

R v. SUFFOLK COUNTY COUNCIL ex p. STEED

COURT OF APPEAL (Butler Sloss, Pill and Schiemann L.JJ.): July 11, 1996

Commons—Registration—Land used for sports and pastimes for over 20 years—Application for registration refused—Whether user of land restricted to inhabitants as of right—Evidence needed to establish user by inhabitants as of right—Whether registration of land as town green would create right to pursue sports and pastimes on the land in question

In 1992 the applicants sought to have an area of land in Sudbury known as the People's Park registered as a town green under the Commons Registration Act 1965 ("the CRA"). It was contended on the form of application that the land had been used for recreational use for at least 20 years from 1970. The land had been acquired in 1987 by the Secretary of State for Health with the object of constructing a new hospital on the land, and the Secretary of State objected to the proposed registration. The respondent local authority resolved that the application should be rejected as it did not establish that the necessary statutory criteria for registration as a town green had been fulfilled. The applicants sought judicial review of that decision on the grounds, *inter alia*, that the local authority had misdirected itself in law as to whether the relevant criteria were met. Carnwath J. dismissed the application at first instance. The applicants appealed.

Held, dismissing the appeal, that section 22 of the CRA, provided that a town or village green was land on which either by specific statutory provision, or by customary right, or by continuous use for not less than 20 years, the inhabitants of the locality were entitled to pursue lawful sports and pastimes. It was a serious step to register land as a town or village green whether in public or private ownership, and that other than in the case of specific statutory allotment, the customary or 20 years continuous use as of right by the inhabitants of the locality would need to be properly and strictly proved. In the present case, the evidence failed by a long way to establish that the land in question had been used for sports or pastimes as of right by the inhabitants of Sudbury. It was necessary for the applicants to demonstrate that the fact of being an inhabitant of Sudbury conferred on a person the right to use the land in question, and not merely as a member of the general public. The judge had therefore been correct to conclude that the applicants had failed to establish that the right to use the land was linked to any particular locality.

Per curiam, though the appeal did not turn on this point, it was arguable that registration of land as a new town or village green under section 13 of the CRA and the subordinate regulations had the effect of confirming in the relevant inhabitants a right to indulge in lawful sports and pastimes on the land in question. It was difficult to construe section 22 of the CRA as having any effect other than opening the way for creation of new rights where 20 years continuous user could be established. It was not the fact of registration under section 13 which created the new right but the fact that the land had been in continuous use for the period prescribed by the Act.

Cases referred to

- (1) *Bolton MDC v. Secretary of State for the Environment* [1995] 1 W.L.R. 1176; [1995] E.G.C.S. 126; [1995] N.P.C. 99A; *The Times*, July 17, 1995, HL.
- (2) *Brocklebank v. Thompson* [1903] 2 Ch. 344.

- (3) *Corpus Christi College, Oxford v. Gloucestershire County Council* [1983] Q.B. 360; [1982] 3 W.L.R. 849; [1982] 126 S.J. 578; [1982] 3 All E.R. 995; (1983) 46 P. & C.R. 9; (1982) 79 L.S. Gaz. 1257; (1983) 81 L.G.R. 29, CA
- (4) *Forbes v. Ecclesiastical Commissioners* (1872) L.R. 15 Eq. 51.
- (5) *Hammerton v. Honey* (1876) 24 W.R. 603.
- (6) *Hue v. Whiteley* [1929] 1 Ch. 440.
- (7) *Jones v. Bates* [1938] 2 All E.R. 237.
- (8) *O'Keefe v. Secretary of State for the Environment* [1996] J.P.L. 42.
- (9) *Mercer v. Denne* [1905] 2 Ch. 538.
- (10) *Mills v. Silver* [1991] Ch. 271; [1991] 2 W.L.R. 324; [1991] 1 All E.R. 449; (1990) 61 P. & C.R. 366; (1990) 134 S.J. 1402; *The Independent*, July 11, 1990, CA.
- (11) *New Windsor Corporation v. Mellor* [1975] Ch. 380; [1975] 3 W.L.R. 25; 119 S.J. 440; [1975] 3 All E.R. 44; 78 L.G.R. 337; 30 P. & C.R. 429; CA; affirming [1974] 1 W.L.R. 1504; 118 S.J. 580; [1974] 2 All E.R. 510; 72 L.G.R. 682
- (12) *R v Joliffe* (1823) 2 B. & C. 54.
- (13) *Re Turnworth Down, Dorset* [1978] Ch. 251; [1997] 3 W.L.R. 370; (1976) 121 S.J. 254; [1997] 2 All E.R. 105; (1976) 33 P. & C.R. 192; *Sub nom. Turnworth Down, Turnworth, Dorset* [1977] 75 L.G.R. 710.
- (14) *Tyson v. Smith* (1838) 9 Ad. & El. 406.

Legislation construed

Commons Registration Act 1965, ss.13 and 22.

Appeal from the order of Carnwath J. dismissing the application for judicial review of Mr Colin Steed and Mr David Steed of the decision of the Suffolk County Council made on September 3, 1992, refusing the registration of land known as People's Park, at Sudbury, as a town green under the Commons Registration Act 1965. The full facts and grounds of the application and appeal are set out in the judgment of Pill L.J.

Gerard Ryan, Q.C., for the applicants.
Vivien Chapman for the respondents.

PILL L.J. On February 27, 1992, Mr David Steed and Mr Colin Steed (the appellants) applied to Suffolk County Council (the respondents) for registration of the People's Park Sudbury, Suffolk (the land) as town green under the Commons Registration Act 1965 (the Act) by way of amendment of the register under section 13. The land is about 15.8 acres in extent and is within the urban fabric of the town of Sudbury as depicted on the current Ordnance Survey plan and to the north-east of the town centre. The land had been purchased by the Borough of Sudbury in the 1870s and renamed People's Park. Its use was later regulated by a scheme approved by the High court and administered by trustees. There was grazing and recreational use. In 1987 the land, together with other land, was acquired from the trustees by the Secretary of State for Health with the object of the construction on it by the regional health authority of a hospital.

The Secretary of State object in writing to the application which was refused by the respondents on September 3, 1992. The planning committee resolved that the application "be rejected on the grounds that it failed to establish that all the statutory criteria for amendment of the register of town and village Greens were met".

This is an appeal against the dismissal by Carnwath J. of the appellants' application to quash that decision of the respondents. The court heard submissions on behalf of the Secretary of State (who was heard in opposition to the motion under Ord. 53 r.9(1)) and the regional authority as well as from

the appellants and the respondents. A substantial sum of money has been spent on site for preparatory work for the hospital.

The application

The application to the respondents was made on Form 30 annexed to the Commons Registration (New Land) Regulations 1969 (S.I. 1969 No. 1843) (the regulations). Those regulations were made by virtue of powers conferred in sections 13 and 19 of the Act. Form 30 is headed "Application for the registration of land which became a town or village green after 2 January 1970". The question "On what date did the land become a town or village green?" is answered "1st August 1990 on completion of 20 year period from 31st July 1970". The question "How did the land become a town or village green?" is answered as follows:

By the use thereof by the local inhabitants, *i.e.* the inhabitants of Sudbury. Lawful sports and pastimes including amongst other things football, dog walking, mushroom picking, fetes, children's games, kite flying, cricket, neighbourhood access, rounders.

In answer to a later question enquiring if there are any other facts relating to the application which ought to be brought to the attention of the registration authority, it is stated:

The inhabitants have used People's Park for lawful sports and pastimes "as a right" for the 20-year period 1970–1990. Same identification of usage pre-1970. Commencement date from time immemorial.

The application was supported by 39 forms, six of which were signed by more than one person, completed by local residents and giving particulars of use of the land. A detailed statement in support was submitted by Mr S.J. Blackwell, resident and former borough surveyor. The detailed written objection of the Secretary of State was supported by statements from four trustees of the Sudbury Common Lands Charity who sold the land to the Secretary of State. The appellants and the Open Spaces Society commented in writing and in detail upon the objections.

When the planning committee considered the application, all the above material was available to them together with a report prepared by the county secretary and solicitor who had obtained counsel's opinion. The recommendation in the report was for rejection of the application.

The appellants claim that the respondents were misdirected in law in the solicitor's report. Upon the evidence and a proper legal direction, the respondents ought to have registered the land as a town green, it is submitted. Further, procedural impropriety is alleged in a failure of the respondents to give the consideration to the application which the Act and Regulations required. The application should be remitted to the respondents for reconsideration.

Town or village green

The Act followed in time the report in 1958 of a Royal Commission on Common Land. Further legislation, which has not since been enacted, was plainly contemplated. The Act has been subject to considerable judicial criticism for its uncertainty, for example in *Corpus Christi College, Oxford v. Gloucestershire County Council*.¹

¹ [1983] Q.B. 360.

The essential characteristic of a town or village green as stated in *Halsbury's Laws*, Vol. 6 para. 525 is that

“by immemorial custom the inhabitants of the town, village, or parish should have acquired the right of playing lawful games thereon and enjoying it for purposes of recreation. The nature of the enjoyment is a matter for proof in each case, and the custom must be limited to the inhabitants of the parish, manor or other district for which it is claimed”.

The classic statement of the nature of a customary right is that of Sir George Jessel M.R. in *Hammerton v. Honey*.²

There are certain rights which may be claimed by custom as distinct from prescription. One is called a right of recreation and amusement, and exercise, for the playing of all manner of lawful games and pastimes, is a right in the nature of an easement which may well be claimed by custom.

Now what is the custom? A custom, as I understand it is, local common law. It is common law because it is not statute law; it is local law because it is the law of a particular place as distinguished from the general common law. Now, what is the meaning of local common law? Local common law, like general common law, is the law of the country as it existed for the time of legal memory, which is generally considered the time of Richard I. Therefore, when people allege a custom they allege that which they call a custom as having the law of the place before the time of legal memory

After all, whatever definition you may give to custom and prescription, we all know that they are legal fictions invented by judges for the purpose of gaining a legal foundation or origin to long usage. I do not suppose anybody imagines that in the case of prescription there has been a lost grant or of a custom that there has been from time immemorial a common law of the particular place, and the meaning and substance of the old law is merely this—that when you find long continued usage which can have a legal origin, then, with the view of preserving to the people claiming them the acquired possession of the rights of property or rights of easement which they have so long enjoyed, you shall attribute these rights, if possible, to a legal origin so as to support them . . .

. . . I agree that, the nature of custom being, as it is, local law, you can only get rid of it the same way as other local laws are got rid of, namely, by Act of Parliament. I am not aware of any other means. Of course, it is opposed to the true notion to support there is such other means, but that is an additional reason why the judges have been very careful, not only in restricting the custom to certain classes of cases, but also in seeing custom is properly and strictly proved. If there is such a custom in the inhabitants of a vill you never can get rid of it, as far as I know, by any means short of an Act of Parliament.

Sir George Jessel also stated that when it is said that “custom must be certain, reasonable, and continuous—that all relates to the evidence of a custom”. Tindal C.J. had stated in *Tyson v. Smith*³ that

² (1876) 24 W.R. 603.

³ (1838) 9 Ad. & El 406 at 421.

It is an acknowledged principle that, to give validity to a custom,—which has been well described to be an usage, which obtains the force of law, and is, in truth, the binding law, within a particular district or at a particular place, of the persons and things which it concerns—it must be certain, reasonable in itself, commencing from time immemorial, and continued without interruption.

Custom, stated Stirling L.J. in *Mercer v. Denne*⁴ is “truly described as a local law”.

The 1965 Act became law against the background that such customary rights existed. The central difficulty about construing the Act is in considering whether it was intended merely or primarily to provide a mechanism for registering rights or whether it has the potential to destroy existing rights and permit the creation of new rights.

In section 22 of the Act, the interpretation section, it is stated that:

Town or village green means land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality or on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports or pastimes as a right for not less than 20 years.

(Lord Denning in the *Corpus Christi College* case referred to the three categories within the definition as classes A, B and C and I will use the same terms).

As the judge pointed out, the statutory definition follows the recommendations of the Royal Commission in adopting a three-part definition but class C is different from that recommended by the commission which was to include

“in a rural parish any unenclosed open space which is wholly or mainly surrounded by houses or their curtilages and which has been continuously and openly used by the inhabitants for all or any such purposes (lawful sports and pastimes) during a period of at least 20 years without protest or permission from the owner of the fee simple or the Lord of the Manor (para. 403 of report).

It may be noted that it has been held that a regular usage of 20 years unexplained and uncontradicted may be sufficient to justify a finding of the existence of an immemorial custom (*Brocklebank v. Thompson*⁵ citing *R. v. Joliffe*.⁶ As will have appeared from the form of the application, Form 30, the appellants however sought to rely upon the third part of the definition, class C, use for lawful sports and pastimes by the inhabitants as of right for the 20 years after January 2, 1970, the 20 being said to commence from July 31, 1970.

⁴ [1905] 2 Ch. 538 at 582.

⁵ [1903] 2 Ch. 344.

⁶ (1823) 2 B. & C. 54.

The statutory framework

It is necessary to set out further extracts from the Act and Regulations. Section 1, insofar as is material provides:

- (1) There shall be registered, in accordance with the provisions of this Act and subject to the exceptions mentioned therein—
 - (a) land in England and Wales which is common land or a town or village green
- (2) After the end of such period, not being less than three years from the commencement of this Act, as the minister may by order determine—[in the event 31 July 1970]
 - (a) no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered;
 - (b) no rights of common shall be exercisable over any such land unless they are registered either under this Act or under the Land Registration Acts 1925 and 1936
- (3) Where any land is registered under this Act but no person is registered as the owner thereof under this Act or under the Land Registration Acts 1925 and 1936, it shall—
 - (a) if it is a town or village green, be vested in accordance with the following provisions of this Act

(Section 8 provides that in certain circumstances the Commons Commissioner shall, in the case of a town or village green, direct the registration authority to register as the owner of the land a local authority). Section 3 provides:

- (1) For the purposes of registering such land as is mentioned in section 1(1) of this Act and rights of common over and ownership of such land every registration authority shall maintain—
 - (a) a register of common land;
 - (b) a register of town or village greens;and regulations under this Act may require or authorise a registration authority to note on those registers such other information as may be prescribed.
- (2) Any register maintained under this Act shall be open to inspection by the public at all reasonable times.

Section 10 provides:

The registration under this Act of any land as common land or as town or village green or of any rights of common over any such land, shall be conclusive evidence of the matters registered, as at the date of registration, except where the registration is provisional only.

Section 13 provides:

Regulations under this Act shall provide for the amendment of the registers maintained under this Act where—

- (a) any land registered under this Act ceases to be common land or a town or village green; or
- (b) any land becomes common land or a town or village green; or
- (c) any rights registered under this Act are apportioned, extinguished or released or are varied or transferred in such circumstances as may be prescribed.

Regulation 3 under the heading “Land becoming common land or a town or village green”, provides, in so far as is material:

- (1) Where after 2nd January 1970, any land becomes common land or a town or village green, application may be made subject to and in accordance with the provisions of these regulations for the inclusion of that land in the appropriate register and for the registration of rights of common thereover and of persons claiming to be owners thereof.

Regulation 3 and subsequent regulations state how an application for registration is to be made and what action is required of the registration authority. Regulation 6(1) provides:

As soon as possible after the date by which statements in objection to an application have been required to be submitted, the registration authority shall proceed to the further consideration of the application, and the consideration of statements (if any) in objection thereto, in accordance with the following provisions of this regulation.

The rest of the regulation provides for the consideration by the authority of written and signed statements of objection and the right of applicants to an opportunity to deal with the contents of objections. Regulation 8 specifies the action to be taken by a registration authority which has “disposed of an application”.

There are detailed notes from Form 30 prescribed by the Regulation. Note 5, under the heading “How land can become a Town or Village Green” provides:

Land can become a town or village green after 2nd January 1970 in one of the following ways:

- (1) By or under an Act of Parliament otherwise than as substituted land (as to substituted land see paragraph (4) below.
- (2) By customary right established by judicial decision.
- (3) By the actual use of the land by the local inhabitants for lawful sports and pastimes as of right for not less than 20 years.
- (4) By substitution or exchange for other land which has ceased to be a town or village green under (enactments) ...

The consideration

The evidence submitted to support the application to the respondents consisted of questionnaires completed by residents of Sudbury between May and December 1991. The printed document is headed “Questionnaire for collecting evidence to create a new green”. The uses mentioned are summarised in the written submissions of counsel to this Court as “The playing of football, cricket and rounders, walking with and without dogs, picnics, flying kites, mushroom picking, jogging, children’s playing and cycling”. The “walking of dogs” features prominently on the forms and

“fetes” and “neighbourhood access” are also mentioned in the application. Almost all the forms include negative answers to questions whether the owner’s permission to use the land had been requested and whether the writer had ever been prevented from using the land. In their statements, the former trustees say that permissions to use were given to the local football club and for activities such as fairs and galas.

In his report, the county solicitor identified the issues as follows:

In considering whether the criteria in the third limb of section 22 are met, there are a number of issues between the applicant and the objector, namely:

- (a) Is there a specific locality the inhabitants of which have indulged in lawful sports and pastimes?
- (b) Has the use been for lawful sports and pastimes?
- (c) Has the user been as of right?
- (d) Has there been 20 years user?

The four issues are then considered, with considerable references to counsel’s opinion. The solicitor concludes:

Counsel has advised that the application does not succeed on the 1st and 4th of the statutory criteria. In addition, the evidence that it meets the 2nd criteria is scant while in respect of the 3rd it is inconclusive either way.

Counsel had advised that most of the evidence came from residents of the area immediately surrounding the land and that did not in law amount to a “locality”. He also advised that because the uses relied on are claimed to have existed before 1970 the land cannot have “become” a town green after 1970 within the meaning of the Act.

The minute of the meeting of September 3, 1992 set the background and continued:

The applicant claimed that People’s Park had become a village green by virtue of 20 years use by local inhabitants. The County Secretary and Solicitor, however, had accepted counsel’s advice that the applicant had failed to satisfy the four criteria needed to establish a new village green. The local member urged the committee to hold a public inquiry into the application. The committee considered the arguments that had been put forward by both supporters of and objectors to the application.

The resolution already noted is then set out.

Judgment and submissions

The judge expressed his agreement with the respondents’ decision. He stated:

First, the evidence presented by the applicants in the present case did not in terms give any indication of a right arising since 1970. There was evidence of recreational use since 1970. But there was no indication that those using the land did so by virtue of a right claimed to have arisen since 1970. On the contrary the use is alleged to have continued virtually unchanged since as far back as the 1920’s or before. There is no hint of anything having happened since 1970 which might be thought to give rise to a right which did not previously exist.

Secondly, the evidence presented in the forms does not link the use to

a right claimed by reference to any particular locality. The use appears to have been mainly by those living in the nearby streets but the evidence does not show that they were asserting a right defined by reference to that, or any other area.

Dealing with evidence of earlier use, Carnwarth J. added:

Such a claim, if well founded, could have been registered in 1970. In the absence of registration it can no longer be relied on. It is clearly not something by virtue of which the land can be said to have “become” a village green since 1970.

When dealing earlier in this judgment with the word “locality”, the judge stated:

Whatever its precise limits, it should connote something more than a place or geographical area—rather, a distinct and identifiable community, such as might reasonably lay claim to a town or village green as of right. In the present case the “locality” on which the application for judicial review and the supporting affidavit rely is Sudbury itself; I agree that this is the only realistic basis on which to proceed.

For the appellants, Mr Gerard Ryan, Q.C., submits that what constitutes a “locality” for present purposes is a question of fact in every case subject only to the requirement that the extent of the locality is ascertainable. A pragmatic approach is required. In proving the right enjoyed, it is not necessary to show its exercise by inhabitants of every part of the locality.

The fact that, on the evidence, the land was a town green before 1970 does not prevent registration as a third category town green by virtue of use for 20 years from 1970, it is submitted. The effect of section 1(2)(a) is that the status of land which qualified for registration but was not registered is permanently disregarded. Section 13(b) does not require reconsideration of the earlier qualification; it is made irrelevant. Completion of the new qualifying period is an event independent of the original qualification and the right to have the register amended is not defeated by the presence of the word “becomes”. For the purposes of registration, the previous qualification should be ignored. In cases where there was a failure to register customary rights by 1970, Parliament did not intend so drastic a sanction as to prevent registration for all time when pre-1970 rights continue to be exercised after that date.

Mr Ryan submits that there was a sufficient assertion by the informants of use “as of right”. As well as the denial of permission granted, there was the signed assertion that the land was the “People’s Park”.

The procedural challenge is on the basis that the respondents, as registration authority, gave no sufficient attention to the facts. They were not entitled to devolve their duty to consider the evidence to counsel. “Consideration” of the application under Regulation 6 requires an “element of inquisition. The respondents must analyse the evidence and, if necessary, make inquiries of their own. It was impermissible to relate propositions of law to unconsidered facts.

Mr Ryan submits that the application should be remitted to the respondents for reconsideration first because they acted on an erroneous view of the law and, secondly, and in any event, because there was no “consideration” of the application within the meaning of the regulations.

On the effect of the word “becomes” in section 13(b) of the Act Mr Chapman, for the Secretary of State and the Health Authority, as on other points, seeks to uphold the finding of the judge. Because the evidence showed no difference in the use before 1970 from that after 1970, the land could not “become” a town green registrable under the Act during the period after 1970. There must be some change in the facts on the ground, it is submitted. Mr Chapman relies, though the judge did not, upon the decision of this Court in *Corpus Christi College Oxford v. Gloucestershire County Council*.⁷ It is submitted that the word “ceases” in section 13(a) was construed in that case as postulating “a beginning and ceasing to be,”⁸ and “become” requires a factual change on the ground.

Mr Thomas, for the respondents, submits that the evidence demonstrates a sufficient consideration of the application. The material submitted by the appellants was available to members along with the solicitor’s report. It was necessary for counsel to access the evidence in order to give legal advice.

Locality and “as of right”

The application must be treated for what it purports to be, that is, an application for the registration for a “new” class C town green for the town of Sudbury by virtue of the third part of the definition in section 22 of the Act. It is new not only as being within class C but in relying on post-January 1970 use. However, I approach the issue on the basis that it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green and that the evidential safeguards present in the authorities already cited dealing with the establishment of a customary right (class B) should be imported into a class C case. Use, as of right, and as inhabitants of Sudbury, for sports and pastimes must be “properly and strictly proved”. Mr Ryan rightly agreed that the requirements of reasonableness, certainty and uninterrupted use are imported into class C cases. Considering usage, Tindal C.J. stated in *Hammerton*:

Again what must be the usage proved? It must not only be consistent with the custom alleged, but, if I may use the expression, not too wide. For instance 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 have got beyond your custom.

That the locality must be certain was confirmed by Lord Denning M.R. in *New Windsor Corporation v. Mellor*.⁹

In my judgment the application inevitably failed on the evidence submitted. I would accept that the application does not necessarily fail because the users of the land are in the main those residents of Sudbury nearest to it, nor does it fail for lack of proof of continuous use. Where the evidence fails, and fails by a long way in my judgment, is in establishing use of the land for sports and pastimes as of right as inhabitants of Sudbury. The expression “as of right”, in this context, requires a belief in the users that they are exercising a right enjoyed by the inhabitants of Sudbury to use the land for sports and pastimes. The expression “as of right” has the same

⁷ [1983] Q.B. 360.

⁸ *per* Oliver L.J. at 378B.

⁹ [1975] Ch. 380 at 387B.

meaning in this Act as it has in the Highways Acts, as to which see *Hue v. Whiteley*¹⁰ per Tomlin J., *Jones v. Bates*¹¹ and *O'Keefe v. Secretary of State for the Environment*¹² citing *Mills v. Silver*.¹³ There must in my judgment be an honest belief in a legal right to use, the legal right in this case being the right as an inhabitant of Sudbury, and not merely a member of the public, to indulge in sports and pastimes on the land. I do not propose to dwell on how much of the use described in the answers to questionnaires can be described as "sports and pastimes" because, on the view I take of the expression "the inhabitants ... of any locality as of right", the evidence falls short of establishing the requisite use. The use does not demonstrate belief in a legal right to use and, even if it did, there is no sufficient definition of the right asserted. It follows that I agree with the judge on the second of his reasons and his comments upon "locality" and would dismiss the appeal on that ground.

"Becomes"

Consideration of the first of the judge's grounds is however appropriate, especially having regard to the most helpful submissions addressed to the court. Had the land become a town green within the meaning of that term in section 13(b) of the Act? Construing the word "becomes" in section 13(b) does involve some assessment of the general effect of the Act, upon which differing views have been expressed. I agree with the judge and with Mr Ryan, that the *Corpus Christi College* case does not assist in the present context. The decision was peculiar to the two-limb definition of "common land" in the context of registration of common rights. On the question whether "becomes" in section 13(b) requires some change in the facts on the ground, the case does not assist.

Having regard to the nature of customary rights, as explained in *Hammerton*, I do not consider that a failure to register a town green under section 1(2)(a) of the Act has the effect of extinguishing the customary rights over the land. The unregistered green shall not be "deemed" to be a green, as registered land would be, but it may still be proved by evidence to be a green. That view is supported by Note 5 to Form 30 (above) which contemplates the existence of customary rights after 1970.

In *Mellor* Lord Denning M.R.¹⁴ cited *Hammerton* as authority for the proposition that a right, once acquired by custom, can only be extinguished by Act of Parliament and added that "no statute can take away that right by a side-wind. It can only be done by express words": see *Forbes v. Ecclesiastical Commissioners*.¹⁵

In *re Turnworth Down Dorset*¹⁶ Oliver J. stated at p.260:

It is not said, it is true, what is the consequence of non-registration of a

¹⁰ [1929] 1 Ch. 440 at 445.

¹¹ [1938] 2 All E.R. 237.

¹² [1996] J.P.L. 42.

¹³ [1991] Ch. 271.

¹⁴ *op. cit.* at 376E.

¹⁵ (1872) L.R. 15 Eq. 51.

¹⁶ [1978] Ch. 251.

town or village green, except to the extent that section 1(2)(a) provides that, after the end of the specified period: "no land capable of being registered under this Act shall be deemed to be common land or a town or village green unless it is so registered". On the face of it, it seems that the local inhabitants are merely left to bear with such fortitude as they can command the fact that the land ... is not deemed to be a town or village green.

I agree with Mr George Laurence, Q.C., in his opinion to the Countryside Commission as published by the Open Spaces Society (*Getting Greens Registered*, 1995), that Oliver J. was indicating in that passage that "the inhabitants will need very little fortitude indeed because, despite the fact that their town or village green is not on the register, their rights to enjoy it remain undisturbed". Oliver J. also stated (at p.260E) that the primary purpose of the Act is "not to derogate from the [common] rights but to provide for their registration and indeed to protect them".

The 1969 Regulations make provision for the registration of "new" greens, that is, greens which did not exist on January 2, 1970. Given that customary rights continue notwithstanding non-registration, and given the apparent purpose of the Act to encourage the registration of town greens, I cannot conclude that Parliament intended in the case of continued use after 1970 to prevent the registration of a new green merely because a customary green had not been registered in time. The Act envisages the creation of class C greens. The word "registered" appears in both paragraphs (a) and (c) of section 13. In the context I read the expression "land becomes a town or village green" in section 13(b) as "land becomes registrable as a town or village green". The way in which Form 30 requires the application to be made supports that view: "Application is hereby made for the registration as a town or village green of the land described below, which *became so registrable* (my emphasis) after 2nd January 1970". Amendment of the register is possible under the section when a green is established as a class C green after January 2, 1970, even if it could have been but was not registered as a class B green under section 1(1)(a).

Creation of rights

Mr Chapman submits that registration of a class C green does not confer on or confirm in the inhabitants of the locality the right to indulge in lawful sports or pastimes on the land. Registration deals not with rights by with registration. The owner can remove the town cricket team from a registered town green.

In *Mellor* application was made, within the time limit imposed by section 1 of the Act, to register land as a village green by virtue of a customary right and also by virtue of 20 years user as of right. The Court of Appeal held that the Chief Commons Commissioner was entitled to find a customary right and it was not necessary to consider the 20 year user. However Lord Denning M.R. stated¹⁷

But the difficulty about this 20-year user is that the Act does not tell us

¹⁷ *op. cit.* at 391H.

what rights, if any, ensue to the inhabitants by virtue of a 20-year user. It enables the land to be registered as a town or village green but that mere fact of registration confer no rights. And at common law 20-year user gives no rights.

Under the heading “The effect of registration”, Lord Denning stated¹⁸:

... there is nothing [in the Act] to tell us what the effect of registration is. It confers no rights in itself. All is left in the air. The estimation is that Parliament intended to pass another statute dealing with these and other questions on common land and town or village greens. This Act twice refers to matters which “Parliament may hereafter determine”: see section 1(3)(b) and 15(3). I hope that another statute will not be long delayed. But, if there should be delay, I would be tempted to infer from this Act of 1965 that Parliament intended that all land registered as a “town or village green” should be available for sports and pastimes for the inhabitants ...”

Browne L.J. stated¹⁹: “I also agree that as the Act stands, and without further legislation, such user (20 year user as of right) confers no rights on the on the public.”

On my earlier findings, the point does not arise for decision in this case but I would respectfully question whether it is correct that registration of a “new” green under section 13 of the Act and the Regulations does not have the effect of confirming in the relevant inhabitants a right to indulge in lawful sports and pastimes on the land. The point was not argued in *Mellor* which in any event concerned pre-1970 and not post-1970 use. Lord Denning recognised that the class C green in section 22 was “a new thing which is not known to the common law”. That proposition cannot, with respect, be challenged but it leaves open the question whether rights may have been created by statute.

Town or village greens undoubtedly have a legal existence. They were expressly exempted from inclosure under section 15 of the Inclosure Act 1845. Section 12 of the Inclosure Act 1857 provided “summary means of preventing nuisances in town greens and village greens”. Section 29 of the Commons Act 1876 provided that “an encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view of the better enjoyment of such town or village green or recreation ground, shall be deemed to be a nuisance”. Section 15 of the Commons Act 1889 brings town and village greens within the regulatory provisions contained in Part I of that Act. Once it is established that land is a town or village green, there are protectable rights to use it.

While I accept that, by its title, the Act is said to be “an Act to provide for the registration ... of town or village greens” and not an Act to amend the law relating to public rights, section 22 does provide that “in this Act unless the context otherwise requires”, class C land is included within the definition

¹⁸ *ibid.* at 392E–G.

¹⁹ *ibid.* at 395G.

“town or village green”. There is no express limitation upon the purposes for which the land is included within the definition. There is no doubt that the inhabitants have rights over class A and class B greens and the effect of land being a class C green should be considered in that context. I find it difficult to conclude other than that Parliament intended, in section 22, to open the way to the creation of new rights. The right is “to indulge in lawful sports and pastimes” while avoiding the need to prove an immemorial custom or legal origin which would establish a class A or class B green. The limitation of the period of user to 20 years does not offend against principle having regard to *Brocklebank* (above). The land is a town green by virtue of statute and, once it is a town green, should bear the same incidents as any other town green. It is the relevant use which, under the statute, creates the right but once it is registered under section 13, section 10 provides that registration shall be conclusive of the matters registered. Classes B and C should be considered together and just as the evidential requirements of class B are imported into class C, the substantive effect of the required proof is in my view the same in both classes.

The analogy is not exact but I see class C as a way of establishing rights just as section 1(1) of the Rights of Way Act 1932 (now section 31 of the Highways Act 1980) provided a means of proving the existence of a highway. Omitting words of limitation and exception, section 1(1) provided that “where a way ... 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”. In *Jones v. Bates*, Scott L.J. stated that the effect of the section was to give “a new statutory effect to mere proof of actual user as of right and without interruption”. An actual dedication need not be proved. I would construe the class C definition as having the same effect in making proof of the appropriate user sufficient to create a right.

The test for considering whether the rights are established is a stringent one, as stated earlier in this judgment. That provides protection for those with an interest in the land. The registration procedure, as laid down in the Regulations, provides further protection by imposing duties upon a registration authority to send, publish and affix notices (Regulation 5(4)) and conferring the right to object. The Regulations, together with the prescribed Form 30 and its notes, appear to me to be drafted on the basis that what is to be registered, if the application is successful, is a right.

Respondents' procedure

Had a different view of the facts by the respondents been a real possibility, I would not have quashed their decision on the ground of procedural irregularity. Regulations require them to consider the application and the material supplied by the applicants and the objectors was available to members. In his report, the respondents' solicitor correctly identified the issues. The regulations do not in my view impose on the respondents in present circumstances a duty to make their own investigations into the use made of the land.

It is right to acknowledge that the solicitor's report did lay stress on counsel's view of the evidence, which the solicitor adopted, but the members were not precluded from making their own assessment of the evidence and, according to the counsel minute, they considered the arguments on both sides. The issues upon construction of the Act are such that legal advice was

not only helpful but essential. There was a “consideration” sufficient to satisfy the requirements of Regulation 6. Nothing I say derogates from the duty of council members to assess the submitted evidence when performing the duty under the Regulations.

Costs

The judge ordered the appellants to pay the costs of the respondents and one half of the costs of the Secretary of State. According to counsel’s note, the Secretary of State was deprived of half his costs on the grounds that the judge took into account “that part of the problem is due to the failure of successive Secretaries of State to implement legislation”.

I do not regard that as a relevant consideration. The Secretary of State for Health cannot be responsible for Parliament’s failure, if it rightly be regarded as failure, to pass legislation on the management of town greens.

This Court should in my view exercise the discretion afresh. The Secretary of State appeared as landowner and developer of land over which rights were claimed by the appellant. His interest was quite different from that of the respondents as registration authority and whose duties were to be performed, it is agreed, in an impartial manner under the Act and Regulations.

There mere fact that the party claiming costs is the developer will not of itself normally justify a second set of costs (*Bolton MDC v. Secretary of State for the Environment*²⁰ per Lord Lloyd.²¹ In this case however, in addition to claiming relief against the registration authority, the appellants sought a declaration that the land was a town or village green. The Secretary of State appeared at the hearing to protect his interest as landowner against a claim to rights over that land. In my judgment, this is one of those cases where the Secretary of State, as well as the respondents, should be awarded costs.

I would dismiss the appeal and allow the Secretary of State’s appeal on costs.

SCHIEMANN L.J. I agree.

BUTLER-SLOSS L.J. I also agree.

*Appeal dismissed.
Secretary of State’s appeal on costs
allowed.*

Solicitors—Barker Gottle, Ipswich; Argles and Court, Maidstone.

Reporter—Christopher Wagstaffe.

²⁰ [1995] 1 W.L.R. 1176.

²¹ *ibid.* at 1178H.