§ Law in Context

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Property Law

Commentary and Materials

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Acquiring interests by other methods

13.1. Introduction

There are a number of ways in which titles to, and interests in, things can be acquired and lost, apart from by express grant or transfer. Titles and interests can arise by implication of law, for example by estoppel or via a resulting or constructive trust or through the presumed intentions of the parties, as briefly noted in Chapter 8. Also, titles and interests can automatically pass from one person to another by operation of law, for example on death or bankruptcy, again as we saw in Chapter 8. In this chapter, we concentrate on another way in which interests can arise without an express grant, namely, by long user.

An interest in someone else's property can be acquired by prescription, a process which involves using someone else's property in a particular way for a sufficiently long period. The process applies not just to private property rights (notably easements and profits) but also to communal property rights, and public rights such as (but not confined to) public rights of way.

The process of acquiring a right like this by long use has obvious similarities with the process of eliminating a rival title by adverse possession but, as we see below, there are important differences between the two.

13.2. The difference between adverse possession and prescription

Unlike Roman-law-based systems, English law has never treated long enjoyment as a means of acquiring title. As we saw in Chapter 11, in English law non-owners instantly acquire titles to land and other tangibles by the mere act of taking factual possession, and the only function of lapse of time is to bar the true owner from his right to object and extinguish his better rival title. The adverse possessor's title is choate and complete from the outset: it is not acquired by long user. However, while ownership cannot be acquired by long user, particular use rights can. If a particular use is made of someone else's land for a sufficiently long time, and the use is of a type, falling short of possession or occupation, that could have constituted a property right if expressly granted, then the use will ultimately become legitimised. So, while in adverse possession law long use merely operates

to eliminate rival titles, prescription is a means by which proprietary rights are acquired over a period of time, the right in question remaining inchoate until the appropriate time has elapsed.

However, these significant analytical differences between the two doctrines should not blind us to their essential similarities: they are both processes by which a property right is acquired by one person at the expense of another, and without payment, and in both cases the effect of the process is to legitimise long user.

13.3. Why long use should give rise to entitlement

Having said that, English law displays an unfortunate ambivalence towards the rationale for prescription. In *R.* v. *Oxfordshire County Council, ex parte Sunningwell Parish Council* [1999] 3 WLR 160, HL (extracted at www.cambridge.org/propertylaw/), Lord Hoffmann treats it as axiomatic that '[a]ny legal system must have rules of prescription which prevent the disturbance of long-established *de facto* enjoyment'. However, as we see from the extract below, this is not a view that is universally held. In 1966, the Law Reform Committee published a report on *The Acquisition of Easements and Profits by Prescription* (Law Reform Committee, Fourteenth Report, Cmnd 3100), concluding by a majority that it ought to be abolished, at least as far as easements were concerned. As far as the majority was concerned, '[t]here is no reason why a person who wishes to acquire an easement over someone else's land should not adopt the straightforward course of asking for it'.

Nevertheless, there are economic arguments for legitimising long-term particular use, but they are perhaps not quite as straightforward as those justifying the extinguishment of title by adverse possession. The law of adverse possession requires an owner who has made no use of his resource for twelve years to give up ownership altogether, leaving unchallengeable ownership with the person who arguably values it more, and to that extent increasing total utility. Over a period of years ownership is (in effect although not in law) transferred from one person to another. The establishment of particular use rights by long usage, however, does not involve a shift in ownership from the owner but a dilution or qualification of it. This will almost invariably involve a consequent diminution in value of the owner's interest, whoever holds it. The question of whether there will nevertheless be an overall increase in total utility will therefore depend on whether this diminution in value is compensated by the value acquired by the particular use holder. Legitimising the recreational use made by people in a particular locality of a site with development potential may, for example, diminish the value of the site to the owner by more than the value of the right to the right holders. However, this is not necessarily so. The user may have managed to capture for himself an economic benefit from a resource controlled by someone else, without reducing the economic value of the resource to the resource holder, or by reducing it by less

than the value of the benefit acquired by the user (thus increasing total utility). The fact that the owner has failed to object over a long period may perhaps be a good indication that this is what has happened. The likelihood that this is the explanation for the owner's inaction is increased by the imposition of a requirement (absent in adverse possession law) that the owner should genuinely have acquiesced in the user (embodied in the rule, considered below, that the user must have been as of right). And the strict regulation of the type of, and circumstances in which, particular use rights that can have proprietary status – as we saw in Chapter 9, only a very narrow range of interests qualifies, and they must be appurtenant to land which is positively benefited, or if in gross and/or enjoyed by a fluctuating class, the benefit extracted from the land must be rigidly specified – also serves to restrict the ways in which, and the extent to which, an enforced dilution of ownership can occur. This might also explain and justify the rule that profits in gross can rarely arise by prescription.

However, even if the acquisition of rights by prescription is efficient, it does not necessarily follow that the user should acquire the rights without payment. A system whereby long use entitles the user to buy the right is feasible, in theory at least. Under such a system, the effect of long user would be to entitle the user to require the servient owner to *sell* the right to him at a price fixed by law. In other words, the servient owner's right to restrain the prescriber's use by an action in nuisance or trespass would be converted from an entitlement protected by a property rule to an entitlement protected by a liability rule, to adopt the analysis discussed in Chapter 6 (Calabresi and Melamed, 'Property Rules, Liability Rules and Inalienability').

Such a scheme was actually brought into operation by the Vehicular Access Across Common and Other Land (England) Regulations 2002 (SI 2002 No. 1711, made under section 68 of the Countryside and Rights of Way Act 2000) allowing those who had long used vehicular access ways over common land to buy the right to do so from the owner of the common land. However, the scheme was brought in after a series of Court of Appeal decisions made it impossible to acquire such a right by prescription, and it became redundant when those decisions were reversed by the House of Lords in *Bakewell Management Ltd* v. *Brandwood* [2004] UKHL 14 (see Clarke, 'Use, Time and Entitlement').

Despite the superficial attractions, there are difficulties with such a scheme. First, in the case of those uses which did have a lawful origin, the user will already have 'paid' for the right: why should she have to pay again? The leading case of *Tehidy Minerals* v. *Norman* [1971] 2 QB 528, CA, for example, concerned land that clearly was ancient grazing land, on which the predecessors of the current grazers had grazed animals as of right back to a date at which our legal system provided no system of formal grant. It is difficult to see why they should now have to buy that right. Also, as a practical matter, in many cases the servient owner will have bought the land with knowledge of the user, and at an appropriately discounted price (this was certainly true in *Tehidy Minerals* v. *Norman*, where

the mining company bought the land from the lord of the manor expressly subject to the grazing rights). Any payment to him will therefore be a windfall, and not easy to justify. It is true that there is a danger of circularity in the argument here: if we changed the law so that long use gave rise to a right to buy the right, arguably the market value of land would not be affected by the existence of inchoate adverse rights. However, this presupposes a perfect market, and the reality might be more complex.

Finally, the basis on which the price would be fixed is not clear. Should it be based on increase in value to the dominant land, or decrease in value to the servient land? In the Vehicular Access Across Common and Other Land (England) Regulations 2002, the price is based on the value of the dominant land and the longevity of the *premises* (i.e. the buildings) benefited by the right of way. If the buildings were in existence on 31 December 1905 the price is 0.25 per cent of the open market value of the dominant land (valued with the benefit of the easement), rising to 0.5 per cent for buildings in existence on 30 November 1930 and 2 per cent in all other cases (regulation 11(1), (2) and (4) of the Regulations). Residential premises replacing other premises on the same site which were also in residential use are treated as in existence on the date when the former premises were in existence (regulation 11(3)). The rationale for this is not obvious: why should the price be cheaper the longer the use has lasted? And why should the diminution in value of the servient land not be a factor?

13.4. Rationale

Even among those who do agree with Lord Hoffmann that long use should indeed give rise to entitlement, there is an unfortunate ambivalence over the rationale for the rule. Do we allow property rights to be acquired by prescription because we consider that it is socially and economically desirable that long-established use of resources should be legitimised, whatever its origin, or because we take long-established use as evidence of original legitimacy? This question has divided judges and commentators for centuries. Since the end of the nineteenth century the courts have insisted that the latter is the fundamental principle on which prescription is based in this jurisdiction, and while there is a high level of artificiality about this, nevertheless it has had a profound effect on the development of the law.

13.4.1. Ascendancy of the presumed grant rationale

The *locus classicus* for the debate about the rationale of prescription is the House of Lords decision in *Dalton* v. *Angus* (1881) LR 6 App Cas 740. The question at issue was the nature of the acknowledged right of a landowner to have the buildings on her land supported by adjoining land. It was common ground that such a right could arise in certain circumstances. The issue was what those circumstances were, and this in turn depended on the nature of the right itself. The facts were that the

claimant bought one of two adjoining houses and converted it into a coach factory, which involved increasing the weight thrown onto a stack of brickwork within the building. Twenty-seven years later, the stack collapsed, bringing the whole factory down with it, when the adjoining owner demolished his house and excavated the land under it to a depth of several feet. The claimant was held entitled to damages from the adjoining owner and his contractor. By the time the case reached the House of Lords it was common ground that ownership of land automatically carries with it a 'natural' right for the land itself (as opposed to any buildings on it) to be supported by adjoining land, so that any action on adjoining land that causes *the land* to collapse will be wrongful. The rationale for this rule is reasonably clear: the physical stuff of land is interdependent, each piece of soil dependent for support on all adjoining pieces of soil. However (and again this was common ground), there is a further rule that a landowner has a similar right of support for 'ancient' buildings on the land (for these purposes, buildings more than twenty years old). In other words, it was accepted that any action on adjoining land that causes the collapse of an 'ancient' building is similarly wrongful. What was at issue was the rationale for this second rule. Three possible analyses were canvassed by the twelve judges who heard the appeal (five members of the House of Lords, and seven additional judges whose opinions they sought). The first was that this right of support for buildings which have been there for more than twenty years is a 'natural' right, just like the natural right of support for the soil and similarly automatically accruing, except that the accrual does not take place until the building has been there for twenty years. The second possible analysis was that this right of support for buildings was an easement acquired by prescription, and that this happened *automatically* by virtue of the twenty-year *de facto* enjoyment of support, regardless of the intentions of the neighbouring owner providing the support. The third analysis – ultimately preferred by the majority of the House of Lords judges – was that it was indeed an easement arising by prescription, but that this *and all other prescriptive rights* were founded on presumed grant by the neighbouring owner whose land provided the support.

The acceptance by the House of Lords of this third analysis thus firmly bases prescription on the 'revolting fiction' of a presumed but now lost grant (the epithet was conferred by Lush J at first instance). There is little doubt that in the case itself it was indeed a fiction – there was no evidence to suggest that the claimants had sought any promises from the defendant when it carried out the works twenty-seven years earlier, and none of the judges expressed the slightest interest in finding out what had actually occurred at that time.

13.4.2. Effect of the 'revolting fiction'

The danger of basing a rule on a fiction is the temptation to treat it as grounded in fact. In particular, there is a strong temptation for the courts to find that no right has been acquired in a particular case because the circumstances are such that no such right could conceivably have been expressly granted. Also, there is a danger

that the fiction will cloud the issue of what is to be done about prescriptive rights in a registration system. If we think that there are policy reasons for allowing long use to become legitimised, there is no reason why prescription should not operate in a registered land system (as indeed it does in some states of Australia, despite the indefeasibility principle underpinning Torrens registration). If, however, prescription is essentially just a rule of evidence, in the sense that long user merely provides evidence from which one may or must infer an initial grant, it is redundant in a registration system where the only admissible evidence of a grant is an entry on the register.

13.5. When long use gives rise to a prescriptive right

If I habitually park my car in your yard I will ultimately acquire a proprietary right to do so, provided that certain conditions are satisfied. The first and obvious point to make is that prescription does not enlarge the category of particular use rights which have proprietary status. It can only legitimise my use of your land if the *right* to make that use of your land could have existed as a proprietary right if you had expressly granted it to me. Aside from this, the acquisition of rights by prescription is governed by an unjustifiably elaborate body of rules, founded in artificiality and never successfully rationalised – an example of common law development of rules by accretion at its very worst.

At present, rights can be acquired by prescription through a variety of common law and statutory routes. These routes developed cumulatively over a period of centuries, each new route providing an alternative to, rather than a replacement of, its precursor, as Lord Hoffmann explains in *Sunningwell*, where he gives a detailed account of the routes currently extant. As he demonstrates, for present purposes the most important point is that, in very broad terms, it is still possible to acquire a private right (i.e. an easement or profit) or a customary right (now governed by the Commons Registration Act 1965) or a public right of way by use for more than twenty years *as of right*.

At the heart of each of these routes is the fiction already noted, that long use is attributable to a lawful origin. The basis of the fiction is the superficially rational inference that, if a pattern of behaviour has persisted over a sufficiently long period (a stranger uses someone else's land as if entitled to do so, and the landowner acquiesces in the use), it must be because the use was authorised in the first place. However, in at least two respects, this is highly artificial.

13.5.1. The problem of negative uses

First, the inference of prior, positive authorisation may be appropriate in the case of what are called 'positive' particular use rights, but it is entirely inappropriate in the case of 'negative' ones. A positive particular use right is one that allows me to do something on your land which would otherwise be actionable by you as a trespass or a nuisance. A right of way over your land or a right to pick the apples

from your tree are good examples. The very first time I cross your land or take your apple I commit a trespass unless you authorise me to do so. If I have done so uninterruptedly for twenty years, it is reasonable to draw the inference that you authorised me to do it at the outset: it seems a more likely explanation than that you, having had the legal right to object for more than twenty years, have nevertheless chosen not to exercise it. In other words, prescription in the case of positive particular use rights has many similarities with the elimination of titles by limitation: in both cases, the defendant's right has been infringed for a long period and the defendant has chosen not to vindicate his rights: in the case of acquisition of titles by long user we say that the consequence of failing to complain about breach of your rights is that you lose them, whereas in the case of prescription we say that, if you fail to complain about infringement of your rights for a sufficiently long period we will infer from that that you authorised the infringement in the first place.

In the case of a negative particular use right, however, the position is quite different. A negative particular use right is one that allows me to prevent you from interfering with natural or man-made forces that would otherwise reach my land. These forces might include light and air, flowing water, the physical support provided by your land for whatever is on my land, and terrestrial television signals. There are two important points about these negative rights. First, in the absence of an easement, I do not have a *right* to receive these forces, but only a *liberty* to make use of them. Secondly, when I exercise my liberty to enjoy these forces, I do not infringe any *right* of yours. As long as your land is in a physical state that does not, as a matter of fact, cause any interruption to these forces, I will receive all these forces as a matter of course and you will have no cause of action. If you do not want me to receive any of these forces, it is always open to you to physically interrupt, obstruct or divert them from me (and we know from *Bradford Corp.* v. *Pickles* (discussed in Notes and Questions 6.8 above) that I cannot complain even if you do so with the sole purpose of injuring or annoying me). In other words, from the outset I had a liberty to receive the forces and you had a liberty to obstruct them. So, from the outset I had no need of your authorisation to 'use' the light, or air, or support etc. for twenty years: I would automatically receive them unless and until you exercised your liberty to interrupt them. It is of course possible that at some point I might decide that the receipt of these forces is so important to me that I want to convert my liberty to receive them over your land into a right – in other words I might want to buy from you a *promise* not to interrupt these forces. This can be done in English law: it would amount to a restrictive covenant entered into by you, restricting the user of your land so as not to interfere with a particular enjoyment of my land (consider how this could have been done in the case of *Bradford* v. *Pickles*). However, it would be odd to infer from the fact that I have enjoyed uninterrupted receipt of these forces for twenty years that you positively *promised* not to interrupt them: this is a promise I had no need for, and you had no reason to give. A much more likely explanation is that you did nothing because you

had no selfish reason to develop your land in a way that would interrupt my receipt of these forces, and no desire to do so for the sole purpose of injuring or annoying me. This point was made forcefully by the judges in the minority in *Dalton* v. *Angus* (1880–1) LR 6 App Cas 740, who argued that a right to support for buildings from neighbouring land automatically accrued after twenty years' use as a matter of law, not as a matter of inference of prior grant. Nevertheless, the majority disagreed and reaffirmed the basic principle that a right to support for buildings is not an inherent right, and as such it can originate only in express grant or prescription, which in itself can only arise out of a presumed prior grant.

13.5.2. Rights that can be granted but not acquired by prescription

Secondly, there are some particular use rights – and again these are on the whole negative particular use rights rather than positive ones – that can arise by express agreement but cannot be acquired by prescription. If all that prescription does is to provide a rule of evidence that long use is proof of an original grant, this is rather odd. If a particular type of property right can arise out of an express agreement between the parties, what logical reason is there for saying that we cannot presume the existence of such an express agreement from the fact that it has been long enjoyed? The answer lies in expediency rather than logic, and again it reveals the artificiality of the implied grant principle. Rights that cannot be acquired by prescription include some, but not all, negative particular use rights. Negative particular use rights that *can* be acquired by prescription include a right of support for buildings on my land from your land (as we know from *Dalton* v. *Angus*), and rights to the passage of light and air through specific windows and defined channels. Negative rights that *cannot* be acquired by prescription include a right of prospect (i.e. a right not to have my view over your land spoilt or interrupted by anything done on your land), a right to receive light or air over your land other than through defined windows or defined channels, and (as we know from *Hunter* v. *Canary Wharf*) a right to receive television or radio signals over your land. All of these rights can, however, be expressly conferred on me, as a landowner, in the same way as any other negative particular use right can be conferred on me, i.e. by the indirect means of your entering into a restrictive covenant with me promising that nothing will be done on your land to interrupt my receipt of these forces. Why will the law of prescription not operate to presume from the fact that I have long enjoyed such a view, or such light and air, that, at some time in the past, you covenanted not to interrupt them, when it will presume such a covenant in the case of long enjoyment of uninterrupted light and air through windows and defined channels, or a right of support for specific buildings? Lord Blackburn in *Dalton* v. *Angus* gives compelling reasons why, as a matter of policy, such rights should not arise by long enjoyment, but no reasons at all as to why it is justifiable, as a matter of evidence, to infer a prior valid authorisation from long user in the one case but not in the other. In distinguishing between a right to light through a specific window and a right to a view, he said:

> [In *Aldred's Case* 9 Co Rep 57b, Lord Coke remarked that damages could be recovered for obstructing an ancient window because] '[I]t may be that, before time of memory, the owner of the said piece of land has granted to the owner of the said house to have the said windows without any stopping of them, and so the prescription may have a lawful beginning; and Wray CJ then said that, for stopping as well of the wholesome air as of light, an action lies, and damages shall be recovered for them, for both are necessary ... But he said that, for prospect, which is a matter only of delight and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect, *unde dicitur, laudaturque domus longos quae prospicit agros*. But the law does not give an action for such things of delight.'
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> ... The distinction between a right to light and a right of prospect, on the ground that one is matter of necessity and the other of delight, is to my mind more quaint than satisfactory. A much better reason is given by Lord Hardwicke in *Attorney-General* v. *Doughty* 2 Ves Sen 453, where he observes that if that was the case there could be no great towns. I think this decision, that a right of prospect is not acquired by prescription, shows that, while on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burthen upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right of prospect, which would impose a burthen on a very large and indefinite area, should not be allowed to be created, except by actual agreement. And this seems to me the real ground on which *Webb* v. *Bird* 10 CB (NS) 268, 13 CB (NS) 841 [no right to the passage of air to a windmill could be acquired by prescription] and *Chasemore* v. *Richards* 7 HLC 349 [no right to percolating water] are to be supported. The rights there claimed were analogous to prospect in this, that they were vague and undefined, and very extensive. Whether that is or is not the reason for the distinction, the law has always ... been that there is a distinction; that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement.

13.6. User as of right and the problem of acquiescence

As Lord Hoffmann points out in *R.* v. *Oxfordshire County Council, ex parte Sunningwell Parish Council*, as a consequence of the fiction that long use is attributable to lawful origin, it is necessary to prove that the user was 'as of right', and this in turn involves a requirement that the servient owner has acquiesced in the use. This is inherently unsatisfactory. There is no necessary connection between a failure to object and an acknowledgment that, having granted the right in the first place, one is not entitled to object. Also, there are considerable difficulties in establishing what amounts to acquiescence for these purposes, as demonstrated in *R. (Beresford)* v. *Sunderland City Council* [2003] UKHL 60 (extracted at www.cambridge.org/propertylaw/), where the House of Lords reached a radically different conclusion from that reached by the Court of Appeal and the judge at first instance. Permission and acquiescence can sometimes

look very similar, as can restraint and acquiescence: when does neighbourly tolerance (raising no objection when your neighbour parks in your yard) merge into acquiescence?

13.7. The future of prescription

The Law Commission is currently undertaking another review of the law of prescription, but it is difficult to see how any significant progress can be made without jettisoning the presumed grant fiction. It is causing particular difficulties at the moment in the case of negative easements, where it is tending to disguise the fundamental underlying problem that some 'negative' rights presently categorised as easements ought perhaps to be recategorised as 'natural rights' automatically appurtenant to land unless expressly bargained away. The problem is particularly acute in relation to rights of support and drainage rights, where often neither dominant nor servient owner is aware that one is impinging on the other. In determining whether the impingement should be a matter of right, the length of time for which the state of affairs has continued appears of doubtful relevance.

The real question is whether the servient owner should be given the initial entitlement to be free from the burden (so that the dominant owner has to buy it off him) or whether the initial entitlement should go to the dominant owner, so that, for example, anyone who wanted to develop his land would have to 'buy' the right to interfere with support for and drainage from the land of his neighbours. Tang Hang Wu explains the problem:

> The objections in extending the natural right of support to lateral support of buildings are two-fold. First, it is said that such a right favours the first person who builds. Second, to grant a right of lateral support would deprive the owner of the adjoining land of the corresponding right to excavate and dig on his own land ...
>
> The criticism that the existence of an automatic right of lateral support of buildings favours the first to build has some force. Two English Law Commissions grappled with this problem. The earlier Law Reform Committee (14th report of the Law Reform Committee, Cmnd 3100, 1966) had proposed a system whereby a person who proposed to build would be able to acquire a right of support before he commenced building. First, the builder serves his neighbour with a notice of his intention to build. If his neighbour took no action, the builder acquires a right of support immediately. If the neighbour serves a counter notice, the matter would be referred to the Land Tribunal who would adjudicate over the case. The Land Tribunal could award either a right of support on payment of compensation or deny such a right as it thought fit. If the procedure was not invoked the builder acquires no right of support.
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> The Law Commission in considering this issue in 1971 took a different view (Law Commission Working Paper No. 36, *Appurtenant Rights*, 1971, pp. 30–1). Their reasoning was as follows:

> It is appreciated that the 'automatic right' [of lateral support] approach gives an advantage to the owner who builds first. Nevertheless, it seems preferable to put the burden of support on the second builder when he comes to excavate rather than to encourage disputes in anticipation of a situation which may never become an issue between the two owners. It must be remembered that this approach has operated for many years under the London Buildings Act. We are not aware of any hardship caused by its operations. Moreover, in modern conditions it is thought to be reasonable to regard building as a normal use of land which can be undertaken freely provided it conforms to planning control and does not infringe a neighbour's existing rights.

On balance, this author is of the view that the Law Commission's stand in 1971 is preferable. The Law Commission has correctly pointed out that, in light of modern planning and zoning requirements by the relevant authorities, a landowner should be free to utilise his land so long as it conforms to such control. Further, the earlier Law Reform Committee's suggestion is untenable. If adopted, it is foreseeable that a builder would be involved in a messy, protracted and expensive dispute even before he starts construction. This is clearly not desirable. There is also the very real practical problem on how a tribunal would award compensation for the right of lateral support. Is it to be premised on the estimated increase in the costs of a hypothetical construction of a building to the neighbour in future? Would inflation be one of the factors to be taken into account? The earlier proposal by the Law Reform Committee involves too much uncertainty and hence should be rejected. (Tang Hang Wu, 'The Right of Lateral Support of Buildings from the Adjoining Land')

Extract 13.1 ***R. v. Oxfordshire County Council, ex parte Sunningwell Parish Council*** **[2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385**

[The facts and the opening part of Lord Hoffmann's judgment were discussed in Notes and Questions 5.2 above. Briefly, the inhabitants of Sunningwell claimed that they had used the glebe land in Sunningwell for sports and pastimes as of right for not less than twenty years, and that, therefore, Oxfordshire County Council was obliged to register the glebe land as a village green under the Commons Registration Act 1965. As Lord Hoffmann explained, the principle issue was whether their user had been 'as of right'.]

LORD HOFFMANN: . . . 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 1965 Act. The language is plainly derived from judicial pronouncements and earlier legislation on the acquisition of rights by prescription. To put the words in their context, it is therefore necessary to say something about the historical background.

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.

[Lord Hoffmann explained that, in the case of squatters and finders, rightful owners would lose their right to get their property back if they failed to bring a court action within a specified period, which in medieval times was calculated by reference to various past events, most famously the accession of Richard I in 1189.]

The judges used this date by analogy to fix the period of prescription for [customary rights and other private and public rights such as rights of way]. 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 . . . the judges treated 20 years' enjoyment as . . . 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 CJ said in the course of an acerbic account of the history of the English law of prescription in *Bryant* v. *Foot* (1867) LR 2 QB 161 at 181:

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

The result of these developments was that, leaving aside the cases in which it was possible to show that (a) the right could not have existed in 1189 and (b) the doctrine of lost modern grant could not be invoked, the period of 20 years' user was in practice sufficient to establish a prescriptive or customary right. It was not an answer simply to rely upon the improbability of immemorial user or lost modern grant. As Cockburn CJ observed, the jury were instructed that, if there was no evidence absolutely inconsistent with there having been immemorial user or a lost modern grant, they not merely could but should find the prescriptive right established. The emphasis was therefore shifted from the brute fact of the right or custom having existed in 1189 or there having been a lost grant (both of which were acknowledged to be fictions) to the quality of the 20-year user which would justify recognition of a prescriptive right ... 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 ... The unifying element in these three vitiating circumstances was that each constituted a reason why it would not have been reasonable to expect the owner to resist the exercise of the right – in the first case, because rights should not be acquired by the use of force, in the second, because the owner would not have known of the user and in the third, because he had consented to the user, but for a limited period. So in *Dalton* v. *Henry Angus & Co., Comrs of HM Works and Public Buildings* v. *Henry Angus & Co*. (1881) LR 6 App Cas 740 at 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 [which, in effect, provided an additional method of statutory prescription for easements, so that, in the cases where the Act applied, if the claimant could prove twenty years' uninterrupted use 'as of right', his claim could not be defeated by proof that the right could not have existed for time immemorial or that it could not be attributed to a lost modern grant].

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 'as of right', which was subsequently held] to have the same meaning as the older expression *nec vi nec clam nec precario* ...

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 ... 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 ... 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 twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way ...

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 [equivalent words in the Prescription Act 1832] ... Introducing the Bill into the House of Lords (HL Debates, 7 June 1932, col. 737), Lord Buckmaster said that the purpose was to assimilate the law on public rights of way to that of private rights of way (84 HL Debates (1931–2), col. 637). It therefore seems safe to assume that 'as of right' in the 1932 Act was intended to have the same meaning as [the equivalent words in the 1832 Act].

My Lords, this was the background to the definition of a 'town or village green' in section 22(1) of the 1965 Act. At that time, there had been no legislation for customary rights equivalent to the 1832 Act for easements or the 1932 Act for public rights of way. Proof of a custom to use a green for lawful sports and pastimes still required an inference of fact that such a custom had existed in 1189. Judges and juries were generous in making the required inference on the basis of evidence of long user. If there was upwards of 20 years' user, it would be presumed in the absence of evidence to show that it commenced after 1189. But the claim could still be defeated by showing that the custom could not have existed in 1189. Thus in *Bryant* v. *Foot* (1867) LR 2 QB 161 a claim to a custom by which the rector of a parish was entitled to charge 13s for performing a marriage service, although proved to have been in existence since 1808, was rejected on the ground that, having regard to inflation it could not possibly have existed in the reign of Richard I. It seems to me clear that class 'c' in the definition of a village green must have been based upon the earlier Acts and intended to exclude this kind of defence. The only difference was that it allowed for no rebuttal or exceptions. If the inhabitants of the locality had indulged in lawful sports and pastimes as of right for not less than 20 years, the land was a town or village green. But there is no reason to believe that 'as of right' was intended to mean anything different from what those words meant in the 1832 and 1932 Acts.

In *R.* v. *Suffolk County Council, ex parte Steed* (1996) 75 P&CR 102 at 111–12 Pill LJ also said that 'as of right' in the 1965 Act had the same meaning as in the 1932 Act. In

holding that it required 'an honest belief in a legal right to use . . . as an inhabitant . . . and not merely a member of the public' he followed *dicta* in three cases on the 1932 Act and its successor legislation, 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 1932 Act. The dispute was over the existence of a public footpath on Box Hill and the judge (at 444) found that for 60 years people had 'used the track to get to the highway and to the public bridle road as of right, on the footing that they were using a public way'. Counsel for the landowner, in reliance on *A-G* v. *Antrobus* [1905] 2 Ch 188 (which concerned the tracks around Stonehenge), argued that the user should be disregarded because people used the path merely for recreation in walking on Box Hill. The judge said (at 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* (1884–5) LR 10 App Cas 378 at 386, namely, that they must have used it in a way which would suggest to a reasonable landowner that they believed they were exercising a public right. To require an inquiry into the subjective state of mind of the users of the road would be contrary to the whole English theory of prescription, which, as I hope I have demonstrated, depends upon evidence of acquiescence by the landowner giving rise to an inference or presumption of a prior grant or dedication. For this purpose, the actual state of mind of the road user is plainly irrelevant.

Tomlin J's parenthesis was picked up by the Court of Appeal in *Jones* v. *Bates* [1938] 2 All ER 237. The defendant asserting a right of footpath adduced overwhelming evidence of user for many years, including evidence of the plaintiff landowner's predecessors in title that they had never stopped people from using the path because they thought it was a public right of way. The judge in the Hastings County Court nevertheless rejected this evidence as insufficient to satisfy section 1(1) of the 1932 Act. The Court of Appeal by a majority held that he must have misdirected himself on the law (there was no right of appeal on fact from a county court) and ordered a new trial. But the case contains some observations on the law, including a valuable exposition by Scott LJ of the background to the 1932 Act. The two majority judgments of Slesser and Scott LJJ 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 LJ (at 241), after citing Tomlin J's parenthesis, went on to say that 'as of right' in the 1932 Act had the meaning which Cotton LJ had given to those words in

the 1832 Act in *Earl De la Warr* v. *Miles* (1881) 17 ChD 535 at 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 LJ ([1938] 2 All ER 237 at 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 LJ was concerned that the county court judge had placed too high a burden upon the person asserting the public right. If he proved that the right had been used so as to demonstrate belief in the existence of a public right of way, that was enough. The headnote to *Jones* v. *Bates* summarises the holding on this point in entirely orthodox terms: '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 *R.* v. *Suffolk County Council, ex parte Steed* (1996) 75 P&CR 102 at 112 Pill LJ referred to his own discussion of the subject at first instance in *O'Keefe* v. *Secretary of State for the Environment* [1996] JPL 42. On the basis of passages from *Jones* v. *Bates* he had there expressed the view that 'as of right' meant user 'which was not only *nec vi, nec clam, nec precario* but was in the honest belief in a legal right to use' (see [1996] JPL 42 at 52) . . .

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 1832, 1932 and 1965 Acts. It is perhaps worth observing that, when the 1832 Act was passed, the parties to an action were not even competent witnesses and I think that Parke B would have been startled by the proposition that a plaintiff asserting a private right of way on the basis of his user had to prove his subjective state of mind. In the case of public rights, evidence of reputation of the existence of the right was always admissible and formed the subject of a special exception to the hearsay rule. But that is not at all the same thing as evidence of the individual states of mind of people who used the way. In the normal case, of course, outward appearance and inward belief will coincide. A person who believes he has the right to use a footpath will use it in the way in which a person having such a right would use it. But user which is apparently as of right cannot be discounted merely because, as will often be the case, many of the users over a long period were subjectively indifferent as to whether a right existed, or even had private knowledge that it did not. Where Parliament has provided for the creation of rights by 20 years' user, it is almost inevitable that user in the earlier years will have been without any very confident belief in the existence of a legal right. But that does not mean that it must be

ignored. Still less can it be ignored in a case like *R*. v. *Suffolk 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) 61 Conv 199.

I therefore consider that *Ex p. Steed* was wrongly decided and that the county council should not have refused to register the glebe as a village green merely because the witnesses did not depose to their belief that the right to games and pastimes attached to them as inhabitants of the village. That was the only ground upon which [the Inspector] 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 [he went on to consider these points, in the passage from his judgment discussed in Notes and Questions 5.2 above] ...

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 [the Inspector'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 [the Inspector] meant only that the existence of the footpath made it easy for people to get there. But Miss Cameron's substantial point was based upon the finding of toleration. That, she said, was inconsistent with the user having been as of right. In my view, that proposition is fallacious. As one can see from the law of public rights of way before 1932, toleration is not inconsistent with user as of right. (See also *Mills* v. *Silver* [1991] Ch 271 at 281 *per* Dillon LJ.) When proof of a public right of way required a finding of actual dedication, the jury were entitled to find that such user was referable to toleration rather than dedication: *Folkestone Corp*. v. *Brockman* [1914] AC 338. But this did not mean that the user had not been as of right. It was a finding that there had been no dedication despite the user having been as of right. The purpose of the 1932 Act was to make it unnecessary to infer an actual dedication and, in the absence of specific rebutting evidence, to treat user as of right as sufficient to establish the public right. *Alfred F.*

Beckett Ltd v. *Lyons* [1967] 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. [The Inspector'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 LJ said in *Blount* v. *Layard* [1891] 2 Ch 681 at 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 1932 Act, Parliament clearly thought that the previous law gave too much weight to the interests of the landowner and too little to the preservation of rights of way which had been for many years in *de facto* use. As Scott LJ pointed out in *Jones* v. *Bates* [1938] 2 All ER 237 at 249, there was a strong public interest in facilitating the preservation of footpaths for access to the countryside. And, in defining class 'c' town or village greens by reference to similar criteria in 1965, Parliament recognised a similar public interest in the preservation of open spaces which had for many years been used for recreational purposes. It may be that such user is attributable to the tolerance of past rectors of Sunningwell, but, as Evershed J said of the origins of a public right of way in *A-G* v. *Dyer* [1947] Ch 67 at 85–6:

> 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.

[The other members of the court all expressed agreement with Lord Hoffmann's speech, and the appeal was allowed.]

Extract 13.2 Law Reform Committee, *The Acquisition of Easements and Profits by Prescription* (Law Reform Committee Fourteenth Report, Cmnd 3100, 1966)

ABOLITION OR IMPROVEMENT?

30. It is clear from the foregoing statement of the existing position that the law of prescription is unsatisfactory, uncertain and out of date, and that it needs extensive reform. The first and most important question for consideration, then, is whether any system of prescription should be preserved, or whether, subject to suitable transitional arrangements, prescription should be abolished and easements should in the future be capable of being created only by grant. If abolition is desirable, the only further question is what transitional provisions are necessary. If, on the other hand, prescription is to be preserved in some form, we must consider how far the law should be reformed.

31. Of the professional bodies whom we consulted three (the Chartered Land Agents' Society, the Law Society and the Society of Labour Lawyers) favoured abolition. So also did Professor Crane. The rest of those whom we consulted, including the Bar Council and the Conveyancers' Institute, favoured the retention of some form of statutory prescription so far as easements are concerned.

Recommendation in favour of abolition

32. By a small majority we have decided to recommend that, subject to the necessary transitional arrangements, the prescriptive acquisition of easements should be abolished. We would not replace prescription by any other method of acquisition, except for rights of support which we discuss separately later in this report (paragraphs 84 to 96). The main considerations which have persuaded the majority to favour abolition are, briefly, that there is little, if any, moral justification for the acquisition of easements by prescription, a process which either involves an intention to get something for nothing or, where there is no intention to acquire any right, is purely accidental. Moreover, the user which eventually develops into a full-blown legal right, enjoyable not only by the dominant owner himself but also by his successors in title for ever, may well have originated in the servient owner's neighbourly wish to give a facility to some particular individual, or (perhaps even more commonly) to give a facility on the understanding, unfortunately unexpressed in words or at least unprovable, that it may be withdrawn if a major change of circumstances ever comes about.

33. There is no reason why a person who wishes to acquire an easement over someone else's land should not adopt the straightforward course of asking for it. The tendency of modern legislation over a wide field, albeit not universal, is to expect people's rights and liabilities to be defined in writing (cf. section 5 of the Agricultural Holdings Act 1948, section 4 of the Contracts of Employment Act 1963 and sections 5 to 9 of the Hire Purchase Act 1965) and the same principle should apply to the means by which easements may be acquired. Moreover, if easements could be acquired only

by written grant, many of the doubts about the precise nature and extent of the easement would, we hope, disappear. In the absence of a grant, there does seem to be considerable difficulty in finding a formula which will not do injustice to a servient owner by rendering him liable to have far more extensive rights imposed on him than he could be said to have recognised by acquiescence (see paragraphs 76 to 79 below).

34. There are also arguments in favour of abolition based as much on practical convenience as on any general theory. It will not be very long now – comparatively speaking, at least – before compulsory registration of title to land on sale will become universal throughout the country, and the aim here should be for the register to be, as far as possible, a true mirror of the title. No doubt this ideal can never be absolutely achieved, but easements arising from prescription certainly constitute one of the most troublesome of the 'overriding interests' which bind the land without being registered. (Public rights of way are much more likely to be visible on inspection of the land than are private rights of way or other easements.) So it is not simply a question of balancing the disappointment of someone who is deprived of what he may think is a long-established right against the chagrin of a man who finds that his good nature or carelessness has allowed his neighbour to steal a march on him. The interests of the general public come into the picture as well; and the advantage to the community of being able to rely on the accuracy and completeness of the register ought to be allowed to tip the scales against the continuance of prescription.

35. Moreover, if a servient owner is to be liable to be saddled with easements created by prescription, then the law ought to provide him with some simple and cheap method of protecting himself against what may otherwise be imposed upon him by the passage of time. The only satisfactory way of doing this is by some system of registration and there are considerable doubts as to the feasibility of this (see paragraphs 64 to 75). Even if it is feasible, it seems doubtful whether those exceptional cases where prescription does meet a genuine need (like that in paragraph 38(e)) would justify the elaborate administrative arrangements that a new system of registration would involve.

36. We do not consider that it is necessary or appropriate for the same legal rules to apply to the acquisition of easements by prolonged enjoyment as apply to the acquisition of title to land by adverse possession. Certainty of title to land is a social need and occupation of land which has long been unchallenged should not be disturbed. Moreover, a squatter's occupation of land is sufficiently notorious to invite preventive action. There is no comparable need to establish easements, and user even 'as of right' may be insidious. The creation of easements, which may limit the use or development of the servient land, should not be encouraged. No serious hardship would result if in future, subject to appropriate transitional safeguards, no easement could be acquired by prescription.

Minority view in favour of retention

37. We think it desirable, however, having regard in particular to the smallness of the majority in favour of abolition and the sharp division of opinion in the evidence

submitted to us on this issue, to set out briefly the views of those members of the Committee who favour retaining some form of prescription and to describe in a subsequent part of this Report (paragraphs 39 to 81) the new system of prescription which we would unanimously recommend in the event of retention.

38. The arguments which in the view of the minority can be used against the considerations urged in favour of abolition in the preceding paragraphs of this report are

(a) Many of the unsatisfactory characteristics of the existing law in the field of prescription can be remedied by the simplifications and amendments discussed later in this report and do not call for the abolition of prescription.
(b) There is no less moral justification for the acquisition of easements by prescription than there is for obtaining a title to land by adverse possession: to represent prescription as a process of 'easement stealing' is to ignore the fact that it involves open enjoyment over a long period in the assertion of a right, and that it is a process designed to give legal recognition and validity to a state of affairs of long-standing, in which successive servient owners may have acquiesced.
(c) The dominant owner for the time being is not in most cases a person who wishes to acquire an easement, but a person who believes or assumes that he is entitled to an easement. This may well have played some part in inducing him either to buy the dominant land or to lay out money on it. Moreover, prescription is a process designed to apply not only to cases where there has in fact been no grant, but also to cases in which there may have been a grant which has been mislaid. The well-settled principle of English law that long-continued possession in assertion of a right should, if possible, be presumed to have had a legal origin (*per* Lord Herschell in *Phillips* v. *Halliday* [1891] AC 228, at p. 231) remains as valid as ever. It would be widely accepted by the public as fair and right that a servient owner who has not for many years taken the trouble to protest against the open enjoyment over his property by a neighbour of a benefit of a kind capable of existing as an easement should be debarred from putting an end to such enjoyment.
(d) In spite of the differences between adverse possession and prescription, the same fundamental considerations apply to them. Anyone who has for a sufficient period had undisputed and uninterrupted enjoyment of something capable of subsisting as a property right, notwithstanding the actual or constructive knowledge of him who might otherwise claim to be the true owner, should be allowed to retain the subject-matter (whether corporeal or incorporeal) as his own property and the other party should be barred from disputing his ownership. If it is accepted that a *status quo* of long-standing ought to be given legal recognition, prescription has not outlived its usefulness. Conveyancers are frequently faced with the question whether a prescriptive title cannot be established: in other words, the *de facto* position often does not accord with the known documentary title.
(e) It should not be assumed that the doctrine is only called in aid where there has in fact been no grant. An easement may well be granted by a deed which does not in any other way affect the title to either the servient or the dominant tenement: the servient

owner may retain no counterpart and his successors may be ignorant of, or overlook, the existence of the grant. Unless and until the easement is disputed, the dominant owner and his successors may have no occasion to refer to the grant, and a long period may elapse during which the grant becomes lost.

(f) Although there has been much registration of title to land, universal registration is still a long way off. The application of compulsory registration to the whole of England and Wales would not in any event mean that the title to all land would at once become registered. The question whether prescription should be abolished or preserved should not be decided on grounds primarily applicable to registered land.

Notes and Questions 13.1

Read the above extracts and *R. (Beresford)* v. *Sunderland City Council* [2003] UKHL 60, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1 As a result of the House of Lords' interpretation of the Commons Registration Act 1965 in *R.* v. *Oxfordshire County Council, ex parte Sunningwell Parish Council*, new communal property rights can now come into existence at any time by virtue of use for twenty years. Consider whether such a communal right could be expressly granted: if not, why not?

2 Explain the difference between acquiescence, toleration and permission. If a landowner has tolerated a use of his land by someone else, should the *de facto* use ripen over time into a right enforceable against the landowner? Examine the arguments on this point considered by Lord Hoffmann in *Sunningwell*. Are the remarks of Evershed J in *Attorney-General* v. *Dyer* [1947] Ch 67 at 85–6, quoted by Lord Hoffmann, consistent with the analysis of prescriptive rights accepted by Lord Hoffmann?

3 Is the line drawn by the House of Lords in *Beresford* between acquiescence and permission satisfactory? In what circumstances, according to the House of Lords, can a right arise by prescription notwithstanding 'implied permission'?

4 Consider the arguments of the majority and the minority in the Law Reform Committee on the issue of abolition of prescription. Which do you find more convincing? Registration of title is much further advanced now than it was in 1966, the date of this report: what effect, if any, does this have on the arguments put by both sides?

5 Devise a scheme, applicable to all kinds of private right, whereby all that could be acquired by prescription would be entitlement to buy the right, on the lines of the scheme set out in the Vehicular Access Across Common and Other Land (England) Regulations 2002 (SI 2002 No. 1711) referred to in the text above. Would it be possible to devise a scheme that met the objections put in the text

above to such schemes? On what basis would you determine the price? Could an analogous scheme be devised for communal and public rights acquired over privately owned land?

6 Examine the criticisms made by Lord Walker at the end of his speech in *Beresford*. To what extent are they justified? What steps should the council have taken to prevent the local residents acquiring this right by prescription? Is this satisfactory?