*335 Regina v Oxfordshire County Council and Another, Ex parte Sunningwell Parish Council

Positive/Neutral Judicial Consideration

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House of Lords

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ICLR

House of Lords

Lord Browne-Wilkinson , Lord Steyn , Lord Hoffmann , Lord Hobhouse of Woodborough and Lord Millett

1999 April 19, 20, 21, 22; June 24

Commons—Town or village green—Customary right—Land used predominantly by villagers for informal recreation—Whether belief in existence of right exclusive to villagers necessary—Whether use for "sports and pastimes"—Whether landowner's toleration barring claim— Commons Registration Act 1965 (c. 64) , ss. 13(b), 22(1)

A parish council applied to the county council pursuant to section 13 of the Commons Registration Act 1965 [1] for registration of 8 glebe land as a village green. They relied, under section 22(1), on 20 years' user ending on 1 January 1994. The landowner objected, and the county council decided to hold a non-statutory public inquiry with a barrister acting as inspector. The inspector found that there had been abundant use of the glebe for informal recreation, which he held to be a pastime for the purposes of the Act, that the informal recreation had been predominantly, though not exclusively, by inhabitants of the village and that successive *336 landowners had been tolerant of that use. He recommended that the application be refused on the ground that the use had not been shown to be "as of right" in the sense of a right exercised in the belief that it was enjoyed by the villagers to the exclusion of all other people. The county council resolved that the application be rejected. The parish council applied for leave to apply for judicial review of the resolution. Buxton J. refused the application. The Court of Appeal, on a renewed application, granted leave to apply but refused the substantive application.

On appeal by the parish council:-

Held, allowing the appeal and declaring the glebe to be a village green, that "as of right" in section 22(1) of the Act of 1965, reflecting the common law concept of nec vi, nec clam, nec precario, did not require subjective belief in the existence of the right; that "sports and pastimes" was a composite phrase and proof of an activity that could properly be regarded as a sport or a pastime in modern times, including the informal recreation found by the inspector, was sufficient; that it was sufficient that the land was used predominantly, rather than exclusively, by inhabitants of the village; and that toleration by the landowner was not fatal to a finding that user had been as of right (post, pp. 346F-G, 355G-356A, 358B, 359A-B).

Hue v. Whiteley [1929] 1 Ch. 440 considered.

Reg. v. Suffolk County Council, Ex parte Steed (1996) 75 P. & C.R. 102, C.A. overruled .

Decision of the Court of Appeal reversed.

The following cases are referred to in the opinion of Lord Hoffmann:

Abercromby v. Town Commissioners of Fermoy [1900] 1 I.R. 302, C.A. .
Attorney-General v. Antrobus [1905] 2 Ch. 188
Attorney-General v. Dyer [1947] Ch. 67 ; [1946] 2 All E.R. 252
Beckett (Alfred F.) Ltd. v. Lyons [1967] Ch. 449; [1967] 2 W.L.R. 421; [1967] 1 All E.R. 833, C.A. .
Blount v. Layard [1891] 2 Ch. 681n., C.A. .
Bright v. Walker (1834) 1 C.M. & R. 211
Bryant v. Foot (1867) L.R. 2 Q.B. 161, D.C. .
Dalton v. Angus & Co . (1881) 6 App.Cas. 740, H.L.(E.) .
De la Warr (Earl) v. Miles (1881) 17 Ch.D. 535, C.A. .
Fitch v. Rawling (1795) 2 H.Bl. 393
Folkestone Corporation v. Brockman [1914] A.C. 338 , H.L.(E.) .
Gardner v. Hodgson's Kingston Brewery Co. Ltd. [1903] A.C. 229, H.L.(E.) .
Hammerton v. Honey (1876) 24 W.R. 603
Hue v. Whiteley [1929] 1 Ch. 440
Jones v. Bates [1938] 2 All E.R. 237, C.A. .
Mann v. Brodie (1885) 10 App.Cas. 378, H.L.(Sc.) .
Mercer v. Denne [1904] 2 Ch. 534
Mills v. Colchester Corporation (1867) L.R. 2 C.P. 476
Mills v. Silver [1991] Ch. 271; [1991] 2 W.L.R. 324; [1991] 1 All E.R. 449, C.A. .
O'Keefe v. Secretary of State for the Environment [1996] J.P.L. 42 ; *[1998] J.P.L. 468, C.A.* .
Reg. v. Suffolk County Council, Ex parte Steed (1995) 70 P. & C.R. 487 ; *(1996) 75 P. & C.R. 102, C.A.* .

The following additional cases were cited in argument:

Attorney-General ex rel. Yorkshire Derwent Trust Ltd. v. Brotherton [1991] Ch. 185; [1991] 2 W.L.R. 1 ; *[1992] 1 All E.R. 230, C.A..; [1992] 1 A.C. 425; [1991] 3 W.L.R. 1126; [1992] 1 All E.R. 230* , *H.L.(E.)* . ***337**
Bell v. Wardell (1740) Will. 202
Bourke v. Davis (1889) 44 Ch.D. 110
Bridle v. Ruby [1989] Q.B. 169; [1988] 3 W.L.R. 191; [1988] 3 All E.R. 64, C.A. .
Buckinghamshire County Council v. Moran (1988) 86 L.G.R. 472 ; *[1990] Ch. 623; [1989] 3 W.L.R. 152; [1989] 2 All E.R. 225, C.A.* .
Eaton v. Swansea Waterworks Co. (1851) 17 Q.B. 267
Fairey v. Southampton County Council [1956] 2 Q.B. 439; [1956] 3 W.L.R. 354; [1956] 2 All E.R. 843, C.A. .
Goodman v. Mayor of Saltash (1882) 7 App.Cas. 633, H.L.(E.) .
Jaques v. Secretary of State for the Environment [1995] J.P.L. 1031
Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council [1937] 2 K.B. 77; [1936] 2 All E.R. 422
Ministry of Defence v. Wiltshire County Council [1995] 4 All E.R. 931
Montgomerie & Co. Ltd. v. Wallace-James [1904] A.C. 73, H.L.(Sc.) .
Reg. v. Oakes [1959] 2 Q.B. 350; [1959] 2 W.L.R. 694; [1959] 2 All E.R. 92, C.C.A. .
Reg. v. Secretary of State for the Environment, Ex parte Billson [1999] Q.B. 374; [1998] 3 W.L.R. 1240; [1998] 2 All E.R. 587
Reg. v. Secretary of State for the Environment, Ex parte Cowell [1993] J.P.L. 851, C.A. .
Reg. v. Secretary of State for the Environment, Ex parte O'Keefe (1997) 96 L.G.R. 100, C.A. .
Sturges v. Bridgman (1879) 11 Ch.D. 852, C.A. .
Sze To Chun Keung v. Kung Kwok Wai David [1997] 1 W.L.R. 1232, P.C. .
The Rye, High Wycombe, Bucks., In re [1977] 1 W.L.R. 1316; [1977] 3 All E.R. 521
Virgo v. Harford (unreported) 11 August 1892, Wills J. (Bristol Summer Assizes) , ; 27 March 1893, Mathew J. (Bristol District Registry)

Appeal from the Court of Appeal.

This was an appeal by Sunningwell Parish Council by leave of the Court of Appeal (Lord Woolf M.R., Waller and Robert Walker L.JJ.) from their judgment and order on 24 November 1997 granting a renewed application by the parish council for leave to apply for judicial review of a resolution of the first respondents, Oxfordshire County Council, passed on 22 October 1996 but dismissing the substantive application. Buxton J., on 11 July 1997, had refused the parish council leave to apply.

By their application, the parish council sought judicial review in the form of an order of certiorari to remove into the High Court and quash the county council's resolution, and/or a declaration that the county council should have acceded to the parish council's application dated 9 November 1995 and registered Sunningdale Glebe as a village green, and/or an order of mandamus either to oblige the county council to register the glebe as a village green or to reconsider the application.

The facts are stated in the opinion of Lord Hoffmann.

George Laurence Q.C. and *W. D. Ainger* for the parish council. Land on which local inhabitants indulge in "lawful sports and pastimes" is land on which they indulge either in lawful sports only (being also lawful pastimes) or in lawful pastimes (not being sports) only or in both lawful sports and lawful pastimes. The informal recreational activities (without ***338*** any communal activities) relied on by the parish council before the inspector are sufficient to constitute pastimes.

Class c in section 22(1) of the Act of 1965 should be construed consistently with classes a and b so far as possible. In particular, (i) the same sports and/or pastimes that can be the subject of class b customary rights should be held capable of acquisition under class c, there being no reason as a matter of language to differentiate the terms and there being every reason, in the interests of contextual consistency, to construe the expression in the same way in the two classes; (ii) the phrase "sports and pastimes" in classes b and c should take its flavour from the possibly wider phrase "exercise or recreation" used in class a and be given a wide interpretation; (iii) the dictum in *Mills v. Colchester Corporation (1867) L.R. 2 C.P. 476* , 486 would apply to any claimed class b customary right. The meaning to be given to the expression "as of right" in class c should be consistent with it. [Reference was also made to *Hammerton v. Honey (1876) 24 W.R. 603* , 604.]

To hold that the only activities which can fall within "sports and pastimes" must be organised or communal or structured in some way would cast doubt on the correctness of numerous decisions of the commons commissioners. In any event, it does not follow, logically or as a matter of language, from the fact that a customary right exists to serve the inhabitants of a locality that the only activities that can lead to the recognition of a class b or c right must be communal ones. It is impossible to draw a satisfactory dividing line between activities carried on by small, perhaps family, groups and those carried on communally. [Reference was made to *Abercromby v. Town Commissioners of Fermoy [1900] 1 I.R. 302* , 314; *Bell v. Wardell* (1740) Will. 202; *Bourke v. Davis (1889) 44 Ch.D. 110* and *Gadsden, The Law of Commons* (1988), p. 385 para. 13.24.]

"Sports and pastimes" should be construed as applying to all manner of pastimes (or even just one pastime), whether or not including any sport. The phrase used in the Act of 1965 derives from its use in the old cases. The point of adding pastimes to sports is to emphasise that use of the land for "mere" pastimes will do. The emphasis is therefore on what is permitted (i.e., all manner of pastimes including sports) rather than on positively requiring use not merely for non-sport pastimes but also for sports. "Sports and pastimes" is plainly meant to be a portmanteau phrase employed to prevent anybody having to argue about whether a particular activity is a sport or a pastime. It would be unsatisfactory if land could not be registered as a town or village green on the basis of informal recreation activity: see *Reg. v. Suffolk County Council, Ex parte Steed (1995) 70 P. & C.R. 487* , 503. The phrase "exercise or recreation" in class a is used equally loosely. The only instances known of allotment (see the Inclosure Act 1845 (8 & 9 Vict. c. 118)) of land falling within class a are allotments for "exercise and recreation:" cf. *In re The Rye, High Wycombe, Bucks [1977] 1 W.L.R. 1316* , 1320-1321. In all three classes the relevant phrase is to be construed as meaning "and/or."

If "sports and pastimes" is to be construed as the second respondents contend, smaller greens that are physically incapable of accommodating both sports and other pastimes (whether communal or not) will in practice be excluded from qualifying under class c (and would likewise have been ***339*** excluded under class b). Many greens are believed to have been registered in the past on the basis of informal recreational activities. These registrations would be shown to have been erroneous. [Reference was made to *Virgo v. Harford (unreported), 11 August 1892* ; Hunter, The Preservation of Open Spaces, and of Footpaths, and Other Rights of Way (1896), pp. 181-182: Bennion, "Threading the Legislative Maze" *(1999) 163 J.P. 264* and Halsbury's Laws of England, 4th ed. reissue, vol. 12(1) (1998), paras. 621-623, pp. 174-176.]

For local inhabitants to indulge in sports and pastimes on land "as of right" is to indulge in them on it for those purposes without force (peaceably), without secrecy (openly) and without permission *as if* they have the right (i.e. in such manner as to convey the impression that they are claiming the right) to do so. It is not necessary that they genuinely believe themselves to have the right so to indulge. The words "openly used ... without protest or permission" in the definition of "town and village greens" recommended in the Report of the Royal Commission on Common Land *1955-1958 (1958) (Cmnd. 462)* , p. 128, para. 403, are precisely what are comprehended in the Latin expression "nec vi, nec clam, nec precario" and in the expression "as of right" in the definition in section 22(1) of the Act of 1965. Roman lawyers, in relation to "clam," could only have had in mind someone who knew that he had no right to be there, so "clam" is inconsistent with any need for honest belief.

The 20-year period mentioned in class c probably derived either from the common law relating to acquisition of customary rights or from the Rights of Way Act 1932 . By parity of reasoning, it would be sensible to construe the expression "as of right" in class c as it would be understood in relation to a claim to customary rights at common law (see *Mills v. Colchester Corporation , L.R. 2 C.P. 476* , 486) or by reference to the use of the expression in statutes, e.g., the Prescription Act 1832 (2 & 3 Will. 4, c.71) and the Act of 1932 (section 1). The Act of 1932 was modelled on the Act of 1832: see *per* Lord Buckmaster (H.L. Debates), 7 June 1932, cols. 635-637; *Attorney-General ex rel. Yorkshire Derwent Trust Ltd. v. Brotherton [1991] Ch. 185* , 200f-g; *[1992] 1 A.C. 425* , 436g-h, 438a-b, 441g, 442d, 446b-d, 447b; *Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council [1937] 2 K.B. 77* ; *Jones v. Bates [1938] 2 All E.R. 237* , 251f and *Fairey v. Southampton County Council [1956] 2 Q.B. 439* , 465. Although the phrase "as of right" appears only in section 5 of the Act of 1832, the expression in section 2 "claiming right thereto" had the same meaning: see *Gardner v. Hodgson's Kingston Brewery Co. Ltd . [1903] A.C. 229* , and *Jones v. Bates [1938] 2 All E.R. 237* , 251e-f. The classic exposition of user of a right of way *otherwise* than "as of right," as used in section 5 of the Act of 1832 in *Bright v. Walker (1834) 1 C.M. & R. 211* , 219 was merely exposition of the common law position, confirmed by the Act of 1832, that use, to be "as of right," had to be peaceable, open and without permission (nec vi, nec clam, nec precario): see *Gale on Easements* , 16th ed. (1997), pp. 209-210; pars. 4-64, 4-65; *Mills v. Colchester Corporation, L.R. 2 C.P. 476* , 486; *Gardner v. Hodgson's Kingston Brewery Co. Ltd. [1903] A.C. 229* , 238; *Eaton v. Swansea Waterworks Co. (1851) 17 Q.B. 267* , 275, 276; *Earl De la Warr v. Miles (1881) 17 Ch.D. 535* , 596; *Sturges v. Bridgman (1879) 11 Ch.D. 852* , 863; *Dalton v. Angus & Co. (1881) 6 App.Cas. 740* , 773 and J. G. Riddall, "A False Trail" [1997] Conv. 199. None of these authorities speaks of the necessity for there to be any belief by claimants in the existence of the claimed right. Neither did the first authority under the Act of 1932 do so: see *Merstham Manor Ltd. v. Coulsdon and Purley Urban District Council [1937] 2 K.B. 77* , 82-84. Tomlin J.'s construction of "as of right" in *Hue v. Whiteley [1929] 1 Ch. 440* , 445 (see *Jones v. Bates [1938] 2 All E.R. 237* , 241c, 245g-h, 251f; *O'Keefe v. Secretary of State for the Environment [1996] J.P.L. 42* , 53; *Reg. v. Secretary of State for the Environment Ex parte O'Keefe (1997) 96 L.G.R. 100* , 115; *Alfred F. Beckett Ltd. v. Lyons [1967] Ch. 449* , 469; *Reg. v. Secretary of State for the Environment, Ex parte Cowell [1993] J.P.L. 851* , 857; *Jaques v. Secretary of State for the Environment [1995] J.P.L. 1031* , 1037 and *Reg. v. Secretary of State for the Environment, Ex parte Billson [1999] Q.B. 374* , 393d-f) was heresy. The distinction made by Farwell J. in *Jones v. Bates* between users who are regardless of the rights of the owner and those who genuinely believe that they are exercising a public right is a false one. The true distinction is between those who use the land or way as if they have the right to do so, i.e., in the manner in which a person rightfully entitled would have used it (see *Bright v. Walker, 1 C.M. & R. 211* , 219) and those who do not so use it. Farwell J.'s distinction between users who think they have the express or tacit licence of the owner and those who genuinely believe they are exercising a public right is also false. The true distinction is between cases where the owner has in fact given his consent and cases where he has not. So long as the use has been carried out in such a way or manner as to assert a permanent right, it is wholly irrelevant that in fact users happened to believe that they were entitled to be on the land by reason of some revocable licence: see *Earl De la Warr v. Miles, 17 Ch.D. 535* , 594 and *Bridle v. Ruby [1989] Q.B. 169* , 177d-e. The principle in those cases is to be preferred to that in *Jones v. Bates* , being consistent with the earlier authorities. The law seeks to give effect to long-standing usage, not only whatever the motive with which the use is enjoyed (*Hue v. Whiteley [1929] 1 Ch. 440*) but also whatever the state of mind (if any) of users as to whether they have the right to be doing what they are doing (*Earl De la Warr v. Miles (1881) 6 App. Cas. 740* and *Bridle v. Ruby [1989] Q.B. 169*). There is no *harm* in claimants having a genuine belief, but there is no need for them to have it. For acts of enjoyment to amount to the assertion of the relevant claimed right (i.e., a private or public right of way or a right in the local inhabitants to indulge in sports and pastimes on a green) it is the nature of the acts themselves, not the belief with which users happen to carry them out, that has the capacity to be interpreted as claiming a right.

For local inhabitants to be able to acquire an honest belief in the right to use would necessarily involve a prior period of use (probably quite a few years) during which users had no such honest belief. If there were a need for users to have a genuine belief in their right to use a green for sports and pastimes, their actual user would thus need in practice to exceed 20 years in order that the 20-year period itself should throughout be accompanied by the requisite belief. It is unlikely that Parliament envisaged such having to be proved either under the Act of 1965 or the Highways Acts. That there has been no challenge to the *Hue v. Whiteley* ***341** belief test in the Highways Acts cases may be because in most cases (as in the present) claimants in fact do have (or say

they have) a belief in their right to indulge in their sports and pastimes or to pass and repass along a claimed way. [Reference was made to section 34(1) of the Highways Act 1959 and *Mills v. Silver [1991] Ch. 271* , 281-282, 288d-e, 290c-d.]

To hold that no belief is required would not impinge on any other area of the law such as adverse possession or prescription. [Reference was made to *Buckinghamshire County Council v. Moran (1988) 86 L.G.R. 472* ; *[1990] Ch. 623* , 644c; *Sze To Chun Keung v. Kung Kwok Wai David [1997] 1 W.L.R. 1232* , 1235h; *Stroud's Judicial Dictionary of Words and Phrases* , 5th ed. (1986), vol. 4, pp. 2291-2292 and Words and Phrases Legally Defined, 3rd ed. (1990), p. 98.]

Even if belief in the existence of the claimed right is necessary, there is no need for belief, in addition, that it is as inhabitants of the locality (i.e. exclusive of the general public) that the right is or may be enjoyed. It is enough if the belief required is merely consistent with the claimed right. Belief that non-inhabitants, viz., the general public, are also entitled to indulge in sports and pastimes on the land, where it exists, is res inter alios acta. It is irrelevant, because such additional belief is not inconsistent with the primary belief.

A two-headed belief test would also be, in practice, impossible to fulfil: it is too specialised. How is any individual local inhabitant to recognise his fellow users as local, as opposed to non-local, inhabitants? (There is, in relation to any particular local user, a total of 64 possible combinations of states of mind.) If the evidence is that only (or mostly) local inhabitants have indulged in the activities, that satisfies the wording of the class c definition. The only justification for a belief test of "as of right" may be that those who have to believe in what they are doing may bring home to the landowner more effectively that a right is being asserted. If, this is correct, a landowner who sees local people using his land for sports and pastimes who happen to entertain the belief that the whole world is entitled to be there is more, not less, likely to be aware that a right is being asserted. So it is not unjust, on a belief theory of "as of right," to permit enjoyment by local inhabitants who have that wide belief to give rise to the right claimed. It is true that the rights that class c creates would not extend to the general public. Once the green was established, the landowner would be entitled to put up an appropriate notice and turn any members of the general public off. But the fact that, in so doing, he would be contradicting the locals' previously-held belief that anybody was entitled to use the green is no reason for denying the protection of the Act of 1965 to cases where the requirements of class c are otherwise satisfied.

Ainger following. As to the difference (if any) between "exercise or recreation" and "sports and pastimes," in the definition of "town or village green" in section 22(1) of the Act of 1965 there is no clear answer, but section 15 of the Inclosure Act 1845 (8 & 9 Vict. c. 118) suggests that Parliament then thought it appropriate to provide that a town or village green (i.e. land used by custom for sports and pastimes) could be allotted as part of an inclosure award and therein be directed to be held in trust for "exercise *and* recreation;" so Parliament appears to have thought that "sports and pastimes" and "exercise and recreation" were either ***342*** synonymous or that "exercise and recreation" was a wider concept (it being unlikely that Parliament would have intended to restrict an existing lawful user).

Sheila Cameron Q.C. and *Charles Mynors* for the second respondents, the Oxford Diocesan Board of Finance. The strict approach taken in *Hammerton v. Honey, 24 W.R. 603* to the category of persons who can substantiate the existence of a custom is also exemplified in earlier authorities: see, e.g. *Fitch v. Rawling* (1795) 2 H.B. 393. These authorities demonstrate that a customary right could be established for the inhabitants of a defined locality (for example, a village or parish) and that the evidence of usage had to substantiate a claim of a right based in the inhabitants which could fail if the usage was indiscriminate, in the sense of including outsiders. In assessing a claim under class c of section 22(1) of the Act of 1965 it is necessary to adopt the same strict approach in relation to the category of persons who can acquire a right. Class c is analogous to class b in this respect. The Court of Appeal in *Reg. v. Suffolk County Council, Ex parte Steed, 75 P. & C.R. 102* , 111 were correct in holding that the evidential safeguards in the authorities dealing with the establishment of a customary right (class b) should be imported into a class c case.

The Royal Commission, in formulating its recommended definition of a town or village green for the purpose of registration under new legislation (Report of the Royal Commission on Common Land *1955-1958 (Cmnd* : 462), p. 128, para. 403) was influenced by the glossary definition (Appendix VI) that it had used for its studies and Report. The important common theme is that both "the place" (in the second limb of the definition) and the "unenclosed open space" (in the third) are ones specially for "inhabitants." Although the words "place" and "unenclosed open space" in the Commission's suggested definition have been replaced by "land" in the definition included in the Act of 1965, the elements or "classes" in that statutory definition reflect those in the Commission's definition and the emphasis remains on "the inhabitants of any locality." [Reference was made to *Ministry of Defence v. Wiltshire County Council [1995] 4 All E.R. 931* , 933-934 and *Halsbury's Laws of England* , 4th ed. reissue, vol. 12(1), pp. 155, 159, paras. 601, 604.]

There was no evidence of communal activities by the villagers on the glebe. There was no activity similar to those in the authorities dealing with a customary right in the inhabitants of a locality. The villagers already have the benefit of an area of land expressly given to them in 1912 as a recreation ground. This is used as a cricket field and has a play area for small children. Consequently there has been no need for the villagers to look to the glebe for the purpose of any communal games, quite apart from its physical unsuitability as sloping ground. Evidence of a succession of individuals or small family groups indulging in informal recreational activities, also indulged in by outsiders, does not constitute evidence of the character required to substantiate a claim of right on behalf of the village. As the benefit of "village green" status is to accrue to the villagers, so, in order for the burden of a right vested in the villagers to be established against the landowner, the past and present usage must be demonstrated to be by the villagers as a body, as distinct from all and sundry.

***343**

The words "sports and pastimes" (see the definitions in the *New Oxford Dictionary of English* (1998)), rather than some more general phrase such as "recreationial activities" or, as in the Inclosure Act 1845, "exercise and recreation," were used by Parliament following the Royal Commission's recommended, wording for the purpose of the registration of a town or village green. The activities that can qualify as "unlawful sports and pastimes" are the same in relation to the statutory class c as in relation to the Commission's class b, because class c refers to " *such* sports and pastimes" The authorities relating to claims to customary rights to "lawful sports and pastimes" are of relevance also to claims under class c. The difference between classes b and c in the statutory definition relates to the period of time during which the inhabitants have to show that they have indulged in the sports and pastimes on the particular piece of land in question. The combination of games and other activities was present in the Commission's glossary definition and indicates that the fact that sport was engaged in by villagers was perceived to be an essential feature of a village green. The statutory class c has greater clarity than the Commission's class c since that referred to "used by the inhabitants for all or any such purposes," whereas the statutory definition requires the inhabitants to have indulged in "such sports *and* pastimes," not either of them in the alternative. As a matter of statutory interpretation, the literal meaning of an enactment is to be preferred wherever possible. The words "sports and pastimes" in classes b and c are to be contrasted with the words "exercise or recreation" in class a. They have distinct and different meanings. The statutory definition similarly requires evidence of indulging in "sports *and* pastimes," i.e. sports as well as other pastimes. To say that evidence as to indulging in pastimes other than sports is sufficient is effectively to substitute the word "or" for the word "and" in the definition: see *Reg. v. Oakes [1959] 2 Q.B. 350* . In the present case there is no absurdity resulting from the strict interpretation of the word "and" in the definition; it follows that there is no reason to depart from the requirement that, under class b or class c, it is necessary to show evidence of sports as well as merely pastimes. Parliament used "or" in class a in the phrase "exercise or recreation." If it had intended that classes b and c should have related to "sports *or* pastimes," as opposed to "sports *and* pastimes," it would have said so.

Sports, including team games such as cricket and football, played by villagers on a regular basis over a long period of time would be a form of usage of the land that would be readily observable by the owner of the land, or likely to be reported to him, and thus, if not opposed, capable of founding a claim to a right in the villagers. Such a use could be enjoyed along with other uses (including pastimes) indulged in by local inhabitants, but it is a combination of sports and pastimes that has to be proved in order to satisfy the statutory definition in class c.

Alternatively, if "sports and pastimes" should be interpreted disjunctively, then proof of either "sports" or "pastimes" still has to show the existence of a sufficiently strong communal element to justify an inference of a right enjoyed by inhabitants of a locality, albeit, having regard to the dictionary definition of "pastime," informal recreational activities can fall within the meaning of that word. The earlier authorities ***344** illustrate the communal nature of the principal activity or activities relied on in proof of the custom. The approach adopted in decisions of the Commons Commissioners supports the point that more is required than informal recreation by individuals or very small groups. It is the nature of the "sports" and the "pastimes" together, and the character of their exercise by inhabitants as a body, that are the material factors. Quantum of usage cannot convert a pastime into a sport if the activity does not come within the ordinary meaning of that word. The oral evidence as summarised in the inspector's report justified his conclusion that the recreational activities were of an informal nature. The reference to ball games did not indicate otherwise. [Reference was made to *Getting Greens Registered* (1995), Appendix 2.]

The words "as of right" were included in class c in preference to those suggested in the Royal Commission: "without protest or permission from the owner of the fee simple." The words "as of right" have been used at common law in relation to claims to customary rights, and, in legislating for the registration of village greens, where the elements in class b and class c were the same except for the period of time over which usage had to be proved, it can properly be inferred that Parliament was applying the same test in relation to the proof of a claim to a village green under class c (20 years) as applied under class b (by custom). The words have long been used to differentiate between a claim to a legal right and a right already established in law. It is the

incipient nature of a claim to a new right that necessitates proof, by those asserting the right, that what has been done over the relevant period of time is not explicable on the facts by reasons other than the right asserted.

Further, the user for a 20-year period within class c must be no less "habitual" than in the case of a custom: see *Hammerton v. Honey, 24 W.R. 603* . The fact that an activity has been indulged in occasionally does not mean that it has been indulged in frequently. There is uncertainty both as to the time at and the part of the glebe (which does cover four hectares) on which each activity took place. The fragmentary nature of the evidence distinguishes it from that contemplated by Sir George Jessel M.R. that is, usage habitually by inhabitants as a body.

In examining a "claim of right," all the circumstances in the case have to be taken into account, particularly to see whether there is any "leave or licence:" see *Goodman v. Mayor of Saltash (1882) 7 App.Cas. 633* , 639. The elements to be substantiated in support of an assertion that usage has been of right have been expressed in different languages at different periods of time: see *Mills v. Colchester Corporation, L.R. 2 C.P. 476* , 486 and *Montgomerie & Co. Ltd. v. Wallace-James [1904] A.C. 73* , 76, 85, 90. In accordance with the approach in the latter case, the inspector was correct to consider (i) the history of the glebe (ownership by the Church, and the role of the rector), (ii) the nature of the glebe (physically and by reference to the recreational activities taking place); and (iii) the "surroundings of the spot in dispute" (the public footpath, from which the straying took place). "As of right" has been interpreted more strictly in the decided cases than just "as if they had a right."

As to tolerance and the belief of persons asserting the existence of a right on the basis of long user, see *Alfred F. Beckett Ltd. v. Lyons [1967] Ch. 449* , which demonstrates that, where on the facts in relation to a claim *on behalf of inhabitants* the court finds that the explanation of the usage lies in tolerance, then it is correct to conclude that a claim as of right has not been proved. The inspector was correct in concluding that the rector and the second respondent had tolerated the use, bearing in mind that he also properly took into account that the use was the consequence of wanderings from the footpath, which in practice would not be capable of being monitored or controlled. A paternalistic rector caring for his parishioners would have permitted children from the school to play on the glebe, and it would have been bizarre for him to have turned off any adults whom he saw picking blackberries or throwing a ball to a child or grandchild. Similarly, a churchwarden tenant of the glebe would have been most unlikely to seek to restrain informal recreation, provided it did not interfere with the grazing of his animals. A proper inference by implication is that the rector permitted use of the glebe whilst it was his property and that, when the inspector referred to tolerance, he had that in mind. As to the possibility of landowners erecting notices, see section 31 of the Highways Act 1980.

The belief approach adopted in *Alfred F. Beckett Ltd. v. Lyons* is correct, because it enables the tribunal to make an assessment as to whether it is possible in a particular case to substantiate a claim "as of right" on behalf of the inhabitants of a locality as a body. The traditional elements of "openly and peacefully and without seeking permission," still need to be considered. No tribunal could reasonably conclude that a claimant has an "honest belief in a legal right to use" land (*Reg. v. Suffolk County Council, Ex parte Steed, 75 P. & C.R. 102* , 112) if the use is secret, by force or by permission. But, having concluded that the use has been open, peaceful and without first obtaining permission, the tribunal also has to make an overall assessment of all the facts of the case, including alternative explanations for the usage: see, for comparison, *Attorney- General v. Dyer [1947] Ch. 67* , 85 and *Jones v. Bates [1938] 2 All E.R. 237* , 248, 252. The claim in this case is on behalf of a body of inhabitants. It is for that reason that the evidence of a belief that the usage was as a villager of Sunningwell is relevant: see *Reg. v. Suffolk County Council, Ex parte Steed , 75 P. & C.R. 102* , 112. The Court of Appeal was right in *Steed* , and the inspector's conclusion was therefore correct on the evidence. The oral evidence given at the inquiry did not reveal any belief in usage as a villager. In relation to the credibility of the claim by the villagers, the inspector was also correct to note that there was no assertion of any claim, either existing or potential, to the land having been a town or village green either when parts of the glebe had been enclosed and sold in 1982 and 1984, or at the two planning inquiries relating to it in 1991 and 1994.

The inspector was correct in regarding the public footpath across the glebe as a critical factor both as a matter of fact and as a matter of law. The evidence before him was that considerable use was made of it. It was used by all sorts of people who were not villagers. It could be inferred that people from neighbouring villages gained access to the glebe by way of it, as did the villagers. Whilst the registration of a footpath on the definitive map is conclusive evidence that there is a highway over which the public have a right of way on foot, the right is one of passage only along the ***346** length of the footpath. There is no right to wander at large, no jus spatiandi (a possible subject matter of a grant or prescription). Exceptional rights to promenade in a particular place do not detract from this general principle. *Abercromby v. Town Commissioners of Fermoy [1900] 1 I.R. 302* related to land designed, constructed, and laid out solely for the purpose of walking and promenading and subsequently used at all times for that purpose. That is altogether different from an ordinary field used occasionally by private individuals.

The balance between protecting the interests of owners of land and recognising valid rights vested in the public or a section of the public has to be carefully maintained. If "wanderings and strollings" from a public footpath can now be relied on to substantiate a claim to a village green capable of registration, consideration would have to be given to fencing alongside all such footpaths. That would not only impose a considerable burden on the Church and other landowners but would also mean that informal access to fields in the countryside might well be substantially restricted in the future. Evidence of straying from a public footpath, as in the present case, cannot properly be relied on in substantiation of a claim by the inhabitants of a locality to register a village green under class c. The owner of land cannot be expected to monitor every person straying off the footpath to ensure that a claim is not subsequently made, differentiating inhabitants of the locality from other members of the public who have acted in the same way. Action of that kind would be repressive as well as unduly burdensome for the landowner, and would be contrary to the established principles of English law, namely, that landowners should not be forced to be "churlish" lest their good nature be misconstrued and used against them to create burdens on their proprietary rights: see *Blount v. Layard [1891] 2 Ch. 681n* . and *Ministry of Defence v. Wiltshire County Council [1995] 4 All E.R. 931* , 936b.

The county council were not represented.

Laurence Q.C. in reply. Tolerance should be equated with acquiescence, not permission. It could not be equated to permission here. [Reference was made to *Alfred F. Beckett Ltd. v. Lyons [1967] Ch. 449* and *Halsbury's Laws of England* , 4th ed reissue, vol. 12(1) p.198: para. 646.]

Their Lordships took time for consideration. 24 June. 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 to form part of the endowment of the rectory. The rector let it for grazing ***347** 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 to the south and is crossed by a largely unfenced public footpath running south from the village towards Abingdon. Local people use the glebe for such outdoor pursuits as walking their dogs, playing family and children's games, flying kites, picking blackberries, fishing in the stream and tobogganing down the slope when snow falls.

In 1994 the board obtained planning permission to build two houses on the northern boundary of the glebe. The villagers were very much opposed. They wanted it preserved as an open space. The parish council applied to the county council to register the glebe as a town or village green under the Commons Registration Act 1965 . It is unclear what rights, if any, registration would confer upon the villagers. The Act is silent on the point. But registration would prevent the proposed development because by section 29 of the Commons Act 1876 (39 & 40 Vict. c. 56) 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 (8 & 9 Vict. c.118). 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 ***348** 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 to 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, the Commons Registration (New Land) Regulations 1969 (S.I. 1969 No. 1843), 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 ***349** 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.JJ.). 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) of the Act of 1965. 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 by reference to the accession of Henry I (1100). The Statute of Merton 1235 (20 Hen. 3, c. 4) brought this date up to the accession of Henry II (1154) and the Statute of Westminster *I 1275 (3 Edw. 1* , c. 39) extended it to the accession of Richard I in 1189.
***350**

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 (21 Jac. 1, c. 16)* , which fixed a 20-year period of limitation for the possessory actions such as ejectment, the judges treated 20 years' enjoyment as by analogy giving rise to the presumption of enjoyment since 1189. But these presumptions arising from enjoyment for the period of living memory or for 20 years, though strong, were not conclusive. They could be rebutted by evidence that the right could not have existed in 1189; for example, because it was appurtenant to a building which had 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 (a) it was possible to show that 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 ***351** 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 & Co* . (1881) 6App.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 (2 & 3 Will 4, c. 71), of which the short title was "An Act for shortening the Time of Prescription in certain cases." Section 2 (as amended by the Statute Law Revision (No. 2) Act 1888 (51 & 52 Vict. c. 57), section 1, Schedule and the Statute Law Revision Act 1890 (53 & 54 Vict. c. 33), section 1, Schedule 1) 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 (as amended by the Act of 1888), which dealt with the forms of pleadings, "as of right." In *Bright v. Walker (1834) 1 C.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 ***352** dedication to public use. As in the case of private rights, such dedication would be presumed from user since time immemorial, that is, from 1189. But the common law did not supplement this rule by fictitious grants or user which the jury were instructed to presume. In *Mann v. Brodie (1885) 10 App.Cas. 378* , 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 40 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 ***353*** 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, 1 C.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 & Co. 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 Act of 1832. Introducing the Bill into the House of Lords (H.L. Debates), 7 June 1932, col. 637, Lord Buckmaster said that the purpose was to assimilate the law on public rights of way to that of private rights of way. 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, L.R. 2 Q.B. 161* , a claim to a custom by which the rector of a parish was entitled to charge 13s. for performing a marriage service, although proved to have been in existence since 1808, was rejected on the ground that having regard to inflation it could not possibly have existed in the reign of Richard I. It seems to me clear that class c in the definition of a village green must have been based upon the earlier Acts and intended to exclude this kind of defence. The only ***354*** 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 *Reg. v. Suffolk County Council, Ex parte Steed , 75 P. & C.R. 102* , 111-112 Pill L.J. also said 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 Act of 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, 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 ***355*** 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 then 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.JJ. 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, 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* summarises the holding on this point in entirely orthodox terms:

"(i) 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 *Reg. v. Suffolk County Council, Ex parte Steed, 75 P. & C.R. 102* , 112 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* , 52. On the basis of passages from *Jones v. Bates* he had there expressed the view that "as of right" meant user "which was not only nec vi, nec clam, nec precario but was in the honest belief in a legal right to use." 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 ***356** 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 Parke B. would have been startled by the proposition that a plaintiff asserting a private right of way on the basis of his user had to prove his subjective state of mind. In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be ignored. Still less can it be ignored in a case like *Reg. v. Suffolk County Council, Ex parte Steed* when the users believe in the existence of a right but do not know its precise metes and bounds. In coming to this conclusion, I have been greatly assisted by Mr. J. G. Riddall's article "A False Trail" [1997] Conv. 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, who appeared for the board, submitted that it should have been rejected for other reasons as well. Although these grounds did not form the basis of any cross-appeal, your Lordships considered that rather than put the parties to the expense of further consideration by the county council followed by further appeals, it would be convenient to consider their merits now.

The first point concerned the nature of the activities on the glebe. They showed that it had been used for solitary or family pastimes (walking, tobogganning, family games) but not for anything which could properly be called a sport. Miss Cameron said that this was insufficient for two reasons. First, because the definition spoke of "sports and pastimes" and therefore, as a matter of language, pastimes were not enough. There had to be at least one sport. Secondly, because the "sports and pastimes" in class c had to be the same sports and pastimes as those in respect of which there could have been customary rights under class b and this meant that there had to be some communal element about them, such as playing cricket, shooting at butts or dancing round the maypole. I do not accept either of these arguments. As a matter of language, I think that "sports and pastimes" is not two classes of activities but a single composite class which uses two words in order to avoid arguments over whether an ***357** 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.B1. 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. 534* , 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: ***358**

> "The evidence of the [parish council'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 [board] 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] 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 ***359** 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.
***360**

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.

Representation

Solicitors: Pryce & Co., Abingdon ; Winckworth Sherwood, Oxford .

(M.G.)

Footnotes

1 Commons Registration Act 1965, s. 13(b): see post, p. 348D. S. 22(1): see post, p. 347D.