

List of Documents within Statement of Reasons (Case Law)

Davis v Whitby [1974] (*paragraph 31*)

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Positive/Neutral Judicial Consideration

Court

Court of Appeal (Civil Division)

Judgment Date

8 November 1973

Report Citation

[1974] 2 W.L.R. 333

[1974] Ch. 186



Court of Appeal

Lord Denning M.R. , Stamp and Orr L.JJ.

1973 Nov. 7, 8

Easement—Prescription—Right of way—Pathway across servient tenement to street—Pathway moved by agreement after 15 years' use—Subsequent use of substituted pathway for 18 years—Whether right of way acquired by prescription

A row of six adjoining terrace houses, nos. 49, 51, 53, 55, 57 and 59, had rectangular shaped gardens of the same size at the back. Between 1935 and 1950 a path across the middle of the gardens was used to give access from the back of the houses to the road in front by paths along the sides of nos. 49 and 59 respectively. In 1950 a path at the far end of the gardens was substituted for the path across the middle. As a result, from 1935 to 1950 the plaintiffs' predecessors in title, the owners of no. 51, used a right over the path across the middle of the gardens at the back of nos. 51 and 49 and along part of the side of no. 49 to the road in front, but from 1950 to 1968 the route was altered to a route at the end of the gardens and along the whole side of no. 49. In 1968 the defendant, the owner of no. 49, obstructed the pathway and the plaintiffs, who had bought no. 51 in 1966, brought an action to establish their right of way. Burgess V.-C. held that the plaintiffs had a right of way over the path.

On appeal by the defendant: -

Held, dismissing the appeal, that long user as of right should if possible be presumed to be of legal origin and since the plaintiffs and their predecessors in title had enjoyed 15 years' user of the way across the middle of the gardens followed by 18 years' user of the substituted way for the same purpose, both users being of right, the two periods of user should be considered as one and added together, which gave a full period of over 20 years, and accordingly the right of way was established by prescription (post, pp. 191H - 192B, D-E, 193A).

Dicta of Patteson J. in *Payne v. Sheddin* (1834) 1 Mood. & R. 382 , 383 and Lord Herschell in *Philipps v. Halliday* [1891] A.C. 228 , 231, H.L.(E.) applied.

Decision of Burgess V.-C. [1973] 1 W.L.R. 629; [1973] 3 All E.R. 403 affirmed.

The following cases are referred to in the judgments:

Payne v. Shedden (1834) 1 Mood. & R. 382 .

Philipps v. Halliday [1891] A.C. 228 , H.L.(E.).

The following additional cases were cited in argument:

Albon v. Dremsall (1610) 1 Brownl. 215; sub nom. Alban v. Brounsall (1609) Yelv. 163.

Bealey v. Shaw (1805) 6 East 208 .

Deacon v. South-Eastern Railway Co. (1889) 61 L.T. 377 .

Greenhalgh v. Brindley [1901] 2 Ch. 324 .

Hulbert v. Dale [1909] 2 Ch. 570 , Joyce J. and C.A. .

*Lovell v. Smith (1857) 3 C.B.N.S. 120 . *187*

Reilly v. Orange [1955] 2 Q.B. 112; [1955] 1 W.L.R. 616; [1955] 2 All E.R. 369, C.A. .

Roberts and Lovell v. James (1903) 89 L.T. 282, C.A. .

Rudd v. Bowles [1912] 2 Ch. 60 .

Tehidy Minerals Ltd. v. Norman [1971] 2 Q.B. 528; [1971] 2 W.L.R. 711; [1971] 2 All E.R. 475, C.A. .

Wimbledon and Putney Commons Conservators v. Dixon (1875) 1 Ch.D. 362 , C.A

APPEAL from Burgess V.-C.

Since July 15, 1966, the plaintiffs, Anthony Edward Davis and Julie Eva Davis, were the registered proprietors with absolute freehold title of 51 Vegal Crescent, Englefield Green, Egham, Surrey, which was expressed to be registered together with rights of way over “the passageway leading from the back into Vegal Crescent.” Since January 28, 1964, the defendant, Harry William Whitby, was the registered proprietor with absolute freehold title of 49 Vegal Crescent. The passageway was L-shaped and since 1950 had run from the end of the rear garden of no. 51 across the end of the rear garden of no. 49 and then along the side of no. 49 and out into Vegal Crescent. But between 1935 and 1950 it had run along the middle of the gardens of nos. 51 and 49 and along part of the side of no. 49.

In June 1968 the defendant obstructed the passageway by erecting two wooden posts maintaining that the plaintiffs had no right of way over it. On November 18, 1968, the plaintiffs issued a writ seeking, inter alia, a declaration that they were entitled to the right of way, an injunction to restrain the defendant from obstructing or causing or permitting the passageway to be obstructed, a mandatory order that the defendant should forthwith take down and remove the obstructions erected by him and damages for obstruction.

On November 9, 1972, Burgess V.-C. [1973] 1 W.L.R. 629 declared that the plaintiffs were entitled to a right appurtenant to their freehold property, no. 51 Vegal Crescent, for themselves and those authorised by them to pass and re-pass on foot with or without, but not riding, bicycles, with or without barrows or perambulators, over and along the passageway running along the north side and along the back of the defendant’s property, 49 Vegal Crescent, for the purpose of access to and egress from the back of the plaintiff’s property.

The defendant appealed on the grounds that the judge was wrong in law in holding that (1) user as a way as of right for two consecutive periods, one of 15 years and one of 18 years, over two different routes over the same servient tenement could constitute prescription for the full period of 20 years next before action within the provisions of [sections 2 and 4 of the Prescription Act 1832](#) ; (2) because it would be contrary to common sense to deprive the plaintiffs of rights they were in the course of acquiring by prescription by reason of the route over which the way was prescribed for having been changed 18 years before action was brought, the prescription could not be so defeated; (3) it would be contrary to natural justice if the prescription aforesaid should be defeated by reason of the change in the route over which the quasi-dominant owners were prescribing; (4) because it would be contrary to natural justice to deprive the plaintiffs of rights they were in the course of acquiring by prescription by [*188](#) reason of the route over which the way was prescribed for having been changed 18 years before action was brought, the prescription could not be so defeated; (5) because it would be as big a trap as any experienced lawyer had met in his whole career if the plaintiffs were deprived of the rights they were in the course of acquiring by prescription by reason of the route over which the way was prescribed for having been changed 18 years before action was brought, the prescription could not be so defeated.

The facts are stated in the judgment of Lord Denning M.R.

B. K. Levy for the defendant. There are two periods of prescription here neither of which gives rise to the full period of 20 years needed to establish a right of way. The notice of appeal sets out the grounds.

A right of way must be certain; bounded and circumscribed and with definite termini: *Albon v. Dremsall* (1610) 1 Brownl. 215; sub nom. *Alban v. Brounsall*, Yelv. 163; *Gale, Easements*, 14th ed. (1972), p. 284.

It is intrinsic to the doctrine of prescription that it must be enjoyment of a use of the servient tenement with the knowledge by the servient owner of the exercise of the right (*Gale, Easements*, 14th ed., p. 179). The prescriptive use of one route across Blackacre may be one to which the servient owner would not object, but objection would be taken to the use of another route. The question is whether the two prescriptive periods of use here can be added together.

The immemorial user of a right of way for all purposes for which a road was wanted in the then condition of the property does not establish a right of way for all purposes in an altered condition of the property which would impose a greater burden on the servient tenement: *Wimbledon and Putney Commons Conservators v. Dixon* (1875) 1 Ch.D. 362. Once the site of a right of way has been recognised by the servient owner, or defined by usage, it cannot be altered except by agreement: *Deacon v. South-Eastern Railway Co.* (1889) 61 L.T. 377. In *Payne v. Shedden* (1834) 1 Mood. & R. 382 the occasional substitution of another path was considered to be substantially the exercise of the old right.

Lovell v. Smith (1857) 3 C.B.N.S. 120, 126-127, where a parol agreement for the substitution of a new way for an old prescriptive way and the consequent discontinuance of use of the old way was held to afford no evidence of an abandonment, supports the defendant. In *Roberts and Lovell v. James* (1903) 89 L.T. 282 a lost grant of a right of way was held not to be implied as against the reversioner merely from user of the way during the servient life tenancy. There is no such thing as an inchoate easement known to the law: *Greenhalgh v. Brindley* [1901] 2 Ch. 324, 326, 328.

Tehidy Minerals Ltd. v. Norman [1971] 2 Q.B. 528, 547 contains the latest statement of the law as to the presumption of modern lost grant. As to the establishment of easements of rights of way by prescription under section 2 of the Prescription Act 1832, see *Gale, Easements*, 14th ed., pp. 146-147. One needs a full 40 years' user in order to defeat a parol consent. In *Reilly v. Orange* [1955] 2 Q.B. 112, where the full period of 20 years' user without interruption before suit was not established, the question of consent was not considered. The two separate periods of user *189 in the present case cannot be added together so as to constitute a full period of 20 years. That would be adding two and two together to make five.

D. Gidley Scott for the plaintiffs. What took place in 1950 amounted to acquiescence. In 1950 the old route had been used as of right for 15 to 20 years. The position in 1950 was only consistent with a claim as of right. The presumption of lawful origin applies. The arrangement that was reached in 1950 did not amount to consent but to acquiescence in the variation of the route so that time continued to run. The two periods before and after 1950 should be added together. The first period might, owing to the absence of witnesses, have been much more. There is no authority to prevent two periods of time exercised as of right from being added together. The whole basis of the doctrine of prescription is acquiescence.

It was said for the defendant that where a right of way is claimed by prescription it must be clear. That proposition applies to where the route of a prescriptive right of way is altered. In *Lovell v. Smith*, 3 C.B.N.S. 120, the full prescriptive period of user had been enjoyed before the agreement for the substitution of the portion. It was decided in 1857 before the fusion of law and equity. One can have an equitable right of way. Mellish L.J. in *Wimbledon and Putney Commons Conservators v. Dixon*, 1 Ch.D. 362, 369, said that where you find "the terminus a quo and the terminus ad quem, the mere fact that the owner does not go precisely in the same track... would not enable the owner of the servient tenement to dispute the right of road." *Rudd v. Bowles* [1912] 2 Ch. 60 was a case of an implied grant, not prescriptive acquisition.

Something in the nature of an equity applies to the re-routing in 1950. There is an equity to allow the two periods to be added together. Patteson J. in *Payne v. Shedden*, 1 Mood. & R. 382, 383 is directly in point: the substitution of another track could be considered as substantially the exercise of an old right; evidence of the enjoyment of the old right. In *Roberts and Lovell v. James*, 89 L.T. 282 there was a substitution of one route for another, but not by agreement or acquiescence.

The plaintiffs rely on the [Prescription Act 1832](#) and the doctrine of modern lost grant. The basis of their claim is most easily put by adding the two periods together; alternatively the court can presume a modern lost grant by way of a grant by substitution and by adding the two grants together. Lord Ellenborough C.J. in *Bealey v. Shaw* (1805) 6 East 208, 215 said that less than 20 years' enjoyment might or might not afford a presumption of right derived from grant or Act of Parliament

“according as it is attended with circumstances to support or rebut the right.” In *Hulbert v. Dale* [1909] 2 Ch. 570 a lost modern grant in the nature of an agreement substituting one way for another was presumed. A modern grant can be presumed in 1950. Reliance is put on Pattenon J. in *Payne v. Shedden*, 1 Mood. & R. 382, 383. As to the period of time for which user must be proved, see *Halsbury’s Laws of England*, 3rd ed., vol. 12 (1955), p. 547, para. 1185.

Levy in reply. *Gale, Easements*, 14th ed., p. 153, note 16, suggests that Pattenon J.’s dictum in *Payne v. Shedden*, 1 Mood. & R. 382, 383 appears to be inconsistent with other authorities there cited.

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The plaintiffs’ case was not pleaded as being based on equity or on estoppel, which must be pleaded. Had equity or estoppel been canvassed at the trial, the evidence might have been different. So the matter comes before the court on whether there is a legal easement or not; and it must be based on prescription or lost modern grant. The passage in *Halsbury’s Laws of England*, 3rd ed., vol. 12, p. 547 may be explicable because it was written before *Tehidy Minerals Ltd. v. Norman* [1971] 2 Q.B. 528 where the 20 years’ period of enjoyment for the presumption of a lost modern grant was accepted. No case is known where there has been held to be a lost modern grant for a period of less than 20 years.

LORD DENNING M.R.

This case raises a new point on the law of easements. There is a row of houses in a terrace at Englefield Green. They are nos. 49, 51, 53, 55, 57 and 59 Vegal Crescent. They were built in the year 1927 and conveyed to separate owners. Each house has a garden about 60 feet long. At the far end of the garden, the householder has a shed where he keeps his wheelbarrow, his tools and so forth. Each can get to it by walking down his garden. But each can also get to it by means of a path at the end of the garden leading round the back and out by the side of the terrace. This path is very useful for carrying coals to the coal shed instead of through the house; also for vegetables and so forth. The question is whether the owners and occupiers of each of the houses have a right of way along the path from the bottom of the gardens out to the road. The evidence shows that, at any rate from the year 1935, there was a pathway which ran across the middle of all the gardens. The occupiers of the houses used this middle path for carrying their vegetables, pushing their wheelbarrows and so forth out into the path at the side and then to the road. There was evidence that this middle path was used for 15 years, starting at any rate from 1935 to 1950.

In 1950 there was a re-arrangement. It was very inconvenient to have a path going across the very middle of the gardens. The occupiers of the three houses numbered 55, 57 and 59 came to an arrangement whereby, instead of the middle path, they substituted a path at the end of their gardens. Each could go along this end path and out in a path on the side of 59 leading to the road. The other three householders thought this was a good idea. So nos. 53, 51 and 49 did the same. The path in the middle was closed. A new path was made at the bottom of the gardens. It was laid out in this way: There was a fence between no. 53 and no. 55 so that the occupier of no. 53 could not get out that way. But he now had a gate at the bottom of his garden by which he could get into no. 51 and go along the path behind 51 and 49 and out into the road. Likewise the occupier of no. 51 could go along a path behind no. 49. In addition, the then owner of no. 49 went to a good deal of expense. He put a fence up alongside the new pathway, and moved his shed down to that end. The evidence shows that from 1950 onwards the occupiers of those three houses - 53, 51 and 49 - used this pathway at the end of their gardens to get out and go round to the front. That went on quite satisfactorily for the next 18 years.

In 1964 Mr. Whitby, the defendant, bought no. 49. It was registered with a clean title. In 1966 Mr. and Mrs. Davis, the plaintiffs bought no. 51. ***191** It was registered at the Land Registry with a right of way over the passageway leading from the back into Vegal Crescent. Shortly afterwards, those two owners were at variance. The owner of no. 51 wanted to put some ash down. The owner of no. 49 objected. He said there was no right of way over this pathway at the back at all. So, in 1968 the plaintiffs (no. 51) brought an action against the defendant (no. 49) to establish the right of way over the pathway.

Burgess V.-C. [1973] 1 W.L.R. 629, 630 found the facts substantially as I have stated. It was proved that for 15 years from 1935 to 1950 the owners and occupiers of no. 51 had used the middle path across the garden. For 18 years they used the path at the end of the garden.

The defendant says that the two paths must be considered separately; under the [Prescription Act 1832](#), in order to establish a right of way, there has got to be user as of right for 20 years without interruption. The defendant says that there is no right of way along the middle path because 15 years is not enough: and there is no right of way along the back path because 18 years is not enough. So there is no right of way under the statute.

The plaintiff says that the two paths must be considered together. The 15 years’ user of the middle path can be added to the 18 years of the back path so as to make 33 years altogether, which is more than the required 20 years. Both counsel told us

that there is no authority in the books covering such a situation.

Some help can however be found from *Payne v. Shedden* (1834) 1 Mood. & R. 382 decided two years after the Act of 1832 was passed. In that case a way had been used for more than 20 years, but it appeared that during that time the line and direction of the way had been a good deal varied. It was objected by counsel that the evidence of the use with such variations was not admissible. Patteson J. held that the evidence was admissible. He put this instance, at p. 383:

“So, if, instead of the direct path from A to B, another track over the plaintiff’s land from A to C, and thence to B, had been substituted by a parol agreement of the parties for an indefinite time, yet the user of this substituted line may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it.”

So here. For 15 years there was a direct path available to those house-holders across the middle of the gardens for their use. Then by a parol arrangement another path was substituted at the end of the gardens for the like use. Applying the words of Patteson J., “the user of [the] substituted line may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it.”

That is the good sense of the matter. For 33 years the occupiers of nos. 53 and 51 have been able to get round to the back of the houses with their coals and their vegetables and so forth. They have done so by means of an open path. It would be quite intolerable that they should now have to carry them through the house to the front. The good sense of the matter is that when you have a way used for some time, and then afterwards a substituted way is used for the self-same purpose, both users **192* being as of right, with the apparent consent or acquiescence of those concerned, then the original way and the substituted way should be considered as one. The periods of user should be added together. If they come to the full period of 20 years before the commencement of the action, the right of way is established.

In conclusion I would only say, as I have said in the course of the argument, the long user as of right should by our law be given a lawful origin if that can be done. Although the evidence did not go back before 1935, nevertheless it is very likely that the middle path was used since 1927, when the houses were built. So by 1950 there may have been a right of way to the middle path. Then, when the end path was substituted in 1950, it took the place of the middle path, with a like right. In *Philipp v. Halliday* [1891] A.C. 228, Lord Herschell said, at p. 231:

“Now I apprehend that where there has been long-continued possession in assertion of a right, it is a well-settled principle of English law that the right should be presumed to have had a legal origin if such a legal origin was possible, and that the courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title.”

It seems to me, after all these years when the owners of 53 and 51 have been able to take out their coals and dustbins from the back by a way, it should be presumed to have a lawful origin.

I agree, therefore, with the opinion expressed by Burgess V.-C. [1973] 1 W.L.R. 629, 630. I would therefore dismiss the appeal.

STAMP L.J.

I agree; but, as the point is a somewhat novel one, I will express my views in my own words. The basis of prescription, as Lord Denning M.R. has pointed out, is that if long enjoyment of a right is shown, the court will strive to uphold the right by presuming that it had a lawful origin. Here, the owner of no. 51 (which, for the purpose of convenience, I will call “the

dominant tenement”) has for upwards of 30 years enjoyed access from the rear of his house over no. 49 (which I will call “the servient tenement”). During the first 15 years it was enjoyed over one path, and during the second period of over 15 years it was enjoyed partly over that path and partly over a substituted path. Viewed as the exercise of a right to pass and re-pass over the servient tenement, it has been enjoyed for upwards of 30 years, which is more than a sufficiently long period for it to be presumed that the right had a lawful origin. Viewed as a right so to pass and re-pass over a specified path, it has not. The question, as I see it, is which is the right way of looking at it. What happened was that in 1950 the new track or path over the back garden of the servient owner’s house was established; but, using it, the dominant owner still used, as he had formerly done, the path at the side of the servient owner’s house. Was the dominant owner then using the new way as of right and as of the same right as formerly? I think he was. In substance, what was enjoyed as well before as after 1950 was access by the dominant owner to the back of his little house from the road in front of the terrace along the side of the servient owner’s premises and across his back garden.

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On the facts of this case, the use of the substituted route is, in my judgment, to be considered as substantially an exercise of the right claimed and enjoyed for the whole period of 30 years. It is not as though the servient owner had said: “I will stop up the way you have been using over these last 15 years, but you may have a new defined way over a wholly different part of my land,” a situation about which I will say nothing.

I had at one time thought that the point taken that the agreement of 1950 by the servient owner amounted to a consent by him which interrupted the enjoyment as of right and so made the user “precario” was a good point. But I accept Mr. Gidley Scott’s submission that what was agreed in 1950 did not involve a simple consent to the user given by the owner of the dominant tenement, but is more consistent (as I think Burgess V.-C. thought) with the existence of a claim of right by the dominant owner settled by the servient owner affording a route less disadvantageous to him than a path crossing the middle of his garden; and I do not think that it was a case of consent, but rather of compromise.

I would, for these reasons, dismiss the appeal.

ORR L.J.

I agree and do not wish to add anything.

Representation

Solicitors: E. & D. Westbrook, Staines; Rowe & Maw for Versluys & Co., Staines.

Appeal dismissed with costs (not to be enforced except on further application). Legal aid taxation for both parties. Leave to appeal refused. (A. H. B.)

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***590 The Queen, On the Prosecution of the National Liberal Land Company, Limited v The Inhabitants of the County of Southampton**



No Substantial Judicial Treatment

Court

Queen's Bench Division

Judgment Date

23 June 1887

Report Citation

(1887) 19 Q.B.D. 590



Divisional Court

Queen's Bench Division

Lord Coleridge , C.J. , Grove , J. , Pollock , B. , and Hawkins , J.

Mathew , J.

1887 June 23

1887 April 19, 20, 21

Bridge—County, Liability of, to repair—Bridge not built in existing Highway—Acquiescence by County, Evidence of—Statute of Bridges (22 Hen. 8, c. 5) —Indictment—Practice—Verdict of Acquittal—Motion for New Trial by Prosecution.

Upon the trial of an indictment against the inhabitants of a county for the non-repair of a bridge built by private owners, but not built in an existing highway, the true effect of the evidence as to the dedication to and the adoption of the bridge by the county is always a question for the jury. The fact that such a bridge is of public utility and is used by the public is not necessarily conclusive against the county on the question of liability, user and utility being only elements for consideration in determining that question; but there need not, in addition to evidence of public user and public utility, be proof of an overt act amounting to a formal adoption by a body capable of representing and binding the county.

Reg. v. Inhabitants of the County of Southampton (17 Q. B. D. 424) in part dissented from.

Where a verdict of not guilty has been returned upon an indictment for non-repair, a new trial will not be granted; but under very special circumstances the Court may order all proceedings upon the judgment to be suspended, so as to give an opportunity for the question to be again raised upon a fresh indictment.

Rex v. Wandsworth (1 B. & Ald. 63) approved .

MOTION on behalf of the prosecutors for a new trial of an indictment against the inhabitants of the county of Southampton for non-repair of the eastern half of a bridge over the river Itchen. The facts of the case are fully set out in the report of a

previous motion for a new trial (*17 Q. B. D. 424*), but a short summary of them, so far as they are material to the present report, is given here.

In 1882 the prosecutors acquired land situated on the left bank of the river Itchen, in the county of Southampton, and being desirous of connecting it with the town of Southampton on the right bank, they built a bridge over the river. On the county side of the river the bridge adjoined building land of the prosecutors, but it was not approached on that side by any public highway. In 1883 the bridge was opened for traffic together with a new road over the building land called Cobden **591* Avenue, which had been constructed in connection with the bridge; on the other side the bridge was connected with an old highway, which ran into the town. The bridge and the new road were dedicated simultaneously to the public by a public ceremony on the day of the opening. The bridge, which was extensively used by the public, having fallen into disrepair, the defendants were indicted for its non-repair upon an indictment containing four counts; the first for non-repair of the whole bridge; the second for non-repair of the approaches at both ends; the third for non-repair of the eastern half of the bridge; and the fourth for non-repair of the eastern approach. At the trial, before Stephen, J., at the Bristol Winter Assizes, 1886, the learned judge directed a verdict for the defendants upon the first, second, and fourth counts, but left the case to the jury upon the third count, and a verdict of guilty was found upon that count.

Cross rules nisi for a new trial were obtained by the parties, but upon argument before a Divisional Court, consisting of Wills and Grantham, JJ., the rule obtained by the Crown was discharged, while the rule of the defendants for a new trial of the third count of the indictment was made absolute. It is not necessary here to set out the grounds of the judgment of the Divisional Court, which is reported at *17 Q. B. D. 424* , but for the purposes of the present report it is enough to say that as regards the third count the judgment of the Court proceeded upon the ground that, the bridge not having been built in an existing highway, the user by the public of the bridge was not evidence of acquiescence by the county in its building and dedication.

A fresh trial of the third count of the indictment took place at the next Bristol assizes, before Mathew, J., when a verdict of not guilty was returned. The prosecutors now moved for a new trial on the grounds (among others) ¹ that the judge wrongly directed the jury that they ought to acquit the defendants unless they had accepted the dedication of the bridge with the intention **592* of keeping it in repair, and that he wrongly left the question of the obligation to repair the bridge to the jury, whereas such question was upon the evidence a question of law, and not of fact. As the summing-up of Mathew, J., to the jury met with the unanimous approval of the Court as containing a correct exposition of the law upon the question, it is here reported at length.

MATHEW, J.

Gentlemen of the jury, the defendants in this case are the inhabitants of the county of Hants. That somewhat vague and indeterminate description is the one by which the present defendants are prosecuted, and the prosecutors, who, we now are informed, are the National Liberal Land Company, insist that the inhabitants of the county accepted a gift of this bridge from them, the Land Company, with the obligation, from the time they accepted it, to keep that bridge in repair. Now that is the case which is sought to be made out by the prosecutors against all the inhabitants of the county. The inhabitants of the county say, “We never took upon ourselves any such burthen, and you cannot point to any act of any constituted authority that, under any statute, or by usage, or by any other understanding, could be fairly said to represent us as a body, and you cannot shew that we ever accepted the gift of the bridge with the consequent liability to keep it in repair.” Upon the evidence which has been given each party has claimed the verdict as matter of law.

Now, gentlemen, the law upon the subject is certainly left in some degree of uncertainty. The whole law of dedication to a community is a difficult topic to deal with, because it is not easy where a community does not act through properly constituted representatives to prove the assent of every individual, or the assent of such a majority of all the individuals as to lead to the conclusion that the general body agreed. In my view of the law the wiser and safer course is to put to you, as shrewd men of business, the question whether you think there has been any such action on the part of the inhabitants of this county as to indicate that they accepted this gift with the consequent burthen—the inhabitants generally, the occupiers, the persons **593* here indicted as those on whom that burthen is sought to be cast. The question is one which has perplexed lawyers but may give you very little trouble.

Now, gentlemen, what is the history of this property? I can well understand a case being presented to a jury where for a long time the necessity had been felt of constructing a bridge in a particular locality and where public meetings had been held indicating the necessity for such communication, and where applications had been made to quarter sessions and other public bodies to aid in the construction of a bridge, and where some one had stepped forward, after objection had been made that the expenditure would be too great—some man of public spirit, and said, “Now I will build the bridge.” I can suppose the jury

saying under such circumstances that there was a public demand for it, and a man of public spirit found the money to build the bridge, and he did that for the public benefit, and the public took it with the understanding that they would be liable for the repair of it. In such a case as that, (I do not say that it would be the law,) I should not be surprised, if the inhabitants after some years had refused to bear their burthen, that the jury said, "We are satisfied after what took place with reference to the erection of this bridge that it was to public munificence that the county owed the bridge, and it was accepted on behalf of the public on the understanding that the man who found the money to build it should not be left under the obligation of keeping it in repair." As I say, I can understand that, but is this a case of that sort? Now you have heard the inhabitants of the county twitted with their ingratitude to the Liberal Land Company. Here was 17,000*l.* worth of iron handed over to this ungrateful county and the county took it, and then when called upon to lay out a few pounds in painting, it declines to do it. Gentlemen, do you really think that the Land Company had any regard to the county in the construction of that bridge? It is all very well to bring down an eminent politician, and to ask the great man to hand over the bridge to the mayor of Southampton. The mayor of Southampton is not one of the present defendants. He is mayor of the town of Southampton, a county of itself, and a different county from this. Certain minds of an ingenuous *594 character might at first be disposed to infer that what was being done was done purely from public spirit, and from no private motive. But what do we know about it now? We know now why that bridge was built. The National Liberal Land Company had bought an estate on the other side of the river. We are not told what they gave for it, but we know what it is worth now. That estate, probably consisting of green fields, was cut off from Southampton and from the rest of the neighbourhood by that intervening river, the Itchen, and the first thing to do to bring those pastures into the character of a building estate, was to connect them with the town of Southampton and coax the city across the river into the meadows on the other side. For that reason, and for that reason only, I should think (it is entirely for you) the 17,000*l.* was paid. That is a good round sum, and the estate must have been acquired under favourable circumstances to admit of that expenditure, and you will have very little doubt I should think that it was the fact that the bridge was put there which gave the property the value of 300*l.* an acre, which is said to be its present price. Those are the circumstances under which this bridge came into existence, and I asked the learned counsel to point out to me any case in which a bridge, having been built for purely private purposes in the first instance, and where there was nothing more than the fact that the public used it afterwards, it was held that there had been a dedication to and an acceptance by the public, and although many cases were referred to, I am not aware of any such authority.

Now, gentlemen, that being so, and those being the circumstances under which the bridge came into existence, it is said, "Why did not some one object to what this company were doing, if the inhabitants of the county were not afterwards to repair the bridge?" But why should any one object? The individuals who lived in the neighbourhood had the convenience of a bridge. It was to be a free bridge, and it was desirable, of course, that the estate should communicate readily with the town. It is said that the navigation was interfered with. What proof is there that it was interfered with, so that anybody would be likely to prosecute this company for what it was doing? It is said that *595 the company would have been indicted unless the whole county agreed, because the approach to the Hard on the eastern side of the river was interfered with. But steps were left for anybody who wanted to go to the Hard just as before. What evidence of assent of the whole body is there? That assent is sought to be proved by user, but you will ask yourselves how the county could have prevented user. It is said that this road brings Southampton into easy communication with Chichester and Portsmouth. Is that the reason why the bridge was put there? People had been living there for centuries without it: do you think there was on this account any anxiety on the part of the county to have a bridge there? It is nonsense, it appears to me (but it is entirely for you), to say that any such motive induced the making of that bridge. What object had this company in bringing the county nearer Portsmouth and Chichester? None. They wanted to bring their estate nearer Southampton. They appear to have known perfectly well what this structure involved, and from the first to have had considerable anxiety to get the county to accept it. But they also appear to have had considerable doubt as to how the county was to be got at. They applied to the justices in quarter sessions, who I am by no means clear would in law represent the county, but there is very strong evidence that the sessions did not undertake the repair of this structure. The quarter sessions did nothing in the world to lead the land company to suppose they would accept the burthen, and the company had early intimation that the county did not, as far as quarter sessions could decide the matter, undertake the burthen of these repairs. You know shortly after the solemn dedication of this bridge the embankment on one side of it began to give way, that there was what is called a settlement, and that was within a few months almost after the bridge was constructed. No one can predict to what extent the settlement of a structure of that kind may go, or what may take place after it has been standing for some time. In this case there was a subsidence, and we do not know what it cost to set it right, but it was set right by those who are suggested to be the real owners of the structure, namely, the land company who built the bridge. Since then, there appears to have been a further settlement. Now what took place with reference to that *596 is worth adverting to. This company placed itself in communication with the surveyor of the county. The surveyor had certain powers under an Act of Parliament which has really no bearing on the question of liability whatever. It was one of the conditions of being allowed to build the bridge that they should have his sanction under that Act of Parliament, and they applied for his sanction, and he does appear to have superintended the erection of the bridge in a certain sense, but he never was satisfied about these approaches, and never gave a final certificate in respect of them. The people who tell you that they

have dedicated the bridge to the public, and that the public have accepted it, go on discussing with him what final steps are to be taken, and they do some repairs long after the period at which the bridge is thrown open and, as they say, the repairs taken from their shoulders and put on to the shoulders of the public. What is the explanation of this? If they are right they might have said, even if the bridge fell, “We are entitled to come down upon you, the county, not only to repair, but to keep the bridge standing, which is what you had undertaken to do when you accepted the dedication from us.” But then there was something more. A few months after this bridge had been thrown open and presented with its three coats of paint to the mayor of Southampton, it wants a new coat of paint, or rather two coats. That requires an expenditure of 100*l.* or thereabouts, and we are told that the expenditure, under very favourable circumstances, would require to be renewed every two years; but the witness was not prepared to say it might not be in a much less time, because this bridge is in an unusually exposed position, and so close to sea-water that the process of rust and corrosion may go on very rapidly. Not a word was said at the opening ceremony of any such liability. The county might well think twice before they accepted a bridge with an obligation of that sort upon the inhabitants, who found their way to and from Southampton previously without this bridge, and without any inconvenience as far as we can see. Why should the county carry this burthen? What was the consideration? The county was not obliged to come to the aid of the company. The erecting of this bridge might be an accommodation to people coming from a distance, but it would be far more convenient to *597 those who expected to buy or occupy land on this estate. Gentlemen, I do not know that I can assist you further. You must give your own view about it. Do you believe the inhabitants of this county ever took to this bridge, and are under any obligation to repair it? If you think they are, you will say they are guilty on the third count of this indictment. If you think that is not made out to your satisfaction, you will acquit them.

Charles, Q.C. (*J. V. Austin* , and *Sclater Booth* , with him), shewed cause. First, there can be no new trial at the instance of the prosecution, the proceeding being a criminal one, and having terminated in a verdict of acquittal. Secondly, the Statute of Bridges (22 Hen. 8, c. 5) , contemplates only bridges built and broken in existing highways; in such cases acquiescence by the county in the dedication of the bridge is presumed, for its building obstructs the traffic, and the obstruction might be treated as a nuisance, and be the subject of an indictment, if the county thought fit to take proceedings: see *per* Bayley, J., in *Rex v. St. Benedict* .² But where the bridge is not built in the line of an existing highway, affirmative evidence of acquiescence, other than that of public user, must be given by the prosecution in order to impose upon the inhabitants the liability to repair. The county authority is the proper body to signify the assent of the county to undertake the repair of a bridge; this, at any rate, is the view taken by the legislature in s. 21 of the Highways and Locomotives Act, 1878 (41 & 42 Vict. c. 77), which provides that under certain circumstances existing bridges which have been erected without the superintendence of the county surveyor, as required by 43 Geo. 3, c. 59, s. 5, may be accepted by the county authority on behalf of the county. In the cases where acquiescence has been presumed from public user of a bridge of public utility, the bridge has been built in a highway: *Rex v. West Riding of Yorkshire*³ ; *Rex v. Bucks*⁴ ; *Rex v. Kent*⁵ . Mathew, J., was right in telling the jury that public use is not public adoption, and the law is correctly laid down in his summing-up.

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Rigby, Q.C. (*Bucknill, Q.C.*, *Pitt Lewis, Q.C.* , and *A. Glen* , with him), for the prosecution. The whole question of dedication and acceptance is one of fact for the jury, but the only question left to them by the judge was that indicated in the judgment of the Divisional Court, whether there had been an adoption by the county. It was never explained to the jury that acquiescence by the county need not necessarily be a formal act, and that from the public user of a bridge of public utility they might, if they pleased, infer an acceptance by the inhabitants. To say that there must be affirmative evidence of adoption beyond that of public user and public utility is contrary to the rule laid down by Lord Ellenborough, C.J., in *Rex v. West Riding of Yorkshire* .⁶

LORD COLERIDGE, C.J.

This is a case which presents some considerable difficulty, but we have come to the conclusion that it may be decided on one very clear point, whether the verdict was obtained in consequence of the misdirection of the learned judge at the trial. The course of litigation has been somewhat remarkable. The prosecutors, for the purpose (as was admitted) of developing a valuable property which was separated from Southampton by the river Itchen, and for the purpose of inducing the inhabitants of Southampton to cross the river and build upon the estate, connected it with the town by the bridge in question. The bridge was built very carefully, and the sum expended upon it was considerable. When it was finished there was in form a most solemn dedication of the bridge to the public at the opening ceremony (although what was done did not amount to a dedication in law), and it was handed over to the mayor and town council of Southampton; since its opening there has been a considerable user by the public of the bridge, using the word “public” in a somewhat limited sense. User by the public has in all cases been treated as an element in determining the liability of the county to repair a bridge; but the word “public” in this connection must not be taken in its widest sense; it cannot mean that it is a user by all the subjects of the Queen, for it is common knowledge that in many cases it is only the residents in the *599 neighbourhood who ever use a particular road or

bridge. In the present case, however, there is no doubt abundant proof of the user of the bridge by, and of its utility to, the public, confining the meaning of that word to that portion of the public which used it.

The bridge having fallen into disrepair, an indictment for its non-repair was presented by the prosecutors against the inhabitants of the county of Southampton, which was tried in the first instance before my brother Stephen at the Bristol Assizes; and after his summing-up the jury returned a verdict of guilty upon the third count, which was a substantial part of the indictment. Both parties being dissatisfied with this result, cross-motions for a new trial were made to a Divisional Court, consisting of my brothers Wills and Grantham, with the result that the prosecutors' rule was discharged, but that of the defendants was made absolute. The case was accordingly tried a second time before my brother Mathew, the trial being confined to the third count of the indictment, and upon his summing-up the jury returned a verdict of acquittal. The prosecutors now question this second verdict, and the summing-up under which it was obtained, and move for a second new trial.

The first question which presents itself for consideration is whether under any circumstances there can be a new trial of this indictment, the proceeding being a criminal one in form, and having resulted in a verdict of acquittal. To this technical argument (I do not use the word in any depreciatory sense) we accede, and we think that the true view is to be found in the judgment of Lord Ellenborough in *Rex v. Wandsworth*⁷, where a new trial was refused in a very similar case to the present. In that judgment the law seems to be admirably expressed, and it contains the true rules which govern the practice of this Court upon such applications. If we thought that there ought to be further proceedings in this case we should not grant a new trial, but, following the example of Lord Ellenborough in the case to which I have just referred, we should suspend all further proceedings upon the judgment, so as to give an opportunity for a fresh indictment to be brought against the defendants. We should *600 refuse the rule in form, but give in substance that for which the prosecutors are applying. But we do not propose to take that course in the present case, because upon the important question of substance which was argued before us we are of opinion that the verdict was right and should be sustained.

We think that in all these cases it must always be a question for the jury as to what is the true effect of all the evidence before them as to dedication and adoption, for in every case there must be dedication and adoption in a certain sense; and in the present case it seems to us upon reading the summing-up of my brother Mathew that he endeavoured, and with complete success, to lay down correctly to the jury the law upon the case submitted to them. The opinions which have been given by the learned judges before whom this case has already come seem to be conflicting. I do not stay to inquire whether my brother Stephen at the first trial intended to lay it down as a legal proposition that, granting the building of a bridge by a private person, and that the bridge when built is of utility to, and is used by, the public, those facts would be conclusive against the county on the question of its liability to repair; the learned judge is understood so to have laid down the law, and if he did so, we are of opinion that his view was not correct. Such a view would involve what we conceive to be the unsound proposition that a bridge built by an individual merely for his private purposes would at once become repairable by the county upon its turning out to be of public utility as evidenced by public user. If on the other hand the learned judges in the Divisional Court really did say that, granting the same premises, there must in addition to evidence of public user and public utility be some proof of an overt act amounting to a formal adoption by a body capable of representing and binding the county, then we think that their judgment cannot in its breadth be sustained. To say that public user supplemented by public utility is no evidence to fix the county with the liability to repair is too broad.

In all these cases, therefore, the question is one of evidence for the jury. Utility is but one element to be considered in determining the question of liability, and it is for the jury to say in each particular case whether the amount of utility is sufficient *601 to satisfy that element, and further whether the amount and character of the user are sufficient to transfer to the county the burden of repair. It may be that a bridge built by a private individual for his private ends becomes in time of great utility to the public, and is largely used by them, and it would be for the jury in such a case to say whether under the circumstances the public utility and user of the bridge were sufficient to bind the county to repair it; the evidence may or may not be sufficient to fix them with liability, but it is for the jury to decide. That we understand to be the way in which my brother Mathew laid down (and it is certainly the way in which he intended to lay down) the law to the jury; we have carefully examined his summing-up, and are unable to extract from it any propositions which are not law, or which are calculated to mislead the jury. The learned judge informs us that he is not dissatisfied with the verdict, and as a satisfactory verdict was returned after a correct statement of the law by the judge, the rule for a new trial must be discharged.

During the argument of the present case several old cases of great authority have been cited to us which contain very important expressions used by Lord Coke, Lord Holt, Lord Mansfield, Lord Ellenborough and other eminent judges, more especially in the cases of *Rex v. West Riding of Yorkshire*⁸; *Rex v. Inhabitants of Kent*⁹ and *Rex v. Inhabitants of Glamorgan*¹⁰, and we do not desire to intimate the slightest doubt of the correctness of the law laid down in those cases, which we take to

be this; that if a private bridge has been built by a private man for his private ends, and it turns out in course of time to be useful to the public and to be used by the public (in the sense of the word which I have explained) those facts are strong and cogent (although not necessarily conclusive) evidence upon which a jury would be warranted in finding, and a judge would be justified in telling them that they might or ought to find (though not as a matter of law but as fact) adoption of the bridge by the county in the sense that I have explained, and consequent liability of the county to repair. We also think that the law laid down in those cases is all the stronger if the bridge *602 about which the dispute arises is part of an existing highway, and has its termini in the highway; the argument for the prosecutors would be much more cogent in such a case, for if the bridge were not useful to and used by the public, it would be a nuisance if built in the public highway.

We hold therefore that there has here been no misdirection, and that the law is to be found stated with substantial correctness in my brother Mathew's summing-up.

GROVE, J., POLLOCK, B., and HAWKINS, J.

concurred.

Representation

Solicitor for prosecution: F. A. A. Rowland .

Solicitor for defendants: H. Sowton , for T. B. Woodham , Winchester.

Rule discharged. (W. J. B.)

Footnotes

- 1 Other points arose in the case besides those here reported. But, inasmuch as they are not noticed in the judgment of the Court, the facts and arguments in regard to them are omitted.
- 2 4 B. & Ald. 447 .
- 3 2 East, 342 .
- 4 12 East, 192 .
- 5 2 M. & S. 513 .
- 6 2 East, 342 .
- 7 1 B. & Ald. 63 .
- 8 2 East, 342 .
- 9 2 M. & S. 513 .
- 10 2 East, 356 (n).

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Judgments - Regina v. Oxfordshire County Council and Others Ex Parte Sunningwell Parish Council

HOUSE OF LORDS

Lord Browne-Wilkinson Lord Steyn Lord Hoffmann Lord Hobhouse of
Wood-borough Lord Millett

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

REGINA

v.

OXFORDSHIRE COUNTY COUNCIL AND OTHERS
(RESPONDENTS)

EX PARTE

SUNNINGWELL PARISH COUNCIL
(APPELLANTS)

ON 24 JUNE 1999

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.

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 10 acres near the ancient village church. It used formed 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 childrens' 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 section 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 Act of 1965 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 20 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 Act of 1965 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 Act of 1965 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 people to make improvements (for example, by building a cricket pavilion). There was no one from whom they could obtain the necessary consent.

The Act of 1965 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. 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 section 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 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 section 13 prescribe no procedure for resolving disputes over applications for amendment. The 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 *Reg. v. Suffolk County Council, Ex parte Steed* (1996) 75 P. & C.R. 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 M.R., Waller and Robert Walker L.J.J.). They decided that they were bound by *Reg. v. Suffolk County Council, Ex parte 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.

The principal issue before your Lordships thus turns on the meaning of the words "as of right" in the definition of a green in section 22(1). 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.

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. 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.

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) brought this date up to the accession of Henry II (1154) and the Statute of Westminster 1275 extended it to the accession of Richard I in 1189.

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.

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, 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 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 C.J. said in the course of an acerbic account of the history of the English law of prescription in *Bryant v. Foot* (1867) L.R. 2 Q.B. 161, 181:

"Juries were first told that from user, during living memory, or even during 20 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."

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 C.J. 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 Corporation* (1867) L.R. 2 C.P. 476, 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. Angus* (1881) 6 App.Cas. 740, 773, Fry J. (advising the House of Lords) was able to rationalise the law of prescription as follows:

"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."

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 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 20 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 20 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 section 5 of the same Act, which dealt with the forms of pleadings, "as of right". In *Bright v. Walker* (1834) 1 Cr. M. & R. 211, 219, 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] A.C. 229, 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 *per* Cotton L.J. in *Earl De la Warr v. Miles* (1881) 17 Ch.D. 535, 596.)

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* (1881) 10 App.Cas. 378, 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 explained, at pp. 390-391 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 states prescription to be a rule of 'positive law, founded upon utility rather than equity,' and he adds, 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, 'positive prescription is generally defined by our lawyers as the Romans did *usucapion*, the acquisition of 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 dedication did not have to be inferred; there was no presumption of law. In *Mann v. Brodie* Lord Blackburn put the rationale as follows, at p. 386:

"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."

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 Cr. M. & R. 211, 219, "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. Angus* (1881) 6 App.Cas. 740, 773, from acquiescence.

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 Corporation v. Brockman* [1914] A.C. 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 section 1(1) provided:

"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. . ."

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 section 2 of the Prescription Act 1832. Introducing the Bill into the House of Lords, Lord Buckmaster said that the purpose was to assimilate the law on public rights of way to that of private rights of way. (84 H.L. Debates (1931-32), col. 637). It therefore seems safe to assume that "as of right" in the Act of 1932 was intended to have the same meaning as those words in section 5 of the Act of 1832 and the words "claiming right thereto" in section 2 of that Act.

My Lords, this was the background to the definition of a "town or village green" in section 22(1) of the Act of 1965. At that time, there had been no legislation for customary rights equivalent to the Act of 1832 for easements or the Act of 1932 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) L.R. 2 Q.B. 161, a claim to a custom by which the rector of a parish was entitled to charge 13 shillings 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 Acts of 1832 and 1932.

In *Steed's case* Pill L.J. also said (75 P. & C.R. 102, 111-112) that "as of right" in the Act of 1965 had the same meaning as in the Act of 1932. 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 Rights of Way Act 1932 and its successor legislation, section 31(1) of the Highways Act 1980, which I must now examine.

The first was *Hue v. Whiteley* [1929] 1 Ch. 440, a decision of Tomlin J. before the Act of 1932. The dispute was over the existence of a public footpath on Box Hill and the judge found, at p. 444, 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 *Attorney-General 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, at p. 445, 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*."

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* (1881) 10 App.Cas. 378, 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 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 E.R. 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 section 1(1) of the Act of 1932. 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 L.J. of the background to the Act of 1932. The two majority judgments of Slesser and Scott L.J.J. 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.

Slesser L.J., at p. 241, after citing Tomlin J.'s parenthesis, went on to say that "as of right" in the Act of 1932 had the meaning which Cotton L.J. had given to those words in the Act of 1832 in *Earl De la Warr v. Miles* (1881) 17 Ch.D. 535, 596: "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.

Scott L.J., at p. 245 also quoted Tomlin J. with approval but went on to say:

"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. . ."

Scott L.J. 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* [1938] 2 All E.R. 237 summarises the holding on this point in entirely orthodox terms:

"The words in the Rights of Way Act 1932, section 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."

Finally in *Steed's* case Pill L.J. referred to his own discussion of the subject at first instance in *O'Keefe v. Secretary of State for the Environment* [1996] J.P.L. 42. On the basis of passages from *Jones v. Bates* [1938] 2 All E.R. 237 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." 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 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 Acts of 1832, 1932 and 1965. It is perhaps worth observing that when the Act of 1832 was passed, the parties to an action were not even competent witnesses and I think that Baron Parke 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 *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" in [1997] 61 *The Conveyancer and Property Lawyer* 199.

I therefore consider that *Steed's* case 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 Q.C., 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, tobogganing, 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 sports or pastimes which people have played or enjoyed at different times in history. Thus in *Fitch v. Rawling* (1795) 2 H.Bl. 393, 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. 538-539, 553. In *Abercromby v. Town Commissioners of Fermoy* [1900] 1 I.R. 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 L.J. said, at p. 314 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 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 *Reg. v. Suffolk County Council, Ex parte Steed* (1995) 70 P. & C.R. 487, 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 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 the glebe was also used by people who were not inhabitants of the village. She relied upon *Hammerton v. Honey* (1876) 24 W.R. 603, 604, in which Sir George Jessel M.R. 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 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 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 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 applicant's 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 objector accepted that the village was capable of being a '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:

"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."

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 *per* Dillon L.J. in *Mills v. Silver* [1991] Ch. 271, 281). 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 Corporation v. Brockman* [1914] A.C. 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 Act of 1932 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 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.

Miss Cameron cautioned your Lordships against being too ready to allow tolerated trespasses to ripen into rights. As Bowen L.J. said in *Blount v. Layard* [1891] 2 Ch. 681n., 691:

"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 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 Act of 1932, 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 had been for many years in de facto use. As Scott L.J. pointed out in *Jones v. Bates* [1938] 2 All E.R. 237, 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 attributable to the tolerance of past rectors of Sunningwell, but, as Evershed J. said of the origins of a public right of way in *Attorney-General v. Dyer* [1947] Ch. 67, 85-86:

"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 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.

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.

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.

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Prepared 24 June 1999

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: QUEEN v. SECRETARY OF STATE FOR ENVIRONMENT EX PARTE ROBERT D. BILLSON [1998] EWHC Admin 189 (16th February, 1998)

IN THE HIGH COURT OF JUSTICE Case No: CO/3886/96
QUEEN'S BENCH DIVISION
CROWN OFFICE LIST
Royal Courts of Justice,
Strand,
London, WC2.

Monday, 16th February 1998

Before:

MR JUSTICE SULLIVAN

B E T W E E N:

THE QUEEN
(Plaintiff)

- and -

SECRETARY OF STATE FOR THE ENVIRONMENT

EX PARTE ROBERT D. BILLSON
(Defendant)

1. MR J. HOBSON appeared as Counsel on behalf of the Secretary of State for the Environment.

2. MR G. LAURENCE QC AND MISS L. DAVIES appeared as Counsel on behalf of Mr Billson.

3. MR C. COCHRANE QC AND MR R. RUNDELL appeared on behalf of the Landowner.

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J U D G M E N T

(As Approved by the Judge)

6. Monday, 16th February 1998

J U D G M E N T

(For Approval by the Judge)

7. MR JUSTICE SULLIVAN: Ranmore Common is a wooded area to the north-west of Dorking. It is traversed by a number of public footpaths and bridleways that are shown on the Definitive Map and also by Ranmore Common Road. There are also a number of tracks across the common. The tracks connect at various points with defined footpaths and bridleways and with Ranmore Common Road. The tracks have been used extensively by members of the public, both on foot and on horseback.

8. In March 1990 the landowner put up barriers obstructing that use. The applicant considered that the tracks were public rights of way and so on 31st January 1993 he asked the County Council for an order under section 53 subsection (2) of the Wildlife and Countryside Act 1981 modifying the Definitive Map and statement to include eight tracks as bridleways, one of them being upgraded from a footpath on the Definitive Map to a bridleway.

9. On 1st December 1993 the County Council declined to make the modification order and so the applicant appealed to the Secretary of State under paragraph 4 of schedule 14 to the 1981 act.

10. On 13th March 1995 the Secretary of State directed the County Council to make a modification order. The County Council did so, making the Surrey County Council Bridleways Numbers 587, 588, 589, 590, 591, 592, 593 and 528 (Wotton) Definitive Map Modification Order 1995.

11. Making the order is only the first step in what was becoming a lengthy process. The 1981 act gives an opportunity for objections to be made to a modification order. The landowner, Mr White, objected, and so the Secretary of State held a public inquiry before deciding whether or not to confirm the order. The decision as to whether or not to confirm the order was transferred to the Inspector, Mr Mellor LLB, who held an inquiry in May 1996.

12. By a letter dated 16th August 1996 the Inspector decided not to confirm the order so that the tracks have not been added, or in one case upgraded to the list of bridleways that are shown on the Definitive Map.

13. It is a curiosity that whilst a decision to confirm an order may be challenged by way of an application to the High Court under paragraph 12 of schedule 15 of the 1981 act, no such right is given if, as happened in this case, the Secretary of State declines to confirm an order. Hence the applicant challenges the Inspector's decision by way of an application for judicial review, and the matter comes before me nearly 8 years after the barriers were first erected.

14. Since there was no evidence of any express dedication of the tracks as rights of way, the applicant relied on section 31 of the Highways Act 1980. So far as material that provides:

"(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 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 subsection (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 subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes -

(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and

(b) has maintained the notice after the 1st January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway."

"(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.

(6) An owner of land may at any time deposit with the appropriate council -

(a) a map of the land on a scale of not less than 6 inches to 1 mile, and

(b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways:

and, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time -

(i) within six years from the date of the deposit, or

(ii) within six years from the date on which any previous declaration was last lodged under this section, to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has been dedicated as a highway since the date of the deposit, or since the date of the lodging of such previous declarations, as the case may be, are in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway."

15. The other enactment upon which the Inspector's decision turned was section 193 of the Law of Property Act 1925, which provided:

"(1) Members of the public shall, subject as hereinafter provided, have rights of access for air and exercise to any land which is a metropolitan common within the meaning of the Metropolitan Commons Acts 1866 to 1898, or manorial waste, or a common, which is wholly or partly situated within [an area

which immediately before 1st April 1974 was] a borough or urban district, and to any land which at the commencement of this Act is subject to rights of common and to which this section may from time to time be applied in manner hereinafter provided:

Provided that -

- (a) such rights of access shall be subject to any Act, scheme, or provisional order for the regulation of the land, and to any byelaw, regulation or order made thereunder or under any other statutory authority; and
- (b) the Minister shall, on the application of any person entitled as lord of the manor or otherwise to the soil of the land, or entitled to any commonable rights affecting the land, impose such limitations on and conditions as to the exercise of the rights of access or as to the extent to the land to be affected as, in the opinion of the Minister, are necessary or desirable for preventing any estate, right or interest of a profitable or beneficial nature in, over, or affecting the land from being injuriously affected, or for protecting any object of historical interest and, where any such limitations of conditions are so imposed, the rights of access shall be subject thereto; and
- (c) such rights of access shall not include any right to draw or drive upon the land a carriage, cart, caravan, truck, or other vehicle, or to camp or light any fire thereon;"

"(2) The lord of the manor or other person entitled to the soil of any land subject to rights of common may by deed, revocable or irrevocable, declare that this section shall apply to the land, and upon such deed being deposited with the Minister the land shall, so long as the deed remains operative, be land to which this section applies."

"(4) Any person who, without lawful authority, draws or drives upon any land to which this section applies any carriage, cart, caravan, truck, or other vehicle, or camps or lights any fire thereon, or who fails to observe any limitation or condition imposed by the Minister under this section in respect of any such land, shall be liable on summary conviction to a fine not exceeding [level 1 on the standard scale] for each offence."

16. Section 193 was relevant because the then owners, Cubitt Estates Limited, had applied section 193 to Ranmore Common by an expressly revocable deed dated 12th December 1929 ("the Deed"). Thereafter, part of the common was conveyed to the National Trust in 1959, which revoked the Deed insofar as it affected its land in 1962.

17. The part of the common on which the disputed tracks are located was purchased by Farmstiles Limited on 31st October 1984. Farmstiles were not told, and did not know, of the existence of the Deed at that time.

18. After the barriers had been erected, Mr White, a Director of Farmstiles, made a statutory declaration under section 31 subsection (6) of the 1980 act. That declaration acknowledged the existence of certain bridleways and footpaths across the common, but it excluded the disputed tracks from the list of rights of way.

19. On 20th June 1990 Farmstiles were told of the existence of the Deed by Mole Valley District Council. On learning of its existence, the company revoked the Deed on 15th October 1990. On 1st November 1991 the land was transferred to Mr White.

20. It is not in dispute that the putting up of the barriers in March 1990 brought the right of the public to use the tracks into question for the purposes of section 31 subsection (2) of the 1980 act, thus the 20-year period in question ran from 1970 to 1990.

21. When the County Council looked at the matter in 1993 it "felt that if there were no other considerations, the user evidence would be more than sufficient to substantiate a presumption of dedication under section 31 of the Highways Act 1980."

22. However, the Council considered "that public rights of way could not have been established under section 31 of the 1980 Act during the existence of the Deed. They maintain that any user after 1929 was not 'as of right' as the owner had given permission for the public to wander over the common. They also

argue that at that time horseriding was a very common form of exercise for members of the rural population and this supports the contention that riding falls within those rights permitted under the 1925 Act."

23. The Secretary of State in 1995 took a different view. He said:

"It is common ground that 1990 is the date when the equestrian use of those paths was challenged by obstructions across them. Therefore, a 20 year period of user has to be established prior to that date. The Secretary of State is satisfied that the evidence of equestrian use on all seven of these routes over the relevant 20 year period would be sufficient to show deemed dedication in the absence of other considerations. Indeed, there seems to be no dispute that many riders have used all the paths in question during this period. The Secretary of State has therefore gone on to consider the effects of the Deed of Dedication of 1929 in relation to the nature of the use and the owners' intention to dedicate."

24. He then took the view in paragraph 12 that horseriding is included within the right to air and exercise.

25. In paragraph 13, he said:

"However, whilst the Secretary of State considers that the Deed of 1929 did grant permission for horse riding on the common, he notes that there is no evidence of any notices or other overt acts by the landowner to indicate that the use was permissive. Indeed, there is no evidence of any indication on the ground that the land was privately owned or of anything that might have led members of the public to believe their use was other than as of right. In these circumstances, the Secretary of State considers that it is reasonable for the public to claim that their use was as of right and he does not consider that the mere existence of the Deed was sufficient to deem the use permissive. Similarly, he does not consider that the Deed represented a clear indication that the owner did not intend to dedicate the way to the public, and there is no evidence of any overt acts by the owner during the relevant period which demonstrate this."

26. He therefore allowed the appeal, but that was expressly without prejudice to any decision as to whether or not to confirm the order.

27. Mr Mellor in his decision letter in 1996 reached the following conclusions:

"21. It has only been possible for me to summarise the contentions of the Applicant and of the Objector as concisely as I have in this letter because virtually all the evidence on the fact and the nature of use of the tracks referred to in the Modification Order has either been conceded or has not been challenged by or on behalf of the Objector. The principal contentious issue is the effect of the Deed of December 1929, applying Section 193 of the Law of Property Act 1925 to Ranmore Common, on the acquisition of public rights of way across the Common. This is clearly a matter of law, and one on which there are differing opinions and few helpful authorities: my own views are set out in the conclusions which follow.

"22. Most of the user evidence was given in the form of completed 'Public Way Evidence Forms' which are not, of course, capable of challenge by cross-examination, and of the more than 1300 completed, many were by the same people in respect of several tracks. However, I was prepared, as was the Objector, to accept this as a substantial amount of evidence given in good faith by people who had, between the mid-1920s and 1991, used one or more of the tracks referred to in the Modification Order for leisure walking, sometimes with dogs, recreation, exercise, training (running), horse riding, organised rambles, and as routes to visit Ranmore Church."

"23. Further, there was no suggestion that people using the tracks did so other than in the belief that they did so 'as of right' in the sense of the most respected judicial definitions of that phrase. There was no evidence of notices on the tracks either referring to the Deed of 12th December 1929 or in any other way indicating any conditions subject to which the public might enjoy access; no steps had been taken to publicise the Deed or its effect and few if any members of the public resorting to the Common are likely to have known of it."

28. He listed the 10 authorities to which he had been referred, and continued:

"25. Since the question of user as of right is not contested, and is a matter on which I have indicated my opinion in Paragraph 23 above, I believe I can properly consider the issue of public bridleway rights in 3 parts, i.e. pre-1929, post-1990 and the period between 1929 and 1990."

29. We are not concerned with his consideration of

the pre-1929 or the post 1990 periods.

30. He continued in paragraph 31:

"In my view, the point on which the Ranmore Common Inquiry turns is what I would call the potentially negative effect of Section 193. In other words, does the application of that Section, whether or not it is known to or appreciated by those who use and enjoy the rights of access which it confers, prevent them acquiring, by uninterrupted and unchallenged usage over a long time, public rights of way? In the case before me, there seems to be no doubt that the existence of the Section 193 Deed was not known to the public; the objector had not published its provisions by notice on the land or elsewhere; until 1990 at least, no signs or barriers had been erected on the common to prohibit or to limit the use of the tracks referred to in the Modification Order; the Section 193 declaration was not registered either under the Land Registration Act 1925 (transfers of any part of the Common had become compulsorily registrable after 1952), the Commons Registration Act 1965, the Land Charges Act 1972, the Local Land Charges Act 1975 - or if it was, this was not disclosed at the Inquiry. The objector accepted that to those members of the public who resorted to Ranmore Common, with or without horses, their use was to them as of right: but the question to be determined is whether the law would recognise that use, conferred by what I have earlier referred to as a revocable statutory licence, in the same terms."

"32. This is a matter of some difficulty, and I have arrived at a conclusion only after a great deal of thought. It is true that the law normally requires evidence of there being no intention to dedicate to be open and explicit, by notice on site, by gate, barrier or challenge. However, where procedures are prescribed by statute, there seems to be no greater obligation than to comply with the statutory requirements. For instance, maps deposited and declarations made under Section 31(6) of the Highways Act 1980 require no other publicity to constitute sufficient evidence to negative the intention of the owner to dedicate. Similarly, the only requirement made by statute of publicity for declarations under Section 193(2) of the Law of Property Act 1925 is that they be deposited with the Secretary of State, and it has not been disputed that this was done with the Deed of 12th December 1929."

"It is therefore tenable, on the balance of probability, that the deliberate application of Section 193 of the 1925 Act to Ranmore Common constituted a form of access by agreement that is sufficient to over-ride any claim to establish public rights of way, and, in the absence of authority to the contrary, I am inclined to that view."

31. Having dealt with two other matters, his final conclusion was:

"38. I referred in paragraph 24 of this letter to the case law which I had been asked to consider and which I did indeed examine. Without attempting a detailed summary of the application of each of those cases to the circumstances giving rise to the Modification Order and the evidence presented to the Inquiry, I would venture to state that not all were relevant to my decision, particularly as the question of use 'as of right' was not a matter of contention. I believe the factual base of 20 years actual enjoyment without interruption was established for all the routes referred to in the Modification Order, that no issue concerning a right to roam around was raised on the facts of this case, and that though users of the tracks on Ranmore Common believed they were there as of right, the existence of the Section 193 declaration, though unknown to them, affected the nature of their use. Indeed, though it was not argued before me, I would not have been inclined to dismiss the contention that land to which Section 193 applied was of

such a character that (while the Section applied) its use could not have given rise to any presumption of dedication, without careful scrutiny."

32. He therefore decided not to confirm the order.

33. Mr Lawrence QC, for the applicant challenges the Inspector's decision on four grounds: firstly, he says, whatever intention might have been evidenced by the Deed it could not be "sufficient" evidence of an intention not to dedicate, because to be sufficient for the purposes of section 31 subsection (1) the landowner's intention had to be manifested to the public. He relies in particular on the dictum of Denning LJ, as he then was, in *Fairey v. Southampton County Council* [1956] 2 QB 439 at page 458:

"In this connexion I would also mention the finding of quarter sessions that in and from 1931 the landowner, by turning off strangers, showed an intention not to dedicate the path as a highway for the use of members of the public at large. This raises the same point. 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; see *Mann v. Brodie*. Such evidence may consist, as in the leading case of *Poole v. Huskinson*, of notices or a barrier: or the common method of closing the way one day a year. That was not done here; but we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it. On this footing there was sufficient evidence to show that there was no intention to dedicate."

34. Although obiter, that dictum has been followed, or a similar approach adopted, in a number of cases. In

35. *R. v. Secretary of State for the Environment, ex parte William Greaves Blake* [1984] JPL, page 101, Walton J said:

"Of course, the onus there was on the landowner to establish no intention to dedicate. Quite clearly, it was not sufficient for the landowner merely to come along and beat his breast and say that all was lost, because there was an intention never to dedicate. That intention had to be manifested by sufficient overt or notorious acts."

36. In *R. v. Secretary of State for the Environment, ex parte Cowell* [1993] JPL 851, Staughton LJ said, at page 857:

"There were dicta, in the case of *Fairey v. Southampton County Council* [1956] 2 QB 439, which said that it was not sufficient for the landowner to have an intention not to dedicate in pectore. He had to manifest that intention by some overt act. That was not said in the section itself, but it seemed a sensible rule. Subsections (3), (5) and (6) all dealt with acts which were, to a greater or lesser extent, overt; those were the examples of how sufficient intention might be demonstrated. So perhaps it was right to say that evidence of intention had always to be in the form of overt acts."

37. The matter was put slightly differently in

38. *Ward and Ward v. Durham County Council* [1994] 70 P & CR 585 by the then Vice Chancellor at page 590:

"In the absence of overt acts demonstrating an intention not to dedicate, such as displaying a 'no right of way' notice the court ought to be slow to find that a landowners' unexpressed intention not to dedicate is sufficient evidence for the purposes of section 31."

39. Finally, in *R. v. Secretary of State for the Environment v. Isle of Wight County Council, ex parte O'Keefe* [1996] JPL page 42, Pill J, as he then was, said a propos the proviso to section 31 subsection (1) at page 59:

"On the point of construction there was of course a danger of putting a gloss on the word 'intention' in the statute and normally, when intention was at issue, a witness was permitted to say after the event what his intention at the time had been. In the context of the 1980 Act however, he (Pill J) respectfully agreed that the intention had to be made manifest by contemporaneous and overt acts. The object of the Act, or one of its objects, was to simplify proof of dedication which was presumed upon proof of user. The statute gave a landowner means of protection against that presumed dedication upon production of sufficient evidence to negative the intention to dedicate during the relevant period of use. Read as a whole, section 31 contemplated overt acts during the relevant period; use, as defined, on the one hand, acts which negative an intention to dedicate on the other.

He would in any event have followed the authority referred to. Further, it would be a rare case in which a statement after the 20-year period of what the intention had been during that period could be 'sufficient evidence' unless made manifest by acts during the 20-year period. In the circumstances of the case, the sub-committee and the officers were entitled to take the view they had done. A failure to take into account expression of intention made only after the event, if a misdirection, was not a material one which should invalidate the order."

40. That decision was affirmed by the Court of Appeal on 29th July 1997, but the transcript of the Court of Appeal's decision does not take the matter any further.

41. Here, says Mr Laurence, the Inspector had concluded that no steps were taken to publicise the Deed and few if any members of the public resorting to the Common were likely to have known of it.

42. Mr Laurence says that the Inspector erred in drawing an analogy with the lack of publicity required for declarations under section 31 subsection (6) of the 1980 Act. Parliament chose to enact subsection (6) as a specific means of satisfying the proviso to subsection 31(1). The declaration has to particularise the highways that are acknowledged, be deposited with the highway authority and be renewed every 6 years. It is wholly different from a deed under section 193, which is not concerned with highways at all.

43. He points out that to be effective under section 31 subsection (3) as evidence of a contrary intention the notice must have been erected so as to be visible to persons using the way.

44. Equally, he says, if other evidence of a contrary intention is to be relied on then that intention must have been capable of being apprehended by the public using the way.

45. He accepts that there will on his approach be a fine line between acts which are a sufficient manifestation of a contrary intention and acts which are sufficient to bring the right of the public to use the way into question. Once the contrary intention is not merely capable of being apprehended but is actually apprehended by the public they would no longer be using the way believing their use to be of right and/or their right would have been called into question.

46. Mr Laurence's second point is that the proviso to section 31 subsection (1) applies only where the evidence shows that the landowner did not intend to dedicate throughout the whole of the 20-year period. He says that the words "during that period" refer back to the "full period of 20 years" and Parliament did not choose to say "during that period or any part thereof". He points to the fact that to be effective for the purposes of subsection (3) a notice has to be maintained, and that declarations made under subsection (6) have to be renewed every 6 years. Here the landowner had no knowledge of the Deed between 1984 and 1990. Although the Inspector concluded that this did not negate the effect of the Deed there was no evidence which showed independently of the Deed that the landowner had no intention to dedicate the tracks during that period.

47. Thirdly, he says, in any event, the Deed is not evidence of an intention on the part of the landowner not to dedicate. Whilst it gave members of the public rights of access to the Common for air and exercise on a revocable basis, it said nothing about whether the public could pass and repass along physically defined tracks on the Common to get, for example, from one edge of the common to another. Such a use of the tracks to pass and repass going from A to B, rather than simply rambling over the Common for air and exercise would be a public use of the tracks "as of right".

48. The Inspector had noted that the question of user as of right was not contested. Thus, the Inspector was to be read as concluding as a fact that there had been sufficient use of the tracks by the public outside the terms of the permission conferred by section 193 to satisfy the requirements of user in section 31 subsection (1).

49. He submitted it was not open to the respondents to reopen the question of whether user had been as of right. Section 193 enabled landowners to confer a new right on the public, a right of access for air and exercise to common land. It could not have been Parliament's intention that conferring this new right would restrict the public's ability to acquire a right of way by evidence of long user at Common Law.

50. I will return to Mr Laurence's submissions on the "as of right" issue when I have set out the respondent's submissions in respect of that matter.

51. Mr Laurence's fourth point was that the rights of access granted to members of the public by section 193 do not include a right of access on horseback as well as on foot.

52. In *Mienes v. Stone* 30th April 1985, unreported, Farquarson J, as he then was, and Tudor Price J expressed opposing views on this question, both expressions of view being obiter. Mr Laurence invites me to prefer the view of Farquarson J. Had Parliament intended to confer the right on members of the public on horseback it would have said so. Since it did not, the Deed is wholly silent as to the dedication of bridleways and so the order should have been confirmed in respect of equestrian rights.

53. Mr Hobson for the Secretary of State submits that the manner in which the Inspector concluded the tracks were used (paragraph 22 of his decision letter) was consistent with the public simply exercising rights of access for air and exercise within section 193 subsection (1) of the 1925 Act.

54. The Inspector accepted that the public used the tracks in the belief that they were doing so as of right (paragraph 23). When the Inspector said in paragraph 25 that user as of right was not contested he cross-referred back to paragraph 23. Thus, on a proper construction of the decision letter, the Inspector was not concluding as a fact that user was as of right, merely that there was undisputed user for the purposes he described and that the public believed that such user was as of right.

55. The Inspector went on to consider what was the effect of the Deed on that undisputed evidence of user.

56. Mr Hobson submitted that before one gets to the proviso in section 31(1) one has to consider whether the way has actually been enjoyed by the public as of right for the requisite period. To establish that it was necessary for the public to demonstrate that they believed they were entitled to use the way as of right, but that belief, although necessary, was not sufficient. It was also necessary to show that the way had actually been enjoyed *nec vi, nec clam,*

nec precario.

57. None of the cases were concerned with force or secrecy. Dealing with user by permission, in the absence of any evidence from the landowner to the effect that the use had been permissive the public's belief that they were using the way as of right would usually suffice. In those circumstances they were not required to prove a lack of permission. But if the landowner gave evidence that the use was with permission and that evidence was not gainsaid, the use would not be as of right, notwithstanding the belief of the public that it was.

58. Mr Cochrane QC for the landowner made similar submissions, and he and Mr Hobson referred to dicta of Hilbery J in *Merstham Manor Limited v. Coulsden and Purley Urban District Council* [1936] 2

All ER 422. Those dicta were cited by the Court of Appeal in *Jones v. Bates* [1938]

2 All ER 237.

59. Slesser LJ at page 241 said:

"The expression 'as of right' as applied to a public way was considered by Tomlin J in *Hue v. Whiteley* (2), at p. 445, where he defines user as of right as meaning that the users were: believing themselves to be exercising a public right to pass from one highway to another.

I think that this is the proper meaning to be attributed to the words in the 1932 Act, and I would further apply to them the language of Cotton LJ in *De la Warr (Earl) v. Miles* (3) at p. 596, quoted by Hilbery J in the *Merstham Manor* case (4) at p. 83:

Acts have been done as of right, that is to say, 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."

60. Scott LJ at page 245 said:

"There is only one way in which the public can enjoy a footway, and that is by walking over it, and this is the meaning of the short word 'user' in all the cases about footpaths. Members of the public enjoy it 'as of right' when, as Tomlin J said, in *Hue v. Whiteley* (2), at p. 445, they use it: believing themselves to be exercising a public right to pass from one highway to another.

This seems to me the simplest and truest interpretation of the three words 'as of right', as applied to public rights of way. It is doubtless correct to say that negatively they 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, and I do not think that Parliament borrowed the words 'as of right' from the law of easements, as the judge thought. It chose them because all through the decided cases upon public rights of way they had been judicially used, and in the sense stated by Tomlin J. Nor do I think that Hilbery J, in the only reported case upon the 1932 Act, *Merstham Manor Ltd v. Coulsdon & Purley Urban District Council* (4), really meant to say anything different from what Tomlin J had said, when, at pp. 82, 83, he quoted Brett LJ in *De La Warr (Earl) v. Miles* (3) (at p. 591):

'The true interpretation of those words 'as of right' seems to me to be that he has done so upon a claim to do it, as having a right to do it without the lord's permission, and that he has so done it without that permission...' It is the requisite quality of the act, not merely the act itself, which is here defined The essential quality of the acts - that is, as acts done as of right - has from early days in our law been established by showing that the acts were done openly I think it right, therefore, to hold that, where the words 'as of right' are used in the Rights of Way Act 1932, in connection with actual enjoyment, they are satisfied if the evidence shows that the actual enjoyment has been open, not by force and not by permission from time to time given."

61. Finally, in *Cowell*, Balcombe LJ had said at page

858:

"If, therefore, it was established by evidence that the user was permissive, it could not be 'as of right', no dedication could be inferred, and in the particular circumstances of this case it was, in his judgment, unnecessary to go on to consider what had been called 'the proviso'; those were the words at the end of section 31(1), unless there was sufficient evidence that there was no intention during that period to dedicate it.

Of course it was possible that there might be cases where it would be established on the evidence that there had been actual user or enjoyment 'as of right' because there was no force, secrecy or permission, but nevertheless it would still be open to a landowner to prove that there was no intention to dedicate."

62. In that case both Rose LJ and Staughton LJ had observed that arguments that enjoyment by the public had been as of right and that under the proviso there was no intention to dedicate might well overlap, and the same evidence might well be relevant under both heads.

63. Turning to the proviso, Mr Hobson says that it was originally inserted in section 1 of the Rights of Way Act 1932 as a benevolent provision for the protection of the landowner. The requirement that there should be "sufficient evidence" of no intention to dedicate was to prevent the landowner from retrospectively asserting a lack of intention when he had said and done nothing during the 20-year period. There was no requirement that his intention must be made manifest to the public as contended by Mr Laurence. He accepts that it would not be a sufficient intention if the intention remains locked in the landowner's own mind, see Denning LJ in *Fairey*, or if it remains in pectore, see Staughton LJ in *Cowell*. But, he says, Denning LJ erred in equating the evidence necessary to satisfy the proviso with the evidence necessary to support the proposition that the right of the public to use the way had been brought into question.

64. In the case of the latter he accepts that the landowner's challenge must be sufficiently open and notorious to bring it home to the public that their right to use the way is being challenged. The evidence of the landowner's conduct may be sufficient to serve both purposes, to bring the right into question and to show that he had no intention to dedicate, but it need not be. There may be sufficient evidence of lack of intention to dedicate even though the public do not realise that their right has been brought into question, otherwise there would be no scope for the operation of the proviso.

65. In *Jaques v. Secretary of State for the Environment* [1995] JPL 1031, Laws J had discussed the relationship between the first and second parts of

section 31 subsection (1). He said at page 1037:

"First, persons asserting a right of way under the subsection had to demonstrate actual enjoyment, as of right and without interruption, for at least 20 years. The expression 'as of right' meant that the members of the public using the way had to believe they have the right to do so. This was clear from *Hue v. Whiteley* and *Cowell*; indeed, it could not be otherwise, since if the expression 'as of right' meant that the public had to demonstrate an objective legal right to use the way, the statutory provision would be circular or question-begging. The nature of the user that had to be established was described by the old Latin tag '*nec vi nec clam nec precario*'. It meant that the use had to be open not secret, and in effect unobstructed.

Quite plainly, the second part of section 31(1) imported a further requirement. It meant that even if use of the required quality was proved, the status of right of way would not be established if the landowner demonstrated an intention not to dedicate. The logical relationship between the two parts of the subsection entailed that proof of an intention not to dedicate could be constituted by something less than proof of facts which had to 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. That was not a very satisfactory state of affairs. It was plain that the landowner had to 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 was no right to use the way. He could only conclude that any sufficiently overt act or series of acts indicating an intention to keep the way private would be enough for the landowner's purposes in relation to the second part of the subsection, though they did not in fact bring home to the public his objection to their using his land."

66. Mr Hobson said that the cases cited by Mr Laurence were all examples of the Court accepting that the landlord could not simply keep his intention to himself and then retrospectively assert that there had been

a lack of intention all along. Thus in *Blake Walton J* said that it was not sufficient for the landowner merely to come along and beat his breast and say that all is lost.

67. In *Cowell Staughton LJ* had contrasted overt acts with an intention that was kept to oneself.

68. In *O'Keefe Pill J* was rejecting as sufficient evidence of no intention to dedicate a statutory declaration which had been made after the way had been brought into question where there had been no overt acts during the relevant period.

69. In *Ward* the then Vice Chancellor did not go so far, contenting himself with saying that the court should be slow to find that a landowner's unexpressed intention not to dedicate was sufficient for the purposes of section 31.

70. What is sufficient evidence is a question of fact. The execution of the Deed and depositing that deed with the relevant Government department was a sufficiently overt act for the purposes of the proviso, submits

71. Mr Hobson. He points out that section 31, subsection (6) does not require the deposit of the declaration with the local authority to be publicised locally or at all.

72. So far as Mr Laurence's second issue is concerned, he says that the Deed continued to have effect until it was revoked in 1990 so that the public's use of the Common continued to be with permission until then. But, in any event, he says, that the words "evidence that there was no intention during that period to dedicate" in section 31 subsection (1) should not be read as though the proviso said "evidence that there was no intention throughout that period to dedicate".

73. He contrasts the landowner's position with that of the public who have to show that they have enjoyed the right of way, the way as of right and without interruption "for a full period of 20 years".

74. Thus, subject to questions of *de minimis*, if the evidence shows that, for example because of changes in land ownership, there was no intention to dedicate for some period within the 20 years, the way is not deemed to have been dedicated under section 31 subsection (1).

75. In this context Mr Cochrane pointed to certain dicta of Walton J in *Blake*, in which he accepted that for the first 3 years of the 20-year period in that case a notice sufficient to indicate no intention to dedicate had been in position. Walton J said that that was fatal to the applicant's case that there was a right of way. Walton J's approach had been endorsed in *Cowell* by Balcombe LJ at page 858:

"Walton J (rightly in his view, although criticised by Mr Laurence) held that a notice which was not maintained throughout the whole of the relevant period necessary under section 31(3) could nevertheless be relied on as evidence that during the time that notice was displayed, the way was being used with the permission of the owner, and therefore, during that period at least, there was not user 'as of right'."

76. In response to Mr Laurence's third point, Mr Hobson and Mr Cochrane said that by executing the Deed under section 193 subsection (2) the landowner conferred upon members of the public rights of access to the Common for air and exercise. Such rights were enjoyed over many other commons by virtue of section 193 subsection (1). The rights extend over the whole of the Common, including any tracks across it, thus the public have an express licence to use the tracks for that purpose. That permission serves a dual function, of negating any user as of right, and of satisfying the proviso, particularly since the licence in this case is expressly revocable.

77. The respondents argue that on the facts found by the Inspector that was how the public were using the tracks: for air and exercise. The one possible exception was the use of the tracks as "routes to the church", but there was no indication in the decision letter of the extent of that use, and here it was being claimed that the tracks were bridleways and there was no evidence of significant numbers of the public riding to church.

78. Turning to the fourth ground on which Mr Laurence challenged the decision, the respondents contended that the Deed did not limit the public's right of access for air and exercise to a right of access on foot. It extended to access on horseback. In 1925 horseriding was a popular way of taking air and exercise and if Parliament had intended to exclude horseriders from commons generally it would have said so expressly. If horseriding caused problems on any particular common the Minister could impose limitations and conditions under section 193 subsection (1) paragraph (b). This had been done in the case of other commons, see paragraph 28 of the decision letter.

79. Finally, the respondents pointed to paragraph (c) of section 193 subsection (1), which specifically provided that the rights of access should not include a right to draw or drive carriages, carts, et cetera, upon the land. If the right of access is limited to pedestrians only this provision would have been otiose. In 1925 horses would have been perhaps the principal means of drawing carriages, carts, and so forth, onto commons.

80. In response to the respondent's submissions that the licence conferred upon the public by the Deed was sufficient, not merely for the purposes of the proviso to section 31 subsection (1), but also for the purpose of defeating any claim that the public's enjoyment of the tracks was 'as of right', Mr Laurence argued that it was sufficient to establish that a way was actually enjoyed as of right if the evidence established that the public were using the way believing themselves to be exercising a public right. That is what the Inspector had concluded in paragraph 23 of his decision letter. He submitted that the law relating to the public rights of way had diverged from that relating to private rights of way. Whilst in the latter case it was necessary to establish as a fact that the use for the requisite period had been without the landowner's permission and the belief that of the user was irrelevant, in the former case the belief of the user that he was exercising a public right was all important, and if that belief was established it did not matter whether there was evidence which showed that the user was in fact with permission.

81. He relied on the dicta of Farwell J in *Jones v. Bates*:

"The expression 'as of right', which is to be found in sect. 1 of the Act of 1932, corresponds with the words claiming right in the Prescription Act, 1832, and, in my judgment, bears the same meaning. These words have been explained in several cases, and I understand them to mean that the user must have been by persons who honestly believed that they had a legal right so to do, as distinguished from user by persons who thought they had the express or tacit licence of the owner, or were regardless of the rights of such owner. That being so, the evidence of persons who used the way that they have seen others, unknown to them, using it is some evidence of actual user, but it is not necessarily of great weight, because it is impossible to say whether or not the user of such persons was 'as of right'."

82. He also referred me to the dicta of Pill J in

O'Keefe, at page 52:

"He (Pill J) considered user as of right to mean user which was not only *nec vi, nec clam, nec precario* but was in the honest belief in a legal right to use. In that context, the legal right believed to exist was the right of members of the public to pass and re-pass on a public highway. There was no further requirement of knowledge of the procedures by which the right had come into existence. If such knowledge were to be required, many users of their town's main street might have difficulty in explaining themselves, the public probably being largely unaware of the concept of dedication.

He had used the Latin expression *nec vi, nec clam, nec precario* not only because it was succinct but also to avoid using, instead of *precario*, one of the several words suggested as alternatives to *precario*: including 'licence', 'permission', and 'tolerance'. Force and secrecy were not significant features in the present case. Mr Laurence submitted that the use which was tolerated was use *precario*. Toleration should be regarded as tacit permission and had to be distinguished from acquiescence."

83. The Court of Appeal dismissed an appeal against that decision. Mummery LJ said at page 22 of the transcript: "The relevant issue was sufficiently considered by reference to whether the public use without

interruption for 20 years was in the honest belief in a legal right to use it as a public footpath. There was ample material to support the view that the user was peaceable, open, not by permission and as of right."

84. Mr Laurence accepts that Mummery LJ's use of the word "and" was equally consistent with it being necessary to demonstrate both an honest belief in a legal right to use the way and evidence that the user was not in fact by permission.

85. He adds that at the inquiry before Mr Mellor, because it was accepted that the user was "as of right" the applicant did not call the witnesses who would have spoken to their public way evidence forms. I have been provided with a specimen form. It is very detailed and includes, for example, a question: "For what purpose were you using the way?"

86. In the light of those submissions I set out my own conclusions as follows: the first question to be answered is what did the Deed permit? Section 193 subsection 1 conferred rights of access for air and exercise on the public in respect of very many commons. By

subsection (2) additional commons could be made subject to such rights. In my view Parliament intended in 1925 to confer the broadest possible rights of access for air and exercise to those commons, subject only to the limitations set out in paragraphs (a) to (d) of the proviso to section 193 subsection (1).

87. The rights of access for air and exercise extend over the whole of the Commons in question, including any tracks across them. Walking along such tracks for the purpose of taking air and exercise is permitted by

section 193. Indeed, using the tracks across a common will often be the most convenient way of taking air and exercise, particularly in a wooded area such as Ranmore Common.

88. Since the dicta in *Mienes v. Stone* are obiter and conflict with each other I am free to conclude that the rights of access for air and exercise conferred by

section 193 are not confined to access on foot, but extend to access on horseback. I do so conclude. Riding would have been a normal way of taking air and exercise in 1925. In paragraphs (a) to (d) of the proviso to section 193 subsection (1) Parliament set out those limitations which it wished to impose on the rights of access.

89. Not merely do paragraphs (a) to (d) not specifically exclude horseriding, but paragraph (c), which excludes the drawing or driving of carriages, carts, et cetera, would be otiose (or addressed specifically to motor vehicles) if the public were not allowed to bring horses on to commons at all. In 1925 many, if not most carriages, carts and so forth, would still have been horse drawn.

90. If horseriding caused a problem on any particular common then limitations and conditions could be and have been imposed prohibiting horseriding under paragraph (b) of the proviso.

91. The next question is: how were the public actually using Ranmore Common?

92. I bear in mind that there was no cross-examination, and that because of the extent of agreement the applicant called only one out of many potential witnesses who were prepared to speak to their public way evidence forms, but the findings of the Inspector in paragraph 22 of the decision letter are clear: the public were using the tracks "for leisure walking, sometimes with dogs, recreation, exercise, training (running), horseriding, organised rambles and as routes to visit Ranmore Church. On the face of it, with the sole possible exception of the use of the tracks as routes to visit the church, that is precisely the kind of use of the tracks that falls within section 193 subsection (1) and which is therefore permitted by virtue of the Deed.

93. Turning to the use of the tracks as routes to visit the church, I would accept the proposition that if a track across a common is not used for the purpose of taking air and exercise but is being used by the public for some other purpose: as a route between points A and B, for example, from the village across a

common to a nearby school, church, or railway station, then in principle such usage of the track is capable of establishing a right of way over it under section 31 of the 1980 Act. It may well be difficult to distinguish between user of the track for air and exercise and use for other purposes. For example, the walk across the common to the church may well be the longer way round, but more attractive, and so the public may choose to use it for the dual purpose of enjoying air and exercise on the common and getting to church. But if that distinction can be drawn on the evidence a right of way over a track may in principle be established even though it runs across a common. But here there is no indication in the decision letter as to how many of the 1300 rights of way forms refer to the use of the tracks as routes to visit the church and no indication as to which of the 8 tracks were used for this purpose. We do not know whether the visits were for the purposes of worship or because the church was an attractive place to visit whilst one was taking air and exercise. Moreover, it was being claimed that the tracks were bridleways and there is no suggestion that significant numbers of the public rode to church on horseback. I do not therefore consider that this reference to use as routes to the church takes the use of the tracks across Ranmore Common as described by the Inspector outside the ambit of taking "air and exercise".

94. Thirdly, what did the Inspector mean when he said in paragraph 25 of his decision letter that the question of "user as of right" was not contested? In the light of his description in paragraph 22 of how the tracks were actually used I am unable to accept Mr Laurence's submission that the Inspector was thereby finding as a fact that the public were using the tracks in ways other than those permitted by the Deed.

95. One has to read the decision letter as a whole and in a commonsense way. Although it was dealing with legal issues it should not be construed as though it was an enactment. The Inspector describes the use made of the tracks in paragraph 22 and there is no suggestion elsewhere in the decision letter of any use that falls outside the ambit of taking air and exercise (apart that is from the use of routes to visit the church which I have dealt with above).

96. In my view, all the Inspector was saying in paragraphs 22 to 25 of the decision letter was that it was not contested that:

- (a) there was a substantial amount of evidence of the public using the tracks in the manner described in paragraph 22 of the decision letter, and
- (b) they used the tracks in that manner in the belief that they did so 'as of right' (paragraph 23).

97. The Inspector then went on in paragraphs 31 to 33 to determine the question, as he put it, "whether the law would recognise that use conferred by what I have earlier referred to as a revocable statutory licence in the same terms".

98. Fourthly, was the belief of the public that their use of the tracks was 'as of right' sufficient to establish enjoyment as of right for the purposes of dedication under section 31 subsection (1) of the 1980 act?

99. I do not accept that the law relating to the creation of private and public rights of way has diverged as contended by Mr Laurence.

100. In both cases it is necessary to establish that the use of the way was in fact enjoyed without force, secrecy or permission.

101. Whilst the belief of the user may well be irrelevant for the purposes of the acquisition of a private right of way, indeed, he may well be seeking quite deliberately to establish a way across his neighbour's land; in order to establish the existence of a public right of way it is necessary for the public to establish a genuine belief that their enjoyment of the way was "as of right".

102. In practice it will normally be sufficient for those claiming the existence of a public right of way to establish that they enjoyed it for the requisite period in the belief that they were doing so as of right. They do not have to prove in every case that they were using the way without permission if that issue is not raised, but if the landowner establishes that their use was in fact with permission, that will defeat the claim that their use was as of right.

103. I believe that my conclusion accords with the dicta of Slessor LJ and Scott LJ at pages 241 and 245 in *Jones v. Bates* and with the dicta of Balcombe LJ in *Cowell* at page 858, to which the respondents have

referred.

104. I consider that Mr Laurence has taken the observations of Farwell J on page 251 of *Jones v. Bates* somewhat out of context. A little further on at letter H, Farwell J added:

"Further, it must be remembered that, even if user for more than 20 years, by members of the public who honestly believed that they were entitled to use the way, is established, it is by no means conclusive of the issue whether the alleged right has been proved. That must depend on a variety of matters which must be taken into consideration - for instance, the locality, the nature of the user and its quantity, reputation, the terminus at each end, and other similar matters. All these are questions of fact, as is the ultimate conclusion to be drawn from them - namely, whether or not the public right has been proved."

105. In *O'Keefe*, Pill J was not dealing with an express permission to use the way. It was being argued that toleration should be distinguished from acquiescence. In deciding that use which was tolerated could be "as of right", Pill J was, in effect, rejecting that claimed distinction.

106. It follows that, on the admittedly limited information contained in the decision letter, the users of the tracks on Ranmore Common were doing what they were permitted to do under section 193 by virtue of the Deed, and no more. Their enjoyment of the ways was by licence and not as of right, even though they genuinely believed that it was as of right.

107. Whilst that conclusion will be disappointing to the applicant and to the many other users of the tracks, I do not consider that it leads to any absurdity or anomaly. Rather the reverse, there are a large number of commons where section 193 applies or has been applied. There must be very many walkers and riders who enjoy using the tracks across them and who do so in the firm belief that their user is as of right. It would be strange if using such tracks for "leisure walking, recreation, exercise, running or horseriding", precisely the kind of activities permitted by section 193, should somehow establish rights of way across those commons.

108. Therefore, consideration of the proviso does not arise, but as Staughton LJ in *Cowell* remarked, it may well overlap with the requirement that the user be as of right.

109. That need not necessarily be so. Mr Cochrane gave examples of cases where there might be no permission to use the tracks in question but where the owner could nevertheless establish that he had no intention to dedicate. They included the landowner who had a long-term programme of mineral extraction and restoration over a large area. His intention to excavate the tracks in due course might be well established by contemporaneous plans and policy statements, yet he might be content to acquiesce in the public's user of the tracks in the meantime. In such a case there would be no permission to use the tracks, but the landowner would nevertheless be able to establish that he had no intention to dedicate.

110. In the present case, the Deed is expressly revocable. It is clear evidence that the landowner intended that the public could be stopped from using the common and from walking and riding along the tracks thereon at any time that he chose.

111. I would accept Mr Laurence's argument that the Deed is silent as to what the landowner's intention might be if the public were to use the tracks across the common not for the purpose of taking air and exercise in accordance with the Deed, but for some other purpose, such as travelling along a particular track to a particular destination for the purpose of getting to that destination, but as I have indicated, that question does not arise on the facts of this case as found by the Inspector.

112. Is the Deed "sufficient evidence" of the landowner's intention, given that it was not publicised or made manifest to the users of the way?

113. The authorities cited by Mr Laurence, *Blake*, *Cowell*, *Ward* and *O'Keefe*, all of which I have referred to above, do no more, in my view, than establish the proposition that evidence of the landowner's intention must be overt and contemporaneous. Thus, it will not avail the landowner to assert after the event that he had no intention to dedicate, but he is not required to publicise his intention to users of the way.

114. The only dicta to the contrary are those of Denning LJ in *Fairey*. Mr Laurence accepts that they were obiter.

115. Insofar as they equate the evidence necessary to satisfy the proviso with the evidence necessary to bring home to the public that their right to use the way is being called into question, they go too far, in my view.

116. Implicit in Mr Laurence's submissions is the existence of a very fine line between acts that are sufficiently "open and notorious" to be capable of bringing the landowner's intention not to dedicate to the attention of the public, but which are not so open and notorious that they succeed in bringing the user of the way into question. His approach seems to me to leave little if any scope for the operation of the proviso.

117. The landowner must not keep his intention locked in his own mind, but whether his acts are fairly described as overt or covert must be a question of fact for the Inspector.

118. One can imagine far-fetched hypothetical examples: writing a letter to oneself and placing it in one's desk drawer, but the Inspector was entitled to conclude in this case that the formal execution of a deed addressed to "all men" and depositing that deed with the appropriate Government department, was a sufficiently overt act.

119. I accept that the analogy with section 31 subsection (6) is not precise, because Parliament created a specific means of negating intention, and the declaration has to be deposited with a highway authority and renewed every 6 years, but it is fair to observe that Parliament did not feel that it was necessary to bring the existence of such a declaration to the attention of the public using the way.

120. It is true that in order to be effective under section 31 subsection (3) the notice has to be visible to persons using the way, but erecting such a notice is merely one way of establishing a contrary intention, and is deemed to be sufficient in the absence of proof of a contrary intention.

121. One would expect that the evidential threshold required to bring the landowner within such a deeming provision would be relatively high.

122. Finally, does it matter that *Farmstiles Limited* did not know of the existence of the Deed between October 1984 and June 1990? Since the permission conferred by the Deed continued regardless of the landowner's state of knowledge it could make no difference as to whether the enjoyment of the public was during that period "as of right".

123. I do not accept Mr Laurence's submission that for the proviso to operate at all there must be evidence that there was no intention to dedicate for the whole of the 20-year period. Whilst "that period" is a reference back to the 20-year period, "during that period" is not to be equated with "throughout that period".

124. Thus if there is sufficient evidence that for say 5 or 10 years during the 20-year period a landowner who objected to riders or walkers across his land had no intention to dedicate, that would defeat a claim of dedication under section 31 subsection (1).

125. I consider that such an approach is consistent with that adopted by Balcombe LJ in *Cowell* in respect of the effect of a section 31 subsection (3) notice which is not maintained throughout the whole of the relevant period. It is effective for the period during which it is maintained.

126. If the evidence shows that there was no intention to dedicate for only a very short period during the 20 years questions of *de minimis* may well arise. They would have to be resolved on the facts by the Inspector hearing the evidence.

127. I therefore conclude that the Inspector was right not to confirm the order and that the applicant's challenge to his decision must fail.

128. I would like to express my gratitude to all counsel for the very full and helpful submissions that they have put to me.

129. MR HOBSON: My Lord, I appear on behalf of the Secretary of State. We would seek our costs, my Lord.

130. MR JUSTICE SULLIVAN: Do you resist that,

131. Mr Laurence, the Secretary of State's costs?

132. MR LAURENCE: My Lord, yes, I do resist it. Your Lordship may be aware from his personal experience that there is a developing trend, and perhaps judicial review is as good an example of the trend as any, to exercise a discretion whether to order an unsuccessful applicant to pay the Secretary of State's costs rather more cautiously than before and, my Lord, the reason for the trend, in my respectful submission, is this: that frequently cases of this sort involve a distinct public element. The applicant is plainly interested in the outcome of the proceedings for himself, but it is equally plain that in seeking judicial review he is in effect seeking a legal result which will redound to the benefit of many members of the public, other than himself.

133. This was perhaps as good an example of such a case, my Lord, as could be imagined, and I can tell your Lordship from my own experience -- and I do not know that it would assist you to look at the case -- I can tell your Lordship from my own experience that Potts J in a case called Mayhew took the view that an unsuccessful member of the public in proceedings where Mrs Mayhew was seeking clarification as to the extent of the public's rights over the land in question. I would need to remind myself of the precise issue, my Lord, but it was analogous in the sense that she was not speaking merely for herself in dealing with proceedings.

134. Potts J took the view that there was an appropriate case not to order that, although Mrs Mayhew was unsuccessful, she should pay the Secretary of State's cost.

135. My Lord, that is merely illustrative of the developing trend which I invite your Lordship to note, and which I invite you on the facts of this particular case to say ought to be given a further small impetus by your Lordship refusing the Secretary of State's application to have Mr Billson pay his costs.

136. Although your Lordship has expressed the view in the course of his judgment that this matter will be disappointing for the applicant, of course it will, but that it has implications for many commons, all over the country. My Lord, we might just as well have expressed the view that the withdrawal by landowners of the permission in effect accorded by applying section 193 to the particular common owned by them is itself a very serious matter from the point of view of members of the public who may for a long time have enjoyed the facility of what they had come to regard and did regard as a right, namely, the right to pass and repass on foot and on horseback across the particular tracks.

137. My Lord, under those circumstances, your Lordship may feel that the point which Mr Billson here sought to establish, which is that in circumstances like the present, although the general right of having access to the common is withdrawn by the revocation of the Deed applying section 193 to the land, he was seeking, we would say, respectfully my Lord, quite understandably and rightly, to establish the very

important point that the public did not thereby lose the right to the enjoyment of tracks which they had been in the habit of passing and re-passing over in the exercise of believing themselves to have a public right.

138. My Lord, in addition, it is for consideration -- and your Lordship may think that the legal issue itself which has been last established by your Lordship's decision in this case -- was not one which as it were changed between the schedule 14 appeal and the determination by the Secretary of State of the appeal under schedule 15, and I will, if I may, just read to your Lordship a letter from the Government Office for the South East, and I will give my learned friend opportunity to look at it in a moment before he responds.

139. My Lord, he refers, does the writer of the letter, who is I think the same Mr Palmer under whose name the schedule 14 decision is given, he writes to Mr Billson and says this:

"Wildlife and Countryside Act 1981, Section 53 and Schedule 15 alleged bridleways across Ranmore Common":

"I refer to our recent telephone conversation and your letter of 27 August about the decision of the Inspector" -- it should have been "not to confirm" -- "the Definitive Map Modification in respect of these alleged bridleways.

I have now discussed the contents of your letter with our legal advisers and the legal position as we see it as is as follows, the Secretary of State has statutory powers to appoint a person to decide certain cases on his behalf. A decision made by an Inspector so appointed has the full force of a decision made by the Secretary of State. A decision not to confirm an order is final just as a decision to confirm it would have been and it can only be overturned by the courts.

The Secretary of State (in the person of the Inspector) having heard the evidence at the inquiry, is entitled not to confirm the order even though such a decision may appear to be in conflict with his earlier decision to direct the Surveying Authority to make the order. It may be that the evidence or discussion at the inquiry brings out points or arguments that were not apparent as at the time of the Secretary of State's earlier decision. However, if you believe that the Secretary of State's decision not to confirm the order was wrong in law you do, of course, have the right to seek a judicial review of the decision. You are strongly advised to seek professional legal advice before taking such a step."

140. And then this, my Lord:

"You will understand that in these circumstances, I cannot comment on the matters of substance in your letter regarding the Ranmore Common case. Nevertheless, I do understand your concern at the apparent inconsistency of the Secretary of State's decisions on this matter. We are looking at this in the context of the way future cases are handled".

141. My Lord, I wonder if I can just ask Mr Billson if he has got a copy of that letter that I can just put before your Lordship while my learned friend is looking at it. I thought it right to read it in full so that your Lordship that the context in which the final paragraph appears.

142. My Lord, this was indeed a case where the same narrow questions of law which fell to be resolved at the schedule 14 appeal stage fell again to be resolved at the stage of the schedule 15 inquiry. Mr Palmer

on behalf of the Secretary of State took a different view on the schedule 14 appeal of that legal question of law than did the Secretary of State's Inspector at the schedule 15 inquiry.

143. If ever there was a case in which there appears, on the face of it, to have been different views expressed even within the -- different views within the Secretary of State's jurisdiction if I can put it that way -- my Lord, this is such a case and that links, I would respectfully invite your Lordship to say, with a consideration that there was a public point of very considerable importance at issue here, a point that Mr Billson is not to be taken as an ordinary litigant seeking to assert an ordinary litigant's rights in circumstances where the usual consequences would follow if that litigant was unsuccessful.

144. My Lord, I have not brought the Mayhew case with me because I have taken the view that these cases do in the end depend on the discretion which the individual judge thinks it right to exercise in relation to costs on the facts of the particular case, but I would invite your Lordship just to give me a moment if necessary in order to show you that case if you think, having heard my account of what occurred there, you believe you would be assisted to see it, but subject to that, my Lord, my respectful suggestion is that this would be a proper case in which to order that each side should pay their own costs.

145. MR JUSTICE SULLIVAN: I suspect that Mayhew may well turn, as so many of these cost decisions do, on the particular facts of that case, so unless you positively press me to take it, I will not ask you for it.

146. MR LAURENCE: I hope your Lordship could just accept that it was also a case under the Act, the Wildlife and Countryside Act, it went really, from recollection, to the kind of objection which was capable of giving rise to a decision in favour of the public following the making of a modification order, and, my Lord, to that extent, it was in the same area, although I think Mrs Mayhew's point on behalf of the public was -- and, again, I say this from recollection and I would need to check it if it were thought material -- her point was that an existing footpath ought not to be upgraded to a higher status because she was concerned on behalf of the walking public that bridle rights should not be established over the way.

147. My Lord, those, however, are my submissions in support of saying that each side should be ordered to pay its own costs.

148. MR JUSTICE SULLIVAN: Do you want to reply to that?

149. MR HOBSON: Very briefly, my Lord. We would submit that the very clear principle is costs should follow the event. It is quite clear you do have a discretion, but we would say that this is not an appropriate case to exercise it. If you were to exercise it it would impose a very heavy burden on Government departments, because most cases of judicial review could be said to be matters of great public importance where issues need to be resolved.

150. My learned friend submitted that Mr Billson was no ordinary litigant. We would submit that to avoid problems of costs this matter could have been brought by a representative interest group which would dissipate the burden. I have nothing further to add, my Lord.

151. MR JUSTICE SULLIVAN: Thank you very much. Further applications? Yes, Mr Cochrane?

152. MR COCHRANE: Your Lordship will have noted I am sure at tab 16 the case of Bolton.

153. MR JUSTICE SULLIVAN: I noticed it was on the index but it was the one case that was not actually in my file. I did not, however, think it necessary to draw it to anyone's attention.

154. MR COCHRANE: My Lord I have not got a another copy because I had assumed it was in your Lordship's bundle. Obviously it has not been referred to yet because it was totally irrelevant.

155. My Lord, I am sure it is unnecessary for me to remind your Lordship of what was held so clearly and stated so clearly in the speech of Lord Lloyd of Berwick in that case about a second set of costs. It is true of course in that case we were concerned with the planning appeal, the Secretary of State's costs at first instance and the developer's costs, but I would submit that the general principles set out on page 1178 apply in any public law case such as this where there is a claim by another interested party for costs. The principles set out on the second half of page 1178, just below halfway down: "What then is the proper approach?"

156. My learned friend wants me to start at the top of the first paragraph, the top of that page:

"In the Birmingham City Council case all the costs were, in one way or another, met either by the Legal Aid Board or otherwise at public expense. Here there is no question of any of the costs being funded by the Legal Aid Board. But similar considerations apply. The House will be astute to ensure that unnecessary costs are not incurred. Where there is multiple representation the losing party will not normally be required to pay more than one set of costs, unless the recovery of further costs is justified in the circumstances of the particular case."

157. So that is the starting point with the general principle. But then later in that page there are exceptions, half way down the page:

"What then is the proper approach? As in all such questions to do with costs, the fundamental rule is that there are no rules. Costs are always in the discretion of the court, and a practice, however widespread and longstanding, must never be allowed to harden into a rule. But the following propositions may be supported."

158. I do not rely on (1). It is (2) and (3) so far as I am concerned:

"(2) The developer" -- and I submit that in this instance I am in the same position as the developer was in Bolton -- "will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case."

"(3) A second set of costs is more likely to be awarded at first instance, than in the Court of Appeal or House of Lords ..."

159. Now, my Lord, I start by emphasising that your Lordship found against this applicant at a stage before you reached the proviso. It was towards the end of your Lordship's judgment, although you go on to consider the proviso you said the proviso does not arise, because your Lordship found that by reason of the Deed this user was not in fact as of right; it was precario.

160. Now, my Lord, our reading of the Inspector's decision was that it certainly was not clear that that was his view, and we considered that he meant exactly what he said in paragraph 25. We took him at face value that the question of user as of right is not contested. We thought he had made the very leap -- and we still think he probably had -- the very leap which my learned friend says is correct, namely, from proof or acceptance of a genuine belief that the user was as of right; (2) -- i.e. skipping out *nec clam* and *precario* -- the conclusion that the question of user as of right is not contested, and we considered that that as a matter of law was wrong and your Lordship has agreed as a matter of law if that is what he was saying he was wrong.

161. My Lord, it is important to note, in my submission, that the Secretary of State's skeleton argument does not take that point at all, and my learned friend expressed himself somewhat surprised during the course of argument that the Secretary of State was now taking that line.

162. Your Lordship will see in the Secretary of State's skeleton argument that he identifies four issues. In the Secretary of State's skeleton argument, starting on page -- I am skipping the setting out of the facts and the background -- starting out on page 5 he identifies issues 1, 2, 3 and 4, and not one of them raised the point that we considered crucial: can this use be said to have been as of right by virtue of the Deed? Issue 1: can the Deed be evidence of lack of intention to dedicate, to satisfy the proviso? Issue 2: does it confer equestrian rights? That is the Deed. Issue 3, on the next page: does the execution of the Deed in circumstances which the public were unaware of the existence constitute evidence of lack of intention? Again, it was on the proviso, issue 3, and finally, on the last page, issue 4: did the Inspector err in holding that the proviso was satisfied although he found for 6 years the landowner was unaware of the existence of the Deed?

163. MR JUSTICE SULLIVAN: Mr Hobson left himself a toe hole, the sentence in issue 1, such permission may indicate user as of right and he, having left himself a toe hole he then --

164. MR COCHRANE: He has got his whole body in there; he managed to force the door open and entered. The point I make, my Lord is this: we could not have known, and indeed I think largely speaking we were right to suspect that the Secretary of State was not proposing to argue that point, which was in fact the point on which your Lordship -- I mean, the point on the proviso was strictly speaking obiter, because your Lordship had already determined that the user was not as of right by virtue of the Deed. That argument does appear in our skeleton, and I suspect that it was when the Secretary of State read our skeleton that he realised that that argument might possibly be a hare that would run or course, and it then did figure in his argument, but in my submission there was no way that we could know that the Secretary of State was going to, so to speak, argue that point which we considered to be the fundamental point, and we were right on that.

165. So, my Lord, for that reason I would submit that there, first of all, clearly, we had a strong interest being the landowners, but that we could not sit back and rely on the Secretary of State to argue that point, since it was not apparent that he was alive to it.

166. MR JUSTICE SULLIVAN: What do you want to say about that, Mr Laurence?

167. MR LAURENCE: My Lord, what I want to say about that is this: that the application of the Bolton rule, difficult as it is, is not to be rendered more difficult by the accident of what it is that in the event the Secretary of State chooses or does not choose to argue.

168. The question is whether the second party, or the third party, can show that there was likely to be a separate issue on which he was to be entitled to be heard; that is to say -- and when Lord Lloyd uses the words: "an issue not covered by counsel for the Secretary of State, or unless he has an interest which requires separate representation". What must be meant there is that there is something separate from what the Secretary of State in defending the decision letter can be expected to say in so defending it, and an applicant in the position of Mr Billson is not to be liable, I respectfully submit, to find himself paying a second set of costs because in the event it is found that the Secretary of State has chosen to confine himself, in defending the decision letter, to particular arguments when he could and should, in the judgment of -- as it turns out in the judgment of the Court -- have taken further points. The question is rather whether those further points were properly open to the Secretary of State, and if they were, and could have been taken by him, they are points which nevertheless entitle the third party to come along and say he wanted to add belt and braces to the argument of the Secretary of State, and it is -- it may not be without significance that, according to my note, Mr Cochrane stood up at the end of my learned friend Mr Hobson's argument to say that what he was here to do was to add braces to the belt.

169. My Lord, this is not a case in which, in my respectful submission, the applicant should pay two sets of costs. My Lord, if it were held to be a case in which two sets of costs have got to be paid by this applicant, one might as well get rid, I respectfully say, of the rule that the losing party will not normally be required to pay more than one set of costs because the qualifying phrase, "unless the recovery of further costs is justified in the circumstances of the particular case" will have been interpreted in such a way as to permit that requirement to be said to have been satisfied in almost every case, and, my Lord, in truth what has happened is that Mr Cochrane has come here and been glad to add his arguments to those of the Secretary of State in seeking to uphold the decision of the Inspector, but that in reality the points which were open to Mr Hobson to argue and which he did in the event argue on behalf of the Secretary of State, were points which were identical to those capable of being taken by Mr Cochrane, and in those circumstances I invite your Lordship to say that it would be inappropriate to visit a second set of costs on Mr Billson.

170. MR COCHRANE: My Lord, I did use the phrase "belt and braces", but I added that the reason that we were here was that we took a different view from the Secretary of State as to what the Inspector had said in his decision letter and as to what the law was in respect of user as of right.

171. MR JUSTICE SULLIVAN: So far as costs are concerned, Mr Laurence urges upon me that the applicant should not be taken as an ordinary litigant; he is seeking to establish a public right, and he refers me to a case where Potts J accepted that in a case under the 1981 act it might be appropriate for the Secretary of State not to have his costs.

172. I can understand that there may be cases where in effect there is almost what amounts to almost a joint attempt to clarify the law for the benefit of both the Government department and an applicant, but here I can see no reason not to apply the normal rule.

173. The problem seems to relate to this particular common, although I accept of course that my decision may well have implications for other commons.

174. Mr Laurence referred me to a letter from the Government Office for the South East of 18th September 1996 dealing with the fact that the Secretary of State had reached apparently conflicting decisions, firstly, in deciding to order the County Council to make a modification order and then, secondly, through his Inspector in deciding not to confirm the order. But the first letter made it perfectly clear that the decision to require the County Council to make the modification order was without prejudice to the Secretary of State's ultimate decision, and that of course can only be made after he has heard the objections to the modification order and, as the letter of 18th September 1996 points out, that may well result in the Inspector having new evidence or different arguments presented to him.

175. So far as Mr Cochrane's application for costs is concerned, I have been referred to the case of Bolton [1995] 1 WLR 1196, and to the speech of Lord Lloyd of Berwick at page 1178.

176. The relevant proposition is the second one:

"The developer will not normally be entitled to his costs unless he can show that there was likely to be a separate issue on which he was entitled to be heard, that is to say an issue not covered by counsel for the Secretary of State; or unless he has an interest which requires separate representation. The mere fact that he is the developer will not of itself justify a second set of costs in every case."

177. The reference to "the developer" is of course explained by the fact that the Bolton case was a planning case.

178. It does seem to me that it was not clear what the Secretary of State's attitude would be to the "as of right" issue. It was certainly open to the Secretary of State to argue that point, as Mr Laurence points out, but it was not clear on the papers whether he was proposing to do so.

179. It seems to me, therefore, that there was in that sense a separate issue on which the landowner was entitled to be heard.

180. I found Mr Cochrane's submissions most helpful, that goes without saying, but to a degree he was, as he fairly put it, adding braces to the Secretary of State's belt. There was a degree of overlap.

181. In my view, therefore, the fair order is that the second respondent should be paid half of its costs by the applicant, but that the first respondent should get its costs in full.

182. MR LAURENCE: Your Lordship, one other matter arises, and that is that your Lordship will be aware that under section 18 (1) A of the Supreme Court Act 1981 provision is made for the rules of the Supreme Court to prescribe classes of case in which an appeal shall lie with the Court of Appeal only with the leave of the Court, and, my Lord, applications for judicial review are included in such cases by virtue of Order 59 rule (1) B.

183. MR JUSTICE SULLIVAN: It is an oddity that if it was an appeal against a decision confirming an order I think you would not need leave, would you; you could go straight off to the Court of Appeal without leave, but since you are appealing a judge's decision about a refusal to confirm one you are going by judicial review and so you do need leave. It is another quirk, I suppose.

184. MR LAURENCE: My Lord, it is a quirk and --

185. MR JUSTICE SULLIVAN: You need leave, and you ask for leave?

186. MR LAURENCE: It appears I definitely need leave and, my Lord, I ask for leave.

187. MR JUSTICE SULLIVAN: Mr Laurence, unless you are going to be opposed I need not trouble you on leave. It does seem to me that provisionally, without having heard either of the respondents, the points you argued are of considerable importance, but do either of you respondents wish to oppose that in the light of what I have just said?

MR HOBSON: No.

188. MR JUSTICE SULLIVAN: Very well, you may have your leave.

189. MR LAURENCE: My Lord, may I say something that is easier to say when you are on the losing side than if you are on the winning side without being misunderstood: we are very grateful for the trouble you have taken in judgment and delivering it so speedily after last week's hearing, and I am sure my learned friend's associate themselves with that remark.

190. MR COCHRANE: My Lord, indeed I do.

191. MR JUSTICE SULLIVAN: I was ably assisted by your
submissions.

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OPINIONS
OF THE LORDS OF APPEAL
FOR JUDGMENT IN THE CAUSE

R (on the application of Godmanchester Town Council)
(Appellants) v. Secretary of State for the Environment, Food and
Rural Affairs (Respondent) and one other action

R (on the application of Drain) (Appellant) v. Secretary of State
for the Environment, Food and Rural Affairs (Respondent) and
one other action

Appellate Committee

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Lord Hope of Craighead
Lord Scott of Foscote
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Interveners

Edwin Simpson
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Hearing dates:
8, 9 and 10 May 2007

ON
WEDNESDAY 20 JUNE 2007

HOUSE OF LORDS

**OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT
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(Respondent) and one other action**

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the Environment, Food and Rural Affairs (Respondent) and one
other action**

[2007] UKHL 28

LORD HOFFMANN

My Lords,

1. These two appeals are test cases brought before the House for a ruling on the effect of the presumption in section 31(1) of the Highways Act 1980:

“Where a way over any land... has been actually 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 main issue in both appeals is over the nature of the evidence which will be sufficient to demonstrate that there was no intention to dedicate. Although the point can be put in a variety of ways, it seems to me to turn in the end on the meaning of the word “intention”. The respondent landowners say that intention is a state of mind, with all the subjectivity which that implies. In principle, the owner himself is the person best qualified to give evidence about his own state of mind. Such evidence could be confirmed by acts done during the relevant period, such as putting up notices or barriers or recording his intentions in letters or memoranda. In evaluating such acts, no distinction can be drawn between those which would have come to the attention of users of

the way and those which would not. What matters is the owner's state of mind and not what users of the way would have thought about it.

3. The contrary view is that the term intention is being used in an objective sense. It means what users of the way would reasonably have thought to be the owner's state of mind, which may or may not coincide with his actual state of mind. Similarly when one speaks of the intention of the parties to a contract, one means what a reasonable person, possessed of the background knowledge available to the parties, would have understood what they meant by using the language in which they expressed their agreement. Likewise, adverse possession by a squatter is said to require an *animus possidendi*, an intention to possess. But, as Slade J said in the leading case of *Powell v McFarlane* (1977) 38 P & CR 452 (approved as a "remarkable judgment" by the House of Lords in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419, per Lord Browne-Wilkinson at p. 432):

"In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world."

4. Before I say anything about the facts of this appeal, I must put section 31(1) into its wider setting. It is derived from section 1(1) of the Rights of Way Act 1932, which in turn built upon foundations laid by the common law. As has often been explained, English law differs from civilian systems such as the law of Scotland by having no doctrine of acquisition of rights, public or private, by long user: see *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335, 349. Instead, it treats user since time immemorial, that is to say, since 1189, as raising an irrebuttable presumption that the right had a lawful origin in grant to a predecessor in title or dedication to the public at large. As the reign of Richard I slipped further into the remote past, that presumption had to be supplemented by the judicial invention of others. In the case of claims to private easements such as rights of way, juries were told that user since time immemorial could be inferred from evidence of user for a long time, but that this could be rebutted by evidence that the easement could not have existed in 1189. As that was often quite easy to prove, the presumption had to be further supplemented by directions that the jury could in such a case infer the existence of a more recent grant which had been lost. This remained the

law until it was reformed by the Prescription Act 1832, to which I shall return later.

5. In the case of a public right of way, a lawful origin had to be found in dedication by the landowner at some unknown date in the past. Such dedication was analogous to the lost modern grant of a private easement. Juries were told that they could find such a dedication on evidence of user openly and as of right by members of the public and were often encouraged to do so. The reason for juries and judges being willing to make and accept findings that there had been a dedication or a lost modern grant was of course the unfairness of disturbing rights which had been exercised without objection for a long time. In Scottish law, this policy was given effect by the more logical method of allowing such user to create the right. But in England the policy of the law was not openly acknowledged. Instead, juries were told that in order to uphold the public right, they had to find as a fact that there had been an act of dedication accompanied by the necessary *animus dedicandi* on the part of the landowner: see *Poole v Huskinson* (1843) 11 M & W 827.

6. As a matter of experience and common sense, however, dedication is not usually the most likely explanation for long user by the public, any more than a lost modern grant is the most likely explanation for long user of a private right of way. People do dedicate land as public highways, particularly in laying out building schemes. It is however hard to believe that many of the cartways, bridle paths and footpaths in rural areas owe their origin to a conscious act of dedication. Tolerance, good nature, ignorance or inertia on the part of landowners over many years are more likely explanations. In *Jones v Bates* [1938] 2 All ER 237, 244 Scott LJ said that actual dedication was “often a pure legal fiction [which] put on the affirmant of the public right an artificial onus which was often fatal to his success.” In *Jaques v Secretary of State for the Environment* [1995] JPL 1031, 1037 Laws J called it an “Alice in Wonderland requirement.”

7. Nevertheless, juries and other tribunals of fact did frequently find that such acts of dedication had taken place, no doubt for the reason I have suggested. So much so that in *Folkestone Corporation v Brockman* [1914] AC 338 it was argued that, in the absence of evidence of facts inconsistent with such a dedication, they were obliged to make such a finding. But this submission was rejected by the House of Lords and it became settled that user was no more than evidence from which dedication could be inferred. It was open to the jury to ascribe the user to toleration or some other cause. Since, as I have said, some other cause

was in real life more likely, it became difficult to predict when or for what reason a jury would have sufficient sympathy with the users of the highway to find that there had been a dedication.

8. English judges were embarrassed by the fictions of lost modern grant, *animus dedicandi* and the like (“a bad and mischievous law, and one which is discreditable to us as a civilized and enlightened people” said Cockburn CJ in *Bryant v Foot* (1867) LR 2 QB 161, 179) and looked enviously north of the border (see Lord Blackburn in *Mann v Brodie* (1885) 10 App Cas 378, 386.) The law of private rights of way and certain other easements was reformed by the Prescription Act 1832 and since this provided a model for the 1932 Act, it is helpful to see how it worked. Starting from the common law, namely that user since 1189 would establish the easement, it provided in section 2 that a claim to such an easement which had been “actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years” should not be defeated by evidence which showed that it had arisen at some earlier date. This meant that it could no longer be defeated by showing that it had arisen after 1189.

9. Section 4 provided that the “full period of twenty years” should be taken to be the period next before the proceedings in which the claim shall have been “brought into question”. If the statute had said no more, it would have been possible for a landowner to defeat a claim under the Act by the simple expedient of interrupting the enjoyment of the easement. The time which had necessarily to elapse between the interruption and the commencement of proceedings by the dominant owner to vindicate his right would automatically have prevented the latter from proving enjoyment without interruption for the 20 years “next before” the proceedings. Section 4 therefore went on to provide that “no act or other matter shall be deemed to be an interruption” unless it had been submitted to or acquiesced in for one year after the party interrupted had had notice thereof. That meant that if the servient owner barred the way, the dominant owner had a year within which to commence proceedings and claim the benefit of the statute.

10. The 1932 Act followed the same pattern, but with two important variations. First, section 1(1) contained the proviso which allowed the presumption of dedication to be rebutted by “sufficient evidence that there was no intention during that period to dedicate such way”. There was no such proviso in the 1832 Act. Other subsections in section 1 of the 1932 Act provided that specific acts would be treated as sufficient evidence to negative the intention to dedicate. By section 1(3) (now

section 31(3) and (5) of the 1980 Act), a notice inconsistent with dedication, placed and maintained “in such a manner as to be visible to those using the way” will be sufficient. If the notice is torn down, notice in writing to the county and borough or rural district council that the way is not dedicated to the public will be sufficient. By section 1(4) (now section 31(6) of the 1980 Act) a landowner may deposit with the county council and the borough, urban district or rural district councils a map of his land and a statement indicating which ways he admits to have been dedicated as highways. He may then at any time within the next 10 years make a statutory declaration that he has not dedicated any additional ways and that will be sufficient evidence to negative his intention to have dedicated any such ways. The process may be repeated by further statutory declarations at intervals of not more than 10 years.

11. The other difference was that the 20 year retrospective period did not, as in the 1832 Act, run from the commencement of the proceedings contesting the highway, with a year’s grace period which did not count as an interruption. Instead, it ran from when the right to the way was “brought into question”, without any grace period. That suggests that the draftsman, with the example of section 4 of the 1832 Act before him, thought that if he ran the period back from the date when the right was brought into question, no grace period would be needed.

12. That, my Lords, is the common law and statutory background against which the dispute over the meaning of the term “sufficient evidence that there was no intention...to dedicate” in section 31(1) must be resolved. The help which may be obtained from the pre-1932 cases is limited. As the onus was on the claimant to prove dedication and there was no need for the landowner to prove facts inconsistent with dedication, the courts were not concerned to pin down very precisely what would be sufficient to show inconsistency. There are, however, some indications that the judges were looking at how the matter would have appeared to users of the way.

13. In *Trustees of the British Museum v Finnis* (1833) 5 Car & P 460, 465 Patteson J told a jury:

“If a man opens his land, so that the public pass over it continually, the public, after a user of very few years, would be entitled to pass over it, and use it as a way; and if the party does not mean to dedicate it as a way, but only to give a licence, he should do some act to show that he gives

a licence only. The common course is, to shut it up one day in every year, which I believe is the case at Lincoln's Inn."

14. This suggests that what matters is the impression given to members of the public. Likewise in *Barraclough v Johnson* (1838) 8 Ad & E 99, 105, Littledale J said:

"A man may say that he does not mean to dedicate a way to the public, and yet, if he had allowed them to pass every day for a length of time, his declaration alone would not be regarded, but it would be for a jury to say whether he had intended to dedicate it or not. The facts may warrant them in believing that the way was dedicated, though he has said that he did not so intend: and, if his intention be insisted upon, it may be answered that he should have shewn it by putting up a gate, or by some other act."

15. In *Regina v Broke* (1859) 1 F & F 514, 515, a trial on indictment for stopping up a highway, the landowner claimed to have instructed his servants to allow only seafaring men and pilots to use the path and to turn back anyone else. Pollock CB said:

"Even supposing these instructions to have been given and acted on, yet, unless it can be proved that they were communicated to the persons who used the path, and that they did so by virtue thereof, and not of right, their user was a user by the public, and the right of way has been gained, if the user has been continued long enough."

16. It is true that there is no express statement that intention had to be negatived by overt and notorious acts. But then, as I have said, intention did not have to be negatived at all. And there is no case in which a jury was directed to have regard to an act which one might call private, in the sense of something which would not have come to the attention of users of the way.

17. The first consideration of the matter after 1932 was the decision of the Court of Appeal in *Fairey v Southampton County Council* [1956] 2 QB 439. This was an application to quarter sessions (under section 31

of the National Parks and Access to the Countryside Act 1949) by the owner of Bossington House in Hampshire for a declaration that a footpath over his land was not a public highway. The evidence was that it had been used uninterruptedly from 1885 to 1931 by inhabitants of the nearby villages of Bossington, Houghton and Horsebridge. As from that date, a new owner of the estate had challenged users who were not near neighbours and turned them back. Quarter sessions found that the challenges had brought the public right to use the path into question and that the relevant 20 year period for the purposes of the Act was therefore 1911 to 1931. As there had been qualifying user during this period, the public right of way was established.

18. The landowner appealed by case stated to the Divisional Court. One ground of appeal, which is not relevant to this case, was that if quarter sessions were right about the relevant 20 year period, the Act could not apply because it was not retrospective. The other ground was that the challenges did not bring the right to use the path into question. The landowner said that it was not brought into question until he objected in 1953 to the inclusion of the path in the definitive map. But he relied on the challenges as evidence to negative an intention to dedicate during the 20 years ending in 1953.

19. The Divisional Court rejected both arguments and the landowner appealed to the Court of Appeal. The leading judgment was given by Denning LJ. He dealt first with what amounted to bringing the right into question. Although the passage is a long one, I think that it should (with one or two excisions) be quoted in full:

“I think that in order for the right of the public to have been ‘brought into question’, the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance, by putting a barrier across the path or putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. Some village Hampden may push down the barrier or tear down the notice: the local council may bring an action in the name of the Attorney-General against the landowner in the courts claiming that there is a public right of way: or no one may do anything, in which case the

acquiescence of the public tends to show that they have no right of way.

But whatever the public do, whether they oppose the landowner's action or not, their right is 'brought into question' as soon as the landowner puts up a notice or in some other way makes it clear to the public that he is challenging their right to use the way.

Applying this test, I ask myself: when did the landowner here make it clear to the public that he was challenging their right to use the way? Quarter sessions held that he did so in 1931, when he objected to the use of the path by persons who were not local residents. We do not know what evidence was before them on that point. If the landowner merely turned back one stranger on an isolated occasion, that would not, I think, be sufficient to make it clear to 'the public' that they had no right to use it. He ought at least to make it clear to the villagers of Bossington, Houghton and Horsebridge. They were the members of the public most concerned to assert the right, because they were the persons who used the path. They knew – better than the landowner himself – how long they had used it. They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it...I think we ought to assume that quarter sessions had sufficient evidence before them to support their finding. We ought to assume that in 1931 when the landowner turned back strangers, he did it in so open and notorious a fashion that it was made clear, not only to strangers, that they had no right to use the path, but also to local residents, that they only used it by tolerance of the owner."

20. That was sufficient to dispose of the case, since there was no dispute that there had been qualifying user in the 20 years before 1931. As a statement of what amounts to bringing the right into question, it has always been treated as authoritative and was applied by the inspectors and the Court of Appeal in these cases. But Denning LJ then went on to consider the finding of quarter sessions that the landowner's conduct in 1931 and thereafter had demonstrated an intention not to dedicate the path as a highway:

"In this connection I would also mention the finding of quarter sessions that in and from 1931 the landowner, by

turning off strangers, showed an intention not to dedicate the path as a highway for the use of members of the public at large. This raises the same point. 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 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: see *Mann v Brodie* (1885) 10 App Cas 378, 386. Such evidence may consist, as in the leading case of *Poole v Huskinson* (1843) 11 M & W 827, of notices or a barrier: or the common method of closing the way one day a year. That was not done here; but we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it. On that footing there was sufficient evidence to show that there was no intention to dedicate."

21. These observations on the meaning of "evidence that there was no intention to dedicate" were obiter dicta. They were not necessary for the decision and the other two members of the Court (Birkett and Parker LJ) did not mention the point. But there are obiter dicta and obiter dicta. These were no throw-away lines. This was a learned and carefully prepared reserved judgment (including reference to authorities which had not been cited by counsel) by one of the greatest English judges on a matter close to his heart: a village dispute in his own county of Hampshire.

22. For over forty years, Denning LJ's statement of the law remained unchallenged. It was cited in text books and applied in judgments of lower courts (see, for example, Walton J in *R v Secretary of State for the Environment, ex parte Blake* [1984] JPL 101, 102, Pill J in *O'Keefe v Secretary of State for the Environment* [1996] JPL 42, 58-59 and Laws J in *Jaques v Secretary of State for the Environment* [1995] JPL 1031, 1035-1037). This last case, although following the *Fairey* case, contains some puzzling dicta. Laws J said that the effect of the proviso was that —

“even if use of the required quality was proved, the status of right of way would not be established if the landowner demonstrated an intention not to dedicate.”

23. That is plainly true. But the judge then went on:

“The logical relationship between the two parts of the subsection entailed that proof of an intention not to dedicate could be constituted by something less than proof of facts which had to 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.”

24. This, I am afraid, I do not follow at all. The evidence which will satisfy the proviso is not something less than enjoyment as of right but something different. For example, there may be a notice which says “No right of way. Trespassers will be prosecuted.” Nevertheless, for upwards of twenty years members of the public may have ignored the notice and used the way, openly and apparently in the assertion of a right to do so. Their user will satisfy section 31(1) but the landowner, even on the most objective test, will have satisfied the proviso. (It may be that putting up the notice also brought the right to use the way into question, in which case, as in the *Fairey* case, the public would succeed if they could prove another 20 years user before the notice went up. But that is another matter.) The potential contradiction imagined by Laws J may be due to the view held, at the time of his judgment, that enjoyment as of right required a subjective belief by the users that they had the relevant right – a view which was rejected in *R v Oxfordshire County Council, ex parte Sunningwell Parish Council* [2000] 1 AC 335. Even so, there need not be any contradiction. The users and the landowner may simply differ in their opinions as to whether the right exists or not.

25. In *R v Secretary of State for the Environment, ex parte Cowell* [1993] JPL 851, 857 Staughton LJ, after noting that Denning LJ’s requirements of overt and notorious acts were dicta, went on to say that although “that was not said in the section itself”, it “seemed a sensible rule.” If that might seem less than wholehearted assent, Staughton LJ’s view had become firmer three years later when he presided in the Court of Appeal in *Secretary of State for the Environment v Beresford Trustees* (31 July 1996, unreported) and concurred in the judgment of

Hobhouse LJ. With characteristic precision, Hobhouse LJ said of the phrase “sufficient evidence that there was no intention during that period to dedicate it”:

“This is not a subjective test. The absence of intention must be objectively established by overt acts of the landowner.”

26. He went on to cite the passage in the *Fairey* case as authority. This time, the application of the objective test was undoubtedly *ratio decidendi*. The issue was whether the proviso had been satisfied and the inspector who conducted the inquiry had found that there was not “sufficient evidence of overt acts by the owners to show the public at large that there was no intention to dedicate.” This finding had been set aside by the judge but was restored by the Court of Appeal. The case was not reported, presumably because the law reporters thought that it laid down no new principle.

27. The first sign of dissent was in *R v Secretary of State for the Environment, ex parte Billson* [1999] QB 374, 395, where Sullivan J said that the dicta of Denning LJ went too far. In his opinion, all that was required was that evidence of the owner’s intention be “overt and contemporaneous”. But he was not required to “publicise his intention to users of the way.” A purely private act would do. Writing a letter to oneself and putting it in a locked drawer was described as a “far-fetched hypothetical example” but there is no suggestion that it would not in principle be sufficient. The judge was not referred to the *Beresford* case, no doubt because it had not been reported.

28. In *R v Secretary of State for the Environment, Transport and the Regions, ex parte Dorset County Council* [2000] JPL 396, Dyson J took the new doctrine to its logical conclusion. After examining the authorities (again, without citation of the unreported *Beresford* case) he said:

“On the face of it, the language of the proviso is straightforward. All that is required is that there be sufficient evidence of lack of intention to dedicate. Coming to the matter untutored by previous authority, one may be forgiven for thinking that what Parliament intended was that the tribunal of fact simply decide as a

matter of fact whether there is or is not sufficient evidence of intention to dedicate...I accept that as a matter of fact the tribunal of fact will rarely, if ever, find that there is sufficient evidence of lack of intention to dedicate in the absence of overt and contemporaneous acts on the part of the owner. I do not, however, think that such a requirement can be spelled out of section 31(1) as a matter of construction.”

29. I do not understand why, if Dyson J is right in saying that “intention” in section 31(1) refers to the landowner’s actual state of mind, it would be rare for a tribunal of fact to find evidence of lack of intention unless there was proof of overt and contemporaneous acts. Who better to give evidence of the owner’s state of mind than the owner himself? It is true that if he was asserting some improbable state of mind, one might look for corroboration. But there is nothing improbable in not having an intention to dedicate. It is the conclusion that the owner did intend to dedicate which is improbable: a “pure legal fiction”, an “Alice in Wonderland requirement.”

30. In these appeals, the Divisional Court and Court of Appeal followed the construction given to section 31(1) by Dyson J in *R v Secretary of State for the Environment, Transport and the Regions, ex parte Dorset County Council* [2000] JPL 396 and disapproved of Denning LJ’s statement of the law in the *Fairey* case. This time, the unreported *Beresford* case was cited, but Auld LJ said ([2006] QB 727, 740) that it was “not a reasoned decision as to the meaning of the proviso so as to bind this court.” Like Dyson J, Auld LJ thought (at p. 753) that in practice overt and contemporaneous acts evidencing lack of intention to dedicate would be required:

“In most cases, no doubt, the fact-finder will look for overt, in the sense of objectively identifiable contemporaneous acts or declarations, if only to guard against any risk of abuse by landowners who might seek to rely on retrospective acts or declarations after the expiration of the relevant 20-year period.”

31. Again, I cannot see why it should be an abuse for a landowner to say, after the expiry of the 20-year period, that although he did nothing to stop the public from using the way, this was due to tolerance, ignorance or inertia and without any intention to dedicate it as a

highway. Such evidence would be an inherently plausible account of his state of mind. The only objection is that allowing the presumption to be defeated by such evidence would make nonsense of the Act.

32. My Lords, in my opinion the law as stated by Denning LJ in the *Fairey* case and by Hobhouse LJ in the *Beresford* case was correct and the Court of Appeal was wrong. I think that upon the true construction of section 31(1), “intention” means what the relevant audience, namely the users of the way, would reasonably have understood the landowner’s intention to be. The test is, as Hobhouse LJ said, objective: not what the owner subjectively intended nor what particular users of the way subjectively assumed, but whether a reasonable user would have understood that the owner was intending, as Lord Blackburn put it in *Mann v Brodie* (1885) 10 App Cas 378, 386, to “disabuse [him]” of the notion that the way was a public highway. The Court of Appeal said that this would involve reading words into the Act; placing a gloss on the statute. But, outside the criminal law and parts of the law of torts, it is common to use the word intention in an objective sense, as in the intention of Parliament, the intention of the parties to a contract and, even in Latin, the *animus possidendi* which a squatter must have to acquire a title by limitation.

33. It should first be noted that section 31(1) does not require the tribunal of fact simply to be satisfied that there was no intention to dedicate. As I have said, there would seldom be any difficulty in satisfying such a requirement without any evidence at all. It requires “sufficient evidence” that there was no such intention. In other words, the evidence must be inconsistent with an intention to dedicate. That seems to me to contemplate evidence of objective acts, existing and perceptible outside the landowner’s consciousness, rather than simply proof of a state of mind. And once one introduces that element of objectivity (which was the position favoured by Sullivan J in *Billson’s* case) it is an easy step to say that, in the context, the objective acts must be perceptible by the relevant audience.

34. Such a construction is in my view supported by reading section 31 as a whole. The primary example of an act which would negative an intention to dedicate is the erection and maintenance of a notice inconsistent with dedication “in such manner as to be visible to persons using the way”: section 31(3). If the notice is torn down or defaced, notice to “the appropriate council” will have the same effect: section 31(5). If any overt act would do, why should the notice have to be given to “the appropriate council”? A notice to an inappropriate council, or to

the landowner's solicitor or friend, would be just as good. In the Court of Appeal, Auld LJ said that a notice to the appropriate council would be unlikely to come to the attention of the public using the way and this was an indication that, in general, the landowner's intention did not have to be communicated to users of the way. I disagree. A notice to the council under section 31(5) is plainly regarded as second best and is only allowed when the original notice has been torn down or defaced, just as substituted service is allowed only when there is good reason to dispense with personal service. It is true that users of the way are not very likely to call at the County Council offices to ask whether any notices under section 31(5) have been lodged, but a well-advised defender of rights of way, such as the Ramblers' Association, will know where to look and be able to draw such notices to the attention of users. The fact that in certain defined circumstances one can resort to a method less likely to come to the attention of users of the way is no basis for concluding that in general it does not matter whether the landowner's intention can come to their attention or not.

35. The same point may be made about the elaborate provision for maps, statements and statutory declarations in section 31(6). What would be the point of all this if Parliament was using the word "intention" in a subjective sense which could be proved by any relevant evidence? And why did Parliament, by Schedule 6, paragraph 4 of the Countryside and Rights of Way Act 2000, insert a new section 31A (not yet in force in England) into the 1980 Act to establish a register of the maps and statements deposited under section 31(6) and require that it should be available for inspection free of charge? Surely to make such alternative methods of rebutting the presumption available to the public, so as to approximate as far as possible to the primary method of rebuttal.

36. Then there is the problem of the interruption of continuous user before the commencement of proceedings which, as we saw, the 1832 Act for private rights of way solved by providing a year's grace in which to bring the proceedings. The 1932 Act dispensed with a grace period by calculating the 20 years back from the date on which the right was called into question. The scheme contemplated by Parliament was that once users of the way were made aware that their right to use the way was challenged, they should not be able to gain an advantage from subsequent use of the way and the landowner should not be able to gain an advantage by subsequent prevention of use. What happened after the way was called into question was irrelevant to the operation of the Act. On the Court of Appeal's construction, however, the well-advised landowner, facing the possibility of a claim to a right of way based on many years' enjoyment, will make a private declaration that he has no

intention to dedicate and will lodge it in a safe place. Only afterwards will he close the way or otherwise call the right into question. The effect will be to make it impossible for the claimants to prove the full 20 years user ending when the way was closed, because the owner will be able to satisfy the proviso in respect of the final period after he made his declaration.

37. My Lords, I think it is most unlikely that Parliament intended that the 1932 Act could be capable of being defeated by so simple a device, leaving the claimants to the arbitrary and illogical rules of common law, preserved by section 31(9). In the *Fairey* case Denning LJ, turning to the proviso after his discussion of bringing the right into question, said that it raised the same point. In general, that seems to me to be right. I do not say that all acts which count as negating an intention to dedicate will also inevitably bring the right into question. For example, I would leave open the question of whether notices or declarations under section 31(5) or (6) will always have this effect. I should think that they probably would, because their purpose is to give notice to the public that no right of way is acknowledged. But we need not decide the point. I do not even say that acts which would indicate to reasonable users of the way that the owner did not intend to dedicate will inevitably bring the right into question, because one cannot foresee all cases. But the Act clearly contemplates that there will ordinarily be symmetry between the two concepts. Thus section 31(3) provides that an appropriate notice will be sufficient evidence to negative the intention to dedicate and section 31(2) provides that the right may be brought into question “by a notice such as is mentioned in subsection (3) below or otherwise”. The notice will therefore both negative intention to dedicate and bring the right into question, while the words “or otherwise” contemplate other ways of bringing the right into question (like barring the way, permanently or once a year) which would also in my view be sufficient to negative an intention to dedicate.

38. I am not particularly troubled by the thought that this would leave little scope for the operation of the proviso. It is true that acts negating an intention to dedicate would also, by calling the right into question, throw the inquiry back into an earlier period. If there was no rebutting evidence during that period, the right would be established (as in the *Fairey* case) and the proviso would not apply. But the 1932 Act began as a private member’s bill in the House of Commons which underwent considerable amendment in the House of Lords, including the insertion of the provision for calculating time backwards. I would not expect such an Act to be particularly elegant in the way its parts meshed together, but the general purpose seems to me clear enough and was

given effect by the construction adopted by Denning LJ in the *Fairey* case.

39. My Lords, that leaves two alternative submissions put forward by Mr Laurence QC for the appellants, with which I can deal very shortly. The first was that “during that period” in the proviso meant during the whole of that period. The intention not to dedicate had to be continuously manifested. There is authority against this construction (see, for example, Walton J in *R v Secretary of State for the Environment, ex parte Blake* [1984] JPL 101, 104, saying that proof of lack of intention to dedicate for 17 of the 20 years would be “fatal to the applicant’s case”) and I do not think that it can possibly be right. The proviso negatives the effect of the enjoyment of the right for the period during which there was no intention to dedicate. If that leaves less than 20 years of unrebutted enjoyment, the claim fails.

40. The other submission was that notices under sections 31(3), (5) and (6) are an exhaustive statement of the way in which an intention to dedicate may be rebutted. But section 31(2) speaks of the right being called into question by a notice “or otherwise” and it is hard to imagine an act which called the right into question and did not also evidence an intention not to dedicate.

41. That brings me to the facts of the two appeals. Both arise out of applications to the surveying authority under section 53 of the Wildlife and Countryside Act 1981 to modify the definitive map and statement by adding a right of way not shown on the map. One application was by Godmanchester Town Council to add a public footpath around three sides of the perimeter of Monk’s Pit, Godmanchester. This was a former gravel pit, rectangular in form, which had become a small lake. The map already showed a footpath along one of its sides and the application was to add a path which completed a circuit round the lake. The other was to add a footpath across land belonging to the Yattendon Estate at Aldworth in Berkshire. In both cases an inspector appointed under Schedule 15 of the Wildlife and Countryside Act 1981 found that there had been qualifying user for upwards of 20 years before the right had been called into question. The chief issue in each case was whether the proviso had been satisfied.

42. In the *Godmanchester* case, the Church Commissioners, as landowners, relied upon the erection of a sign and works done on the footpath as evidence of lack of intention to dedicate. The inspector

rejected these as ambiguous or insufficient. But the owners also produced a letter to the local planning authority, written during the 20 year period, in which they complained of pedestrian trespass “around those parts of the pit which are not designated as a public footpath.” Such a letter would not have come to the attention of users of the path or satisfied any of the alternative methods of negating intention to dedicate in section 31. The inspector, following *Dyson J* in the *Billson* case and *Sullivan J* in the *Dorset* case, nevertheless held that the letter was sufficient and her decision was upheld by the Court of Appeal. For the reasons I have given, I think that this was wrong and the decision must be quashed.

43. In the *Yattendon* case there were two inquiries. The first inspector found that the right of way was brought into question by the erection of signs in 1992. The estate owner relied upon three kinds of evidence as negating an intention to dedicate before that date. They were, first, an earlier sign nailed to a beech tree, secondly, challenges by estate employees to people using the way and thirdly, a clause in an agreement granting an agricultural tenancy of the relevant land, by which the tenant covenanted to warn and keep off unauthorised persons from trespassing, to give notice to the owner of any continued acts or trespass and not to allow any footpaths to be created. The inspector accepted the first two categories as sufficient evidence of lack of intention to dedicate and said nothing about the effect of the tenancy agreement. He therefore refused to confirm the county council’s order adding the footpath to the map.

44. The applicant then applied for judicial review to quash the inspector’s decision on the ground that he did not address his mind to the question of whether the notices and challenges, which he had treated as evidence of lack of intention to dedicate, had also brought the right into question, requiring an investigation of an earlier 20 year period. The Secretary of State conceded that the decision could not stand and by consent it was quashed and a new inquiry ordered.

45. At the second inquiry, another inspector also found that the right of way was brought into question by the erection of signs in 1992. The earlier notice or notices had been insufficient for this purpose. The same was true of the challenges.

46. When she came to consider whether there was lack of intention to dedicate, she rejected the signs as insufficient and said nothing about the challenges. This may be because she took the view that if they were

insufficient to bring the right into question, they would also be insufficient to be sufficient evidence of lack of an intention to dedicate. That would, in my opinion, be a consistent view to take. But, again following the *Billson* and *Dorset* cases, she said that the clause in the tenancy agreement was sufficient.

47. I rather doubt whether, even on the principle applied by the Court of Appeal, the clause could be regarded as sufficient. The fact that landlord and tenant have signed a common form agreement containing such a clause says very little about their actual states of mind. But I think that it was wrong in principle to take the tenancy agreement into account, because it would not have been available to users of the right of way. The *Yattendon* decision must therefore also be quashed.

48. The appellants ask that both cases be remitted to the Secretary of State with a direction to confirm the orders adding the footpaths. In each case, the only ground upon which the inspector held the presumption under section 31(1) to be rebutted was inadmissible. But I do not think that this would be fair. In the *Yattendon* case the first inspector held the presumption rebutted on other, admissible grounds and both landowners may have conducted their cases on the assumption that little other rebutting evidence was needed because, on the law stated by Dyson J and Sullivan J, their private declarations were sufficient. The Secretary of State, or an inspector appointed by him, is the statutory decision-making authority and I do not think that the House should substitute its own decision.

49. Nevertheless, the landowners may consider, in the light of the opinions of your Lordships and the evidence which they have adduced at the earlier inquiries, that it would serve no purpose to demand a further inquiry and I draw attention to the power of the inspector under section 250(5) of the Local Government Act 1972 (as applied by paragraph 10A of Schedule 15 to the Wildlife and Countryside Act 1981) to award costs.

50. In the result, I would quash both decisions and remit the cases to the Secretary of State to decide in accordance with the opinions of the House. Since writing this opinion, I have had the opportunity of reading in draft the opinion to be delivered by my noble and learned friend Lord Hope of Craighead and I entirely agree with his observations on the public dialogue by which users and landowners may respectively assert and deny the existence of a right of way.

LORD HOPE OF CRAIGHEAD

My Lords,

51. Commenting on the history and meaning of the Rights of Way Act 1932, Sir Lawrence Chubb, who was an environmental campaigner all his life and was knighted for his services to the English countryside, observed that in legal theory all highways, including public footpaths and bridleways, must have originated by one of two methods. They must either have been created under some statutory authority or have been dedicated by some owner. He conceded however that relatively few footpaths or bridleways have ever been deliberately or expressly granted by any definite act or deed on the part of a landowner: *Journal of the Commons, Open Spaces and Footpaths Preservation Society* (October 1932), vol 2, 244, 247. Such altruistic acts are not unknown. But, almost without exception, English landowners are jealous of their right to exclude the public from their private property. Given the numbers a public way may attract, and the tendency of some members of the public to drop litter wherever they go, who can blame them? For completeness, it should be added that a public way may be acquired by prescription. But in *Mann v Brodie* (1885) 10 App Cas 378, 386, Lord Blackburn said that in England it is in practice never necessary to rely on prescription since time immemorial. Deemed dedication is all that is needed to achieve this.

52. Deemed dedication may be relied upon at common law where there has been evidence of a user by the public for so long and in such a manner that the owner of the fee, whoever he is, must have been aware that the public were acting under the belief that the way has been dedicated, and the owner has taken no steps to disabuse them of that belief. The 1932 Act, which the Highways Act 1980 replaced, was enacted to clarify the law. No definite time was required at common law for a dedication to be inferred. In *Mann v Brodie*, 386, Lord Blackburn observed that a very short period of public user would often satisfy a jury. For the statutory presumption to apply, however, a full period of 20 years is required: section 31(1). Unlike the period which is needed for prescription, which can be measured between any dates however long ago for which evidence is available, this period must be calculated retrospectively from the date when the right of the public is brought into question: section 31(2).

53. The common law has not laid down fixed rules as to what the owner may do to disabuse the public of the belief that the way has been dedicated for use by the public. The statute clarifies the law in this respect too. The erection and maintenance of a notice which is inconsistent with the dedication of the way as a highway which is visible to persons using it will, in the absence of proof of a contrary intention, be sufficient evidence: section 31(3). If it is torn down or defaced, a notice to the appropriate council that the way is not dedicated as a highway will have the same effect: section 31(5). So too will the deposit with the council by the owner of a map and a statement indicating which ways, if any, he admits to have been dedicated as highways, so long as this is backed up every ten years by a declaration that no additional way has been dedicated in the meantime: section 31(6). The appropriate council is, in effect, the guardian of the public interest in these matters. In country areas, it is the council of the county in which the way or the land is situated: section 31(7).

54. Thus a balance is struck between the interests of the public and those of the landowner. The landowner knows that he can resist claims that a way across his land is a public way so long as he takes the steps that are mentioned in these subsections. But erecting a notice or lodging the relevant documents with the council may come too late if there is sufficient evidence of inaction on the landowner's part for a period of 20 years, calculated retrospectively from the date when he takes this step, to bring about the public right by presumed dedication. This is because the date as from which the calculation is to be made is the date when the right of the public is brought into question. If no-one seeks to assert that the way is a public way, *cadit quaestio*. But if there is a challenge, the right of the public to use the way will be taken to have been brought into question as soon as the landowner seeks in the ways the statute mentions to negative the intention to dedicate. The same will be true of other acts, or of some other course of conduct, by which the landowner seeks to exclude the public. The steps which the statute mentions are not to be taken as exhaustive of those that may be taken for this purpose: see the words "or otherwise" at the end of section 31(2). Whatever he does, time will have begun to run against the landowner from the beginning of the period of 20 years calculated backwards from the first such act or from the start of that course of conduct.

55. On the other hand, for so long as the landowner takes his first step to exclude the public within the 20 year period and keeps doing this in a way that continues to negative his intention to do so, he will be protected from presumed dedication under the statute. There will, in terms of the proviso to section 31(1), be "sufficient evidence that there

was no intention during that period to dedicate it.” It will be sufficient for this purpose that the situation which the proviso contemplates has arisen at any time within the 20 year period. Time ceases to run against the landowner as from that point. Irrespective of when this occurs, the period that the statutory presumption requires will have been interrupted. If it starts running again, a full 20 years will be needed thereafter before the requirement will be satisfied. So all the landowner need do is ensure that no 20 year period goes by without his taking overt acts to challenge the use of the way by the public.

56. The central question in these appeals is how that intention is to be demonstrated. Mr Simpson said that the words of the statute should be taken literally. An absence of intention was enough. So it was not necessary for the landowner to reveal his intention to anybody. In other words, contrary to what Denning LJ said in *Fairey v Southamptton County Council* [1956] 2 QB 439, 458, he could keep his intention locked up in his own mind. I do not think that this extreme view finds any support in the authorities. But in *R v Secretary of State for the Environment, Ex p Billson* [1999] QB 374, 395 Sullivan J said that the proviso did not require the landowner to publicise his intention *to users* of the way (my emphasis). In *R v Secretary of State for the Environment, Transport and the Regions, Ex p Dorset County Council* [2000] JPL 396, 407 Dyson J went further. He said that he would not place any gloss on the proviso at all and that, in disproving an intention to dedicate, the owner need not bring home to the users that there was no right to use the way. Their approach was adopted in this case by both the Divisional Court and the Court of Appeal. In the Court of Appeal Auld LJ said that the proviso is concerned with intention and its proof, not with communication of that intention to members of the public [2006] QB 727, 752, para 63. He added this explanation:

“To construe it as requiring the latter or even proof of overt and contemporaneous acts falling short of such communication would be to read words into it which would have been clearly included if that had been intended, and which would run counter to the operation of section 31 read as a whole.”

In para 64 he said that there was no statutory threshold as to sufficiency of evidence for the purpose of the proviso.

57. In my opinion this is to take too narrow a view of the purpose and effect of the proviso. Like the whole of the subsection of which it forms part, it was drafted against the background of the common law. The express exclusion of 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” demonstrates this point. So too does the use of the phrase “actually enjoyed by the public as of right and without interruption”, which can only be understood by referring to what is required for this purpose by the common law. As for the proviso, the essential point is that the presumption of dedication at common law involves a dialogue between the landowner and the public. It is conducted by acts on the part of the public which indicate an assertion of its right to use the way and, if he wishes to deny the public that right, by acts on the part of the landowner to indicate the contrary. As Lord Blackburn said in *Mann v Brodie* (1885) 10 App Cas 378, 386, he must take steps to disabuse the public of the belief that the way has been dedicated to public use. Whether the steps that he has taken to communicate this fact to the public are sufficient for that purpose is, of course, a question of fact for the Inspector. But the landowner must communicate his intention to the public in some way if he is to satisfy the requirements of the proviso. That was the position prior to the 1932 Act, and I can find nothing in that Act or in the 1980 Act to indicate that it was Parliament’s intention that such a fundamental rule should be departed from.

58. Scott LJ in *Jones v Bates* [1938] 2 All ER 237, 247 saw this point, as did Denning LJ in *Fairey v Southampton County Council* [1956] 2 QB 439, 457. Scott LJ said that the main object of the 1932 Act was to get rid of the onerous fiction of proving an actual dedication. There is no indication in his opinion that he thought that it was its intention to alter the nature of the evidence that would be relevant to show whether there was an intention to dedicate or not to dedicate, as the case may be. Denning LJ said that the landowner must make his position clear to the members of the public most concerned to assert the right:

“They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it.”

There are indications elsewhere in section 31 that support this view. The notice referred to in section 31(3) must be “visible to persons using the way.” A notice which is put up somewhere else, or which remains

in the landowner's workshop, will not do. This is because it will not be effective to communicate the landowner's intention to those who wish to assert the right to use the way unless they can see it. The elaborate process of depositing a map and other documents with the appropriate authority that section 31(6) describes would be a pointless exercise if all that was needed was for the landowner to send a letter which gave expression to his intention to his estate agent or his solicitor.

59. For these reasons, as well as those given by my noble and learned friend Lord Hoffmann whose speech I have had the advantage of reading in draft and with which I am in full agreement, I would allow the appeals and make the orders that he proposes.

LORD SCOTT OF FOSCOTE

My Lords,

60. The issue in these two appeals, as my noble and learned friend Lord Hoffmann has said, is whether the respective landowners, respondents in the two appeals, have shown "sufficient evidence" (s.31(1) of the Highways Act 1980) that they had no intention during the relevant 20 year period to dedicate as public footpaths the paths over their land claimed by the appellants to have achieved that status by 20 years' public user. Section 31(1) speaks of a "deemed" dedication brought about by the requisite 20 years' user unless there is "sufficient evidence" that there was "no intention during that period to dedicate ...". The emphasis in section 31(1), regarding the means whereby a path may achieve the status of a public path, is on dedication. Dedication by the landowner was the common law means whereby a public right of way could be created. Scott LJ in *Jones v Bates* [1938] 2 AER 237 was very scornful about common law dedication. He described dedication as "usually quite imaginary", "often a pure legal fiction", and expressed a clear preference for prescription on the Scottish model where public user of the requisite quality for the requisite period would impel the legal conclusion that the path was public whatever the landowner might say or prove about his intention (see pages 244–245). He was not, however, joined in these strictures by his Court of Appeal colleagues and, for good or ill, dedication by the landowner remains the basis on which paths used by the public can attain the status of public paths. What section 1(1) of the Rights of Way Act 1932, now section 31(1) of the 1980 Act, did was to provide a

means whereby the insufficiency of positive evidence of the intention of the landowner to dedicate a path as a public way could be sidestepped. If the path had been used by the public as of right and without interruption for twenty years before the right of the public to use the path had been “brought into question”, it was to be “deemed” to have been dedicated unless the landowner could show “sufficient evidence that there was no intention” to dedicate. The onus was shifted to the landowner. But the basis of the public status bestowed on a path by public user remained after 1932, and remains, dedication. Prescriptive user alone is not necessarily enough.

61. The particular issue in each of these appeals, where there has been the requisite quality of public user of the path in question for the requisite period, concerns the nature of the evidence about his intentions that the landowner must show in order to displace the deemed dedication brought about by the twenty years’ user. Section 31(1) simply speaks of “sufficient evidence” and the Act contains no guide as to what might be sufficient. There are two questions. First, can an intention held *in pectore* by the landowner and disclosed to no-one ever constitute “sufficient evidence” for section 31(1) purposes? If the answer is ‘No’, must “sufficient evidence” (other than evidence made sufficient by subsections (3), (5) or (6) of section 31) consist of acts which, objectively viewed from the standpoint of the users of the path, demonstrate the intention of the landowner that they should not use the path?

62. To answer these questions one must, in my opinion, start with the law about dedication of highways as it stood immediately before the enactment of the 1932 Act. It is said that the Prescription Act 1832 provided a model for the 1932 Act. This is no doubt correct but analogies drawn from the rules about prescription of private easements can, if applied to dedication of paths as public rights of way, go astray. For example, private easements, under common law, are private rights in rem and can only be created by grant. Hence the need, until statutory intervention came to assist, for the fiction of a lost modern grant to be invented. The creation of a public right of way, by contrast, is brought about by dedication of the way as a public way by the landowner. The dedication need not be formal. Sufficiently unequivocal conduct by the landowner evincing his intention to dedicate will suffice. There must also be acceptance of the dedication by the public, evidenced by their use of the path. So long user of the path by the public with the owner standing by and acquiescing in the user is consistent with there having been a dedication and its acceptance by the public. It can be taken, in

the absence of evidence to the contrary, to justify the inference of the requisite dedication.

63. These very different approaches to the creation of private rights of way on the one hand and public rights of way on the other hand lead, post the advent of the Prescription Act 1832 enabling private easements to be acquired by 20 years' use as of right, to two important differences between them. First, user for the acquisition by prescription of private rights of way has to be, among other things, *nec precario*, ie as of right, not by permission of the landowner. User to justify the inference of dedication of a public right of way, on the other hand, has to be user of such a character and in such circumstances as to justify the inference that the landowner *had* given permission, not merely temporarily but on a permanent basis, for the user. Second, the inference of dedication brought about by long public user is not conclusive. Where private rights are concerned, however, sufficiently long user of a sufficient quality creates, by prescription, the right. Where public rights are concerned, the user is no more than evidence from which the dedication can be, but does not always have to be, inferred.

64. The merely evidential character of long public use was emphatically confirmed by this House in *Folkestone Corporation v Brockman* [1914] AC 338. The issue was whether a particular roadway had been dedicated as a public highway. The evidence was that from 1827 or thereabouts the roadway had been used by members of the public on foot without interruption, openly and to the knowledge of the landowner or his agents. But the justices, dealing with objections by local householders to being required to meet the expenses of certain street works—objections based on their contention that a dedication of the roadway should be inferred, in which case the costs would fall on the inhabitants at large—had held that there had been no dedication. The decision had been upheld by the Divisional Court but reversed in the Court of Appeal. Lord Kinnear, giving the first speech in the House, cited a passage from Lord Blackburn's speech in *Mann v Brodie* 10 App Cas 378 at 386:

“... where there has been evidence of a user by the public so long and in such 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 that fact may find that there was a dedication by the owner, whoever he was”.

Lord Kinnear then continued, at 352:

“The points to be noted are, first, that the thing to be proved is intention to dedicate, and secondly, that while public user may be evidence tending to instruct dedication, it will be good for that purpose only when it is exercised under such conditions as to imply the assertion of a right, within the knowledge and with the acquiescence of the owner of the fee.”

At 354 after emphasising that “... the question is whether the facts are sufficient to raise the presumption ...”, he said:

“I think it fallacious to assume dedication on a partial view of the evidence, and only after that has been done to inquire whether conflicting facts are strong enough to dislodge a conclusion already reached”.

And at 355:

“ ... the presumption cannot be held to be established in law at any intermediate stage of the proof, or until the whole facts and circumstances have been fully considered ...”

and at 356:

“The question is one of fact, turning upon probabilities of conduct”.

65. Lord Atkinson, at 361, summed up the argument for a dedication that had been put forward by counsel for the respondent thus:

“Proof of open, uninterrupted, and continuous user raises a praesumptio juris in favour of dedication. If evidence be not produced to rebut this presumption, it must prevail. ... In the present case there was such evidence of user, no rebutting evidence was produced, the justices were therefore bound in law to find that this way was dedicated to the public, and their decision to the contrary was a decision made without any evidence to support it, and consequently invalid in point of law”.

This argument was rejected. The House held that the inference of intention to dedicate drawn from long and uninterrupted user as of right was an inference of fact and that the justices were not bound to draw the affirmative inference. The House allowed the appeal.

66. My Lords, the state of the law as explained by the House in *Folkestone Corporation v Brockman* was the law addressed by the 1932 Act and I do not believe that the remedial provisions introduced by that Act can be properly understood otherwise than against the background of the pre Act state of the law.

67. Section 1(1) of the 1932 Act seems to me to have set itself firmly to reverse *Folkestone Corporation v Brockman*. The Act, in effect, accepted the arguments of counsel for the respondent, as recorded by Lord Atkinson, that the House had rejected. Under section 1(1), and now its successor, section 31(1) of the 1980 Act, there are two questions of fact, not, as the House held in 1914, only one. The first question is whether the way has been “actually enjoyed by the public as of right and without interruption for a full period of 20 years.” The language was plainly borrowed from section 2 of the Prescription Act 1832 but the meaning of “as of right” must be interpreted in the context of dedication, not prescription. If the first question can be given the answer ‘yes’, there will be a “deemed” dedication, something more, in my opinion, than the pre 1932 evidentiary presumption of an intention to dedicate referred to by Lord Kinnear and Lord Atkinson in the *Folkestone Corporation* case. The statutory conclusion, the “deemed” dedication, stands unless the specified statutory condition of escape, “sufficient evidence that there was no intention to dedicate”, is satisfied. That is the second question of fact.

68. Evidence merely that the landowner lacked any intention to dedicate, eg. that he had never given dedication a moment’s thought,

will not suffice. Counsel on both sides accepted that that was so and that the statutory requirement was not simply for evidence of the absence of an intention to dedicate but was for evidence of a positive intention not to dedicate. I think that must be right. Evidence “sufficient” to displace the statutory deemed conclusion of dedication should at least establish a positive intention. Lord Kinnear in the *Folkestone Corporation* case had referred to “the probabilities of conduct” ([1914] AC at 356) on which the question would turn. If that was so in the pre 1932 Act days—and counsel accepted that there was no pre 1932 case that suggested the contrary—a *fortiori* it must have remained a requirement under the Act.

69. The issue on which these appeals turn, therefore, is whether evidence of an intention not to dedicate can ever (unless it be evidence made sufficient under subsections (3), (5) or (6) of section 31) be sufficient unless it demonstrates the intention to the public at large or, at least, to the users of the path in question. Acts blocking passage along the path by, for example, the padlocking of gates would be likely to be sufficient. Regular challenges to users of the path might suffice. But expressions of intention never disclosed or circulated privately would not, in my opinion, be “sufficient”. The reason they would not is that they would do nothing to curb the public user of the path, or to disabuse users of the path of any belief that they had a right to use it, or to make clear to those users who did not care or give a thought to whether or not they had a right to use the path that they were trespassers. In *Fairey v Southampton County Council* [1956] 2 QB 439 Lord Goddard CJ in the Divisional Court and Denning LJ (as he then was) in the Court of Appeal referred to various ways in which a landowner might demonstrate his opposition to the use by the public of the path over his land. Denning LJ referred at 458 to “... 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.” This requirement of overt acts such as to demonstrate to the public that the landowner had no intention to dedicate seems to me consistent with the nature and quality of the “sufficient evidence” required by the Act to rebut a deemed dedication brought about by twenty years uninterrupted public user.

70. Lord Hoffmann has discussed in his opinion what, for section 31(2) purposes, would constitute bringing the right of the public into question. I am in respectful agreement with what he has said and would only add that the bringing of the public right into question could, in my opinion, be done not only by the landowner but also by a member of the public or by the local authority. A member of the public might apply to

the court for relief of some sort that would bring the right into question, or a prosecution brought by a local authority against the landowner for, eg. allowing a stile to fall into disrepair, might, if the landowner disputed that there was any public right of way, be similarly regarded. There is, in my opinion, no necessary symmetry between acts that bring the public right into question and acts of the landowner to demonstrate that he does not intend dedication.

71. For these reasons, supplemental to those of Lord Hoffmann with which I am in full agreement, I would allow these appeals and make the orders that he proposes. Having had the advantage of reading the opinions of my noble and learned friends Lord Hope of Craighead and Lord Neuberger of Abbotsbury I want to express also my agreement with the reasons they have given for coming to the same conclusions.

BARONESS HALE OF RICHMOND

My Lords,

72. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend, Lord Hoffmann. I agree with it so completely that it is a work of supererogation for me to add anything more. On the main issue, two points have weighed most heavily with me.

73. One is the wording of the so-called proviso itself: “. . . unless there is sufficient evidence that there was no intention during that period to dedicate it”. If the private thoughts of the landowner were enough, the section need only have read “. . . unless there was no intention. . .” The section is calling for sufficient manifestation of the landowner’s intention during the relevant time.

74. The other point is that the section tells us what the landowner’s intention is deemed to have been unless he shows us to the contrary. There are many contexts in which references to the intentions of the parties are to their intentions as objectively understood by an informed but impartial outsider. If the public enjoy the way as of right and without interruption for 20 years, the statute tells us what an objective outsider is to assume – that the landowner intends to dedicate it as a highway. To

rebut that, the landowner has to do something which the objective outsider would understand to mean that he had no such intention. I agree that (leaving aside the specific means provided for in the section) the objective outsider would not so understand unless the landowner did something to bring his intention to the notice of the public who might use the way. But I also agree that it is what the public should reasonably understand from the landowner's actions which count, rather than their subjective wishful thinking or belief.

75. In agreeing that both these cases should be remitted to the Secretary of State to decide, I am remembering only too well that the reasons given when one is reaching one result on the facts may be quite different from the reasons given when one is reaching another. Points which have been discarded in the former case may assume more importance in the latter and vice versa. Facts which were not considered in one context, because they did not have to be, may deserve further and better consideration in the light of the law as it has now been explained. Much of the evidence in these cases is relevant to more than one point – to whether the user is ‘as of right’, to whether it was ‘without interruption’, to whether the right has been ‘brought into question’ and to whether there is ‘sufficient evidence that there was no intention’. All the relevant evidence should be considered as a whole, rather than allocated to one issue or another. I would not myself feel confident that there can be only one answer in either of these cases.

76. I agree, therefore, that these appeals should be allowed, the decisions quashed and the cases remitted to the Secretary of State for him to decide. This will, of course, include him deciding in accordance with the statutory procedures as well as with the opinions of the House.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

77. I have had the benefit of reading in draft the opinions of my noble and learned friends, Lord Hoffmann and Lord Hope of Craighead. For the reasons they give, I too would allow these appeals and remit the cases to the Secretary of State. The issues raised are of some significance, and I will therefore briefly explain my reasons.

The main issue: the meaning of “intention”

78. The main issue in these appeals is whether, as the appellants contend, the intention referred to in what I will call the proviso to section 31(1) of the Highways Act 1980 has to be communicated contemporaneously (i.e. during the twenty years referred to in the section) to members of the public using the way. For a combination of reasons, I am clearly of the view that the answer is yes.

79. First, the whole tenor of section 31, whether it is dealing with establishing presumed dedication (enjoyment “as of right”), or rebutting presumed dedication (“without interruption” and the provisions of subsections (3) to (6)) is directed towards observable actions from which presumptions may be made or rebutted. It is true that communications with the local authority under sections 31(5) and (6) are not with members of the public, but a local authority would be obliged to retain the documents there referred to, and to permit members of the public to inspect them.

80. Secondly, one of the purposes of section 1 of the Rights of Way Act 1932 (the original ancestor of section 31 of the 1980 Act) was to get rid of a landowner’s ability to rely on the argument that he treated the users of the way as “tolerated trespassers” to defeat a claim of presumed dedication based on long user – see *R v Oxfordshire County Council ex p Sunningwell Parish Council* [2000] 1 AC 335 at 353B-E. In my opinion, if a landowner can say, after twenty years public use of a way as of right, that he had no subjective intention to dedicate, although there was no contemporaneous communication of that intention, this purpose would be effectively neutralised.

81. Thirdly, as Lord Hoffmann’s analysis of the cases prior to the 1932 Act shows, the common law appears to have required some form of act or statement communicated to users of the way, so that evidence of the subjective uncommunicated intention of the landowner would not have been enough (or even admissible) to rebut a presumption of dedication. It would be surprising if section 31(1) of the 1980 Act, which uses the language and concepts of the common law relating to highways, changed the law radically, and in a direction inconsistent with its purpose, so as to enable a landowner to rely on an intention of which the users of the way were not merely unaware, but could have no means of becoming aware.

82. Fourthly, the notion that a subjective intention is enough to defeat a presumed dedication under section 31(1) leads to difficulties. Despite the submission of Mr Simpson, for the interveners Yattendon Estates Ltd, to the contrary, it would be unattractive and surprising, as Mr Mould QC, for the Secretary of State, accepted, if a landowner could simply rely, after the expiry of the twenty years, on his statement (e.g. at an inquiry such as those held in the present cases) that he had no intention to dedicate. To meet that point, the courts have developed a theory which appears to me to be unjustified, whether it is a principle of law or a practical rule. That theory is that, in the absence of some contemporary overt act or statement, a fact-finding tribunal cannot, or is unlikely to, find a sufficient intention not to dedicate merely on the basis of the landowner's subsequent statement to that effect (see e.g. per Auld LJ in this case in the Court of Appeal at [2006] QB 727 at paragraph 64). Why should that be so? It would not be justified by the statutory wording, even if it had the meaning that the respondents allege. In many, I suspect most, cases it would be easy to believe that a landowner would not want to have a highway, even it is only a public footpath, over his land. Further, in the light of the way the proviso to section 31(1) is expressed ("sufficient evidence that there was no intention"), it appears to me that, on the respondents' case, a landowner could defeat a claim simply on the basis that he was unaware of the effect of the main part of section 31(1).

83. Fifthly, the cogent and clear analysis of Denning LJ in *Fairey v Southampton County Council* [1956] 2 QB 439 at 458, quoted by Lord Hoffmann, clearly indicates that the intention referred to in the proviso to section 1(1) of the 1932 Act was intended to be a communicated intention. That analysis was accepted and recorded in textbooks, and it was followed and applied in cases identified by Lord Hoffmann by High Court Judges and by the Court of Appeal for the subsequent forty years. Further, it appears to have been an analysis which was acceptable to the legislature, given that section 1(1) of the 1932 Act was re-enacted in section 34(1) of the Highways Act 1959 and again in section 31(1) of the 1980 Act.

84. Sixthly, I turn to the crucial question of the effect of the words of the proviso to section 31(1). I do not agree with the Court of Appeal that construing the word "intention" in the section as carrying with it the notion of communication involves placing an unjustifiable gloss on the statutory wording. At least outside the criminal law, the word is often used by lawyers in a way which carries with it a requirement to communicate, as well as to possess, the relevant intention. Indeed, sometimes, an uncommunicated intention is irrelevant, as when one

speaks of the intention of the parties when construing a contract. Further, the proviso does not require “no intention” but “sufficient evidence that there was no intention”. If the respondents were correct, there would have been no need for that longer phrase. The notion that the “evidence” referred to in the proviso must be contemporaneous and communicated is further supported by the fact that a very similar phrase (including both “evidence” and “intention”) is used at the end of section 31(3) to describe the effect of a notice erected on the way.

85. Seventhly, the provisions of section 31(3) to 31(6) seem pretty extraordinary if an uncommunicated intention suffices to satisfy the proviso. Why bother with such potentially time-consuming and expensive procedures if, for instance, a simple and clear letter from the landowner to his solicitor, confirming that he has no intention to dedicate, will do?

86. Eighthly, Mr Laurence QC, for the appellants, raised the spectre of a landowner being able to defeat a claim under section 31(1), if the respondents are correct, by sending such a letter, and only some time thereafter calling the right into question by challenging its use. If such a device worked, it would be another reason for allowing this appeal. It may be that the point can be answered by the letter being treated as an act calling the right into question under section 31(2). However, to treat such a private declaration as having that effect seems to me to fly in the face of the natural meaning of the expression “brought into question”.

Other issues: the meaning of “during”, and manifesting the intention

87. The second question is whether the phrase “during that period” in the proviso to section 31(1) means “during the whole of that period”, as the appellants argued, or “at some point during that period”, as was contended by the respondents. As a matter of ordinary language, it is clear that the phrase could easily bear either meaning. In the present context, it appears to me clear that it has the latter meaning.

88. First, the former interpretation would lead to wholly unrealistic results. It would mean that signs referred to in section 31(3) (combined, where appropriate, with the documents referred to in section 31(5)), and the documents referred to in section 31(6), would be ineffective unless they were in place for the whole of the twenty year period. Mr Laurence was forced to concede that it would therefore be necessary to imply

some sort of period of grace, based on reasonableness, but that is not warranted by the wording of the section, and it would be a recipe for uncertainty and dispute.

89. Secondly, it is clear that an interruption of the user at some point during the relevant twenty year period, such as the landowner locking a gate and preventing access, will defeat an argument based on user “as of right” under section 31(1) during that period. Traditionally, one day a year is the norm – see for instance *Merstham Manor Ltd v Coulsdon and Purley UDC* [1937] 2 KB 77 at 85. However, it may depend on the facts of the particular case whether this is enough to amount to a sufficient interruption; that was the view taken by the Court of Appeal in *Lewis v Thomas* [1950] KB 438. Whatever the position, it is clear that, to be effective, the interruption need not last long in the context of twenty years in order to defeat user as of right. It would be inconsistent if the sign contemplated by section 31(3), or any other action or communication invoked as evidence of lack of intention, had to be in place for the whole of the twenty years.

90. This is not the occasion to discuss how long a sign would have to be present, or when the documents referred to in sections 31(5) and (6) would have to be lodged, during the twenty years relied on in any particular case. It is conceivable that one day in twenty years would be enough in a particular case, and it even may be the case, I suppose, that it would be enough as a matter of principle, but it may well be that what constitutes a sufficient period will depend on the facts of the particular case – see the discussion in *Lewis*.

91. It is fair to add that this conclusion can, at any rate at first sight, be said to sit a little uneasily with the procedures set out in sections 31(5) and (6). They appear to contain somewhat elaborate requirements if all that is needed is, for instance, the erection of a notice for a relatively short period under section 31(3). The answer, I think, is this. A landowner who wishes to protect his position over many decades may be concerned that he or his successors will forget to keep checking that a section 31(3) notice remains intact, and that, following a defacing of a notice, he may let twenty years uninterrupted use occur. Such a landowner may be glad to be able to protect his position by taking advantage of section 31(5). As to section 31(6), it appears to be aimed primarily at large estates, and enables a landowner to protect himself, *inter alia*, in relation to potential rights of way which he may not even know are in the process of being acquired under section 31(1).

92. Finally, there is the appellants' argument that the only means by which a landowner can bring himself within the proviso are those contained in section 31(3) to (6). That is simply not what section 31 provides as a matter of language, it is inconsistent with the words "or otherwise" in section 31(2), and it does not seem to me to lead to a sensible result. I can see no reason why a landowner who has made his objections sufficiently clear orally to those using the way should be debarred from contending that he has thereby sufficiently manifested his lack of intention to dedicate to bring himself within the proviso. Again, this is not the occasion to consider how often or to how many people or with what words the objection would have to be made to bring the case within the proviso.

*439 Fairey v Southampton County Council.



Positive/Neutral Judicial Consideration

Court

Court of Appeal

Judgment Date

19 June 1956

Report Citation

[1956] 3 W.L.R. 354

[1956] 2 Q.B. 439



Court of Appeal

Denning , Birkett and Parker L.JJ.

Lord Goddard C.J. , Hilbery and Stable JJ.

1956 May 14, 15; June 19.

1956 Jan. 24.

Highway—Right of way—Footpath over private land—Uninterrupted user by public for more than 20 years—Owner's objection to use by public other than local residents in 1931—No intention to dedicate thereafter—Whether right to use land "brought into question"—Effect of [Rights of Way Act, 1932](#) —Whether retrospective— [Rights of Way Act, 1932 \(22 & 23 Geo. 5, c. 45\)](#), ss. 1, 2 .

Statute—Retroactive effect—Procedural Act—Act giving right of prescription—Not procedural—Whether retrospective as to end of period of user—Intention of Act— [Rights of Way Act, 1932](#) .

In 1954 a landowner applied to quarter sessions for a declaration that no right of way existed over a path on his land shown as a public path on a map prepared by the local authority. Quarter sessions found that the path had been used by the public without interruption or objection from 1885 to 1931, though there was no sufficient evidence on which an intention to dedicate or not to dedicate could be presumed at common law; that on an occasion in 1931 the then owner had objected to the use of the path by the public other than local residents; and that thereafter he and the *440 present landowner successively had turned such persons off the path and by so doing had shown an intention not to dedicate the path as a highway; but they determined that a public right of way was deemed to have been dedicated by [section 1 of the Rights of Way Act, 1932](#) ,¹ and dismissed the application.

The landlord appealed to the Divisional Court, which held (1) that the right of the public to use the land was "brought into question" within the meaning of [section 1 \(6\) of the Rights of Way Act, 1932](#) ,² when a landlord for the first time refused to allow the public to use a way which they had been using without *441 interruption for over 20 years, and that it was not necessary, to bring the case within the Act, for the member of the public whose right was questioned, to insist that he had a right of way; and (2) (Stable J. dissenting) that the Act of 1932 was a procedural Act which took effect retrospectively and

it was no objection that the period of 20 years after which the public was deemed to have acquired a right terminated before the Act came into force. On appeal by the landowner:-

Held:

(1) that the landowner, by taking steps in 1931 to stop the public using the way, had “brought into question” their right to use it within the meaning of section 1 (6) of the Act of 1932.

Per Denning L.J. For the right of the public to be “brought into question” the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use a way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. Further, to prove that he had no intention to dedicate a way, there must be evidence of some overt acts on his part such as to show the public who used the way - here, the local residents - that he had no such intention.

(2) That the Act of 1932, like the [Prescription Act, 1832](#), was not merely procedural, for it affected the substantive law by giving and defining rights; but that the Act by its terms was clearly intended to operate retrospectively; and that, since 20 years’ enjoyment of the way had been had as of right by the public before 1931, it was by section 1 (1) of the Act a highway, although the Act came into operation only in 1934.

Cooper v. Hubbuck(1862) 12 C.B.N.S. 456 and *Jones v. Bates*, 54 T.L.R. 648; [1938] 2 All E.R. 237 considered.

Decision in *Attorney-General and Newton Abbot Rural District Council v. Dyer*[1947] Ch. 67; 62 T.L.R. 632; [1946] 2 All E.R. 252 approved.

Decision of Divisional Court affirmed in the result.

CASE STATED by appeals committee of Hampshire Quarter Sessions.

On December 29, 1954, application was made by the appellant, Sir Richard Fairey, pursuant to [section 31 of the National Parks and Access to the Countryside Act, 1949](#), for a declaration that on May 11, 1953, no public right of way existed over a path at Bossington in the County of Southampton delineated on a provisional map prepared by the respondents, the Southampton County Council, pursuant to [section 30](#) of the Act.

The appeals committee heard the application on May 3 and 4, 1955, and found the following facts: On May 11, 1953, the council prepared a draft map pursuant to [section 27](#) of the Act and on November 13, 1953, the landowner objected to the inclusion therein of the path in question. After his objection ^{*442} had been heard the council prepared the provisional map. The path in question began at a point in the public highway opposite Bossington farm and terminated at a stile on the boundary between lands owned by the landowner and lands of the British Transport Commission adjacent to Horsebridge station. Further paths gave access from the stile to Horsebridge station and through it to the public highway. Throughout living memory the lands over which the path ran had belonged to the owner for the time being of Bossington House. In 1885 the estate belonged to one Deverell and in or about 1931 it descended to John Deverell. In 1937 the appellant purchased the estate and remained the owner and occupier thereof. The path existed as a farm convenience prior to the construction of the railway in 1860. Since 1885 the path had been used by members of the public without interruption both (i) to obtain access to Horsebridge station and Horsebridge village and beyond, and to places beyond the western end of the path or vice versa and (ii) for the purposes of recreation, such as, for example, a circular walk from Houghton in the evenings through the meadows and round by the highways. Some of the persons so using the path were strangers to the locality but many were known to the owner for the time being either as his tenants or his employees or as neighbouring residents. (Persons in the last three categories are hereinafter referred to as “local residents.”) In so far as the path was used for recreation it was so used mainly by such local residents; user in category (i) above was more frequent by local residents than by strangers to the locality.

Between 1885 and 1931 the public use of the path was *nec vi nec clam nec precario* nor was it interrupted, and during that period the owners for the time being of the land raised no objection to the use of the path by the persons and in the manner referred to above; nevertheless quarter sessions were not satisfied, on the evidence before them, that an intention to dedicate on the part of such owners could be presumed at common law nor had they sufficient evidence of an intention on the owners' part before 1931 not to dedicate the path as a public highway.

On an occasion in 1931 the then owner, John Deverell, had objected to the use of the path by the public other than local residents. From 1931 until 1937 John Deverell, and at all material times since 1937 the appellant, made no attempt to prevent local residents from using the path, but if any other member of the public was seen thereon by either of them he was told that he had no right to be there. Both thereby showed **443* an intention not to dedicate the path as a highway for the use of members of the public at large. There was no evidence that any member of the public questioned the right of either John Deverell or the appellant thus to prevent the use of the path.

It was contended by the appellant that a public right of way over the path should not be deemed to have been dedicated under [section 1 of the Rights of Way Act, 1932](#) , ³ in that (a) the right was not brought into question within the meaning of section 1 (6) of the Act until 1953 when the appellant objected to the inclusion of the path in the map prepared by the respondents; and (b) that during the period of 20 years immediately preceding 1953 the owners of the land for the time being had shown an intention not to dedicate.

It was contended by the respondents (a) that the right of the public to use the path was brought into question by John Deverell in 1931 when he told users other than local residents that they had no right to use the path; (b) that during a period of more than 20 years immediately before the time in 1931 when the public right to use the path was brought into question (i) the public at large had used the path as of right and without interruption, and (ii) that there was no sufficient evidence that there was no intention to dedicate the path as a highway; (c) that therefore the path must in accordance with [section 1 of the Rights of Way Act, 1932](#) , be deemed to have been dedicated as a highway.

The appeals committee were of opinion that the period of 20 years referred to in [section 1 \(6\) of the Rights of Way Act, 1932](#) , meant, on the facts, the period immediately before the first occasion in 1931 when it was proved to their satisfaction that the owner for the time being had objected to the use of the path by persons who were not local residents. They accordingly determined that a public right of way was deemed to have been dedicated by virtue of section 1 and dismissed the application.

The landowner appealed.

Percy Lamb Q.C. and *J. P. Widgery* for the appellant. Two questions arise in this appeal: (1) What is the meaning of the words "brought into question" in [section 1 \(6\) of the Rights of Way Act, 1932](#) ? (2) Does the Act take effect retrospectively? On the first question it is submitted that on the phraseology of section 1 (6) of the Act, and on the facts found, the right of the public to use the way was not brought into question in 1931 and quarter sessions were wrong in so holding. The words "brought **444* into question" connote two parties, and therefore a mere statement by a landowner that a way over his land is not a right of way is not sufficient to bring the right of the public to use the way into question within the meaning of section 1 (6) of the Act. [Reference was made to the [Prescription Act, 1832](#) .]

The case finds that from 1885 to 1931 the pathway in question was used by the public without objection, but quarter sessions were unable to make the common law presumption of dedication and therefore there was no common law highway in existence. In 1931 and thereafter John Deverell, the then owner, and subsequently the appellant, showed an intention not to dedicate the pathway, and there was no evidence that any member of the public ever questioned their right to prevent him from using the pathway. Yet quarter sessions decided that the right of the public to use the pathway had been brought into question in 1931 when John Deverell prevented the public from using the path and that a statutory highway was thereby created. Quarter sessions were wrong in so holding.

[HILBERY J. "Notice as aforesaid" in section 1 (6) may bring the right of the public into question. A notice does not connote two parties.]

If a notice is put up by a landowner denying the public the use of the path and nobody asserts a contrary right, then the public right is not brought into question. Until there is evidence before the court of one party asserting a right and another party asserting the contrary, the right of the public cannot be brought into question. All that John Deverell did in 1931 was to assert his right and that assertion was not questioned by any member of the public. On the facts found here, the only time that the

public right to use the path was brought into question was in 1953 when the new right of way was claimed by the county council and included in the map prepared by them pursuant to [section 30 of the National Parks and Access to the Countryside Act, 1949](#) , and the appellant gave notice of objection.

[LORD GODDARD C.J. If the public had been using the pathway for 20 years and the owner then said that there was no right of way, that is bringing the public right into question.]

If this first argument is wrong, then it is submitted that the Act is not retrospective so as to cover a period of 20 years which began and determined before the Act came into force. The decision in [Attorney-General and Newton Abbot Rural District Council v. Dyer](#) ⁴ is erroneous. Although the 20-year period can commence at any time, it must determine after the Act came into force, that is to say, after January 1, 1934. A landowner ought not to be affected by an Act which is not expressed to be retrospective.

[LORD GODDARD C.J. referred to the [Prescription Act, 1832](#) .]

I know of no case under that Act where it has been held that the period of user could commence and determine before the Act came into force. It is contrary to all the canons of construction to hold that the Act of 1932 is retrospective. In [Attorney-General and Newton Abbot Rural District Council v. Dyer](#) ⁵ Evershed J. over-simplified the Act in holding that it was substantially a procedural Act which was not intended to create new rights. It does create new rights in the sense that it affects the rights of the public and of landowners. The Act may be in part procedural, but it is not wholly so. An Act which is in part procedural but which in part creates or destroys rights ought not to be construed retrospectively unless that is expressly so stated: see Maxwell on Interpretation of Statutes, 10th ed., p. 113. The general statement of the law by Sargant J. in [In re Hale's Patent](#) ⁶ is applicable here.

Finally, section 2 (1) of the Act supports the submission, as the insertion of that subsection clearly shows that the Act is to affect matters arising only after the date when the Act came into operation, namely, on January 1, 1934. The appeal should be allowed.

J. Scott Henderson Q.C. and *M. G. Polson* for the county council. On the first point raised in the appeal, the starting point of the Act is that the public must have been using the way as of right for a period of 20 years. If that is proved, then section 1 (6) comes into play. By the terms of that subsection any notice which satisfies the requirements of section 1 (3) , which deals with notice, will bring the right of the public to use the way into question, so that the right may be questioned by a “Private” notice, or “Trespassers will be Prosecuted,” each of which satisfies the terms of section 1 (3). But the public right may be brought into question in an infinite number of other ways.

[He was stopped.]

As to the second point, the right of the public to use the way can be questioned at any time. Reliance is placed on section 1 (6) of the Act.

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[STABLE J. If the words “right of the public” are construed as being a right conferred by the Act of 1932, then it could not have come into being in 1931.]

It over-simplifies the position to say that the Act conferred a new right. Its purpose was to give members of the public a right to continue in the enjoyment of a right which they had hitherto enjoyed: see *Jones v. Bates, per Scott L.J.* ⁷ It is an Act which enables the public to prove their right. On the facts found in the present case, members of the public, at least so far as local inhabitants were concerned, continued to use this way at all times. Section 1 (6) and section 1 (3) when read in conjunction are clear enough to indicate that their right of user could be questioned at any time by any act on the part of the owner which showed an intention not to dedicate, for example, by closing the way, by posting a notice, by bringing an action for trespass against a member of the public, or by stopping the public from using the path, as John Deverell did in 1931. Those are all acts which bring the right of the public to use the path into question and they may be done at any time. [Reference was made to [section 4 of the Prescription Act, 1832](#) .]

As to the effect of section 2 (1), the purpose of its insertion was to give a landowner an opportunity to take legal proceedings between the date when the Act was passed and the date when it came into force, so that the court might determine whether a right of way existed or not. In the present case the appellant did not take legal proceedings and he cannot rely on section 2 (1).

[STABLE J. It is an extraordinary position that a man who starts litigation retains his rights but that he who does not loses them.]

That is implicit in the policy of the Act.

[HILBERY J. Section 2 (1) tacitly recognizes that the arbitrary rules laid down by the Act affect the rights of landowners retrospectively and therefore gives them a right to take proceedings to prove whether the ways in question are rights of way or not.]

[Reference was made to *Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council*.⁸]

Percy Lamb Q.C., in reply, referred to *Attorney-General v. Antrobus*.⁹

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LORD GODDARD C.J.

This is a case stated by the quarter sessions for the county of Southampton, to whom the appellant applied for a declaration that on May 11, 1953, no public right of way existed over a path at Bossington in the County of Southampton, which path was delineated upon a provisional map prepared by the respondents pursuant to [section 30 of the National Parks and Access to the Countryside Act, 1949](#).

It is unnecessary to say more than that under the Act the county council have to prepare a map on which is shown what they consider to be the rights of way, and the landowner, or any other person aggrieved, can object and say that a path or road shown on the map as a public right of way is not a public right of way. If the county council do not accept the objector's contention the matter goes to quarter sessions. [His Lordship stated the facts and continued:] I say in passing, because the question does not arise immediately in the present case, that "local residents," even limited in the way that quarter sessions have said that it was understood, that is, to "tenants, employees and neighbouring residents," is a very wide term and it might some day have to be decided whether, if people in so large a category were allowed to use the path without interruption, that was not a user by the public.

I now turn to the Act. [His Lordship read [section 1 \(1\), \(3\) and \(6\) of the Rights of Way Act, 1932](#), and continued:] For the purposes of the first matter which we have to consider in the case, those are all the provisions of the Act which need be mentioned. The justices have found that it was not until after 1931 that an attempt was made by the then owner of the land to prevent persons using the land. If he saw strangers on the land whom he did not want to be there he met them, challenged their right to be there and told them that they were not entitled to be there, and such people, being in a law-abiding country, accepted what he told them and went away. The first question we have to decide, therefore, is whether quarter sessions were right in holding that 1931 was the time when the right of the public to use the way was brought into question. Mr. Lamb has contended that one can only bring a matter into question if an assertion made on one side is disputed on the other; but I do not think that it is necessary, to bring a case within that provision in section 1 (6) of the Act, to say that when the owner denies to a person that there is a right of way that that person should thereupon insist that there is and perhaps proceed to try to assert his right by walking across the land or registering in *448 some way his disagreement with what the owner has said. It seems to me that the owner raises the question by challenging the right of a person to walk along the road. If he says: "You have no right to be here," turning him off his land, he is raising the question that that person has no such right. He can certainly do it by putting up a notice which will raise the question, but it seems to me that he can do it also by telling a person to get off his land.

Therefore, the position is that for more than 20 years - in fact for over 40 years - the public used this way as a right of way. In 1931 and thereafter the question was raised whether the public had the right to use the way because the owner not only endeavoured to, but did, turn people back. By so doing, it seems to me that he brought the right of the public to use the way into question. I do not think that it is necessary for a member of the public to say: "I will bring an action against you," or "I will force my way or assert my right in some other way." The owner brings the right into question by refusing to allow the public the right to use what they had used for some 40 years. Therefore, I think that quarter sessions were right in holding in the present case that the material time when the right was brought into question was some time in 1931. No attempt has been made to give the exact month, nor does it matter; 1931 is the critical year, and if sessions were right in that, Mr. Lamb agrees that the appeal fails subject to the point whether the Act is retrospective.

We have listened to an interesting discussion on whether this Act is retrospective or not. It has been argued that although the

20-year period may begin before the Act came into force, it must determine after it has come into force because, it is said, the Act must not be construed retrospectively as it affects the rights of the landowner. Speaking for myself, I agree with the decision of Evershed J. in *Attorney-General and Newton Abbot Rural District Council v. Dyer*.¹⁰ In that case Evershed J. held¹¹ that the Act was retrospective, that is to say, the fact that the time both began and ended before the Act came into force was immaterial for this purpose. It has always been held that a procedural Act does or may act retrospectively, and one test of whether an Act is a procedural Act is whether it is an Act which is mainly concerned with evidence. The Act under consideration is in many respects similar to the *Prescription Act, 1832*, which provided, as its preamble shows, that owing to the difficulties of proving user from time immemorial, certain changes in the law were desirable and, instead of a person who asserted that he was entitled to an easement over land or light or water having to give evidence from which the court could infer a grant or user from time immemorial, the Act substituted the prescriptive periods of 20 years in some cases and 40 years in others. That seems to me to be the object of the present Act. The long title, which does not help, is: "An Act to amend the law relating to public rights of way; and for purposes connected therewith." There is no preamble, but it seems to me that the main object of the Act is to substitute a definite period, namely, 20 years' user by the public, for the necessity of proving the fact of long user and so forth, from which common law dedication can be presumed. That being so, I think it is no objection to say, when the law has laid down that 20 years is the period over which the public are to be deemed to have acquired a right of way, that the 20 years would have terminated before the Act came into force. Section 1 (6) provides: "Each of the respective periods of years mentioned in this section shall be deemed and taken to be the period next before the time when the right of the public to use a way shall have been brought into question ..." The material time is the period next before the time when the right of the public shall have been brought into question. The Act does not use the words "when the right of the public to use the way shall have been brought into question after the commencement of this Act." It simply provides that when it has to be determined whether there is a way or not, all one has to find is whether for 20 years before the landowner asserted in one way or another that there was no right of way, the public had used it as of right.

Considerable argument has been based on section 2 (1) of the Act, which provides: "Nothing in this Act shall affect any proceedings pending at the commencement of this Act, and where in respect of any way a court of competent jurisdiction decides in proceedings so pending, or has before the commencement of this Act decided, that the way is not a highway, this Act shall not apply except as respects enjoyment of the way after the date of the decision." One can give illustrations of the way in which the Act may act unevenly, perhaps harshly, against some people and not against others, but I think that that subsection is one which was intended to give landowners before the Act came into force - it was passed on July 12, 1932, but did **450* not come into operation until January 1, 1934 - the opportunity of beginning an action in order to have the question of the existence or non-existence of a right of way determined. If they chose then to bring an action for a declaration that no right of way existed over the land or an action for damages for trespass, and could obtain a decision that at the time they issued the writ there was no right of way, then this Act was not to take away the right established in the action; but if they did not bring the action, then it seems to me that the Act will apply and they have to take their chance of whether it can be proved, as it was in the present case, that the public had established a right of way 20 years before the matter was raised.

For these reasons, I think that the court of quarter sessions came to a right decision.

HILBERY J.

I am of the same opinion and for the same reasons.

STABLE J.

I agree with the judgment delivered by my Lord on the first point as to whether by warning people off his land in the way he did the landowner was bringing the right of the public to use the way into question, and I have nothing to add on that point. As regards the retrospective effect of the Act, I have come to an opposite conclusion, and as the matter is one of far-reaching importance, I think that I should state the conclusion at which I have arrived.

The law, as I understand it, is as stated by Sargant J. in *In re Hale's Patent*,¹² where he says¹³: "No doubt the general law is that, while rights are not statutorily altered retrospectively, procedure is, apart from indications to the contrary, altered retrospectively; but where rights and procedure are dealt with together in the way in which section 8 of the [Patents and Designs] Act of 1919 deals with them, the intention of the legislature would seem fairly clear - namely, that the old rights are still to be determined by the old tribunal under the Act of 1907, and that only the new rights under the substituted section are to be dealt with by the tribunal thereby substituted for the Treasury."

On the findings of the justices in the present case, on some date in 1931 the then owner of the land took action, and when I

say “took action” I do not mean took legal proceedings, but took steps to assert that there was no public right of way over *451 this land; and it is agreed that if this matter had been litigated in 1931, on the findings of the justices in this case, he would have been successful in establishing that he was entitled to the enjoyment of his park without any interference whatsoever by the public. In 1932 the Rights of Way Act was passed, and the successful contention of the respondents here is that the passing of that Act destroyed the right the owner enjoyed in 1931 to use his land without interference by the public and created a new right in the public to pass over that land. I need only refer to the opening words of section 1 of the Act: “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 ...” Subsection (6) of section 1 provides the terminal date of that 20 years, and it is on the construction of that subsection that it seems to me that this matter depends. [His Lordship read section 1 (6) and continued:]

If the prohibition by the appellant’s predecessor in title and the appellant’s prohibition of the public to use this land is regarded as a continuing matter then it was, as I think it should be, in operation when and after the Act came into force, but what is said here is that one has to go back to 1931 when the prohibition was first brought into force; in other words, that the terminal date of the 20-year period may be a date prior to the passing or the coming into operation of this Act.

Section 1 (3) provides: “A notice by the owner of the land over which any such way passes inconsistent with the dedication of the way as a highway, placed before or after and maintained after the commencement of this Act,” is a notice as aforesaid which brings the right into question. That postulates that a notice, posted before the Act came into force, must be maintained after the Act comes into operation. If the only notice given by the owner in the present case was the notice referred to in section 1 (3), and if he had been sufficiently astute to pull it down immediately before the Act was passed into law, there would have been no terminal date to which the 20 years could run.

The other matter which appears to me to be remarkable is that section 2 (1) provides that nothing in the Act shall affect any proceedings which have been taken before the Act came into force or where proceedings are so pending. The result of that *452 is this, that if in 1931, when the owner warned the public off, somebody had said: “You cannot do that, we have a right here,” and he had brought an action, he would have been protected by that section. The only reason, presumably, why he did not bring an action was the finding by the justices that no member of the public asserted the existence of a right, no doubt for the very good reason that at that time no right existed for the public to assert. It does seem to me an extraordinary result where a number of landowners are in identical situations that those who do not choose to litigate because nobody asserts a contrary right should lose their rights whereas those against whom the contrary right is asserted and who do start litigation are protected. I would only add that it seems to me that the conclusion I have reached is reinforced by subsections (1) and (5) of section 1 and also by section 4 of the Act, which provides: “The person entitled to the remainder or reversion immediately expectant upon the determination of a tenancy for life or pour autre vie in land shall have the like remedies by action for trespass or an injunction to prevent the acquisition by the public of a right of way over such land as if he were in possession thereof.” I understand that that is an entirely new right conferred on reversioners, and one asks oneself what is the use of giving them that right if retrospectively any rights they had had been extinguished in 1931 when (a) there was no adverse right and (b) there was no machinery by which the reversioners could have protected the then existing position.

For these reasons, in my view, the Act operates in this way: the starting-point of 20 years can be any time before the coming into force of the Act; the terminal date must be a date after the Act came into operation.

Appeal dismissed. (E. M. W.)

The landlord appealed.

[*Note.* - The submissions in the Court of Appeal as to the date at which the right of way had been “brought into question” were substantially the same as those in the Divisional Court and accordingly are not reported. The submissions on the quality and effect of the Act of 1932 were developed, with citations of cases not before the Divisional Court, and, as summarized below, supplement the submissions in that court.]

Percy Lamb Q.C. and *J. P. Widgery* for the landowner. The Act of 1932, the title of which is prayed in aid, is not substantially *453 procedural, for it creates a public right where none existed before it came into force. It gives and defines rights: compare *Lush J. in Poyser v. Minors*,¹⁴ on the distinction between “procedure” and the law which “gives or defines the right.”

An Act is not to be construed to have retrospective operation, “unless such a construction appears clearly in the terms of the Act, or arises by necessary and distinct implication”: *West v. Gwynne*.¹⁵ The dicta of Wright J., in *In re Athlumney, Ex parte Wilson*,¹⁶ that “a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment”; and that if the language “is fairly capable of either interpretation it must be construed as prospective only” are applicable here: see also *National Real Estate and Finance Co. v. Hassan*.¹⁷

Though section 2 (1) of this Act expressly saves rights in pending actions, it does not follow that Parliament thereby intended that as a whole it should operate retrospectively. In *In re Hale's Patent*¹⁸ Sargant J. said that where rights and procedure were dealt with together, the old rights were to be determined under the old Acts and only the new rights were to be dealt with by the substituted tribunal.¹⁹ That statement of general principle (on which Stable J. founded his dissenting judgment in the present case) is relied on as showing that so far as rights are affected this landowner's right in 1931 ought to be determined according to the law then in being, though inasmuch as the Act is procedural it may operate retrospectively. On the construction given to this Act by the majority in the Divisional Court a “notice ... placed before or after and maintained after the commencement of this Act” could not avail this landowner; nor would the right given to the reversioner by section 4 be of any use to him. In *Cooper v. Hubbuck*²⁰ Willes J.,²¹ considering the very similar language of the *Prescription Act, 1832*, said that it created a right in land just as much as if it had been given by grant.

[DENNING L.J. Lord Goddard C.J. suggested that that Act was procedural.]

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Unfortunately *Cooper v. Hubbuck*²² was not cited to the court. [*Lauri v. Renad*²³ was also referred to.] The decision of Evershed J. in *Attorney-General and Newton Abbot Rural District Council v. Dyer*²⁴ that this Act was substantially procedural was erroneous. The effect of procedural changes on rights was discussed in *Colonial Sugar Refining Co. Ltd. v. Irving*,²⁵ in which the Privy Council said that the right of appeal to that committee was a right which could not be taken away without express words. *Director of Public Prosecutions v. Lamb*,²⁶ where a regulation in clear language changed the punishment for an offence between the committing of the offence and the charge, is distinguishable.

[BIRKETT L.J. Are not the rules applicable to the criminal law different? At Nuremberg the lawyers argued for days on retrospective effect.]

There is authority that penal statutes are not to be construed retrospectively, and no person has a vested right in punishment. [*The Ydun*²⁷; Maxwell on Interpretation of Statutes, 10th ed., p. 277, and Pratt and Mackenzie on The Law of Highways, 19th ed., p. 24, on “express dedication of a highway” were also referred to.] To construe this Act retrospectively would be to take away a right of property without compensation; and that is contrary to all the canons of construction.

J. Scott Henderson Q.C. and *M. G. Polson* for the council. The true question is not whether the Act is procedural, but what is its intention; this Act shows an intention to apply to past as well as to future user: in *Jones v. Bates*²⁸ Scott L.J.²⁹ said that this Act intended to bring the English law into line with the more sensible Scots law. The difference of language between section 1 (6) of this Act and the very similar language of *section 4 of the Prescription Act, 1832*, by which the words “shall have been or shall be” in the latter Act have now been altered to “shall have been,” is prayed in aid as showing Parliament's intention that the period of 20 years' user may be in the past as well as in the future. [*Colls v. Home and Colonial Stores Ltd.*³⁰ was also referred to.] In the present case this landowner has not been deprived of a right. He allowed the public to enjoy *455 a right and the length of the enjoyment has crystallized the public right. *Attorney-General and Newton Abbot Rural District Council v. Dyer*³¹ was correctly decided. As against *Colonial Sugar Refining Co. v. Irving*,³² *Rathbone v. Munn*³³ and *Theo. Conway Ltd. v. Henwood*³⁴ decided that a right of appeal was a mere matter of procedure. This Act does not create new rights but it provides a method of procedure for establishing inchoate rights which have accrued. The passing of this Act did not destroy the right which the landowner had in 1931; if this matter had been litigated in 1931 the landowner would have succeeded. There is nothing in the language of this Act which is ambiguous; it deals with evidence and is substantially procedural, and it must be construed retrospectively.

Lamb Q.C. in reply. The words “shall have been” in section 1 (6) refer to the 17-month period between the passing and the coming into force of the Act, during which the landowner could put up a notice to stop the 20 years running. A notice would be nugatory if the Act is retrospective to a period which started and finished before the Act was passed, because the notice could not then affect the acquisition of the right by the public. [*Folkestone Corporation v. Brockman*³⁵ was also referred to.]

DENNING L.J.

There is a footpath at Bossington in Hampshire, which is used by the country folk as a way to get to Horsebridge station and Horsebridge village, and also as a walk round from Houghton. For 46 years from 1885 to 1931 this footpath was used by members of the public as of right without interruption. Some of the persons so using it were strangers to the locality, but it was mainly used by local residents. The case finds that since 1931 the landowner “made no attempt to prevent local residents from using the said path, but if any other member of the public was seen thereon by the landowner, he was told that he had no right to be there.” In 1953 the county council showed the footpath in their map as a footpath over which the public had a right of way. The owner thereupon objected and took the matter to quarter sessions. They decided that there was a public right of way along the path. Quarter sessions said that, if they had been asked to determine the matter at common law, they would have held that there was no public **456* right of way along the footpath, because they were not satisfied that there was any intention by the owner to dedicate it as a highway: but quarter sessions went on to hold that the public have acquired a right of way under the [Rights of Way Act, 1932](#) . The owner appealed to the Divisional Court, which decided against him by a majority. He now appeals to this court.

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: see section 2 (2) . 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 A.D. 1189. The new statutory period of 20 years has no fixed starting point, but only a finishing point. The public must have used the way as of right for the period of 20 years next before their right to use it was “brought into question.” We have now to consider how the period of 20 years is to be calculated.

The thing to do is to find the finishing point and then count back 20 years. This means that in this case we have to find the time when the right of the public to use the way was first “brought into question by notice as aforesaid or otherwise” within section 1 (6) of the Act. Those words are obviously taken from the similar words in [section 4 of the Prescription Act, 1832](#) , which was considered by the Court of Common Pleas in [Cooper v. Hubbuck](#).³⁶ In that case Willes J. said that³⁷ “in order to have the claim ‘brought into question’ there must be at least enough in the proceedings to apprise the parties that the claim was advanced, so that there might be an opportunity of litigating it.” Applying those observations to this case, I think that in order for the right of the public to have been “brought into question,” the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance, by putting a barrier across the path or putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. Some village Hampden may push down the barrier or tear down the notice: the local council may bring an action in the name of the Attorney-General against the landowner in the courts claiming that there is a public right of way: **457* or no one may do anything, in which case the acquiescence of the public tends to show that they have no right of way.

But whatever the public do, whether they oppose the landowner’s action or not, their right is “brought into question” as soon as the landowner puts up a notice or in some other way makes it clear to the public that he is challenging their right to use the way.

Applying this test, I ask myself: when did the landowner here make it clear to the public that he was challenging their right to use the way? Quarter sessions held that he did so in 1931, when he objected to the use of the path by persons who were not local residents. We do not know what evidence was before them on that point. If the landowner merely turned back one stranger on an isolated occasion, that would not, I think, be sufficient to make it clear to “the public” that they had no right to use it. He ought at least to make it clear to the villagers of Bossington, Houghton and Horsebridge. They were the members of the public most concerned to assert the right, because they were the persons who used the path. They knew - better than the landowner himself - how long they had used it. They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it. This view is supported by a case which was decided nearly a hundred years ago - [Reg. v. Broke](#)³⁸ - about a footpath at Ipswich. Sea-faring men proved that they had used the path without interruption for a great many years for the purpose of their calling. The landowner sought to rebut the public right by proving that he had turned back all persons who were not sea-faring men: but it was held that that was not sufficient for the purpose. Pollock C.B. said³⁹ that the user by the sea-faring men was a user by the public and that long user by them gave the public a right of way. If the landowner wished to deny the public right, he ought to have made it clear to the sea-faring men that they used it by his leave and not as of right. So, here, the landowner ought to have made it clear to the villagers. We have no information on this point, but I think we ought to assume that quarter sessions had sufficient evidence before them to support their finding. We ought to assume that in 1931 when the landowner turned back

strangers, he did it in so open and notorious a fashion that it was made clear, not only to strangers, that they *458 had no right to use the path, but also to local residents, that they only used it by tolerance of the owner. If so, he did bring the right into question in 1931, as quarter sessions have found.

In this connexion I would also mention the finding of quarter sessions that in and from 1931 the landowner, by turning off strangers, showed an intention not to dedicate the path as a highway for the use of members of the public at large. This raises the same point. 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: see *Mann v. Brodie*.⁴⁰ Such evidence may consist, as in the leading case of *Poole v. Huskinson*,⁴¹ of notices or a barrier: or the common method of closing the way one day a year. That was not done here; but we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it. On this footing there was sufficient evidence to show that there was no intention to dedicate.

I think, therefore, that we should accept the findings of quarter sessions that the landowner brought the public right into question in 1931 and thereafter showed a sufficient intention not to dedicate the path as a highway. Even so, there is found to be 20 years' user by the public as of right before 1931: and the question is whether that is sufficient to give a statutory right to use the footpath. The difficulty is that the [Rights of Way Act, 1932](#), was not passed until July 12, 1932, and did not come into operation until January 1, 1934. The 20 years' user before 1931 took place before the Act was passed. Can the public acquire a right of way by 20 years' user before the Act? Is the Act retrospective to that extent?

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 *459 the burden of proof: for whereas previously the legal burden of proving dedication was on the public who asserted the right (*Folkestone Corporation v. Brockman*⁴²), 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. It is interesting to notice that the courts held that the [Prescription Act, 1832](#), did not relate to pleading or procedure only: see *Cooper v. Hubbuck*,⁴³ per Willes J. Neither does this Act.

Seeing that this Act does affect the substantive law, it is not to be given a retrospective operation unless such a construction appears very clearly on the terms of the Act or arises by necessary and distinct implication. I think, however, that such is the case here: the whole tenor of the Act is to establish a public right by 20 years' user; and the wording of section 2 (1) carries with it the necessary and distinct implication that, except as therein stated, the Act applies to enjoyment of the way before the commencement of the Act. This was the view of Evershed J. in *Attorney-General and Newton Abbot Rural District Council v. Dyer*,⁴⁴ and I agree with him.

Mr. Lamb pointed to the fact that Parliament allowed an interval of 17 months between the time when the Act was passed (July 12, 1932) and the time when it came into operation (January 1, 1934); and he asked: was not that period given so as to enable any landowner (who did not intend to dedicate a path as a highway) to put up a notice saying that his property was private, and that there was no right of way over it? I agree that that was the object of the interval; but I think the object is substantially achieved. If a notice were put up before 1933, it would have this effect: if the 20 years had not then run, the notice would prevent a public right being acquired; whereas if it had already run, the notice would serve as an emphatic assertion that the path had heretofore been used by tolerance of the owner and not by right of the public; and the longer it remained there without challenge the more effective it would be to prove the correctness of his assertion. If it was challenged before the end of 1933, the landowner could get the matter resolved by the courts under the law as it stood before the Act: see section 2 (1). If it was not challenged until after 1933, the new law applied; *460 but he could point to the acquiescence in the notice as a strong point in his favour to show that the enjoyment had not theretofore been had as of right.

My conclusion is, therefore, that the Act is retrospective. Once the 20 years' enjoyment has been had as of right by the public, then whether the 20 years' enjoyment was before or after the Act, the way is by the Act a highway; and the landowner cannot escape from that position by saying that he never intended to dedicate it as a highway. I would dismiss the appeal.

BIRKETT L.J.

This appeal from a decision of the Divisional Court raises important questions affecting landowners and the members of the public under the provisions of the [Rights of Way Act, 1932](#). [His Lordship stated the facts, and continued:] The main purpose of the [Rights of Way Act, 1932](#), was to simplify the procedure when it was 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*⁴⁵; *Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council*.⁴⁶

Section 1 (6) of the Act of 1932 provides that the 20-year period shall be deemed to be the period next before the time when the right of the public to use a way shall have been brought into question by notice or otherwise. This subsection differs from the corresponding provision in the [Prescription Act of 1832](#), which required the periods of 20 and 40 years therein mentioned to be “next before some suit or action” in which the right was questioned. Therefore if today a member of the public is turned back from a footpath, on the ground that there is no right of way, and action is taken to assert the public claim, the period of 20 years necessary to be proved will be up to the date of the act of turning back, and not up to the time that the action to assert the public right is taken.

In the present appeal it is found that members of the public were turned back in 1931, and the same thing happened at ^{*461} intervals after that date. The evidence made it clear that from 1885 to 1931 the public had been using this footpath “as of right,” without interruption, and on that evidence the footpath is deemed to have been dedicated under section 1 (1) of the Act of 1932, for there was no evidence at all that within that period there was no intention to dedicate the way. The act of the landowner in turning members of the public back in 1931, in my opinion, was “bringing the right into question,” because if there had been user as of right for 20 years without interruption, and then steps were taken to stop members of the public from using the way on the ground that the public had no rights there at all, then this is clearly an occasion “when the right of the public to use the way shall have been brought into question by notice as aforesaid or otherwise”: section 1 (6). There is no fixed method laid down by the Act by which the right is to be brought in question. The words “or otherwise” leave the matter at large. A barrier or a notice would, of course, bring the right into question; but when the landowner takes steps to stop members of the public using the way, for my own part I do not think there can be any clearer way of bringing the right into question. After 1931 the landowner showed an intention not to dedicate the path as a public highway; but his act then was unavailing. Forty-six years had passed between 1885 and 1931, and no evidence was given to show that in those years there was an intention not to dedicate the way as a public highway. Everything therefore turns in this appeal on whether the 46 years ending in 1931 are within the words of section 1 (1) of the Act of 1932.

The Act, although passed into law on July 12, 1932, did not come into force until January 1, 1934, and the requirement of a period of 20 years of which the subsection speaks was fulfilled in the present case before the Act was passed in 1932. This raises the important question whether the Act is intended to be retrospective in its operation. The rule is now well established that an Act is not to have retrospective effect, save in matters of procedure, unless the Act makes it plain that it is to have retrospective effect.

In the Divisional Court the view was taken that this Act dealt only with procedure, and the decision in *Attorney-General and Newton Abbot Rural District Council v. Dyer*⁴⁷ was followed. It is not always easy to maintain this clear distinction between Acts dealing with procedure only and Acts which create rights; and the [Rights of Way Act of 1932](#), I should have thought, was ^{*462} more than an Act dealing with procedure only, as the [Prescription Act of 1832](#) was held to be in *Cooper v. Hubbuck*.⁴⁸ Section 2 (2) of the [Rights of Way Act, 1932](#), makes it quite plain that the new procedure under the Act is an *additional* method of establishing the dedication of highways, and does not abolish or alter the existing methods. In any cases where for any reason the Act has no application, the existing law can be used in the same way as it was used before the Act was passed. Thus, for example, if evidence of public user for five years is enough in all the circumstances of the case to prove the landowner’s intention to dedicate, there is no need to prove the use for 20 years. The essential test is: what is the intention of the statute? In my opinion, while I think that the statute was not confined merely to procedure but was dealing with rights, I yet think that the intention of the statute was that it should be retrospective in its operation. Section 58 of the [National Parks and Access to the Countryside Act, 1949](#), amended the [Rights of Way Act, 1932](#), by deleting the concluding words of section 1 (1) and the whole of section 1 (2). The purpose of this was to make the period of 20 years apply in all cases, but in doing so there was in section 58 (2) of the [National Parks Act](#) a saving in favour of proceedings pending at December 16, 1949, and also for cases then decided by courts of competent jurisdiction. Similarly, section 2 (1) of the Act of 1932 is a transitional provision to prevent possible conflict between the old and the new law in cases already decided, or in cases in

course of being decided when the Act came into force on January 1, 1934.

I am therefore of opinion that the period of 20 years laid down by the Act is not to be reckoned from January 1, 1934, but that any way used uninterruptedly and as of right for a period of 20 years can be claimed as a public way, whenever the period of 20 years occurred, subject to the provisions of the [Rights of Way Act, 1932](#).

I agree with the conclusion of the Divisional Court that the footpath in question is a public way as claimed by the Southampton County Council, and that this appeal ought to be dismissed.

PARKER L.J.

I have come to the same conclusion. Before the appeals committee of quarter sessions the only point taken on behalf of the appellant was that the 20-year period to be considered was that next before the proceedings in question, and that by reason of the action taken by the appellant and his predecessor ^{*463} since 1931 there was shown an intention during that period not to dedicate the footpath in question. I will assume that such action was sufficient evidence that there was no intention to dedicate, since the contrary was not argued, but it is to be observed that no action was taken in regard to a considerable section of the public, namely, "local residents" as described in the case, but only in regard to strangers. The question, however, remains whether, as the respondents contend, the right of the public to use the footpath had not been brought into question at an earlier date, namely, in 1931, when such action was first taken. The appeals committee and the Divisional Court held that this contention was right, and, accordingly, subject to the point hereinafter referred to, it is clear that as a result of what had happened between 1885 and 1931 the footpath pursuant to section 1 (1) of the Act is deemed to have been dedicated. I agree with this conclusion. It seems to me clear that from 1885 to 1931 the public were asserting a right to enjoy this footpath, so that if in 1931 steps were taken to warn off persons asserting such a right, such action was clearly bringing into question that right. The question is largely one of fact and, the appeals committee having so found, there is no reason to disturb that finding.

Before the Divisional Court, however, and before this court, the appellant raised a more formidable point, namely, as to the retrospective operation of the Act. The Act was passed on July 12, 1932, and came into operation on January 1, 1934. It clearly applied to a 20-year period occurring wholly after January 1, 1934. It was conceded that it applied to a 20-year period commencing before and ending after January 1, 1934, but it was denied that it could apply to a 20-year period occurring, as in the present case, wholly before January 1, 1934. To support this, strong reliance was placed on the well-known principle that an Act is not to be construed so as to have retrospective effect, except in regard to matters of procedure only, unless the Act is clearly intended to have that effect.

It is sufficient to cite two passages from the authorities. In *In re Athlumney, Ex parte Wilson* ⁴⁹ Wright J. said this ⁵⁰ : "Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is ^{*464} fairly capable of either interpretation, it ought to be construed as prospective only."

In *In re Hale's Patent* ⁵¹ Sargant J. said ⁵² : "No doubt the general law is that, while rights are not statutorily altered retrospectively, procedure is, apart from indications to the contrary, altered retrospectively; but where rights and procedure are dealt with together in the way in which section 8 of the Act of 1919 deals with them, the intention of the legislature would seem fairly clear - namely, that the old rights are still to be determined by the old tribunal under the Act of 1907, and that only the new rights under the substituted section are to be dealt with by the tribunal thereby substituted for the Treasury."

The Divisional Court (Stable J. dissenting) held that the Act applied where, as here, the 20-year period was wholly before the commencement of the Act. In arriving at his conclusion, Lord Goddard C.J. (with whom Hilbery J. agreed) said ⁵³ : "It has always been held that a procedural Act does or may act retrospectively, and one test of whether an Act is procedural is whether it is an Act which mainly deals with evidence. The Act under consideration is in many respects similar to the [Prescription Act, 1832](#), which provided, as its preamble shows, that owing to the difficulties of proving user from time immemorial, certain changes in the law were desirable and, instead of a person who asserted that he was entitled to an easement over land or light or water having to give evidence from which the court could infer a grant or user from time immemorial, the Act substituted the prescriptive periods of 20 years in some cases and 40 years in others. That seems to me the object of the present Act." In other words, they treated the Act as a procedural Act, and, in doing so, came to the same conclusion as Evershed J. in *Attorney-General and Newton Abbot Rural District Council v. Dyer*, ⁵⁴ who said ⁵⁵ : "In the first

place, it is to be borne in mind that the Act of 1932 is substantially a procedural Act, in the sense that it is designed, not to create new rights or new causes of action, but rather to simplify and render more easy the means of making good claims of a well-established kind.”

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Mr. Lamb, for the appellant, has urged with considerable force that this Act, though it admittedly in part deals with matters of procedure, nevertheless, to use the words of Lush J. in *Poyser v. Minors*,⁵⁶ “gives or defines” legal rights. That was indeed the view of Stable J. in the present case. For my part, I think that that conclusion is right, and, without going into the matter in detail, I am content to adopt what was said by Willes J. in *Cooper v. Hubbuck*,⁵⁷ in dealing with the [Prescription Act, 1832](#), which, as Lord Goddard C.J.⁵⁸ pointed out in the present case, the present Act resembles in many respects. Willes J., with whom Erle C.J. and Byle J. concurred, in considering [section 4 of the Prescription Act](#) (which was similar to section 1 (6) of the Act of 1932), said⁵⁹: “The section in question is the last of those which deal with the creation of the right. It is not a section relating to pleading or procedure only, but has for its object to appoint the terminus of the period of prescription which by the previous sections was to confer a right. This it does by reference to the commencement of ‘some suit or action wherein the claim or matter, &c., shall have been or shall be brought in question.’ The effect, therefore, is that, immediately upon the bringing of such suit or action, the enjoyment, if within the previous sections as to length and otherwise, shall ripen into a right.” This case was unfortunately not before the Divisional Court; nor was it referred to in *Attorney-General and Newton Abbot Rural District Council v. Dyer*.⁶⁰

That, of course, does not dispose of the matter, because the question remains whether, even though the Act gives or defines legal rights, the intention is clear that it should have a retrospective operation. If so, it should be so construed, even if the consequences may in certain cases appear unjust or hard. In order to ascertain the intention, it is, I think, legitimate to consider not only the language used in, but the object of, the enactment.

In *Jones v. Bates*⁶¹ Scott L.J. discussed at some length the purpose of the [Rights of Way Act, 1932](#), in these words⁶²: “Before discussing the evidence and judgment below, I want to consider what the law now is since the passing of the [Rights of Way Act, 1932](#), which the judge had to apply. The new Act, as *466 stated in its long title, was an amending Act. Before the Act, the law applicable was the common law. The main alteration is effected by section 1, 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, whether a carriage-road, a bridle-path or a footpath, 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 - at any rate within the last century or two - 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 other 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. That decision if given by a High Court judge sitting alone, was open to revision by a Court of Appeal, but not if given by a county court or other court, whose decision on fact was made final by statute. Whichever jurisdictional mode of deciding questions of fact happened to have been invoked in the particular case, 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 *467 Scottish premises, the public claimant failed on the additional English requisites. I infer from its terms that the [Rights of Way Act, 1932](#), was passed for the definite purpose of getting rid of these extra difficulties of proof, and of assimilating our English legal position to the more sensible one obtaining north of the Tweed.” Accepting his analysis, as I do, I would not expect to find any limitation on its operation.

Turning to the language used, it is to be observed that section 1 (6), which defines the 20-year period, introduces no limitation as to the time when the right of the public to use the way shall have been brought into question. Indeed, the words “by notice as aforesaid,” which are clearly a reference back to subsection (3) and cover therefore a notice “placed before ... and maintained after the commencement of this Act,” point to a period ending before the commencement of the Act.

Again, it seems to me that the necessary implication from section 2 (1) is that the Act is retrospective in operation. It was suggested that that subsection was necessary in order that the new provisions as to evidence (see section 3) should not apply to pending actions, and that this was its only effect. I cannot accept this argument, which appears to ignore the latter part of the subsection, where it says that in regard to decisions given before the commencement of the Act, and in regard to decisions given in actions pending at the commencement of the Act, "this Act shall not apply except as regards enjoyment of the way after the date of the decision." These words, as it seems to me, can only be explained on the basis that the Act, except to that extent, was intended to be retrospective. Indeed, that was the view of Evershed J. in *Attorney-General and Newton Abbot Rural District Council v. Dyer*.⁶³

I appreciate that, as Stable J. pointed out,⁶⁴ this interpretation may in certain circumstances produce consequences which are hard and even extraordinary, but in my judgment the language of the Act taken as a whole is sufficiently clear to rebut the presumption. Accordingly, I would dismiss the appeal.

Representation

Solicitors: Ashurst, Morris Crisp & Co. ; Theodore Goddard & Co. for G. Andrew Wheatley, Winchester .

Appeal dismissed. Leave to appeal to the House of Lords granted. (M. M. H.)

Footnotes

- 1 [Rights of Way Act, 1932, S. 1](#) : "(1) 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 wo.y 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, ... (3) A notice by the owner of the land over which any such way passes inconsistent with the dedication of the way as B highway, placed before or after and maintained after the commencement of this Act in such a manner as to be visible to those using the way, shall, in the absence of proof of a contrary intention, be sufficient evidence to negative the intention to dedicate such way as a highway, and where a notice has been placed in the manner provided in this subsection and is subsequently torn down or defaced, notice in writing by the owner of the land to the council of the county and of the borough or urban or rural district council in which the way is situate that the way is not dedicated to the public shall, in the absence of proof of a contrary intention, be sufficient evidence to negative the intention of the owner of the land to dedicate such way as a highway. (5) In the case of land in the possession of a tenant for a term of years or from year to year let on lease, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of any such tenancy, have the right to place and maintain such notice as aforesaid, but so that no injury is done thereby to the business or occupation of the tenant. (6) Each of the respective periods of years mentioned in this section shall be deemed and taken to be the period next before the time when the right of the public to use a way shall have been brought into question by notice as aforesaid or otherwise." S. 2 : "(1) Nothing in this Act shall affect any proceedings pending at the commencement of this Act, and where in respect of any way a court of competent jurisdiction decides in proceedings so pending, or has before the commencement of this Act decided, that the way is not a highway, this Act shall not apply except as respects enjoyment of the way after the date of the decision. (2) Nothing in this Act shall operate to prevent the dedication of a way as a highway being presumed on proof of user for any less period than twenty years or to prevent the dedication of a way as a highway being presumed or proved under any circumstances under which it can be presumed or proved at the time of the passing of this Act." S. 4 .: "The person entitled to the remainder or reversion immediately expectant upon the determination of a tenancy for life or pour autre vie in land shall have the like remedies by action for trespass or an injunction to prevent the acquisition by the public of a right of way over such land as if he were in possession thereof."
- 2 [Rights of Way Act, 1932, S. 1](#) : "(1) 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 wo.y 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, ... (3) A notice by the owner of the land over which any such way

passes inconsistent with the dedication of the way as B highway, placed before or after and maintained after the commencement of this Act in such a manner as to be visible to those using the way, shall, in the absence of proof of a contrary intention, be sufficient evidence to negative the intention to dedicate such way as a highway, and where a notice has been placed in the manner provided in this subsection and is subsequently torn down or defaced, notice in writing by the owner of the land to the council of the county and of the borough or urban or rural district council in which the way is situate that the way is not dedicated to the public shall, in the absence of proof of a contrary intention, be sufficient evidence to negative the intention of the owner of the land to dedicate such way as a highway. (5) In the case of land in the possession of a tenant for a term of years or from year to year let on lease, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of any such tenancy, have the right to place and maintain such notice as aforesaid, but so that no injury is done thereby to the business or occupation of the tenant. (6) Each of the respective periods of years mentioned in this section shall be deemed and taken to be the period next before the time when the right of the public to use a way shall have been brought into question by notice as aforesaid or otherwise.” S. 2 : “(1) Nothing in this Act shall affect any proceedings pending at the commencement of this Act, and where in respect of any way a court of competent jurisdiction decides in proceedings so pending, or has before the commencement of this Act decided, that the way is not a highway, this Act shall not apply except as respects enjoyment of the way after the date of the decision. (2) Nothing in this Act shall operate to prevent the dedication of a way as a highway being presumed on proof of user for any less period than twenty years or to prevent the dedication of a way as a highway being presumed or proved under any circumstances under which it can be presumed or proved at the time of the passing of this Act.” S. 4 : “The person entitled to the remainder or reversion immediately expectant upon the determination of a tenancy for life or pour autre vie in land shall have the like remedies by action for trespass or an injunction to prevent the acquisition by the public of a right of way over such land as if he were in possession thereof.”

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4 [\[1947\] Ch. 67; 62 T.L.R. 632; \[1946\] 2 All E.R. 252](#) .

5 [\[1947\] Ch. 67; 62 T.L.R. 632; \[1946\] 2 All E.R. 252](#) .

6 [\[1920\] 2 Ch. 377, 386; 36 T.L.R. 832](#) .

7 [\[1938\] 2 All E.R. 237, 244; 54 T.L.R. 648](#) .

8 [\[1937\] 2 K.B. 77; 52 T.L.R. 516; \[1936\] 2 All E.R. 423](#) .

9 [\[1905\] 2 Ch. 188; 21 T.L.R. 471](#) .

10 *[1947] Ch. 67; 62 T.L.R. 632; [1946] 2 All E.R. 252 .*
11 *[1947] Ch. 67 , 87.*
12 *[1920] 2 Ch. 377; 36 T.L.R. 832 .*
13 *[1920] 2 Ch. 377 , 386.*
14 *(1881) 7 Q.B.D. 329 , 333.*
15 *[1911] 2 Ch. 1, 15; 27 T.L.R. 444 .*
16 *[1898] 2 Q.B. 547 , 552.*
17 *[1939] 2 K.B. 61, 74; 55 T.L.R. 570; [1939] 2 All E.R. 154 .*
18 *[1920] 2 Ch. 377; 36 T.L.R. 832 .*
19 *[1920] 2 Ch. 377 , 386-387.*
20 *(1862) 12 C.B.N.S. 456 .*
21 *Ibid. 468.*
22 *12 C.B.N.S. 456 .*
23 *[1892] 3 Ch. 402, 420-421; 8 T.L.R. 637 .*
24 *[1947] Ch. 67; 62 T.L.R. 632; [1946] 2 All E.R. 252 .*
25 *[1905] A.C. 369, 372-373; 21 T.L.R. 513 .*
26 *[1941] 2 K.B. 89; [1941] 2 All E.R. 499 .*
27 *[1899] P. 236; 15 T.L.R. 361 .*
28 *[1938] 2 All E.R. 237; 54 T.L.R. 648 .*
29 *[1938] 2 All E.R. 237 , 244-245.*
30 *[1904] A.C. 179; 20 T.L.R. 475 .*
31 *[1947] Ch. 67 .*
32 *[1905] A.C. 369 .*
33 *(1868) 18 L.T. 856 .*
34 *(1934) 50 T.L.R. 474 .*
35 *[1914] A.C. 338; 30 T.L.R. 297 .*
36 *(1862) 12 C.B.N.S. 456 .*
37 *Ibid. 468.*
38 *(1859) 1 F. & F. 514 .*
39 *Ibid. 515.*
40 *(1885) 10 App.Cas. 378 , 386.*
41 *(1843) 11 M. & W. 827 .*
42 *[1914] A.C. 338; 30 T.L.R. 297 .*
43 *12 C.B.N.S. 456 , 468.*
44 *[1947] Ch. 67, 89; 62 T.L.R. 632; [1946] 2 All E.R. 262 .*
45 *54 T.L.R. 648; [1938] 2 All E.R. 237 .*
46 *[1937] 2 K.B. 77; 52 T.L.R. 516; [1936] 2 All E.R. 422 .*
47 *[1947] Ch. 67 .*
48 *12 C.B.N.S. 456 .*
49 *[1898] 2 Q.B. 547 .*
50 *Ibid. 551-552.*
51 *[1920] 2 Ch. 377; 36 T.L.R. 832 .*
52 *[1920] 2 Ch. 377 , 386.*
53 *Ante 448; [1956] 1 All E.R. 419 .*
54 *[1947] Ch. 67 .*
55 *Ibid. 88.*
56 *(1881) 7 Q.B.D. 329 , 333.*
57 *12 C.B.N.S. 456 .*
58 *Ante 448.*
59 *12 C.B.N.S. 456 , 467.*
60 *[1947] Ch. 67 .*
61 *[1938] 2 All E.R. 237 .*
62 *Ibid. 244-245.*
63 *[1947] Ch. 67 , 89.*
64 *Ante 452.*