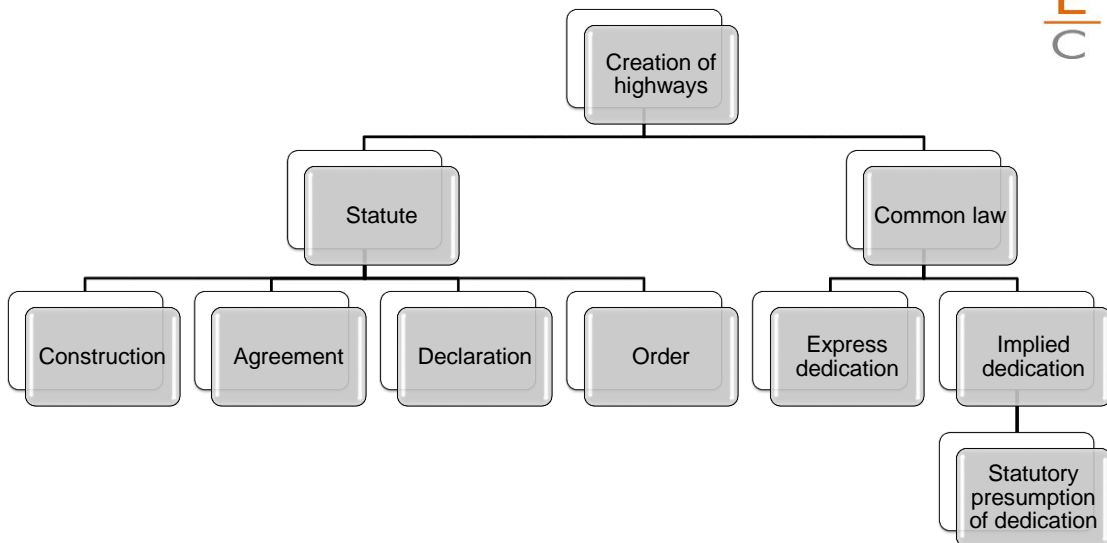


The Creation of Highways
THE NUTS AND BOLTS



Miriam Seitler
Landmark Chambers
Monday 16 March 2018



Creation of highway by statute: Highways Act 1980



- Construction: s.24 gives the Minister and local highway authority the power to construct highways;
- Agreement: s.38 gives local highway authority the power to agree with person having necessary capacity to dedicate the land as highway. S.25 gives powers in respect of footpaths, bridleways and restricted byways – public path creation agreement;
- Declaration: s.34 by declaration of County Council, Metropolitan District Council or London Borough Council in respect of a street that is not yet a highway;
- Order: s.26 in respect of footpaths, bridleways and restricted byways – public path creation order.

Creation of highway at common law



The essential elements



- Intention to divest himself forever of right to exclude public from lawfully using highway
- Dedication to public at large

Creation of highway at common law



A limited dedication

- Dedication can be limited to certain modes of passage
 - Greater rights of dedication are generally deemed to include lesser rights
 - Dedication cannot be limited to a certain category of person
 - Dedication must be in perpetuity
 - Dedication can be subject to some reservation of landowner's rights or subject to some physical obstruction or restriction
-

Creation of highway at common law



Capacity to dedicate

- Lessees: no capacity to expressly dedicate highway (without the concurrence of freehold owner) because do not have power to bind in perpetuity.
 - Public bodies: yes, subject to any incompatibility with the purposes for which the public body was created.
 - Crown: yes.
-

Creation of highway at common law



Natural Environment and Rural Communities Act 2006, s.66

(1) No public right of way for mechanically propelled vehicles is created after commencement unless it is

- (a) created (by an enactment or instrument or otherwise) on terms that expressly provide for it to be a right of way for such vehicles, or*
- (b) created by the construction, in exercise of powers conferred by virtue of any enactment, of a road intended to be used by such vehicles.*

→ dedication by virtue of use for mechanically propelled vehicles is no longer possible

Creation of highway at common law



Natural Environment and Rural Communities Act 2006, s.67

(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement²

(a) was not shown in a definitive map and statement, or

(b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway.

But this is subject to subsections (2) to (8).

Creation of highway at common law



Natural Environment and Rural Communities Act 2006, s.67

(2) Subsection (1) does not apply to an existing public right of way if²

...

(b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c. 66) (list of highways maintainable at public expense)

Creation of highway at common law



Natural Environment and Rural Communities Act 2006, s.67

Fortune v Wiltshire Council [2013] 1 WLR 808

- A list that was not fully compliant with s.36(6) still sufficed;
- This was despite the fact that the list might be defective, need correcting or omit necessary information;
- An electronic database sufficed as a list “in writing deposited at the authority's offices.”

Creation of highway at common law



Implied dedication

- Look at the character and use of the way
- Nec clam, nec vi, nec precario
- No particular period of use
- Imply an intention to dedicate in the landowner
- Burden of proof is on the person asserting that there has been such dedication
- Can one show implied dedication as against lessee? Acquiescence of the freehold owner needs to be shown, which can be challenging.

Creation of highway at common law



Statutory presumption

- Section 31(1), Highways Act 1980:

“ Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to a presumption of dedication, has actually been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”

Creation of highway at common law



Statutory presumption: a way of such a character that use of it by the public could not give rise at common law to a presumption of dedication

- Kotegaonkar v Secretary of State for the Environment, Food and Rural Affairs [2012] EWHC 1976: start and end points of the path were on private land.

Creation of highway at common law



Statutory presumption: as of right

- Subjective understanding of the user is not determinative: R v Oxfordshire CC ex p Sunningwell PC [1999] 3 WLR 160
- Acquiescence is the key idea
- Nec vi, nec clam, nec precario: R(Lewis) v Redcar [2010] UKSC 11
- The use of the way does not itself have to be lawful: Bakewell Management Ltd v Brandwood [2004] 2 All ER 305

Creation of highway at common law



Statutory presumption: nec vi

- Obviously includes removing physical obstacles to entry and/or passage.
- Can “vi” extend to usage in the face of verbal protests or signs/notices by the landowner?
- Yes, in the easements context.
- Yes, in the town and village green context.

Creation of highway at common law



Statutory presumption: without interruption

- Lewis v Thomas [1950] 1 KB 438
- Some positive and physical act (by landowner) preventing the exercise of the alleged right of way
- Intention not necessary, but can be a factor relied upon
- Not necessary to show that any person’s use has in fact been interrupted



Creation of highway at common law

Statutory presumption: bringing into question the right of the public to use the way

- The process of making an application for inclusion as a public path in the Definitive Map is capable of bringing the right into question
- Note the overlap between acts bringing right into question, acts of interruption and evidence showing a contrary intention: *Godmanchester Town Council v Secretary of State for Environment, Food and Rural Affairs* [2007] UKHL 28



Creation of highway at common law

Statutory presumption: contrary intention

Godmanchester Town Council v Secretary of State for Environment, Food and Rural Affairs [2007] UKHL 28:

- "intention" meant what the relevant audience, namely the users of the way, would reasonably have understood the landowner's intention to be;
- The test was objective: the reasonable user would have to understand that the landowner was intending to disabuse him of the notion that the land was a public highway;
- The phrase "during that period" in the proviso to s.31(1) meant "at some point during that period". The intention not to dedicate did not have to be continuously demonstrated for the whole 20-year period.

Creation of highway at common law



Landowner's protections: notices – s.31(3)

- Erection of visible notice inconsistent with dedication as a highway
- Sufficient evidence of intention to dedicate as a highway
- If notice is torn down or defaced, landowner can give notice to the appropriate council. This amounts to sufficient evidence of contrary intention.
- *Burrows v Secretary of State for the Environment, Food and Rural Affairs* [2004] EWHC 132: notice must have been erected on authority of landowner but does not need to have been in place for full 20 years
- “in the absence of proof of a contrary intention”

Creation of highway at common law



Landowner's protections: deposited maps and statements– s.31(6)

- Landowner deposits with Council a map of his land with statement of ways that have been dedicated over it
- Prescribed form
- Declarations (in prescribed form) at 20 year intervals that no additional rights of way have been dedicated
- Sufficient evidence to rebut presumption
- NB. “in the absence of contrary intention” → burden thrown back on the person claiming the way

Creation of highway at common law



Evidence of dedication

- Section 32, Highways Act 1980

A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for which it was made or compiled, and the custody in which it has been kept and from which it is produced.

Creation of highway at common law



Evidence of dedication

- Definitive Map=conclusive evidence of highway status: Wildlife and Countryside Act 1981, section 56
- Records of Quarter Sessions
- Up to date list of streets maintainable at public expense
- Inclosure awards and plans
- Ordnance survey maps
- Tithe maps
- Maps prepared for purpose of Finance Act 1910



mseitler@landmarkchambers.co.uk

