to the public (*s*). "It cannot be meant that the whole green was a highway, and the statement is expressly that the public have not exercised any greater or other right of passage over the grass adjoining the metalled road than they have over the rest of the green" (*t*). "In the first place, a highway may exist which is not metalled road at all; but generally a part is metalled and a part left which is not hard road; and, in general, when the highway is between two fences all the ground that is between the fences is presumably dedicated as highway, unless the nature of the ground or other circumstances rebut that presumption. In the present case there are no fences, and there is nothing to raise the presumption that one part of the open green more than another beyond the actual road has been dedicated" (*u*).

Mode of User.—The extent of the public right, as regards the mode of using the way, is a question for the jury under all the circumstances of the case. The cases on this subject chiefly deal with private rights of way, and have little direct application to highways. It has been said that the right to be inferred must be commensurate with the user (*x*); but this proposition is subject to

(*q*) *Per cur.*, *Elwood* v. *Bullock* (1844), 6 Q. B. 411.

(*r*) *R.* v. *Johnson* (1859), 1 F. & F. 657.

(*s*) *Easton* v. *Richmond Highway Board* (1871), L. R. 7 Q. B. 69. *Cf. Rowley* v. *Tottenham Urban District Council*, [1914] A. C. 95.

(*t*) COCKBURN, C.J., *Easton's* case, *supra*.

(*u*) BLACKBURN, J., *ibid.*

(*x*) *Ballard* v. *Dyson* (1808), 1 Taunt. 279.

some qualification. A jury may find that a road is a public drift-way, though no one has ever seen an instance of cattle being driven there (*y*). "You must generalise to some extent" (*z*). The subject has a practical bearing with reference to the introduction of new means of locomotion; but the most definite principle that can be suggested is, that the right extends to all forms of traffic which have been usual and accustomed, and also to all which are reasonably similar or incidental thereto, and which neither make the right substantially more burdensome to the owner of the soil, nor the way substantially less safe or commodious to the public using it (*a*). Where a parade by the seaside was authorised under certain local Acts to be used by foot passengers, perambulators, invalid carriages and similar vehicles, it was held that a user for motor cars or motor races could not be allowed (*b*).

Obstacles and Restrictions.—The legality of obstacles in a highway, which would otherwise be nuisances, depends on the supposition that the highway was dedicated subject to them. But when the evidence shows that the obstacle (such as a cellar-flap) has existed in its present condition as far back as living memory goes, "the jury ought to draw the conclusion that it has existed as long as the street, and that the dedication of the way to the public was with the cellar-flap on it, and subject to the reservation of its being continued there" (*c*).

The same principle is applied as regards rights reserved by the owner, *e.g.*, the right to retain gates (*cc*), or to plough up a footpath. "There is no doubt that as far as living memory goes back, while on the one hand the public has enjoyed this right of way, on the other hand the owner or occupier of the field during the same period has from time to time ploughed up the whole of his field without any regard to the particular track over which the footpath passes. The only proper inference to be drawn is, that the exercise of this right of the owner has been coeval with the exercise of the right of way of the public; and again, the proper inference from that is,

(*y*) Sir J. MANSFIELD, C.J., *ibid.*

(*z*) PARKE, B., in *Cowling* v. *Higginson* (1838), 4 M. & W. 245.

(*a*) *Cf. R.* v. *Mathias* (1861), 2 F. & F. 570 (perambulator on footway); *Case* v. *Midland Rail. Co.* (1859), 27 Beav. 247 (steamboat on navigable canal).

(*b*) *Att.-Gen.* v. *Blackpool Corporation* (1907), 71 J. P. 478 (LEIGH CLARE, V.-C., Lancaster Palatine Court).

(*c*) *Fisher* v. *Prowse* (1862), 2 B. & S. 770. *Cf.* Viner Abr. Nuisance (*c*): "If a man hangs a gate upon a public highway it is a nuisance; but gates which have been in highways time out of mind are not any nuisance." And see *Jones* v. *Matthews* (1885), 1 T. L. R. 482.

(*cc*) *Att.-Gen.* (*Aethwy Rural District Council*) v. *Meyrick* (*Sir George*) *and Jones* (*John*) (1915), 79 J. P. 515.

that the right of the public was granted, or the original dedication of the way was made, subject to this right in the owner periodically to plough up the soil" (*d*). On the other hand, where an owner claimed the right to plough up a footpath across a field which had formerly been a grass common, but had about thirty years before been inclosed and cultivated as arable land, but no witness remembered that the path had been ploughed up until about thirteen years before, since which time it had sometimes been ploughed up, the court thought the justices were right in presuming that the road had not been dedicated subject to the alleged right (*e*).

(*d*) COCKBURN, C.J.: *Mercer* v. *Woodgate* (1869), L. R. 5 Q. B. 26.
(*e*) *Harrison* v. *Danby* (1870), 34 J. P. 759.