

Jaques v Secretary of State for the Environment [1994] Lexis Citation 4111

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QUEEN'S BENCH DIVISION (CROWN OFFICE LIST)

LAWS J

27 MAY 1994

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J Wicks for the Applicant.; J Hobson for the Respondent.

Buss Murton, Tunbridge Wells; the Treasury Solicitor

LAWS J

This is a statutory appeal brought under Paragraph 12 of Sch 15 of the Wildlife and Countryside Act 1981. By it the appellant seeks to have quashed 3 orders made under the Act of 1981 by the Kent County Council which modified the definitive map, maintained by the Council under s53 of the Act, so as to show 3 footpaths as public footpaths over which the public enjoyed rights of way.

The paths in question are near Sevenoaks, on land belonging to the appellant. In February 1986 a Mr Alchin applied to the Council for an order under s53(2) of the Act of 1981 modifying the definitive map and statement by adding 6 new bridleways or footpaths, including the 3 with which I am concerned. The appellant objected. The Council rejected Mr Alchin's application. Mr Alchin appealed to the Secretary of State, who decided to direct the Council to make orders modifying the definitive map as Mr Alchin had proposed. Under the statutory provisions, which I will set out in a moment, those orders were subject to confirmation in accordance with Sch 15. The Secretary of State appointed an Inspector to determine whether they should be confirmed, and a public local inquiry was held in February 1992, at which the appellant was represented. His case was that the footpaths in question were private; they had not been dedicated as public highways either at common law, nor under s31 of the Highways Act 1981.

The Inspector's decision letter is before the court. It was given on 15 January 1993. He confirmed the orders with which this application is concerned, thus rejecting the appellant's case.

The material statutory provisions are as follows:

S53(1) of the Wildlife and Countryside Act 1981 defines the "definitive map and statement" as meaning (so far as relevant to these proceedings) "the latest revised map and statement prepared ... under s33 of the 1949 Act". The 1949 Act is the National Parks and Access to the Countryside Act 1949, into whose provisions it is unnecessary to travel. S53(2) provides:

"As regards every definitive map and statement, the surveying authority shall -

(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence before that date, of any of the events specified in ss(3); and

(b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event."

S53(3):

"The events referred to in ss(2) are as follows -

(a) the coming into operation of any enactment or instrument, or any other event, whereby -

...

(iii) a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path;

(b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path;

..."

S53(6) engages the provisions of Sch 15 in relation to "the making, validity and date of coming into operation of ... orders under ss(2)". Para 2 of Sch 15 requires that such an order be confirmed before it comes into effect; if there are no objections, the Council may confirm the order itself if it proposes no modification to it (para 6); where an order is opposed, confirmation is for the Secretary of State, and para 7 requires him to hold a local inquiry (or afford an objector an opportunity of being heard by an appointed person). Para 12 of the Schedule then provides for the jurisdiction of this court: the provision is very close to like provisions found in the planning, highways, and compulsory acquisition legislation. It is enough to say that the statutory appeal is not on the merits, but requires a point of law to be shown; and that if the appellant is successful, it is common ground that any order I make under the statute has the effect, not merely of quashing the act of confirmation by the Secretary of State's Inspector: it means that the original orders made by the Council would be quashed, so that the Council would have to embark upon the statutory process again from the beginning if they sought to persist in the designation of these footpaths as public rights of way.

S56 provides in effect that the definitive map and statement is to be conclusive evidence that a footpath shown upon it is subject to a public right of way.

S31 of the Highways Act 1980 provides in part:

"(1) 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 any presumption of dedication, has been 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.

(2) The period of 20 years referred to in ss(1) above is to be calculated retrospectively from the date when the right

of the public to use the way is brought into question, whether by a notice such as is mentioned in ss(3) below or otherwise."

Ss(3)-(6) provide for specific means by which a landowner may negative an intention to dedicate the way as a highway.

Miss Wicks for the appellant takes a number of points. One, which concerned the fact that the land where one of the three footpaths (number 717) is situated was requisitioned in wartime, does not bear on the other footpaths. Her major argument, which if good will carry the day as regards all three paths, was that the Inspector found as a fact that the appellant had for the preceding 46 years demonstrated by his overt actions that he had no intention of dedicating the footpaths to the public; that this finding concluded in the appellant's favour the question, arising under the closing words of s31(1) of the Act of 1980, whether there was "sufficient evidence that there was no intention during that period [sc the 20 years of public use] to dedicate it"; and that therefore the Inspector was bound to conclude that the paths were not dedicated under s31 although, in fact, he concluded the contrary. I shall deal first with this submission. As I shall show, its resolution turns largely upon the differences between the old common law rules relating to the dedication of public rights of way and the effect, on its true construction, of s31.

In paras 45-49 of his report the Inspector sets out the appellant's evidence as to what he did to prevent or inhibit public use of his land, including the 3 footpaths. An iron gate was erected at one point in 1955, and there was evidence that it was still there in 1963. It was replaced by various wooden gates, and later by metal ones which stand today. Padlocks and chains were fitted. Workers on the estate knew that gates had to be kept locked. 18 gates were bought in 1967. The whole area enclosing the paths was fenced, and that work was completed between 1957 and 1961. Further fencing was also installed later. Various notices were erected. The Inspector accepted (para 65) that this had been done, but found that there was "no hard evidence" of notices carrying such specific words as "No Footpath". Other notices seem to have said "Private Woods", "Private", and so forth.

The Inspector found, in para 66 to which I must come, that the terminus ad quem for the purposes of the period of time in which public use of two of the footpaths had to be shown for the purposes of dedication was 1970/1. The paragraph on which Miss Wicks relies as containing the finding of fact crucial to her argument is 58. This is the relevant sentence:

"Turning to the possible presumption of dedication under common law I conclude that for the last 46 years, while the Objector has been directly involved with the Estate, he has shown by his various actions that he had no intention of dedicating the FPs."

It is important to notice that this finding is made in the context of the Inspector's consideration of the common law position.

In para 59 the Inspector said:

"In the following paragraphs, as required by WLCA81 s53, and HA80 s31, I will deal with the various Orders by considering initially when the right to use the particular FP was first raised. I will then decide the date on which the right to use it was called into question, which will be the date from which 20 years use must be calculated. I will consider if the public used it freely without being obstructed, without seeing notices or being challenged and believing they did so as of right'. I will also consider what the Objector did to make it clear to the public he had no intention of dedicating the FP. I will then decide whether the FP should be added to the Definitive map or not."

Since he had rejected any question of common law dedication, what follows in the Inspector's report must necessarily be directed to the applicability or otherwise of s31. I should read para 63-66:

"63. I believe the gates were initially aimed at keeping gypsies and vehicles out of the Estate, and it was only as planting advanced that they really became an important part of the effort to exclude pedestrians as well. However,

the number of those who claim to have driven vehicles through estate gates or opened gates after the mid 1950s, supported by those who said they were never obstructed and others who said they would not knowingly trespass, convinces me that the gates were not kept locked in spite of instructions that this should be done.

64. I note that fencing was erected around the estate between 1957 and 1961. More fencing, including rabbit netting, was erected as planting progressed. I also note that staff repaired gaps that were made. I believe the fencing linked to planting was not put across major tracks (needed by forestry workers), but may well have crossed the less important ones. Supporters' evidence convinces me that the fences had little effect on pedestrians. I suspect that people either went through open gates, gaps by the gates, skirted round the end of the fencing, or in some cases cut the fences ... However, I conclude that the majority, who had probably been walking the route for some years, barely noticed the fences.

65. As far as notices are concerned, they must clearly show to the public that there was no intention to dedicate the FPs. I accept that many notices were put up, but there was no hard evidence to suggest that any in this area carried the words 'No Footpath' or something similar. I conclude that the Supporters, virtually all of whom said they remembered no notices until 1970/1, meant that they had not remembered seeing any notice suggesting that a footpath they had used over the years was closed to them. I also accept that PFPs often run alongside and through private woodland.

66. The weight of evidence convinces me that, in spite of efforts by the Objector, the public's right to use SR719 and SR721 was first called into question in 1970/1 when Dragons Teeth and padlocked gates stopped them. I further conclude that the public used them openly, unobstructed and unchallenged and as of right for over 20 years, from at least 1946 until 1970/1."

Footpath 717 is dealt with separately (from para 69 onwards): it engaged the point as to requisition. The Inspector held that the terminus ad quem in relation to this path was 1956. For present purposes I need only set out the last 2 sentences of para 73:

"I therefore conclude that on the evidence presented the public used SR717 for at least 20 years before 1956, and probably as far back as the beginning of the century. I conclude that the use was open and unobstructed, and that users were not challenged, saw no notices telling them the FP was private, and believed they were using it as of right."

Until 1932, the dedication of a footpath as a public right of way was a matter regulated by the common law. Miss Wicks' major submission, as I have indicated, rests on the proposition that the Inspector's finding in para 58, although given in the context of the common law position, concludes the issue of dedication under s31 in her client's favour. It is therefore necessary to describe the old common law; but first I should set out the relevant provisions of the 1932 Act, which, while preserving the common law position, for the first time introduced a statutory regime. S1(1) is strikingly similar to s31(1) of the Act of 1980:

"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 20 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, or unless during such period of 20 years there was not at any time any person in possession of such land capable of dedicating such way."

That second proviso is not replicated in s31(1); and

this is of some materiality to the argument concerning

footpath 717 which was requisitioned, a point to which I must

return. SS(2):

"Where any such way has been enjoyed as aforesaid for a full period of forty years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention to dedicate such way."

I need not read further.

The previous common law is described by Scott LJ in *Jones v Bates* [1938] 2 All ER 237 at 244as follows:

"Before the Act [sc the Act of 1932], the law applicable was the common law. The main alteration is effected by s1, which gives a new statutory effect to mere proof of actual user as of right and without interruption. At the time of the passing of the Act, the main outline of the law affecting proof of a public highway ... had been drawn quite clearly by judicial decisions. Whereas in Scotland proof of 40 years' user as of right, and without interruption in the enjoyment of the right, ipso facto established the legal conclusion that the way was public by prescription, in England no such convenient rule of law had been evolved by our courts. Our legal theory had always been ... that the sole origin of a public highway was dedication to the public use by the owners of the land over which it ran, and in consequence that, in case of dispute, the public right could be established only by such evidence as would justify an inference of fact that the way had at some date, known or unknown, been so dedicated. The corollary followed that, on this as on all others issues of fact, the tribunal had to decide, once there was some affirmative evidence before it of user, whether or not on balance it was sufficient to establish dedication. ... the task of the tribunal of fact was not limited to deciding the necessary questions of user - was it of right? Was the exercise of the right interrupted? How long had it continued? These findings would in Scotland have sufficed for the decision of the legal issue. In England, however, the tribunal had to deal with such difficult investigations as the state of the title of the owners and whether there was an owner who could dedicate, and consequently sometimes even the time when the dedication - usually quite imaginary - had in fact taken place. Above all the other difficulties, the Tribunal had solemnly to infer as an actual fact that somebody or other had in fact dedicated. It was often a pure legal fiction, and yet put on the affirmant of the public right an artificial onus which was often fatal to his success. The practical result of the English rule of law was that in many cases, although quite a formidable body of evidence was available to demonstrate what I will call the Scottish premises, the public claimant failed on the additional English requisites."

In *Fairey v Southampton County Council* [1956] 2 QB 439, [1956] 2 All ER 843 at page 456 of the former report, Denning LJ said this:

"The Rights of Way Act 1932 has introduced a new means by which the public may acquire a right of way, in addition to the old means of dedication, which, be it noted, is still preserved ... The new means of acquiring it is by prescription for 20 years. The old common law prescription for a right of way had to run from time immemorial, that is, from the time when Richard Coeur de Lion came to the throne in AD 1189. The new statutory period of 20 years has no fixed starting point, but only a finishing point."

Then at 458:

"In my opinion a landowner cannot escape the effect of 20 years prescription by saying that, locked in his own mind, he had no intention to dedicate: or by telling a stranger to the locality (who had no reason to dispute it) that he had no intention to dedicate. In order for there to be sufficient evidence that there was no intention' to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large - the public who used the path, in this case the villagers - that he had no intention to dedicate. He must, in Lord Blackburn's words, take steps to disabuse those persons of any belief that there was a public right ... Such evidence may consist ... of notices or a barrier: or the common method of closing the way one day a year.

...

I must say at once that to my mind this Act of 1932 is not a procedural Act. It affects the substantive law in the following respects: it creates a new statutory right to a highway by prescription in addition to the old right by dedication. It reverses the burden of proof: for whereas previously the legal burden of proving dedication was on the public who asserted the right ..., now after 20 years user the legal burden is on the landowner to refute it. It gives reversioners a right to interfere and gives the public a right of way if they do not interfere: whereas previously reversioners had no right to interfere and the public could acquire no right of way against them."

Birkett LJ said at 460:

"The main purpose of the Rights of Way Act 1932 was to simplify the procedure when it sought to establish a way as a public highway. It does not profess to alter the general law as to the manner in which public rights are deemed to have come into existence. The important change is in the length of time which is enough to establish the intention. If the way can reasonably be presumed to have been dedicated as public, then proof of public user for 20 years past is now enough, if the user has been as of right', without interruption, and it is not proved by the landowner that the intention to dedicate the way was not continuous during the 20 years: Jones v Bates."

Miss Wicks submits that the only relevant change effected by statute was to reverse the burden of proof in relation to the issue of the owner's intention to dedicate. Since in para 58 the inspector has not merely found (for the purpose of the common law) that those asserting the right of way have failed to prove an intention to dedicate on the part of the appellant, but rather that the appellant has affirmatively proved, by his overt acts, no intention to dedicate, his conclusion suffices to resolve the question of statutory dedication under s31 in the appellant's favour. Mr Hobson for the Secretary of State submits that, for the purposes of the statute, the Inspector's finding in para 58 is not enough, and that in paras 64-66 he found, in effect, that the closing words of s31(1) had not been satisfied.

Taking the passage I have cited from Scott LJ in Jones v Bates as a full and convenient description of the common law, it seems to me that the material change effected by the statute of 1932 (and carried through to the Act of 1980) did not merely consist in a shift of the burden of proof. The common law required not only that the claimant to the right should show that the landowner had evinced an intention to dedicate; he had to show actual dedication; and it was precisely because such an event was usually fictitious or imaginary that the common law was unsatisfactory. But under s31 the landowner must prove merely that he had no intention to dedicate; certainly, he must prove it by overt acts, directed (as Lord Denning indicated in Fairey) to the public who use the way in question. Lord Denning contemplated that the traditional means of closing the way for one day in the year would suffice.

The result is, in my view, that under the statute the landowner has a lesser proposition to disprove than under the common law the claimant had to prove. This approach vindicates the plain purpose of the Act of 1932 for the very reason explained by Scott LJ: it expunges from the law the Alice in Wonderland requirement of any actual dedication.

But on this reasoning, though it is not precisely the way in which she put the matter, Miss Wicks must succeed, since the Inspector has found in terms that the appellant has disproved by overt acts (and they were plainly directed to the users of the ways) any intention on his part to dedicate. I do not think that the respondents' case can be saved by references to paras 64 to 66. The whole burden of those paras goes to the question of open and unobstructed user. There is, it is true, a reference in the first sentence of para 65 to the need for the notices to show to the public that there was no intention to dedicate. It may be that the notices alone would not negative that intention; but even if in para 64-66 the Inspector intended distinctly to find as a fact that the appellant had not negated the relevant intention within the closing words of s31(1), his decision would be flawed because there is no explanation whatever of how such a finding can sit with what he said in para 58. More than this, on the assumption that para 64-66 contain a finding that the appellant's intention to dedicate had not been negated under s31, that finding could only be reconciled with para 58 upon the premise that the appellant had to disprove something more, for the purposes of s31, than the Inspector found that he had disproved in para 58. But on the reasoning I have advanced, that is not the case.

That is the end of the case; but, despite the statutory changes, this area of the law remains convoluted, and I should say something about the relationship between the first and second parts of s31(1). First, persons asserting a right of way under the subsection must demonstrate actual enjoyment, as of right and without interruption, for at least 20 years. The expression "as of right" means that the members of the public using the way must believe they have the right to do so. This is clear from *Hue v Whiteley* [1929] 1 Ch 440 and *R v Secretary of State for the Environment, ex parte Cowell* [1993] JPL 851; indeed, it could not be otherwise, since if the expression "as of right" meant that the public must demonstrate an objective legal right to use the way, the statutory provision would be circular or question-begging. The nature of the user that has to be established is described by the old Latin tag "*nec vi nec clam nec precario*". It means that the use must be open not secret, and in effect unobstructed.

Quite plainly, the second part of s31(1) imports a further requirement. It means that even if use of the required quality is proved, the status of right of way would not be established if the landowner demonstrates an intention not to dedicate. The logical relationship between the two parts of the subsection entails that proof of an intention not to dedicate can be constituted by something less than proof of facts which must have made it clear to the public that they had no right to use the way: otherwise, once the interested public had established their case under the first part of the subsection, there would be no room for the operation of the second part. This is not a very satisfactory state of affairs. It is plain that the landowner must disprove an intention to dedicate by overt acts directed to the members of the public in question, but equally plain that they need not actually bring home to the public that there is no right to use the way. I can only conclude that any sufficiently overt act or series of acts indicating an intention to keep the way private will be enough for the landowner's purposes in relation to the second part of the subsection, though they do not in fact bring home to the public his objection to their using his land.

I may deal with the remainder of Miss Wicks' submissions shortly. She complained that the Inspector did not properly consider whether his own findings relating to the notices ought to have led to the conclusion that there was no intention to dedicate within the closing words of s31(1); and the evidence as to the fences and gates meant that the way cannot have been used "openly, unobstructed and unchallenged and as of right". I have entertained some doubt whether in paras 64-66 the Inspector did give proper consideration to the first, as well as the second, part of ss(1); but while the subsection plainly contemplates two stages, there is no requirement that an Inspector deal with them in any particular way, and were it not for para 58, on balance I would have concluded, particularly in light of para 66, that this Inspector intended to deal with both arms of the subsection. However, the terms of para 58 cast doubt on any such conclusion. So this aspect of the case does not amount to a free-standing basis on which to accord Miss Wicks relief. As regards the fences and gates, the Inspector's conclusion is that, at any rate, most of the public found no obstruction or challenge to their use of the way; that, I think, was a matter of fact for him. It is not enough for Miss Wicks' purpose that I might find his conclusion surprising.

Finally I turn briefly to the point as to requisitioning, which affects only footpath 717. As I have said, the Inspector took the 20 year period as regards this footpath as ending in 1956. There was no contest that there was a time during that period in which land including the footpath had been requisitioned by the military authorities.

There is no dispute between the parties but that when land is requisitioned, the authorities do not obtain the fee simple, but simply a right to possession. Miss Wicks submits that in consequence of this, the authorities have no capacity to dedicate a path as a public right of way, since the power or right to do so lies only with an owner. She says there is an analogy with the position of a tenant, who cannot create a highway over his landlord's land without the freeholder's consent: *Wood v Veal* (1822) 5 Barnewall and Alderson 454, or with the position relating to a tenant for life under a strict settlement: *HM Attorney-General and Newton Abbot Rural District Council v Dyer* [1947] Ch 67, [1946] 2 All ER 252.

Mr Hobson accepts that if the requisition factually interrupted the period of 20 years use by the public, there can be no statutory dedication, on the simple ground that the first part of s31(1) would not then be fulfilled. That was indeed the position in relation to two other footpaths which the Inspector had to consider. But he distinguished the case of 717, "because there was apparently little obvious military presence in Great Britain's Wood [where the footpath

runs] during WW2, and there was also clear evidence that it was used by several people during the period of requisition." (para (70)

The Newton Abbot case was one in which the right of way was in fact upheld under s1(2) of the Act of 1932, on the basis of 40 years user and no sufficient evidence of an absence of intention to dedicate. The judge held, however, that had the plaintiffs needed to rely on the common law, they would have failed for want of a capacity to dedicate in the relevant owner. S1(2), in contrast to s1(1), did not negative dedication in a case where there was no person in possession of the land, during the relevant period, capable of dedicating the way. S31(1) likewise imposes no such requirement. It follows, as it seems to me, that the bare fact that there is not a person in possession of the land capable of dedicating the way cannot of itself defeat a claim under s31(1). Thus, for the purposes of s31(1) of the 1980 Act and s1(2) of the 1932 Act alike, dedication will not be defeated where for example the only person in possession is a tenant who has not himself the capacity to dedicate. So the mere legal circumstance that the military authorities have no title by virtue of their requisition does not of itself negative dedication under s31(1).

However, in my judgment a right of way cannot arise under s31 if at some time during the relevant period there is no person at all having the legal right to create a public right of way. Where the only person in possession is a tenant, he together with his landlord can create a right. But where the land is requisitioned, though the requisitioners take no title, no person having an interest in the land has the power to dedicate it as a public right of way. In *Tehidy Minerals* [1971] 2 QB 528, [1971] 2 All ER 475, which was concerned with rights of common over land which had for a period been requisitioned, Buckley LJ said this at 543G of the former report:

"The effect of the requisition was to displace all other interests in the land during its continuance, with the result that from the date of the requisition until December 31st 1960 no one can have enjoyed any grazing rights on the Down by virtue of any common right. It is therefore impossible for any of the defendants to make out a case under s1 of the Prescription Act 1832, not because the requisition constituted an interruption' within the meaning of the section (which it may not have done, since neither the dominant owners nor the servient owner had any choice in the matter), but because during the requisition there was no enjoyment within the terms of the section."

It seems to me that similar considerations apply here. The fact of the requisition is simply inconsistent with the existence of public rights of way.

In the result, I would have upheld Miss Wicks' case on this ground also in relation to footpath 717.

The Definitive Map Modification Orders relating to each of the three footpaths will be quashed.

Judgment accordingly.

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