

**a R v Oxfordshire County Council and another,
ex parte Sunningwell Parish Council**

HOUSE OF LORDS

b LORD BROWNE-WILKINSON, LORD STEYN, LORD HOFFMANN, LORD HOBHOUSE OF
WOODBOROUGH AND LORD MILLETT

19, 20, 21 APRIL, 24 JUNE 1999

c *Commons – Registration – Town or village green – User as of right – Villagers using
glebe for informal recreation – Parish council applying to register glebe as village green
on basis of user as of right – Whether user as of right required belief by villagers that
they enjoyed right to exclusion of all other people – Whether informal recreation a
pastime – Commons Registration Act 1965, s 22(1).*

d The glebe at Sunningwell in Oxfordshire was an open space which was used for
informal recreation, predominantly, though not exclusively, by inhabitants of the
village. In 1994 the owners of the glebe, the Oxford Diocesan Board of Finance
(the board), obtained planning permission to build two houses on its northern
boundary. The villagers were opposed to the proposed development, and
consequently the parish council applied to the county council to register the
glebe as a town or village green under s 13^a of the Commons Registration
e Act 1965. It claimed that the glebe had been used by the villagers ‘as of right’ for
lawful sports and pastimes for at least 20 years, and that accordingly it had
become a village green under s 22(1)^b of the Act. Such registration would have
prevented the proposed development, and it was therefore opposed by the board.
The county council held a non-statutory public inquiry where the witnesses said
f that they believed they had a right to use the glebe, but did not say that they
believed such right was confined to inhabitants of the village. The inspector,
relying on Court of Appeal authority, held that such belief was a prerequisite for
user as of right within the meaning of s 22(1), and accordingly recommended that
the application for registration be refused. His recommendation was accepted by
the county council, and the parish council applied for judicial review. That
g application was dismissed by the Court of Appeal, and the parish council appealed
to the House of Lords. On the appeal, the board supported the inspector’s
conclusion, but also sought to uphold the decision on a number of other grounds,
including lack of evidence of the use of the land for sports as opposed to pastimes.
It further contended that such sports and pastimes had to be the same as those
h which would give rise to customary rights under s 22(1), namely an activity with
a communal element such as playing cricket, shooting at butts or dancing around
the maypole. In addition, the board contended that the user was too broad for
the purposes of s 22(1), and that a finding by the inspector that use of the land had
been tolerated by the owners was inconsistent with user as of right.

j **Held** – (1) Where an application for registration of a village green was grounded
on user as of right within the meaning of s 22 of the 1965 Act, it was not necessary
to establish that the village’s inhabitants knew or believed that they had a legal

^a Section 13, so far as material, is set out at p 389 *d*, post

^b Section 22, so far as material, is set out at p 388 *d e*, post

right to use the land for sports and pastimes. Rather the term 'as of right' in s 22(1) had the same meaning as in s 5^c of the Prescription Act 1832 and s 1^d of the Rights of Way Act 1932, namely user that was nec vi, nec clam, nec precario, and there was no additional requirement of subjective belief. A conclusion to the contrary would be inconsistent with the principles of prescription in English law where an unbroken line of descent could be traced from the common law concept of nec vi, nec clam, nec precario to the term 'as of right' in the 1832, 1932 and 1965 Acts. Thus user which was apparently as of right could not be discounted merely because many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. It therefore followed that in the instant case the county council should not have refused to register the glebe as a village green merely because the witnesses had not deposed to a belief that the right attached to them as inhabitants of the village (see p 387 h j, p 392 b to d, p 393 j, p 394 b c, p 395 j to p 396 e, and p 399 f g, post); *Mann v Brodie* (1885) 10 App Cas 378 and *Hue v Whiteley* [1928] All ER Rep 308 considered; *R v Suffolk CC, ex p Steed* (1996) 75 P & CR 102 overruled.

(2) The term 'sports and pastimes' in s 22(1) of the 1965 Act did not comprise two classes of activities, but was a single composite class which used two words in order to avoid arguments over whether an activity was a sport or a pastime. Thus an activity fell within the composite class as long as it could be properly called a sport or a pastime. Furthermore, sports and pastimes included those activities which would today be regarded as such, for example informal recreation. In the instant case, the inspector had found abundant evidence of the use of the glebe for informal recreation, and it was not inconsistent with user as of right that such activity had been tolerated by the owners. Moreover, it was sufficient for the purposes of s 22(1) that the glebe had been used predominantly by inhabitants of the village. Accordingly, the appeal would be allowed (see p 387 h j, p 396 j to p 397 d j, p 398 d h and p 399 e to g, post).

Notes

For the registration of town and village greens, see 6 *Halsbury's Laws* (4th edn reissue) para 672.

For the Commons Registration Act 1965, s 22, see 7 *Halsbury's Statutes* (4th edn) (1999 reissue) 696.

Cases referred to in opinions

Abercromby v Fermoy Town Comrs [1900] 1 IR 302, Ir CA.

A-G v Antrobus [1905] 2 Ch 188.

A-G v Dyer [1946] 2 All ER 252, [1947] Ch 67.

Beckett (Alfred F) Ltd v Lyons [1967] 1 All ER 833, [1967] Ch 449, [1966] 2 WLR 421, CA.

Blount v Layard [1891] 2 Ch 681n, CA.

Bright v Walker (1834) 1 CM & R 211, 149 ER 1057.

Bryant v Foot (1867) LR 2 QB 161; *aff'd* (1868) LR 3 QB 497, Ex Ch.

Dalton v Henry Angus & Co, Comrs of HM Works and Public Buildings v Henry Angus & Co (1881) 6 App Cas 740, [1881-5] All ER Rep 1, HL.

^c Section 5, so far as material, provides: '... in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this Act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right ...'

^d Section 1, so far as material, is set out at p 393 f g, post

- De la Warr (Earl) v Miles* (1881) 17 Ch D 535, [1881–5] All ER Rep 252, CA.
- a** *Fitch v Rawling* (1795) 2 Hy Bl 393, [1775–1802] All ER Rep 571, 126 ER 614.
Folkestone Corp v Brockman [1914] AC 338, HL.
Gardner v Hodgson's Kingston Brewery Co Ltd [1903] AC 229, HL.
Hammerton v Honey (1876) 24 WR 603.
Hue v Whiteley [1929] 1 Ch 440, [1928] All ER Rep 308.
- b** *Jones v Bates* [1938] 2 All ER 237, CA.
Mann v Brodie (1885) 10 App Cas 378, HL.
Mercer v Denne [1904] 2 Ch 534, [1904–7] All ER Rep 71; *aff'd* [1905] 2 Ch 538, [1904–7] All ER Rep 71, CA.
Mills v Colchester Corp (1867) LR 2 CP 476; *aff'd* (1868) LR 3 CP 575, Ex Ch.
Mills v Silver [1991] 1 All ER 449, [1991] Ch 271, [1991] 2 WLR 324, CA.
- c** *O'Keefe v Secretary of State for the Environment* [1996] JPL 42; *aff'd* (1997) 76 P & CR 31, CA.
R v Suffolk CC, ex p Steed (1996) 75 P & CR 102, CA; *aff'g* (1995) 70 P & CR 487.

Appeal

- d** The Sunningwell Parish Council (the parish council) appealed with the leave of the Court of Appeal (Lord Woolf MR, Waller and Robert Walker LJ) from its order on 17 July 1997 whereby it (i) granted the parish council's renewed application for leave to apply for judicial review of a decision by the first respondent, the Oxfordshire County Council (the county council), on 22 October 1996 rejecting the parish council's application to register the glebe at Sunningwell, Oxfordshire,
- e** as a village green under s 13 of the Commons Registration Act 1965, but (ii) dismissed the substantive application for judicial review. The parish council's initial application for leave to apply for judicial review had been refused by Buxton J on 11 July 1997. The county council played no part in the appeal which was opposed by the second respondent, the Oxford Diocesan Board of Finance
- f** (the board), the owner of the glebe. The facts are set out in the opinion of Lord Hoffmann.

George Laurence QC and *W D Ainger* (instructed by *Pryce & Co*, Abingdon) for the parish council.

- g** *Sheila Cameron QC* and *Charles Mynors* (instructed by *Winckworth Sherwood*, Oxford) for the board.

Their Lordships took time for consideration.

24 June 1999. The following opinions were delivered.

- h** **LORD BROWNE-WILKINSON.** My Lords, I have had the benefit of reading in draft the speech to be delivered by my noble and learned friend Lord Hoffmann. I agree with it and for the reasons which he gives would allow the appeal and direct the Oxfordshire County Council to register the glebe as a village green.
- j** **LORD STEYN.** My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons given by him I would also make the order he proposes.

LORD HOFFMANN. My Lords, the glebe at Sunningwell in Oxfordshire is an open space of about ten acres near the ancient village church. It used to form part

of the endowment of the rectory. The rector let it for grazing and received the rent. On a reorganisation of church properties in 1978 it was transferred to the Oxford Diocesan Board of Finance (the board). The land slopes upwards towards the south and is crossed by a largely unfenced public footpath running south from the village towards Abingdon. Local people use the glebe for such outdoor pursuits as walking their dogs, playing family and children's games, flying kites, picking blackberries, fishing in the stream and tobogganing down the slope when snow falls.

In 1994 the board obtained planning permission to build two houses on the northern boundary of the glebe. The villagers were very much opposed. They wanted it preserved as an open space. The parish council applied to the county council to register the glebe as a town or village green under the Commons Registration Act 1965. It is unclear what rights, if any, registration would confer upon the villagers. The Act is silent on the point. But registration would prevent the proposed development because by s 29 of the Commons Act 1876 encroachment on or inclosure of a town or village green is deemed to be a public nuisance.

Section 22(1) of the 1965 Act contains a three-part definition of a 'town or village green'. They are usually called classes 'a', 'b' and 'c'. I shall use the same terminology.

'[a] ... land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or [b] on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or [c] on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than twenty years.'

Class 'a' includes land which was allotted for exercise and recreation by Act of Parliament or the Inclosure Commissioners when making an order for the inclosure of a common under the Inclosure Act 1845. Before 1845, when commons were inclosed under private Acts of Parliament, it was common for the Act itself to set aside some land for this purpose. There is no suggestion that the glebe was so allotted and the parish council do not rely upon class 'a'. Class 'b' refers to land which by immemorial custom the local inhabitants are entitled to use for sports and pastimes. This is the traditional village green with its memories of maypole dancing, cricket and warm beer. Immemorial custom means in theory a custom which predates the accession of Richard I in 1189. Although, as I shall in due course explain, the law may presume a custom of such antiquity on evidence which a historian might regard as somewhat slender, the parish council do not rely upon class 'b'. They take their stand on class 'c', which was first introduced by the 1965 Act itself. It is no longer necessary to resort to fictions or presumptions about what was happening in 1189. It is sufficient that the inhabitants of the locality have in fact used the land as of right for lawful sports and pastimes for more than 20 years.

The main purpose of the 1965 Act was to preserve and improve common land and town and village greens. It gave effect to *The Report of the Royal Commission on Common Land 1955-1958* (1958) (Cmnd 462), which emphasised the public importance of such open spaces. Some commons and greens were in danger of being encroached upon by developers because of legal and factual uncertainties about their status. Others were well established as commons or greens but there was uncertainty about who owned the soil. This made it difficult for the local

- a people to make improvements (for example by building a cricket pavilion). There was no one from whom they could obtain the necessary consent.

The 1965 Act dealt with these problems by creating local registers of common land and town and village greens which recorded the rights, if any, of the commoners and the names of the owners of the land. If no one claimed ownership of a town or village green, it could be vested in the local authority.

- b Regulations made under the Act prescribed time limits for registrations and objections and the determination of disputes by Commons Commissioners. In principle, the policy of the Act was to have a once-and-for-all nationwide inquiry into commons, common rights and town and village greens. When the process had been completed, the register was conclusive. By s 2(2), no land capable of being registered under the Act was to be deemed to be common land or a town or village green unless so registered.

In the case of greens in classes 'a' or 'b', this meant that unless they were registered within the prescribed time limit, they could not be registered as such thereafter. (There is a question about whether non-registration of a class 'a' green also extinguished the prior statutory rights of exercise and recreation, but

- d that need not detain us now.) But a class 'c' green could come into existence upon the expiry of any period of 20 years' user. This might be after the original registration period had expired. Section 13 therefore provided for the amendment of the register in various situations including where: '(b) any land becomes common land or a town or village green ...' The Sunningwell Parish Council applied to the Oxfordshire County Council, as registration authority, for an amendment to add the glebe to the register on the ground that it had become a village green by 20 years' user ending on 1 January 1994.

The board objected to the application. The regulations made under s 13 [Commons Registration (New Land) Regulations 1969, SI 1969/1843] prescribe no procedure for resolving disputes over applications for amendment. The

- f jurisdiction of the Commons Commissioners was limited to disputes arising out of the original applications, all of which have now been determined. The county council was left free to decide upon its own procedure for dealing with an application to amend. It decided to hold a non-statutory public inquiry and appointed Mr Vivian Chapman, a barrister with great experience of this branch of the law, to act as inspector. Mr Chapman sat for two days in the village hall, received written and oral evidence and heard legal submissions. He submitted a report to the county council in which he made various findings of fact, which the county council accepted. I shall refer to these later. But he recommended that the application be refused on the ground that the user of the land by the villagers had not been shown to be 'as of right'. In coming to this conclusion, he followed the decision of the Court of Appeal in *R v Suffolk CC, ex p Steed* (1996) 75 P & CR 102, which held that 'as of right' meant that the right must be exercised in the belief that it is a right enjoyed by the inhabitants of the village to the exclusion of all other people. In the present case, the witnesses all said that they thought they had the right to use the glebe. But they did not say that they thought that the right was confined to inhabitants of the village. Some thought it was a general public right and others had no views on the matter. This was held to be fatal to the application.

The parish council applied for judicial review of the county council's decision. Buxton J refused leave and the application was renewed before the Court of Appeal (Lord Woolf MR, Waller and Robert Walker LJ). They decided that they were bound by *Ex p Steed* to dismiss the application. But they also expressed the view that your Lordships might think that that case was wrongly decided. The Court of

Appeal therefore granted leave to move for judicial review, dismissed the substantive application and gave leave to appeal to your Lordships' House. a

The principal issue before your Lordships thus turns on the meaning of the words 'as of right' in the definition of a green in s 22(1) of the 1965 Act. The language is plainly derived from judicial pronouncements and earlier legislation on the acquisition of rights by prescription. To put the words in their context, it is therefore necessary to say something about the historical background. b

Any legal system must have rules of prescription which prevent the disturbance of long-established de facto enjoyment. But the principles upon which they achieve this result may be very different. In systems based on Roman law, prescription is regarded as one of the methods by which ownership can be acquired. The ancient *Twelve Tables* called it usucapio, meaning literally a taking by use. A logical consequence was that, in laying down the conditions for a valid usucapio, the law concerned itself with the nature of the property and the method by which the acquirer had obtained possession. Thus usucapio of a res sacra or res furtiva was not allowed and the acquirer had to have taken possession in good faith. The law was not concerned with the acts or state of mind of the previous owner, who was assumed to have played no part in the transaction. c
The periods of prescription were originally one year for moveables and two years for immoveables, but even when the periods were substantially lengthened by Justinian and some of the conditions changed, it remained in principle a method of acquiring ownership. This remains the position in civilian systems today. d

English law, on the other hand, has never had a consistent theory of prescription. It did not treat long enjoyment as being a method of acquiring title. Instead, it approached the question from the other end by treating the lapse of time as either barring the remedy of the former owner or giving rise to a presumption that he had done some act which conferred a lawful title upon the person in de facto possession or enjoyment. Thus the medieval real actions for the recovery of seisin were subject to limitation by reference to various past events. In the time of Bracton the writ of right was limited from the accession of Henry I (1100). The Statute of Merton 1235 (20 Hen 3, c 4) brought this date up to the accession of Henry II (1154) and the Statute of Westminster 1275 (3 Edw 1, c 39) extended it to the accession of Richard I in 1189. e

The judges used this date by analogy to fix the period of prescription for immemorial custom and the enjoyment of incorporeal hereditaments such as rights of way and other easements. In such cases, however, the period was being used for a different purpose. It was not to bar the remedy but to presume that enjoyment was pursuant to a right having a lawful origin. In the case of easements, this meant a presumption that there had been a grant before 1189 by the freehold owner. f
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As time went on, however, proof of lawful origin in this way became for practical purposes impossible. The evidence was not available. The judges filled the gap with another presumption. They instructed juries that if there was evidence of enjoyment for the period of living memory, they could presume that the right had existed since 1189. After the Limitation Act 1623 (21 Jac 1, c 16), which fixed a 20-year period of limitation for the possessory actions such as ejectment, the judges treated 20 years' enjoyment as by analogy giving rise to the presumption of enjoyment since 1189. But these presumptions arising from enjoyment for the period of living memory or for 20 years, though strong, were not conclusive. They could be rebutted by evidence that the right could not have existed in 1189; for example, because it was appurtenant to a building which had h
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a been erected since that date. In the case of easements, the resourcefulness of the judges overcame this obstacle by another presumption, this time of a lost modern grant. As Cockburn CJ said in the course of an acerbic account of the history of the English law of prescription in *Bryant v Foot* (1867) LR 2 QB 161 at 181:

b ‘Juries were first told that from user, during living memory, or even during twenty years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really existed.’

c The result of these developments was that, leaving aside the cases in which it was possible to show that (a) the right could not have existed in 1189 and (b) the doctrine of lost modern grant could not be invoked, the period of 20 years’ user was in practice sufficient to establish a prescriptive or customary right. It was not an answer simply to rely upon the improbability of immemorial user or lost modern grant. As Cockburn CJ observed, the jury were instructed that if there was no evidence absolutely inconsistent with there having been immemorial user or a lost modern grant, they not merely could but should find the prescriptive right established. The emphasis was therefore shifted from the brute fact of the right or custom having existed in 1189 or there having been a lost grant (both of which were acknowledged to be fictions) to the quality of the 20-year user which would justify recognition of a prescriptive right or customary right. It became established that such user had to be, in the Latin phrase, *nec vi, nec clam, nec precario*: not by force, nor stealth, nor the licence of the owner. (For this requirement in the case of custom, see *Mills v Colchester Corp* (1867) LR 2 CP 476 at 486.) The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right—in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period. So in *Dalton v Henry Angus & Co, Comrs of HM Works and Public Buildings v Henry Angus & Co* (1881) 6 App Cas 740 at 773, [1881–5] All ER Rep 1 at 30 Fry J (advising the House of Lords) was able to rationalise the law of prescription as follows:

h ‘... the whole law of prescription and the whole law which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and the Judges have had recourse to various expedients for quieting the possession of persons in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest.’

j In the case of easements, the legislature intervened to save the consciences of judges and juries by the Prescription Act 1832, of which the short title was ‘An Act for shortening the Time of Prescription in certain cases’. Section 2 (as amended by s 1 of and the Sch to the Statute Law Revision (No 2) Act 1888 and s 1 of and the Sch to the Statute Law Revision Act 1890) provided:

'No claim which may be lawfully made at the common law, by custom, prescription, or grant, to any way or other easement ... when such way or other matter ... shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated ...'

Thus in a claim under the Act, what mattered was the quality of enjoyment during the 20-year period. It had to be by a person 'claiming right thereto' or, in the language of s 5 of the same Act (as amended by the 1888 Act), which dealt with the forms of pleadings, 'as of right'. In *Bright v Walker* (1834) 1 CM & R 211 at 219, 149 ER 1057 at 1060, two years after the passing of the Act, Parke B explained what these words meant. He said that the right must have been enjoyed 'openly and in the manner that a person rightfully entitled would have used it ...' and not by stealth or by licence. In *Gardner v Hodgson's Kingston Brewery Co Ltd* [1903] AC 229 at 239 Lord Lindley said that the words 'as of right' were intended 'to have the same meaning as the older expression *nec vi nec clam nec precario*'. (See also *Earl De la Warr v Miles* (1881) 17 Ch D 535 at 596, [1881-5] All ER Rep 252 at 262 per Cotton LJ.)

My Lords, I pass now from the law concerning the acquisition of private rights of way and other easements to the law of public rights of way. Just as the theory was that a lawful origin of private rights of way could be found only in a grant by the freehold owner, so the theory was that a lawful origin of public rights of way could be found only in a dedication to public use. As in the case of private rights, such dedication would be presumed from user since time immemorial, that is from 1189. But the common law did not supplement this rule by fictitious grants or user which the jury were instructed to presume. In *Mann v Brodie* (1885) 10 App Cas 378 at 385-386 Lord Blackburn said:

'In England the common law period of prescription was time immemorial, and any claim by prescription was defeated by proof that the right claimed had originated within the time of legal memory, that is, since A.D. 1189. This was, no doubt, an unreasonably long period. And sometimes, by legal fictions of presumed grants, and in part, by legislation, the period required for prescription as to private rights has, in many cases, been practically cut down to a much shorter definite period ... But this has never been done in the case of a public right of way.'

He contrasted the English law on the subject with that of Scotland, which as Lord Watson (at 390-391) explained, followed the Roman model:

'According to the law of Scotland, the constitution of such a right does not depend upon any legal fiction, but upon the fact of user by the public, as matter of right, continuously and without interruption, for the full period of the long prescription. Lord Stair (Stair's Inst. 2, 12, 9) states prescription to be a rule of "positive law, founded upon utility rather than equity," and he adds (Ibid. 2, 12, 11), that, in Scotland, the common rule is by the course of forty years, "but there must be continued possession free from interruption." According to Erskine (Ersk. Inst. 3, 7, 2), "positive prescription is generally defined by our lawyers as the Romans did *usucapion*, the acquisition of

- a property by the continued possession of the acquirer for such a time as is described by the law to be sufficient for that purpose.”

In England, however, user for any length of time since 1189 was merely evidence from which a dedication could be inferred. The quality of the user from which dedication could be inferred was stated in the same terms as that required for private rights of way, that is to say *nec vi nec clam nec precario*. But

- b dedication did not have to be inferred; there was no presumption of law. In *Mann v Brodie* Lord Blackburn (at 386) put the rationale as follows:

- c ‘... where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was.’

- d My Lords, I pause to observe that Lord Blackburn does not say that there must have been evidence that individual members of the public using the way believed there had been a dedication. He is concerning himself, as the English theory required, with how the matter would have appeared to the owner of the land. The user by the public must have been, as Parke B said in relation to private rights of way in *Bright v Walker* (1834) 1 CM & R 211 at 219, 149 ER 1057 at 1060, ‘openly and in the manner that a person rightfully entitled would have used it ...’ The presumption arises, as Fry J said of prescription generally in *Dalton v Henry Angus & Co*, *Comrs of HM Works and Public Buildings v Henry Angus & Co* (1881) 6 App Cas 740 at 773, [1881–5] All ER Rep 1 at 30, from acquiescence.

- e The difficulty in the case of public rights of way was that, despite evidence of user as of right, the jury were free to infer that this was not because there had been a dedication but because the landowner had merely tolerated such use: see *Folkestone Corp v Brockman* [1914] AC 338. On this point the law on public rights of way differed not only from Scottish law but also from that applicable to private easements. This made the outcome of cases on public rights of way very unpredictable and was one of the reasons for the passing of the Rights of Way Act 1932, of which s 1(1) provided:

- g ‘Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way ...’

- h The words ‘actually enjoyed by the public as of right and without interruption for a full period of 20 years’ are clearly an echo of the words ‘actually enjoyed by any person claiming right thereto without interruption for the full period of 20 years’ in s 2 of the 1832 Act. Introducing the Bill into the House of Lords (HL Debates), 7 June 1932, col 737, Lord Buckmaster said that the purpose was to assimilate the law on public rights of way to that of private rights of way (84 HL Debates (1931–32), col 637). It therefore seems safe to assume that ‘as of right’ in the 1932 Act was intended to have the same meaning as those words in s 5 of the 1832 Act and the words ‘claiming right thereto’ in s 2 of that Act.

My Lords, this was the background to the definition of a ‘town or village green’ in s 22(1) of the 1965 Act. At that time, there had been no legislation for

customary rights equivalent to the 1832 Act for easements or the 1932 Act for public rights of way. Proof of a custom to use a green for lawful sports and pastimes still required an inference of fact that such a custom had existed in 1189. Judges and juries were generous in making the required inference on the basis of evidence of long user. If there was upwards of 20 years' user, it would be presumed in the absence of evidence to show that it commenced after 1189. But the claim could still be defeated by showing that the custom could not have existed in 1189. Thus in *Bryant v Foot* (1867) LR 2 QB 161 a claim to a custom by which the rector of a parish was entitled to charge 13s for performing a marriage service, although proved to have been in existence since 1808, was rejected on the ground that having regard to inflation it could not possibly have existed in the reign of Richard I. It seems to me clear that class 'c' in the definition of a village green must have been based upon the earlier Acts and intended to exclude this kind of defence. The only difference was that it allowed for no rebuttal or exceptions. If the inhabitants of the locality had indulged in lawful sports and pastimes as of right for not less than 20 years, the land was a town or village green. But there is no reason to believe that 'as of right' was intended to mean anything different from what those words meant in the 1832 and 1932 Acts.

In *R v Suffolk CC, ex p Steed* (1996) 75 P & CR 102 at 111–112 Pill LJ also said that 'as of right' in the 1965 Act had the same meaning as in the 1932 Act. In holding that it required 'an honest belief in a legal right to use ... as an inhabitant ... and not merely a member of the public' he followed dicta in three cases on the 1932 Act and its successor legislation, s 31(1) of the Highways Act 1980, which I must now examine.

The first was *Hue v Whiteley* [1929] 1 Ch 440, [1928] All ER Rep 308, a decision of Tomlin J before the 1932 Act. The dispute was over the existence of a public footpath on Box Hill and the judge ([1929] 1 Ch 440 at 444, [1928] All ER Rep 308 at 309) found that for 60 years people had 'used the track to get to the highway and to the public bridle road as of right, on the footing that they were using a public way'. Counsel for the landowner, in reliance on *A-G v Antrobus* [1905] 2 Ch 188 (which concerned the tracks around Stonehenge), argued that the user should be disregarded because people used the path merely for recreation in walking on Box Hill. The judge said that this made no difference:

'A man passes from one point to another believing himself to be using a public road, and the state of his mind as to his motive in passing is irrelevant. If there is evidence, as there is here, of continuous user by persons as of right (i.e., believing themselves to be exercising a public right to pass from one highway to another), there is no question such as that which arose in *Attorney-General v. Antrobus*.' (See [1929] 1 Ch 440 at 445, [1928] All ER Rep 308 at 309.)

The decision in the case was that the reasons why people used the road were irrelevant. It was sufficient that they used it as of right. I rather doubt whether, in explaining this term parenthetically as involving a belief that they were exercising a public right, Tomlin J meant to say more than Lord Blackburn had said in *Mann v Brodie* (1885) 10 App Cas 378 at 386, namely that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right. To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription, which, as I hope I have demonstrated, depends upon evidence of acquiescence by the landowner giving rise to an inference or

- a presumption of a prior grant or dedication. For this purpose, the actual state of mind of the road user is plainly irrelevant.

Tomlin J's parenthesis was picked up by the Court of Appeal in *Jones v Bates* [1938] 2 All ER 237. The defendant asserting a right of footpath adduced overwhelming evidence of user for many years, including evidence of the plaintiff landowner's predecessors in title that they had never stopped people from using the path because they thought it was a public right of way. The judge in the Hastings County Court nevertheless rejected this evidence as insufficient to satisfy s 1(1) of the 1932 Act. The Court of Appeal by a majority held that he must have misdirected himself on the law (there was no right of appeal on fact from a county court) and ordered a new trial. But the case contains some observations on the law, including a valuable exposition by Scott LJ of the background to the 1932 Act. The two majority judgments of Slesser and Scott LJ both cite Tomlin J's parenthesis with approval. But the question of whether it is necessary to prove the subjective state of mind of users of the road in addition to the outward appearance of user did not arise and was not discussed.

d Slesser LJ (at 241), after citing Tomlin J's parenthesis, went on to say that 'as of right' in the 1932 Act had the meaning which Cotton LJ had given to those words in the 1832 Act in *Earl De la Warr v Miles* (1881) 17 Ch D 535 at 596, [1881–5] All ER Rep 252 at 262: '... not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done.' This makes one doubt whether he was concerned with the subjective minds of the users.

e Scott LJ ([1938] 2 All ER 237 at 245) also quoted Tomlin J with approval but went on to say:

f 'It is doubtless correct to say that negatively [the words 'as of right'] import the absence of any of the three characteristics of compulsion, secrecy or licence—"nec vi, nec clam, nec precario," phraseology borrowed from the law of easements—but the statute does not put on the party asserting the public right the onus of proving those negatives ...'

g Scott LJ was concerned that the county court judge had placed too high a burden upon the person asserting the public right. If he proved that the right had been used so as to demonstrate belief in the existence of a public right of way, that was enough. The headnote to *Jones v Bates* summarises the holding on this point in entirely orthodox terms:

h 'The words in the Rights of Way Act, 1932, s. 1(1), "actually enjoyed by the public as of right and without interruption," mean that the way has been used without compulsion, secrecy or licence, *nec vi, nec clam, nec precario*.'

j Finally in *R v Suffolk CC, ex p Steed* (1996) 75 P & CR 102 at 112 Pill LJ referred to his own discussion of the subject at first instance in *O'Keefe v Secretary of State for the Environment* [1996] JPL 42. On the basis of passages from *Jones v Bates* he had there expressed the view that 'as of right' meant user 'which was not only *nec vi, nec clam, nec precario* but was in the honest belief in a legal right to use' (see [1996] JPL 42 at 52). But he rejected the further submission that the users should know the procedures by which the right had come into existence.

My Lords, in my opinion the casual and, in its context, perfectly understandable aside of Tomlin J in *Hue v Whiteley* [1929] 1 Ch 440, [1928] All ER Rep 308 has led the courts into imposing upon the time-honoured expression 'as of right' a new and additional requirement of subjective belief for which there

is no previous authority and which I consider to be contrary to the principles of English prescription. There is in my view an unbroken line of descent from the common law concept of *nec vi, nec clam, nec precario* to the term 'as of right' in the 1832, 1932 and 1965 Acts. It is perhaps worth observing that when the 1832 Act was passed, the parties to an action were not even competent witnesses and I think that Parke B would have been startled by the proposition that a plaintiff asserting a private right of way on the basis of his user had to prove his subjective state of mind. In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be ignored. Still less can it be ignored in a case like *R v Suffolk CC, ex p Steed* when the users believe in the existence of a right but do not know its precise metes and bounds. In coming to this conclusion, I have been greatly assisted by Mr J G Riddall's article 'A False Trail' (1997) 61 Conv 199.

I therefore consider that *Ex p Steed* was wrongly decided and that the county council should not have refused to register the glebe as a village green merely because the witnesses did not depose to their belief that the right to games and pastimes attached to them as inhabitants of the village. That was the only ground upon which Mr Chapman advised the council to reject the application. But Miss Cameron, who appeared for the board, submitted that it should have been rejected for other reasons as well. Although these grounds did not form the basis of any cross-appeal, your Lordships considered that rather than put the parties to the expense of further consideration by the county council followed by further appeals, it would be convenient to consider their merits now.

The first point concerned the nature of the activities on the glebe. They showed that it had been used for solitary or family pastimes (walking, tobogganning, family games) but not for anything which could properly be called a sport. Miss Cameron said that this was insufficient for two reasons. First, because the definition spoke of 'sports and pastimes' and therefore, as a matter of language, pastimes were not enough. There had to be at least one sport. Secondly, because the 'sports and pastimes' in class 'c' had to be the same sports and pastimes as those in respect of which there could have been customary rights under class 'b' and this meant that there had to be some communal element about them, such as playing cricket, shooting at butts or dancing round the maypole. I do not accept either of these arguments. As a matter of language, I think that 'sports and pastimes' is not two classes of activities but a single composite class which uses two words in order to avoid arguments over whether an activity is a sport or a pastime. The law constantly uses pairs of words in this way. As long as the activity can properly be called a sport or a pastime, it falls within the composite class. As for the historical argument, I think that one must distinguish between the concept of a sport or pastime and the particular kind of

- a sports or pastimes which people have played or enjoyed at different times in history. Thus in *Fitch v Rawling* (1795) 2 Hy Bl 393, [1775–1802] All ER Rep 571, 126 ER 614 Buller J recognised a custom to play cricket on a village green as having existed since the time of Richard I, although the game itself was unknown at the time and would have been unlawful for some centuries thereafter: see *Mercer v Denne* [1904] 2 Ch 534 at 538–539, 553, [1904–7] All ER Rep 71 at 76. In
- b *Abercromby v Fermoy Town Comrs* [1900] 1 IR 302 the Irish Court of Appeal upheld a custom for the inhabitants of Fermoy to use a strip of land along the river for their evening passeggiata. Holmes LJ (at 314) said that popular amusement took many shapes: ‘... legal principle does not require that rights of this nature should be limited to certain ancient pastimes.’ In any case, he said, the Irish had too much of a sense of humour to dance around a maypole. Class ‘c’ is concerned
- c with the creation of town and village greens after 1965 and in my opinion sports and pastimes includes those activities which would be so regarded in our own day. I agree with Carnwath J in *R v Suffolk CC, ex p Steed* (1995) 70 P & CR 487 at 503, when he said that dog walking and playing with children were, in modern life, the kind of informal recreation which may be the main function of a village green. It may be, of course, that the user is so trivial and sporadic as not to carry
- d the outward appearance of user as of right. In the present case, however, Mr Chapman found ‘abundant evidence of use of the glebe for informal recreation’ which he held to be a pastime for the purposes of the Act.

- This brings me conveniently to Miss Cameron’s second point, which was that the evidence of user was too broad. She said that the evidence showed that
- e the glebe was also used by people who were not inhabitants of the village. She relied upon *Hammerton v Honey* (1876) 24 WR 603 at 604, in which Jessel MR said:

- ‘... if you allege a custom for certain persons to dance on a green, and you prove in support of that allegation, not only that some people danced, but that everybody else in the world who chose danced and played cricket, you
- f have got beyond your custom.’

- That was with reference to a claim to a customary right of recreation and amusement, that is to say a class ‘b’ green. Class ‘c’ requires merely proof of user by ‘the inhabitants of any locality’. It does not say user *only* by the inhabitants of the locality, but I am willing to assume, without deciding, that the user should be
- g similar to that which would have established a custom.

- In my opinion, however, the findings of fact are sufficient to satisfy this test. It is true that people from outside the village regularly used the footpath. It formed part of a network of Oxfordshire Circular Walks. But there was little evidence of anyone other than villagers using the glebe for games or pastimes. Mr Chapman
- h does record one witness as saying that he had seen strangers enjoying informal recreation there. He summed up the position as follows:

- ‘The evidence of the [parish council] witnesses and of the members of the public who gave evidence was that informal recreation on the glebe as a whole (as opposed to use of the public footpath) was predominantly, although not exclusively, by inhabitants of the village. This made sense because there is nothing about the glebe to attract people from outside the village. The [board] accepted that the village was capable of being a
- j “locality” ...’

I think it is sufficient that the land is used predominantly by inhabitants of the village.

Miss Cameron's third and final point was that the use of the glebe was not as of right because it was attributable to neighbourly toleration by successive rectors and the board. She relied upon the following passage in Mr Chapman's report: a

'It appears to me that recreational use of the glebe is based on three factors. First, the glebe is crossed by an unfenced footpath so that there is general public access to the land and nothing to prevent members of the public straying from the public footpath. Second, the glebe has been owned not by a private owner but by the rector and then the Board, who have been tolerant of harmless public use of the land for informal recreation. Third, the land has been used throughout for rough grazing so that informal public recreation on the land has not conflicted with its agricultural use and has been tolerated by the tenant or grazier.'

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I should say that I do not think that the reference to people 'straying' from the footpath was intended to mean that recreational user was confined to people who set out to use the footpath but casually or accidentally strayed elsewhere. That would be quite inconsistent with the findings of user which must have involved a deliberate intention to go upon other parts of the land. I think Mr Chapman meant only that the existence of the footpath made it easy for people to get there. But Miss Cameron's substantial point was based upon the finding of toleration. That, she said, was inconsistent with the user having been as of right. In my view, that proposition is fallacious. As one can see from the law of public rights of way before 1932, toleration is not inconsistent with user as of right. (See also *Mills v Silver* [1991] 1 All ER 449 at 456, [1991] Ch 271 at 281 per Dillon LJ.) When proof of a public right of way required a finding of actual dedication, the jury were entitled to find that such user was referable to toleration rather than dedication: *Folkestone Corp v Brockman* [1914] AC 338. But this did not mean that the user had not been as of right. It was a finding that there had been no dedication despite the user having been as of right. The purpose of the 1932 Act was to make it unnecessary to infer an actual dedication and, in the absence of specific rebutting evidence, to treat user as of right as sufficient to establish the public right. *Alfred F Beckett Ltd v Lyons* [1967] 1 All ER 833, [1967] Ch 449, in which the court was invited to infer an ancient grant to the Prince Bishop of Durham, in trust for the inhabitants of the county, of the right to gather coal on the sea shore, was another case in which the question was whether an actual grant could be inferred. One of the reasons given by the Court of Appeal for rejecting the claim was that the coal gathering which had taken place could be referable to tolerance on the part of the Crown as owner of the sea shore. But the establishment of a class 'c' village green does not require the inference of any grant or dedication. As in the case of public rights of way or private easements, user as of right is sufficient. Mr Chapman's remarks about toleration are therefore, as he himself recognised, not inconsistent with the quality of the user being such as to satisfy the class 'c' definition. d
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Miss Cameron cautioned your Lordships against being too ready to allow tolerated trespasses to ripen into rights. As Bowen LJ said in *Blount v Layard* [1891] 2 Ch 681n at 691: j

'... nothing worse can happen in a free country than to force people to be churlish about their rights for fear that their indulgence may be abused, and to drive them to prevent the enjoyment of things which, although they are

- a matters of private property, naturally give pleasure to many others besides the owners, under the fear that their good nature may be misunderstood.'

On the other hand, this consideration, if carried too far, would destroy the principle of prescription. A balance must be struck. In passing the 1932 Act, Parliament clearly thought that the previous law gave too much weight to the interests of the landowner and too little to the preservation of rights of way which

- b had been for many years in de facto use. As Scott LJ pointed out in *Jones v Bates* [1938] 2 All ER 237 at 249, there was a strong public interest in facilitating the preservation of footpaths for access to the countryside. And in defining class 'c' town or village greens by reference to similar criteria in 1965, Parliament recognised a similar public interest in the preservation of open spaces which had for many years been used for recreational purposes. It may be that such user is
- c attributable to the tolerance of past rectors of Sunningwell, but, as Evershed J said of the origins of a public right of way in *A-G v Dyer* [1946] 2 All ER 252, [1947] Ch 67 at 85–86:

- d 'It is no doubt true, particularly in a relatively small community ... that, in the early stages at least, the toleration and neighbourliness of the early tenants contributed substantially to the extent and manner of the use of the lane. But many public footpaths must be no less indebted in their origin to similar circumstances, and if there is any truth in the view (as stated by Chief Justice Cardozo) that property like other social institutions has a social function to fulfil, it may be no bad thing that the good nature of earlier
- e generations should have a permanent memorial.'

I would allow the appeal and direct the Oxfordshire County Council to register the glebe as a village green.

- f **LORD HOBHOUSE OF WOODBOROUGH.** My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons given by him I would also make the order he proposes.

- g **LORD MILLETT.** My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons he gives I too would allow the appeal and make the order he proposes.

Appeal allowed.

- h Celia Fox Barrister.

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