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power to charge tolls, thus treating clause 22 not as an enabling clause but as a limitation in certain cases on a general power.

For these reasons I would dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Travers Smith, Braithwaite & Co.; Treasury Solicitor.*

F. C.

[COURT OF APPEAL.]

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Denning, Birkett and Parker L.JJ.

FAIREY *v.* SOUTHAMPTON COUNTY COUNCIL.

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

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

In 1954 a landowner applied to quarter sessions for a declaration that no right of way existed over a path on his land shown as a public path on a map prepared by the local authority. Quarter sessions found that the path had been used without interruption or objection by the public from 1885 to 1931, though there was no sufficient evidence on which an intention to dedicate or not to dedicate could be presumed at common law; that on an occasion in 1931 the then owner had objected to the use of the path by the public other than local residents; and that thereafter he and the present landowner successively had turned such persons off the path and by so doing had shown an intention not to dedicate the path as a highway:—

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

[1] Rights of Way Act, 1932, s. 1 (1): "Where a way . . . upon or "over any land has been actually "enjoyed by the public as of right "and without interruption for a full "period of 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."

(3) "A notice by the owner of the "land over which any such way "passes inconsistent with the dedica-"tion of the way as a highway, "placed before or after and main-"tained after the commencement of "this Act in such a manner as to be "visible to those using the way, "shall, in the absence of proof of a "contrary intention, be sufficient evi-"dence to negative the intention to "dedicate such way as a highway, "and where a notice has been placed "in the manner provided in this sub-"section and is subsequently torn "down or defaced, notice in writing "by the owner of the land to the "council of the county and of the "borough or urban or rural district "council in which the way is situate "that the way is not dedicated to the "public shall, in the absence of "proof of a contrary intention, be

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

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

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

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

Decision of Divisional Court [1956] 2 W.L.R. 517; [1956] 1 All E.R. 419 affirmed in the result.

APPEAL from Divisional Court on case stated by appeals committee of Hampshire Quarter Sessions.

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

"sufficient evidence to negative the "intention of the owner of the land "to dedicate such way as a high-"way."

(5) "In the case of land in the "possession of a tenant for a term "of years or from year to year let on "lease, any person for the time being "entitled in reversion to the land "shall, notwithstanding the existence "of any such tenancy, have the right "to place and maintain such notice "as aforesaid, but so that no injury "is done thereby to the business or "occupation of the tenant."

(6) "Each of the respective periods "of years mentioned in this section "shall be deemed and taken to be "the period next before the time "when the right of the public to use "a way shall have been brought "into question by notice as aforesaid "or otherwise."

S. 2 (1): "Nothing in this Act "shall affect any proceedings pending "at the commencement of this Act, "and where in respect of any way "a court of competent jurisdiction "decides in proceedings so pending, "or has before the commencement of "this Act decided, that the way is "not a highway, this Act shall not "apply except as respects enjoyment "of the way after the date of the deci-"sion. (2) Nothing in this Act shall "operate to prevent the dedication of "a way as a highway being pre-"sumed on proof of user for any less "period than twenty years or to pre-"vent the dedication of a way as a "highway being presumed or proved "under any circumstance under "which it can be presumed or "proved at the time of the passing "of this Act."

S. 4: "The person entitled to the "remainder or reversion immediately "expectant upon the determination "of a tenancy for life or pour autre "vie in land shall have the like "remedies by action for trespass or "an injunction to prevent the acquisi-"tion by the public of a right of way "over such land as if he were in "possession thereof."

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The appeals committee heard the application on May 3 and 4, 1955, and found the following facts: On May 11, 1953, the council prepared a draft map pursuant to section 27 of the Act and on November 13, 1953, the landowner objected to the inclusion therein of the path in question. After his objection had been heard the council prepared the provisional map. The path in question began at a point in the public highway opposite Bossington farm and terminated at a stile on the boundary between lands owned by the landowner and lands of the British Transport Commission adjacent to Horsebridge station. Further paths gave access from the stile to Horsebridge station and through it to the public highway. Throughout living memory the lands over which the path ran had belonged to the owner for the time being of Bossington House. In 1885 the estate belonged to one Deverell and in or about 1931 it descended to John Deverell. In 1937 the appellant purchased the estate and remained the owner and occupier thereof. The path existed as a farm convenience prior to the construction of the railway in 1860. Since 1885 the path had been used by members of the public without interruption both (i) to obtain access to Horsebridge station and Horsebridge village and beyond, and to places beyond the western end of the path or vice versa and (ii) for the purposes of recreation, such as, for example, a circular walk from Houghton in the evenings through the meadows and round by the highways. Some of the persons so using the path were strangers to the locality but many were known to the owner for the time being either as his tenants or his employees or as neighbouring residents. (Persons in the last three categories are hereinafter referred to as "local residents.") In so far as the path was used for recreation it was so used mainly by such local residents; user in category (i) above was more frequent by local residents than by strangers to the locality. Between 1885 and 1931 the public use of the path was nec vi nec clam nec precario nor was it interrupted, and during that period the owners for the time being of the land raised no objection to the use of the path by the persons and in the manner referred to above; nevertheless quarter sessions were not satisfied, on the evidence before them, that an intention to dedicate on the part of such owners could be presumed at common law nor had they sufficient evidence of an intention on the owners' part before 1931 not to dedicate the path as a public highway.

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

any member of the public questioned the right of either John Deverell or the appellant thus to prevent the use of the path.

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

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

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

The landowner appealed to the Divisional Court (Lord Goddard C.J., Hilbery and Stable JJ.), which, on January 24, 1956,[2] held, affirming the decision of the quarter sessions appeals committee, (1) that the right of the public to use the land was "brought into question" within the meaning of section 1 (6) of the Act when a landlord for the first time refused to allow the public to use a way which they had been using uninterruptedly for over 20 years, and it was not necessary, to bring the case within the Act, for the member of the public whose right was questioned, to insist that he had a right of way; and (2), Stable J. dissenting, that the Act of 1932 was a procedural Act which took effect retrospectively and it was no objection that the period of 20 years after which the public was deemed to have acquired a right terminated before the Act came into force.

The landowner appealed.

Percy Lamb Q.C. and *J. P. Widgery* for the landowner.

J. Scott Henderson Q.C. and *M. G. Polson* for the county council.

[2] [1956] 2 W.L.R. 517; [1956] 1 All E.R. 419.

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The following cases were cited in argument: *West* v. *Gwynne* [3]; *In re Athlumney, Ex parte Wilson* [4]; *In re Hale's Patent* [5]; *National Real Estate and Finance Co.* v. *Hassan* [6]; *Cooper* v. *Hubbuck* [7]; *Lauri* v. *Renad* [8]; *Poyser* v. *Minors* [9]; *Jones* v. *Bates* [10]; *Attorney-General and Newton Abbot Rural District Council* v. *Dyer* [11]; *Colonial Sugar Refining Co.* v. *Irving* [12]; *Director of Public Prosecutions* v. *Lamb* [13]; *The Ydun* [14]; *Rathbone* v. *Munn* [15]; *Theo. Conway Ltd.* v. *Henwood* [16]; *Folkestone Corporation* v. *Brockman* [17]; *Colls* v. *Home and Colonial Stores Ltd.* [18]

Cur. adv. vult.

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

The Rights of Way Act, 1932, has introduced a new means by which the public may acquire a right of way, in addition to the old means of dedication, which, be it noted, is still preserved: see section 2 (2). The new means of acquiring it is by prescription for 20 years. The old common law prescription for a right of way had to run from time immemorial, that is, from the time when Richard Coeur de Lion came to the throne in A.D. 1189.

[3] [1911] 2 Ch. 1; 27 T.L.R. 444.
[4] [1898] 2 Q.B. 547.
[5] [1920] 2 Ch. 377; 36 T.L.R. 832.
[6] [1939] 2 K.B. 61; 55 T.L.R. 570; [1939] 2 All E.R. 154.
[7] (1862) 12 C.B.(N.S.) 456.
[8] [1892] 3 Ch. 402; 8 T.L.R. 637.
[9] (1881) 7 Q.B.D. 329.
[10] 54 T.L.R. 648; [1938] 2 All E.R. 237.
[11] [1947] Ch. 67; 62 T.L.R. 632; [1946] 2 All E.R. 252.
[12] [1905] A.C. 369; 21 T.L.R. 513.
[13] [1941] 2 K.B. 89; 57 T.L.R. 449; [1941] 2 All E.R. 499.
[14] [1899] P. 236; 15 T.L.R. 361.
[15] (1868) 18 L.T. 856.
[16] (1934) 50 T.L.R. 474.
[17] [1914] A.C. 338; 30 T.L.R. 297.
[18] [1904] A.C. 179; 20 T.L.R. 475.

The new statutory period of 20 years has no fixed starting point, but only a finishing point. The public must have used the way as of right for the period of 20 years next before their right to use it was "brought into question." We have now to consider how the period of 20 years is to be calculated.

The thing to do is to find the finishing point and then count back 20 years. This means that in this case we have to find the time when the right of the public to use the way was first "brought into question by notice as aforesaid or otherwise" within section 1 (6) of the Act. Those words are obviously taken from the similar words in section 4 of the Prescription Act, 1832, which was considered by the Court of Common Pleas in *Cooper* v. *Hubbuck*.[1] In that case Willes J. said that[2] "in order to "have the claim 'brought in question,' there must be at least "enough in the proceedings to apprise the parties that the claim "was advanced, so that there might be an opportunity of "litigating it." Applying those observations to this case, I think that in order for the right of the public to have been "brought "into question," the landowner must challenge it by some means sufficient to bring it home to the public that he is challenging their right to use the way, so that they may be apprised of the challenge and have a reasonable opportunity of meeting it. The landowner can challenge their right, for instance, by putting a barrier across the path or putting up a notice forbidding the public to use the path. When he does so, the public may meet the challenge. Some village Hampden may push down the barrier or tear down the notice: the local council may bring an action in the name of the Attorney-General against the landowner in the courts claiming that there is a public right of way: or no one may do anything, in which case the acquiescence of the public tends to show that they have no right of way.

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

Applying this test, I ask myself: When did the landowner here make it clear to the public that he was challenging their right to use the way? Quarter sessions held that he did so in 1931, when he objected to the use of the path by persons who were not local residents. We do not know what evidence was before them on that point. If the landowner merely turned back one stranger on an isolated occasion, that would not, I think, be sufficient to make it clear to "the public" that they had no right to use it. He ought at least to make it clear to the villagers of Bossington, Houghton and Horsebridge. They were the members of the public most concerned to assert the right, because they were the persons who used the path. They knew—

[1] (1862) 12 C.B.(N.S.) 456. [2] Ibid. 468.

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better than the landowner himself—how long they had used it. They were the persons to tell. It was no good the landowner speaking to a stranger who would know nothing of the public right and would not be concerned to assert it. This view is supported by a case which was decided nearly a hundred years ago—*Reg.* v. *Broke* [3]—about a footpath at Ipswich. Sea-faring men proved that they had used the path without interruption for a great many years for the purpose of their calling. The landowner sought to rebut the public right by proving that he had turned back all persons who were not sea-faring men: but it was held that that was not sufficient for the purpose. Pollock C.B. said [4] that the user by the sea-faring men was a user by the public and that long user by them gave the public a right of way. If the landowner wished to deny the public right, he ought to have made it clear to the sea-faring men that they used it by his leave and not as of right. So here the landowner ought to have made it clear to the villagers. We have no information on this point, but I think we ought to assume that quarter sessions had sufficient evidence before them to support their finding. We ought to assume that in 1931 when the landowner turned back strangers, he did it in so open and notorious a fashion that it was made clear, not only to strangers, that they had no right to use the path, but also to local residents, that they only used it by tolerance of the owner. If so, he did bring the right into question in 1931, as quarter sessions have found.

In this connexion I would also mention the finding of quarter sessions that in and from 1931 the landowner, by turning off strangers, showed an intention not to dedicate the path as a highway for the use of members of the public at large. This raises the same point. In my opinion a landowner cannot escape the effect of 20 years' prescription by saying that, locked in his own mind, he had no intention to dedicate: or by telling a stranger to the locality (who had no reason to dispute it) that he had no intention to dedicate. In order for there to be "sufficient "evidence that there was no intention" to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large—the public who used the path, in this case the villagers—that he had no intention to dedicate. He must, in Lord Blackburn's words, take steps to disabuse those persons of any belief that there was a public right: see *Mann* v. *Brodie*.[5] Such evidence may consist, as in the leading case of *Poole* v. *Huskinson*,[6] of notices or a barrier: or the common method of closing the way one day a year. That was not done here; but we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it. On this footing there was sufficient evidence to show that there was no intention to dedicate.

[3] (1859) 1 F. & F. 514.
[4] Ibid. 515.
[5] (1885) 10 App.Cas. 378, 386.
[6] (1843) 11 M. & W. 827.

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

I must say at once that to my mind this Act of 1932 is not a procedural Act. It affects the substantive law in the following respects: it creates a new statutory right to a highway by prescription in addition to the old right by dedication. It reverses the burden of proof: for whereas previously the legal burden of proving dedication was on the public who asserted the right (*Folkestone Corporation* v. *Brockman* [7]), now after 20 years' user the legal burden is on the landowner to refute it. It gives reversioners a right to interfere and gives the public a right of way if they do not interfere: whereas previously reversioners had no right to interfere and the public could acquire no right of way against them. It is interesting to notice that the courts held that the Prescription Act, 1832, did not relate to pleading or procedure only: see *Cooper* v. *Hubbuck*,[8] *per* Willes J. Neither does this Act.

Seeing that this Act does affect the substantive law, it is not to be given a retrospective operation unless such a construction appears very clearly on the terms of the Act or arises by necessary and distinct implication. I think, however, that such is the case here: the whole tenor of the Act is to establish a public right by 20 years' user; and the wording of section 2 (1) carries with it the necessary and distinct implication that, except as therein stated, the Act applies to enjoyment of the way before the commencement of the Act. This was the view of Evershed J. in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer*,[9] and I agree with him.

Mr. Lamb pointed to the fact that Parliament allowed an interval of 17 months between the time when the Act was passed (July 12, 1932) and the time when it came into operation (January 1, 1934); and he asked: Was not that period given so as to enable any landowner (who did not intend to dedicate a path as a highway) to put up a notice saying that his property was private, and that there was no right of way over it? I agree that that was the object of the interval; but I think the object is substantially achieved. If a notice were put up before 1933,

[7] [1914] A.C. 338; 30 T.L.R. 297.
[8] 12 C.B.(N.S.) 456, 468.
[9] [1947] Ch. 67, 89; 62 T.L.R. 632; [1946] 2 All E.R. 262.

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it would have this effect: if the 20 years had not then run, the notice would prevent a public right being acquired; whereas if it had already run, the notice would serve as an emphatic assertion that the path had heretofore been used by tolerance of the owner and not by right of the public; and the longer it remained there without challenge the more effective it would be to prove the correctness of his assertion. If it was challenged before the end of 1933, the landowner could get the matter resolved by the courts under the law as it stood before the Act: see section 2 (1). If it was not challenged until after 1933, the new law applied; but he could point to the acquiescence in the notice as a strong point in his favour to show that the enjoyment had not theretofore been had as of right.

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

BIRKETT L.J. This appeal from a decision of the Divisional Court raises important questions affecting landowners and the members of the public under the provisions of the Rights of Way Act, 1932. [His Lordship stated the facts, and continued:] The main purpose of the Rights of Way Act, 1932, was to simplify the procedure when it was sought to establish a way as a public highway. It does not profess to alter the general law as to the manner in which public rights are deemed to have come into existence. The important change is in the length of time which is enough to establish the intention. If the way can reasonably be presumed to have been dedicated as public, then proof of public user for 20 years past is now enough, if the user has been "as of right," without interruption, and it is not proved by the landowner that the intention to dedicate the way was not continuous during the 20 years: *Jones* v. *Bates* [10]; *Merstham Manor Ltd.* v. *Coulsdon and Purley Urban District Council.* [11]

Section 1 (6) of the Act of 1932 provides that the 20-year period shall be deemed to be the period next before the time when the right of the public to use a way shall have been brought into question by notice or otherwise. This subsection differs from the corresponding provision in the Prescription Act of 1832, which required the periods of 20 and 40 years therein mentioned to be "next before some suit or action" in which the right was questioned. Therefore if today a member of the public is turned back from a footpath, on the ground that there is no right of way, and action is taken to assert the public claim, the period of 20 years necessary to be proved will be up to the date of the act of

[10] 54 T.L.R. 648; [1938] 2 All E.R. 237.

[11] [1937] 2 K.B. 77; 52 T.L.R. 516; [1936] 2 All E.R. 422.

turning back, and not up to the time that the action to assert the public right is taken.

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

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

In the Divisional Court the view was taken that this Act dealt only with procedure, and the decision in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer* [12] was followed. It is not always easy to maintain this clear distinction between Acts dealing with procedure only and Acts which create rights; and the Rights of Way Act of 1932, I should have thought, was more than an Act dealing with procedure only, as the Prescription Act of 1832 was held to be in *Cooper* v. *Hubbuck.*[13] Section 2 (2)

[12] [1947] Ch. 67.

[13] 12 C.B.(N.S.) 456.

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of the Rights of Way Act, 1932, makes it quite plain that the new procedure under the Act is an *additional* method of establishing the dedication of highways, and does not abolish or alter the existing methods. In any cases where for any reason the Act has no application, the existing law can be used in the same way as it was used before the Act was passed. Thus, for example, if evidence of public user for five years is enough in all the circumstances of the case to prove the landowner's intention to dedicate, there is no need to prove the use for 20 years. The essential test is: what is the intention of the statute? In my opinion, while I think that the statute was not confined merely to procedure but was dealing with rights, I yet think that the intention of the statute was that it should be retrospective in its operation. Section 58 of the National Parks and Access to the Countryside Act, 1949, amended the Rights of Way Act, 1932, by deleting the concluding words of section 1 (1) and the whole of section 1 (2). The purpose of this was to make the period of 20 years apply in all cases, but in doing so there was in section 58 (2) of the National Parks Act a saving in favour of proceedings pending at December 16, 1949, and also for cases then decided by courts of competent jurisdiction. Similarly, section 2 (1) of the Act of 1932 is a transitional provision to prevent possible conflict between the old and the new law in cases already decided, or in cases in course of being decided when the Act came into force on January 1, 1934.

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

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

PARKER L.J. I have come to the same conclusion. Before the appeals committee of quarter sessions the only point taken on behalf of the appellant was that the 20-year period to be considered was that next before the proceedings in question, and that by reason of the action taken by the appellant and his predecessor since 1931 there was shown an intention during that period not to dedicate the footpath in question. I will assume that such action was sufficient evidence that there was no intention to dedicate, since the contrary was not argued, but it is to be observed that no action was taken in regard to a considerable section of the public, namely, "local residents" as described in the case, but only in regard to strangers. The question, however, remains whether, as the respondents contend, the right of the public to use the footpath had not been brought into question at an earlier date, namely, in 1931, when such action was first

taken. The appeals committee and the Divisional Court held that this contention was right, and, accordingly, subject to the point hereinafter referred to, it is clear that as a result of what had happened between 1885 and 1931 the footpath pursuant to section 1 (1) of the Act is deemed to have been dedicated. I agree with this conclusion. It seems to me clear that from 1885 to 1931 the public were asserting a right to enjoy this footpath, so that if in 1931 steps were taken to warn off persons asserting such a right, such action was clearly bringing into question that right. The question is largely one of fact and, the appeals committee having so found, there is no reason to disturb that finding.

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

It is sufficient to cite two passages from the authorities. In *In re Athlumney, Ex parte Wilson* [14] Wright J. said this [15]: "Perhaps no rule of construction is more firmly established than "this—that a retrospective operation is not to be given to a "statute so as to impair an existing right or obligation, otherwise "than as regards matter of procedure, unless that effect cannot "be avoided without doing violence to the language of the enact-"ment. If the enactment is expressed in language which is "fairly capable of either interpretation, it ought to be construed "as prospective only."

In *In re Hale's Patent* [16] Sargant J. said [17]: "No doubt the "general law is that, while rights are not statutorily altered "retrospectively, procedure is, apart from indications to the "contrary, altered retrospectively; but where rights and pro-"cedure are dealt with together in the way in which section 8 "of the Act of 1919 deals with them, the intention of the legis-"lature would seem fairly clear—namely, that the old rights are "still to be determined by the old tribunal under the Act of "1907, and that only the new rights under the substituted "section are to be dealt with by the tribunal thereby substituted "for the Treasury."

The Divisional Court (Stable J. dissenting) held that the Act applied where, as here, the 20-year period was wholly

[14] [1898] 2 Q.B. 547.
[15] Ibid. 551–552.
[16] [1920] 2 Ch. 377; 36 T.L.R. 832.
[17] [1920] 2 Ch. 377, 386.

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before the commencement of the Act. In arriving at his conclusion, Lord Goddard C.J. (with whom Hilbery J. agreed) said: "It has always been held that a procedural Act does or "may act retrospectively, and one test of whether an Act is "procedural is whether it is an Act which mainly deals with "evidence. The Act under consideration is in many respects "similar to the Prescription Act, 1832, which provided, as its "preamble shows, that owing to the difficulties of proving user "from time immemorial, certain changes in the law were desir-"able and, instead of a person who asserted that he was entitled "to an easement over land or light or water having to give "evidence from which the court could infer a grant or user from "time immemorial, the Act substituted the prescriptive periods "of 20 years in some cases and 40 years in others. That seems "to me the object of the present Act" [*Fairey* v. *Southampton County Council*].[18] In other words, they treated the Act as a procedural Act, and, in doing so, came to the same conclusion as Evershed J. in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer*,[19] who said[20]: "In the first place, it is "to be borne in mind that the Act of 1932 is substantially a "procedural Act, in the sense that it is designed, not to create "new rights or new causes of action, but rather to simplify and "render more easy the means of making good claims of a well "established kind."

Mr. Lamb, for the appellant, has urged with considerable force that this Act, though it admittedly in part deals with matters of procedure, nevertheless, to use the words of Lush J. in *Poyser* v. *Minors*,[21] it "gives or defines" legal rights. That was indeed the view of Stable J. in the present case. For my part, I think that that conclusion is right, and, without going into the matter in detail, I am content to adopt what was said by Willes J. in *Cooper* v. *Hubbuck*,[22] in dealing with the Prescription Act, 1832, which, as Lord Goddard C.J.[23] pointed out in the present case, the present Act resembles in many respects. Willes J., with whom Erle C.J. and Byle J. concurred, in considering section 4 of the Prescription Act (which was similar to section 1 (6) of the Act of 1932), said[24]: "The section in ques-"tion is the last of those which deal with the creation of the "right. It is not a section relating to pleading or procedure "only, but has for its object to appoint the terminus of the "period of prescription which by the previous sections was to "confer a right. This it does by reference to the commencement "of 'some suit or action wherein the claim or matter, &c., shall "'have been or shall be brought in question.' The effect, there-"fore, is that, immediately upon the bringing of such suit or "action, the enjoyment, if within the previous sections as to

[18] [1956] 2 W.L.R. 517, 522; [1956] 1 All E.R. 419.
[19] [1947] Ch. 67.
[20] Ibid. 88.
[21] (1881) 7 Q.B.D. 329, 333.
[22] 12 C.B.(N.S.) 456.
[23] [1956] 2 W.L.R. 517, 522.
[24] 12 C.B.(N.S.) 456, 467.

" length and otherwise, shall ripen into a right." This case was unfortunately not before the Divisional Court; nor was it referred to in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer* [25] (vide supra).

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

In *Jones* v. *Bates* [26] Scott L.J. discussed at some length the purpose of the Rights of Way Act, 1932, in these words [27]: " Before discussing the evidence and judgment below, I want to " consider what the law now is since the passing of the Rights of " Way Act, 1932, which the judge had to apply. The new Act, as " stated in its long title, was an amending Act. Before the Act, " the law applicable was the common law. The main alteration " is effected by section 1, which gives a new statutory effect to " mere proof of actual user as of right and without interruption. " At the time of the passing of the Act, the main outline of the " law affecting proof of a public highway, whether a carriage-" road, a bridle-path or a footpath, had been drawn quite clearly " by judicial decisions. Whereas in Scotland proof of 40 years' " user as of right, and without interruption in the enjoyment of " the right, *ipso facto* established the legal conclusion that the " way was public by prescription, in England no such convenient " rule of law had been evolved by our courts. Our legal theory " had always been—at any rate within the last century or two— " that the sole origin of a public highway was dedication to the " public use by the owners of the land over which it ran, and in " consequence that, in case of dispute, the public right could be " established only by such evidence as would justify an inference " of fact that the way had at some date, known or unknown, " been so dedicated. The corollary followed that, on this as on " all other issues of fact, the tribunal had to decide, once there " was some affirmative evidence before it of user, whether or not " on balance it was sufficient to establish dedication. That " decision if given by a High Court judge sitting alone, was open " to revision by a Court of Appeal, but not if given by a county " court or other court, whose decision on fact was made final by " statute. Whichever jurisdictional mode of deciding questions " of fact happened to have been invoked in the particular case, " the task of the tribunal of fact was not limited to deciding the " necessary questions of user—Was it of right? Was the exercise " of the right interrupted? How long had it continued? These

[25] [1947] Ch. 67.
[26] [1938] 2 All E.R. 237.
[27] Ibid. 244–245.

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" findings would in Scotland have sufficed for the decision of the " legal issue. In England, however, the tribunal had to deal " with such difficult investigations as the state of the title of the " owners and whether there was an owner who could dedicate, " and consequently sometimes even the time when the dedication " —usually quite imaginary—had in fact taken place. Above all " the other difficulties, the tribunal had solemnly to infer as an " actual fact that somebody or other had in fact dedicated. It " was often a pure legal fiction, and yet put on the affirmant of " the public right an artificial onus which was often fatal to his " success. The practical result of the English rule of law was " that in many cases, although quite a formidable body of " evidence was available to demonstrate what I will call the " Scottish premises, the public claimant failed on the additional " English requisites. I infer from its terms that the Rights of " Way Act, 1932, was passed for the definite purpose of getting " rid of these extra difficulties of proof, and of assimilating our " English legal position to the more sensible one obtaining north " of the Tweed." Accepting his analysis, as I do, I would not expect to find any limitation on its operation.

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

Again, it seems to me that the necessary implication from section 2 (1) is that the Act is retrospective in operation. It was suggested that that subsection was necessary in order that the new provisions as to evidence (see section 3) should not apply to pending actions, and that this was its only effect. I cannot accept this argument, which appears to ignore the latter part of the subsection, where it says that in regard to decisions given before the commencement of the Act, and in regard to decisions given in actions pending at the commencement of the Act, " this " Act shall not apply except as regards enjoyment of the way after " the date of the decision." These words, as it seems to me, can only be explained on the basis that the Act, except to that extent, was intended to be retrospective. Indeed, that was the view of Evershed J. in *Attorney-General and Newton Abbot Rural District Council* v. *Dyer*.[28]

I appreciate that, as Stable J. pointed out,[29] this interpretation may in certain circumstances produce consequences which are hard and even extraordinary, but in my judgment the

[28] [1947] Ch. 67, 89.

[29] [1956] 2 W.L.R. 517, 525.

language of the Act taken as a whole is sufficiently clear to rebut the presumption. Accordingly, I would dismiss the appeal.

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Appeal dismissed.
Leave to appeal to the House of Lords granted.

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

M. M. H.

[CHANCERY DIVISION.]

In re INGLETON CHARITY. CROFT AND OTHERS *v.* ATTORNEY-GENERAL.

1956
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Danckwerts J.

[1955 R. No. 793.]

Charity—Education—School site—Land granted for school—Closure of school—Reverter of land under School Sites Act—Possessory title claimed by vicar and churchwardens—Sale of land—Declaration by trustees that proceeds of sale held on fresh trusts—Original trusts not terminated by closure of school—School Sites Act, 1841 (4 *&* 5 *Vict. c.* 38), *ss.* 2, 7—*Endowed Schools Act,* 1869 (32 *&* 33 *Vict. c.* 56), *s.* 5 (*as amended by the Education* (*Miscellaneous Provisions*) *Act,* 1948 (11, 12 *&* 13 *Geo.* 6, *c.* 40)).

Education—School—Closure of school—Original trusts affecting land not affected.

Certain land was granted, pursuant to the School Sites Act, 1841,[1] by a deed of grant dated August 11, 1846, to the minister and chapel wardens of the district (now the vicar and churchwardens of the parish) of Ingleton and their successors for a site for a school for poor persons in the district "and for no other "purpose." The school was carried on in premises on the land until 1929, when it was closed. The property was used for various parochial purposes until 1932, when it was let to a limited company to whom it was eventually sold in 1952. The vicar and churchwardens for the time being considered that after the closure of the school the property had reverted to the estates of the grantor under section 2 of the Act, but that no claim having been made, they had acquired a possessory title by adverse possession, and that the closure of the school having brought about the termination of the original trusts they were entitled to hold the property or proceeds

[1] School Sites Act, 1841, s. 2: "Any person, being seised in fee "simple . . . of and in any manor "or lands . . . and having the "beneficial interest therein . . . may "grant . . . any quantity . . . of "such land, as a site for a school "for the education of poor persons ". . .: Provided . . . , that upon "the said land . . . ceasing to be "used for [such purpose], the same "shall thereupon immediately revert "to and become a portion of the said "estate held in fee simple . . . or of "any manor or land as aforesaid, as "fully to all intents and purposes as "if this Act had not been passed, "any thing herein contained to the "contrary notwithstanding."