Case No: B2/2001/2462

Neutral Citation No: [2002] EWCA Civ 1634
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM CANTERBURY COUNTY COURT
(HHJ POULTON)

Royal Courts of Justice
Strand,
London, WC2A 2LL

Thursday, 14th November 2002

Before:

LORD JUSTICE SIMON BROWN
(Vice-President of the Court of Appeal Civil Division)
LORD JUSTICE MANTELL
and
LORD JUSTICE SEDLEY

- -

Between:

MASSEY & DREW	Claimant/ Respondent
- and -	
BOULDEN	Defendant/ Appellant

- -
- -

Vivian Chapman Esq (instructed by Messrs John Collins & Partners) for the Appellants
Peter Harrison Esq (instructed by Messrs Kingsfords) for the Respondents

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Judgment
As Approved by the Court

Lord Justice Simon Brown:

1. This appeal concerns a vehicle track ("the track") across a village green called The Pinn at Bonnington near Ashford in Kent. The track leads from a public highway over the green to a residential property known as The Old School House. The appellants own the green, the respondents the house. On 1 October 2001 Judge Poulton in the Canterbury County Court upheld the respondents' claim to a prescriptive vehicular right of way over the track and awarded them damages of £3,500 for its physical interruption by the appellants. He found that the use had commenced by 1956 at latest and had not been interrupted until 1997.

2. The appellants appeal against that holding by permission of the judge below on two central grounds. They contend first that the user was in breach of the criminal law and so could not found a prescriptive right; secondly, that the dominant tenement was in any event enlarged in 1977 so that, even assuming a prescriptive right of way had accrued by 20 years' use before that time, that right did not avail the occupier in respect of the additional part of the dominant tenement. Simply stated though these two grounds are, they contain within them numerous difficult issues, some apparently of wide general application.

3. With that briefest of introductions let me turn next to the facts of the case, which I shall set out as shortly as possible, describing both the topography and the history in only the barest outline.

4. The Pinn is an open green space on the south side of a public highway (the B2067 road between Bilsington and Hythe) mostly to the east side of the T-junction where the B2069 from the north (Aldington) joins the B2067. It is what remains of manorial waste land after the southern part of that land had been enclosed in 1837 to build a village school consisting of a schoolmaster's house with (attached to its northern elevation) a schoolroom which was itself extended northwards into the green in the 1890's. Those three contiguous buildings, besides being mostly south of the green, are also somewhat to the east of the T-junction already described.

5. In the 1920's the school closed and for the next 50 years the original schoolroom and its extension to the north were used as parish rooms. The schoolmaster's house was split into two semi-detached cottages, School Cottage West and School Cottage East, each separately tenanted with its own garden opposite. In May 1977, however, following the sale of both cottages (subject to their tenancies) and the parish rooms, the parish rooms were combined with School Cottage East to form one large residence thereafter known as The Old School House.

6. The track leaves the B2067 to the east of the T-junction (opposite or perhaps just to the east of the line of the school buildings) and describes a broadly south-easterly route across the green to a gate at the north-east corner of The Old School House's garden. Having passed through the gate, vehicles are parked on hardstanding at the bottom of the garden. Pedestrian access to The Old School House and its various component buildings has always been available by a variety of paths which I need not describe; these proceedings concern vehicular access only, vehicular access to the bottom of the respondents' garden.

7. The judge below found, as stated, that continuous use of the track over the green was made by successive occupiers of the dominant tenement (initially School Cottage East and then, after 1977, The Old School House) between 1956 and 1997. Those occupiers included the first appellant's sister, the purchaser and first occupier (with two successive husbands) of the enlarged house, who lived there from 9 May 1977 until April 1986; a Mr and Mrs Burton, who lived there from October 1986 until 1997; and the respondents, who acquired the property from the Burtons in 1997 knowing of the dispute which had by then arisen as to the right of way, and who probably paid a substantially lower sum on that account - the asking price of £120,000 having been reduced to £80,000. The judge held that the period of continuous use was interrupted in law in March 1997 when the appellants complained about it to the Burtons in writing; the track was not, however, physically blocked until 1999 by when the respondents were in occupation of the house. It was the respondents who initiated these proceedings later that year claiming declaratory and injunctive relief, with the result already sufficiently indicated.

8. The appellants, as stated, own the green. They own too Pinn Farm which lies immediately to the south-east of The Old School House and to part of which over many years they have themselves gained access by the disputed track (via a spur towards its south-eastern end). As to The Pinn itself, its eastern part was registered as a village green (as VG 185) under the Commons Registration Act 1965 in 1972; its western part was similarly registered (as VG 230) in 1994. There was little evidence before the court below as to the actual extent to which the green had been used down the years.

9. Against that broad factual backdrop I come now to the first of the appellants' grounds of appeal, namely that the use made of this track by the respondents and their predecessors in title was illegal. That a prescriptive right of way cannot be acquired by a user in breach of a criminal statute is well established and (subject to paragraph 30 below) not in dispute before us - see particularly *Hanning -v- Top Deck Travel Group Ltd* (1993) 68 P&CR 14 and *Robinson -v- Adair* The Times, 2 March 1995. Central to the appellants' case on illegality is s34 of the Road Traffic Act, 1988:

> "Prohibition of driving mechanically propelled vehicles elsewhere than on roads
>
> (1) Subject to the provisions of this section, if without lawful authority a person drives a motor vehicle;
>
> (a) on to or upon any common land, moorland or land of any other description not being land forming part of a road, or
>
> (b) on any road being a footpath or bridleway,
>
> he is guilty of an offence.
>
> …
>
> (3) It is not an offence under this section to drive a motor vehicle on any land within fifteen yards of a road, being a road on which a motor vehicle may lawfully be driven, for the purpose only of parking the vehicle on that land.

(4) A person shall not be convicted of an offence under this section with respect to a vehicle if he proves to the satisfaction of the court that it was driven in contravention of this section for the purpose of saving life or extinguishing fire or meeting any other like emergency.

(5) It is hereby declared that nothing in this section prejudices the operation of-

(a) section 193 of the Law of Property Act 1925 (rights of the public over commons and waste lands), or

(b) any byelaws applying to any land,

or affects the law of trespass to land or any right or remedy to which a person may by law be entitled in respect of any such trespass or in particular confers a right to park a vehicle on any land.

…"

10. "Road" is defined by s192 of the 1988 Act to mean:

> "… any highway and any other road to which the public has access …"

11. It is convenient to consider this provision as now enacted (substituted in the 1988 Act in almost identical terms by the Countryside and Rights of Way Act 2000, s67, Sch 7, paragraph 5) although strictly the legislation relevant for present purposes was that in force between 1956 and 1976 when the right of way was (or was not) being acquired by prescription. During those twenty years five different statutes were in force. There were, however, no material differences between their provisions and those of s34 (and s192) of the 1988 Act, save perhaps that the phrase "land of any other description" in s34(1)(a) read initially (when this provision was first enacted as s14(1) of the Road Traffic Act 1930) "or other land of whatsoever description".

12. The appellants' principal argument under s34 is that the track across The Pinn is (a) "land of any other description" which (b) does not form part of a road, so that those driving along the track (who *ex hypothesi* did not have "lawful authority" to do so else their use could not in any event have given rise to a prescriptive right) have therefore been guilty of an offence contrary to s34(1)(a). Both limbs of the argument raise difficult questions. The appellants succeeded below on the second, the judge holding:

> "There has to be more than effectively a private driveway, even though, of course, the meter man, the postman and others with business at the premises may go there, though in fact with this particular road, they would not go that way, it would probably only be those coming to stay, certainly those coming to visit for some period, who would use that track."

13. The appellants lost, however, on the first limb: although the judge appeared to have overlooked the argument when initially giving judgment, he then, upon this being pointed out, added a brief ex tempore judgment concluding that the phrase "land of any other description" must be construed *ejusdem generis* with the previous words "common land" and "moorland" so that the s34(1)(a) argument failed.

14. Mr Chapman for the appellants now advances three alternative submissions with regard to this important first limb of the argument: first, that it is plain on the language of the statute that the *ejusdem generis* principle is not to apply: the words "land of any other description" unambiguously mean what they say; secondly that, if ambiguous, clear statements made by the promoting minister in Parliament, admissible under *Pepper -v- Hart* [1993] AC 593, resolve the ambiguity in the appellants' favour; thirdly that, even assuming the *ejusdem generis* principle applies, a village green clearly falls within the relevant genus. Let me examine each of these three submissions in turn.

15. Mr Chapman submits that the language of s34(1)(a) is unambiguous, first because the introductory words "any common land, moorland" themselves give rise to no genus - there being no real common feature between common land and moorland (at least until the latter came to be recognised as such in the 2000 Act) - and secondly because the insertion of the words "of any other description" (previously, "land of whatsoever description") demonstrates Parliament's intention to exclude the *ejusdem generis* rule of construction - see the House of Lords decision in *Larsen -v- Sylvester & Co* [1908] AC 295. He might too have pointed to the sharply contrasting words at the end of s34(4): "any other *like* emergency" (emphasis added).

16. Mr Harrison's contrary submission rests essentially upon there being express reference in s34(1)(a) to "common land" and "moorland". Why, he asks forensically, refer to these specific types of land at all unless it is to limit the scope of the general words. The difficulty with this argument, however, is that it would arise in every case where the application or otherwise of the *ejusdem generis* principle falls for consideration, and cannot therefore be decisive in bringing the principle into play.

17. For my part, I accept Mr Chapman's submission that s34(1)(a) is unambiguous although I recognise that the use of the word "whatsoever" in residuary words is not of itself necessarily sufficient in every case to disapply the principle - see *Bennion on Statutory Interpretation* 3rd Edition, in particular at pp961 and 963. That conclusion notwithstanding, I think it right still to consider both the other arguments with regard to the application of s34(1)(a) on the facts of this case since, as Mr Harrison points out, the somewhat striking consequence of so construing the section is that prescriptive rights to vehicular access can never be acquired save over "land forming part of a road" ie over a public highway or over a road to which the public already has de facto access (as to which see below); there will accordingly be those, say, using a neighbour's private drive to access their own houses who, contrary to their long-held belief, have never gained the prescriptive right of way they thought they enjoyed.

18. Let it then be assumed, contrary to my already stated conclusion, that s34(1)(a) *is* ambiguous. A further difficult question then arises before even one comes to consider the

effect of ministerial statements in Parliament under the *Pepper -v- Hart* approach. It is Mr Harrison's contention that any ambiguity must inevitably be resolved in the respondents' favour because of the presumption in favour of the strict construction of penal statutes - see *Cross on Statutory Interpretation* 3rd Edition 1995 p172 and *Bennion*, section 271 at p637:

> "It is a principle of legal policy that a person should not be penalised except under clear law." (wording which, as the recent supplement to the 3rd Edition of *Bennion* points out, I adopted in my own judgment in *R -v- Bristol Magistrates' Court (ex parte E)* [1998] 3 All ER 398 at 804.)

19. For my part I find this argument convincing. Neither counsel was able to find any case in which the *Pepper -v- Hart* approach had been invoked to resolve an ambiguity in a penal statute. That seems to me unsurprising. If, therefore, I had thought s34(1)(a) unclear, I would have construed it as being subject to the *ejusdem generis* principle, difficult though I find it to identify any coherent genus within the clause.

20. Assume, however, that Hansard may be consulted under the *Pepper -v- Hart* principle even in a criminal context, the question then arises as to whether the statements of the promoting minister clearly resolve the supposed ambiguity and, if so, in which way, it being each side's contention that these statements favour them. In this regard I shall hope to be forgiven for not quoting extensively from the series of debates in the House of Lords during which the provision which ultimately became s14 of the 1930 Act was discussed and in certain respects amended. There were many passages in the various statements made by the promoting minister, the Earl Russell, which attracted extensive submissions from counsel on both sides. I content myself with a reference to the minister's explanation for amending the clause at the third reading to substitute the words ultimately enacted, "common land, moorland or other land of whatsoever description", for the original single word "land":

> "The object of this Amendment is to call special attention to common land and moorland in connection with this clause."

It is clear to me from consideration of the entire course of the debates that the minister's concern was not thereby to limit the provision to these sorts of land (to the inclusion of which in the ban many motorists had taken exception) but rather to emphasise that even they, perhaps the *least* likely to be included, *were* included. It would have been thought very odd to legislate for them but not for other sorts of land. As, indeed, the minister had said earlier in the debate (and this is a much abbreviated citation):

> "With regard to the clause about driving on commons, or driving elsewhere than on the highway … [and the 'indignant complaints of people who say that they have been in the habit of going for motor drives in the country and enjoying picnics'] … I [do not] think it should be recognised as a right of the motorist simply because he owns a car to drive on other people's property."

21. It should be remembered that these were comparatively early days for popular motoring and it may be doubted whether their Lordships really contemplated that motorists be permitted to

drive over other people's land, least of all so as to acquire vehicular rights of way by prescription.

22. Assume, however, contrary to my conclusions thus far, that the *ejusdem generis* principle is to apply, I would still find the first limb of s34(1)(a) to be established here. As already stated, I find it difficult to identify any coherent genus within the clause. But even were one able to construct such a genus, it could not to my mind sensibly exclude a village green. As Mr Chapman pointed out, common land and village greens are almost invariably of the same legal origin and, indeed, land sometimes comprises both together. Mr Harrison's argument that the genus should be regarded as land which is particularly attractive to recreational driving and that it excludes this village green I find wholly unconvincing.

23. I turn therefore to the question arising under the second limb of s34(1)(a), whether the track across The Pinn is "land forming part of a road", "road" for this purpose being defined by s192 to mean "any highway and any other land to which the public has access". Has the public access to the track? Assuming, as I do, that the inhabitants of Bonnington who are entitled to use The Pinn as their village green are sufficient to constitute "the public", the answer to this question is clearly yes in the sense that the public can and probably do walk over the track during their use of the green. Is that, however, sufficient for this purpose, or, as Mr Chapman submits, for the definition to be satisfied must the public have access to the track in the sense of using it as a road? In my judgment Mr Chapman is right on this argument too. Perhaps the most helpful authorities on the point are *DPP -v- Vivier* [1991] RTR 205 and *DPP -v- Coulman* [1993] RTR 230. Although neither of them address the narrow question arising, to my mind they lend general support to the view that it is only if walkers use the road *qua* road that this use is regarded as relevant access - see, for example, the discussion of *Harrison -v- Hill* [1932] JC 13 at p210 of the court's judgment in *DPP -v- Vivier*.

24. There was some suggestion during the course of argument that unless the track were to be regarded as "land forming part of a road" those driving along it would not be subject to the breathalyser law - the particular context in which *DPP -v- Vivier* and *DPP -v- Coulman* were decided. That, however, is not so: the breathalyser law applies to those driving "on a road or other public place". As, indeed, was stated in *DPP -v- Vivier* at p208, it was there "unclear, and immaterial, whether the defendant was driving upon one of the roads or at some other place within the caravan park". Even assuming, therefore, that the track is not within the s192 definition of "road", it is undoubtedly a "public place".

25. It follows from all this that I for my part accept Mr Chapman's submission that the relevant use of this track down the years has at all times contravened s34(1)(a).

26. Again, however, lest I am wrong in that conclusion, I turn next to consider Mr Chapman's alternative contention that the use contravened s34(1)(b). Two main questions arise in this regard also: first, whether the track crosses a footpath; secondly, whether in that event the provision is contravened. The judge decided both of these issues in the respondents' favour. the first on the facts, the second on the basis that in this context:

> "… 'on' means 'along' and is not concerned with crossing the footpath. … s34 is aimed at … ensuring that people do not leave a

> road in the ordinary sense and drive along a convenient-looking footpath or bridleway because it is a short cut or it may lead them to a nice place to have a picnic or something along those lines ….” (a view he thought supported by reference to s33 of the Act)

27. Mr Harrison on the appeal did not seek to uphold the judge’s conclusion on the second point: he accepted that the offence is committed irrespective of whether the vehicle is driven along or merely across a footpath. He vigorously relies, however, on the judge’s factual conclusion that he could not be satisfied on the balance of probabilities (the correct test to be applied) that the track in fact does cross a footpath. Mr Harrison points out that this judgment followed a five day hearing during which the judge not only heard from 12 witnesses (including, albeit on a different point, an expert document examiner) but also had a view. He urges us in these circumstances not to interfere with the judge’s findings of fact. It is, of course, a powerful submission. Mr Chapman on the other hand draws our attention to indisputable documentary evidence which, he submits, points conclusively to there having been a footpath along the entire northern length of the respondents’ garden for well over 100 years, a footpath which must inevitably therefore have crossed the track. This footpath is shown consistently by a succession of Ordnance Survey maps and definitive footpath plans to have led from the B2069 at the T junction south-eastwards across The Pinn immediately to the north of the school and along the north side of the respondents’ property before turning southwards after passing the north-east corner of The Old School House’s garden.

28. Reluctant though I am to overturn the judge’s factual finding here, I feel compelled to do so. In reality the evidence on the point was all one way and it is unfortunate that the judge allowed his undoubted and understandable sympathy for the respondents to cloud his view of it.

29. Even, therefore, had I not concluded that the use of this track contravened s34(1)(a), I would have felt driven to hold that it contravened s34(1)(b).

30. There is one further argument advanced by Mr Harrison which I should notice at this stage, an argument which, if sound, would preclude the appellants from relying on contraventions of s34(1) to prevent the acquisition of prescriptive vehicular rights of way. This argument focuses on s34(5) and contends that, were the appellants’ case on s34(1) correct, that would indeed “affect the law of trespass to land” because it would enlarge the remedy enjoyed by the landowner by enabling him to avoid prescriptive rights which would otherwise have accrued. This seems to me an impossible argument. The law of prescription is not that of trespass; rather it is a law under which one infers the notional historical grant of an easement from long use. The provision as to trespass in s34(5) was to confirm in the landowner’s favour that, s34(3) notwithstanding, the section did not grant motorists the right to park within 15 yards of a road, or deprive landowners of their private law rights in this regard. On this point I add only that Mr Harrison’s argument as to the effect of s34(5) is inconsistent with the Divisional Court decision in *Robinson -v- Adair* which applied the principle established in *Hanning -v- Top Deck Travel* (based on s193 of the Law of Property Act 1925) to uses in contravention of s34.

31. At this stage I must briefly mention yet another alternative argument advanced by the appellants, their contention that even if the use over the relevant 20 year period did not contravene s34 of the 1988 Act (or, more accurately, its predecessor provisions), it in any event breached s12 of the Inclosure Act 1859 which makes it an offence, *inter alia*, to injure a village green or interrupt the "use or enjoyment thereof as a place for exercise and recreation". This is a particularly unattractive argument, since, if correct, the appellants and their family down the years would necessarily have committed this same offence by driving over the track. As it is, I reject it both (a) because I see no sufficient reason to regard the existence and use of the track as injuring the green or interrupting its use or enjoyment by others (a point not apparently considered below), and (b) because in any event the judge was to my mind entitled to find on the facts that the prescriptive right had already been acquired before the relevant part of The Pinn became a village green - the track, as he found, bordering rather than falling within the eastern part of The Pinn which was registered as VG185 in 1972, and there being no sufficient evidence to show that the western part including the track was a village green prior to its registration as VG230 in 1994. As with so many of the myriad issues in this case, a full discussion of all these questions would require many more pages of judgment; I shall, therefore, hope to be forgiven for dealing with them in this somewhat summary form. I add only that Mr Chapman additionally but unpersuasively sought to contend that this use over the years also constituted a breach of s29 of the Commons Act 1876.

32. When these proceedings were brought, the conclusion expressed above with regard to s34 would have defeated, apparently for all time, the respondents' claim to a prescriptive right of way over the track. That, however, is no longer the case. By virtue of s68 of the 2000 Act and the Vehicular Access Across Common and Other Land (England) Regulations 2002, which came into force on 3 July 2002, the respondents are now able to purchase from the appellants an easement identical to that which the judge found they had acquired for 0.25% of the current market value of The Old School House. Section 68 provides so far as relevant:

> "(1) This section applies to a way which the owner or occupier (from time to time) of any premises has used as a means of access for vehicles to the premises, if that use of the way-
>
> (a) was an offence under an enactment applying to the land crossed by the way, but
>
> (b) would otherwise have been sufficient to create on or after the prescribed date, and to keep in existence, an easement giving a right of way for vehicles.
>
> (2) Regulations may provide, as respects a way to which this section applies, for the creation in accordance with the regulations, on the application of the owner of premises concerned and on compliance by him with prescribed requirements, of an easement subsisting at law for the benefit of the premises and giving a right of way for vehicles over that way."

I have already sufficiently indicated the effect, on the facts of this case, of the 2002 Regulations.

33. As the General Note to the Current Law copy of the 2000 Act states, s68 was enacted in the aftermath of the Court of Appeal's decision in *Hanning -v- Top Deck Travel* - by which double-decker buses were enjoined from driving through a wooded common - when numerous house-owners became faced with claims from commons' owners. It is no less apt, however to cure unfairness suffered at the hands of other landowners.

34. I come finally on this part of the case to a question raised by Sedley LJ in the course of argument as to whether prescriptive rights can ever be acquired for a use of land which is in conflict with public rights enjoyed over the same land. Assume, for example, that the vehicular use of this track was inconsistent with the public's rights to use The Pinn as a village green. The landowner could not lawfully grant such a right of way; no more, therefore, could such a right be acquired prescriptively by a presumed (lost modern) grant. Such an argument, of course, if sound and established on the facts, would appear to defeat not only any present claim by the respondents to an easement over the track but also any future right to purchase an easement under the 2000 Act: the use of the way would not "otherwise have been sufficient to create … an easement giving a right of way for vehicles" within the meaning of s68(1)(b). For my part, however, I rather doubt whether the argument is sound. It seems to me that it proves too much. Section 68 necessarily implies that sometimes a prescriptive right would otherwise be acquired despite the use being unlawful, yet on this argument the landowner could never properly have made an express grant of such an easement in the first place. In any event the point was not taken in the court below and the facts were accordingly not explored with this consideration in mind. I am wholly unprepared in these circumstances to conclude that the factual basis for such an argument has been made out. Indeed, as already pointed out in paragraph 31 above, the judge found the track to be within that part of The Pinn which was only registered as a village green in 1994 and would not I think have regarded its user during the first twenty years from 1956 as inconsistent with any public rights over that land before it became thus registered.

35. I come now to the second ground of appeal, the appellants' contention that even if the respondents already have, or (as I would hold) are now entitled to purchase, an easement over the track, that would solely be for the benefit of the original dominant tenement, School Cottage East, and not for the benefit of the larger tenement created in 1977 when that cottage was extended to include the two parish rooms. This is so, the argument runs, notwithstanding the judge's conclusion that the enlargement of the house in 1977 brought with it no significant increase in the use made of the track but merely made the property "somewhat more commodious". It is Mr Chapman's submission that the extent of use is not the issue; what is important is that the benefit was acquired only for the original dominant tenement and could not also be used thereafter in favour of the added property.

36. Before turning to examine this argument I would just point out that, quite apart from the 21 years use of the track established by the original dominant tenement from 1956 to 1977, the track was then used uninterruptedly in favour of the enlarged tenement for only two months short of a further 20 years - May 1977 to March 1997 (see paragraphs 5 and 7 above) - for the first nine years, indeed, by the first appellant's sister. It is difficult to conceive of a more unmeritorious claim to restrict the present use of a right of way or a less promising basis on

which to seek relief by way of injunction or even damages. Put that aside, however, the issue is important for present purposes since it will dictate whether the respondents now have the right to purchase the easement in favour only of the original tenement (of course at a lesser price) or in favour of the enlarged tenement consisting of The Old School House.

37. As already indicated, Mr Chapman's core submission is that a right of way established for the benefit of Whiteacre cannot be used for the benefit of both Whiteacre and Blackacre, irrespective of whether such extension of the dominant tenement involves any increase in the overall use of the easement. (Whiteacre, of course, is here School Cottage East and its garden, Blackacre the added parish rooms). This, he submits, is the effect of the governing authorities, most notably *Harris -v- Flower* (1904) 74 LJCt 127, *Graham -v- Philcox* [1984] 1 QB 747, *Peacock -v- Custins* [2001] EGLR 87 and *Das -v- Linden Mews Limited* [2002] EWCA Civ 590.

38. Mr Harrison argues the contrary. His wider submission is that there is no absolute rule of the sort contended for by the appellants and that the critical question is rather whether the use made of Blackacre is more than merely ancillary to that made of Whiteacre. His narrower submission is that any such rule prevents only the use of Whiteacre for direct access to Blackacre and that there has been no breach of that rule here given that the vehicles using the track are not, of course, driven through Whiteacre onto Blackacre, but remain parked at the bottom of Whiteacre's garden.

39. For present purposes I think it unnecessary to discuss the judgments in the various authorities in any great detail. The following summary will suffice. In *Harris -v- Flower* the owners of Whiteacre had acquired Blackacre and built a factory partly on each. The Court of Appeal held that the proposed user of the existing right of way for the purposes of that part of the building which was erected on Blackacre exceeded the grant. Vaughan-Williams LJ concluded:

> "… there must be many things to be done in respect of the buildings on [Blackacre] which cannot be said to be mere adjuncts to the honest user of the right of way for the purposes of [Whiteacre]. … It is not a mere case of user of [Whiteacre] with some usual offices on [Blackacre] connected with the buildings on [Whiteacre]."

40. Romer LJ said:

> "The law really is not in dispute. If a right of way be granted for the enjoyment of Close A, the grantee, because he owns or acquires Close B, cannot use the way in substance for passing over Close A to Close B."

41. *Graham -v- Philcox* is a difficult case and its full exegesis would occupy many pages. It is the respondents who seek to rely upon it, in particular for the Court of Appeal's rejection of the servient owners' "principal submission … that as the dominant tenement for the benefit of which the way is now claimed, namely the coach-house, is not the same as and is indeed greater than the dominant tenement for the benefit of which the way was originally granted, namely only the upper flat in the coach-house, therefore the plaintiffs cannot use that way

now when the coach-house is now one dwelling and the original two flats which it comprised have been combined into one." - see May LJ's judgment at 755G-757C. Mr Chapman argues that on the very different facts of that case the decision was correct and explicable by reference to s62(2) of the Law of Property Act 1925 - see May LJ's judgment at 757E-G - a provision which has no application in the present case. For my part I find *Graham -v- Philcox* unhelpful in the present context and note that it was not even referred to in either of the two subsequent cases to which I now come.

42. *Peacock -v- Custins* concerned a claim by the dominant tenement owners to use a way granted for the limited purposes of 15 acres of agricultural land (Whiteacre) for the additional purpose of accessing and cultivating a further ten acres (Blackacre). Schiemann LJ giving the judgment of the Court of Appeal rejecting the claim said at 91B-E:

> "Considering the position as a matter of principle, we would consider that the defendants are entitled to the declaration that they seek. In our judgment, the authorities to which we have referred, and, in particular, *Harris -v- Flower*, also confirm that, where a court is being asked to declare whether the right to use a way comprises a right to use it to facilitate the cultivation of land other than the dominant tenement, the court is not concerned with any comparison between the amount of use made, or to be made, of the servient tenement and the amount of use made, or that might lawfully be made, within the scope of the grant. It is concerned with declaring the scope of the grant, having regard to its purposes and the identity of the dominant tenement. The authorities indicated that the burden on the owner of the servient tenement is not to be increased without his consent. But burden, in this context, does not refer to the number of journeys or the weight of the vehicles. Any use of the way is, in contemplation of law, a burden, and one must ask whether the grantor agreed to the grantee making use of the way for that purpose. Although in *Harris -v- Flower* Vaughan-Williams LJ mentioned the 'heavy and frequent traffic' arising from the factory that 'could not have arisen without the use of the white land as well as of the pink', the view we take of the reasoning in all three judgments in that case, as appears by the passages set out above, is that all three judges were addressing not the question of additional user, but the different question of whether the white land was being used for purposes that were not merely adjuncts to the honest use of the pink land (the dominant tenement), or, rephrasing the same question, whether the way was being used for the purposes of the white land as well as the dominant tenement.
>
> …
>
> It is, in our judgment, clear that the grantor did not authorise the use of the way for the purpose of cultivating the blue land. This cannot sensibly be described as ancillary to the cultivation of [Whiteacre]."

43. Mr Chapman relies heavily on that statement of the law; Mr Harrison submits that it does not support the absolute principle for which Mr Chapman contends and that on the facts of

the present case Blackacre is properly to be regarded as being used merely as an adjunct to the use of Whiteacre.

44. *Das -v- Linden Mews Limited* concerned claims by the owners of two end of mews houses to use their right of way along the mews to access what had been garden land in separate ownership at the end of the mews to park their cars. In upholding the trial judge's rejection of that claim on the basis that the asserted use of the way was to access and serve a separate use on a tenement which was not part of the dominant tenement, Buxton LJ in the Court of Appeal described the reference to "ancillary" use in the final sentence of the passage quoted above from Schiemann LJ's judgment in *Peacock -v- Custins* as merely a "very limited extension of the enjoyment of the access to the dominant tenement, rather than as we are asked to find in this case, extension of enjoyment of the dominant tenement". He pointed out that the issue in *Das* concerned "a use of a way to access land that is not the dominant tenement without going through the dominant tenement at all", an issue which was addressed neither in *Harris -v- Flower* nor directly in *Peacock -v- Custins*, "another 'passing through' case", as he called it.

45. Having regard to those authorities, I for my part would reject Mr Harrison's narrower submission outlined in paragraph 38 above: the mere fact that this is a vehicular right of way and that the vehicles themselves do not pass through Whiteacre into Blackacre cannot in my judgment operate to distinguish this case from *Harris -v- Flower* and *Peacock -v- Custins*. I would, however, accept his wider submission and, on the facts found here, hold that insofar as the use of the way serves Blackacre that can only sensibly be described as ancillary to its use for the purposes of Whiteacre. This ground of appeal accordingly fails.

46. I would therefore allow the appeal only on the issue of unlawful use and with the result that although the respondents presently have no easement over the track they are now entitled to acquire it under s68 of the 2000 Act.

Lord Justice Mantell:

47. Simon Brown LJ has sufficiently set out the background to this appeal and referred to the relevant statutory provisions. He has concluded that the appeal should succeed on the first ground but not the second. I agree that the appeal should fail on the second ground for the reasons given by my Lord. However, I take a different view as to the proper interpretation and application of section 34 of the 1988 Road Traffic Act both in its present form and previous incarnations. The result is that I would dismiss the appeal altogether. Some explanation is required.

48. My starting point is the definition of 'road'. For the purposes of the Road Traffic Acts which culminate in the Act of 1988, 'road' is defined as

> "any highway and any other road to which the public has access."

So for the disputed right of way to fall outside section 34(1)(a) it must first be a 'road' and secondly it must be accessible by the public. The first question is entirely one of fact (see *Romford Ice and Cold Storage Co Ltd v. Lister* (1956) 2QB 180 per Birkett LJ at 205) as,

largely so, is the second (See *DPP v. Coulman* (1983) Road Traffic Reports 230 per Mann LJ at 233). The judge resolved the first but not the second question in favour of the respondents. At pp. 19 and 20 he said

> "I accept that it was a road; it was clearly defined as such. I do not, however, accept that the public had access. It seems to me that the only people who had access were the owners of and visitors to First School Cottage East and then the Old School House and to Pinn Farm, and as I read the judgment of Mann LJ in *DPP v. Coulman* (1993) Road Traffic Reports 230, that is really not sufficient. There has to be more than effectively a private driveway, even though, of course, the meter man, the postman, and others with business at the premises may go there, though in fact with this particular road, they would not go that way, it would probably be only those coming to stay, certainly those coming to visit for some period, who would use that track."

49. There is no challenge to the judge's first finding of fact, namely that this was and is a road. However the respondents take issue with the second finding. Since public access is not confined to vehicular use, they ask, rhetorically, how can that be when the public has access and has always had access to what is now the village green? Members of the public are as free to walk along the disputed right of way, or road as it has become by virtue of the judge's finding, as the respondents and their visitors. If the proposition, not accepted, be right that access must be for the purpose of using the road qua road then members of the public are free to use it in that way also. It matters not that they have no destination or particular purpose in mind beyond that perhaps of walking the dog without wishing to tread on the grass and accordingly the judge should have held that this was a road to which the public had access.

50. The appellants pithy response taken from the skeleton argument is as follows:

> "It is understood that the respondents argue in support of their respondents' notice that the access way is a road to which the public have access because it runs across the Pinn and the Pinn is open land of which the public has had de facto access on foot. It would make a complete nonsense of the section if it were unlawful to drive on (a) open land or (b) a road which was de iure a public footpath or (c) a road which was not used by the public, but it were lawful to drive on a road which was de facto a public footpath. The scheme of the section is clearly to make it unlawful to drive without authority on any land except on what is de iure or de facto a public vehicular right of way."

51. As stated and unsurprisingly the respondents accept the judge's holding that this was a road. I do not understand it to be challenged on behalf of the appellants. Insofar as a road is a definable way between two points over which vehicles can pass (see *Oxford v. Austin* (1981) RTR 416) I have no doubt that the judge was right. Was he correct in holding that the public does not have access? I think not. Although I am conscious of arguments waiting in the wings as to whether the class or classes of people entitled to walk over the Pinn is and are so limited as not to constitute the public at large it has been assumed for the purposes of this

appeal that the Pinn itself is open to members of the public. It follows that members of the public are as well able to walk over or along the disputed right of way as anyone else. I can find no warrant for the proposition that the only relevant access is use of the road qua road. *Harrison v. Hill* (1932) JC 13 discussed in *DPP v. Vivier* (1991) RTA 205 was concerned with access to a private farm road but insofar as it was held that unopposed recreational use by the public was capable of amounting to access it seems to me that the authority supports rather than confounds the respondents' argument.

52. It follows in my view that section 34(1)(a) does not bite and if the use of this road is to be deemed unlawful it must be by virtue of section 34(1)(b) or not at all.

53. But it would be craven of me to proceed without first attempting to grapple with the difficult question of construction which has been central to the argument.

54. I readily accept that the words "other land of whatsoever description" or even "land of any other description" offer an unpromising starting point for a submission that the section is ambiguous. But if they mean simply what they say a number of curious consequences would seem to follow. First of all there is that mentioned by Simon Brown LJ, namely that unrestrictively construed the section would have the effect of preventing prescriptive rights to vehicular access being acquired save over "land forming part of a road" with the further unhappy consequences mentioned by my Lord. Secondly it will mean that those who access their own houses via a neighbours private drive will have been committing and probably continue to commit a criminal offence. Nor does it stop there; such a construction means that those of us who may have turned our cars around by backing into someone else's driveway will have committed the offence whereas anyone who parks in someone else's driveway within fifteen yards of the road will not. Thirdly it will mean that an offence with far reaching effect will have been on the statute books since 1930, so far as I can discover, without receiving notice from any quarter.

55. Quite apart from this being a penal provision to be construed as leniently as possible the absurdity produced suggests that this is one of those rare cases in which it is permissible to refer to Hansard. As was said by Lord Browne- Wilkinson expressing the view of the majority of their lordships in *Pepper v. Hart* (1993) AC 593 at 634

> "In my judgment subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity."

56. On turning to Hansard, however, I find little by way of a clear statement of intention. There is the passage cited by Simon Brown LJ which speaks in favour of an unlimited construction but there are other passages which appear to me to have the opposite effect. At one point the Earl Russell in moving an amendment to insert clause 13 (now section 34) said

> "What is desired I understand is to prevent cars travelling here and there all over the downs and other similar places where there are no roads, and where those persons have no business to be, and also

> rushing up and down the seashore at seaside places. Those are desirable objects, and we think will attain what is aimed at, but if any of your lordships see a way of improving the clause before the next stage we shall be glad to consider any suggestions that may be made."

At another place, rather more ambiguously, the Earl Russell said:

> "With regard to the clause about driving on commons, or rather driving elsewhere than on the highway I have put down an Amendment, which is intended to meet the point of the noble Earl opposite, and I hope that he will find that it does so."

But perhaps the matter appears most clearly from what was said during the second reading in the House of Commons. The then Minister of Transport, Mr Herbert Morrison, said of this clause:

> "There is another useful provision which has been introduced. It is a common grievance against the minority and not the general body of motorists, who, I say again, are a fairly decent lot of people and are really on the whole, as decent as we are, that some of them have been driving their cars a little wantonly and brutally over bridle ways, pathways, commons and moorlands not forming part of a road. We propose in clause fourteen (as it had become) that it shall be an offence to drive a motor vehicle without lawful authority onto to any such land but they may drive onto land within fifteen yards of a road for the purpose of parking. The Clause does not interfere in any way with the existing remedies for trespass whether the vehicle is within a fifteen yards margin along the road or not."

57. Having regard, therefore, to the content of the Parliamentary debates I consider there is much to be said for the application of the *ejusdem generis* rule and had it been necessary to do so I would have been inclined to uphold the judge in that regard. However, of itself that would not have allowed the respondents to survive because, like Simon Brown LJ, I am firmly of the view that a village green falls within the same genus as common land and moorland.

58. So I turn at last to section 34(1)(b).

59. The first question that arises concerns the judge's failure to be satisfied that the disputed right of way is crossed by a footpath. On this I am entirely in agreement with Simon Brown LJ. I share his reluctance but for the reasons which Simon Brown LJ found compelling, I too would overturn the judge's findings.

60. That should be the end of it. However, in the course of argument Mr Harrison for the respondents made a concession which he probably regrets and which in my view was a mistake. He accepted that the offence was committed irrespective of whether the vehicle is driven along or merely across a footpath. The judge had concluded that

> "'on' means 'along' and is not concerned with crossing the footpath… s.34 is aimed at …ensuring that people do not leave a road in the ordinary sense and drive along a convenient looking footpath or bridle way because it is a short cut or it may lead them to a nice place to have a picnic or something along those lines...".

61. From which I take it that the Judge considered that the road referred to in section 34(1)(b) was to be taken to be the disputed right of way and giving the words their natural meaning the road and footpath must be one and the same and so it would follow that what was envisaged was someone driving along a road which was also a footpath. The contrary view expressed by Simon Brown LJ is that the road in question is the footpath which crosses the disputed right of way and consequently that by driving along the disputed right of way and over the footpath one drives on 'a road being a footpath'.

62. I accept, of course, that a public footpath is a highway and, therefore, within the statutory definition of 'road' (see *Lang v. Hindhaugh* (1986) RTR 271). It follows that anyone who drives along the disputed right of way at the intersection must cross over "a road being a footpath". But possible though it is to read section 34(1)(b) in that way it does not seem to me to give the words their natural meaning. Moreover this is a penal provision and must be construed accordingly. So after a deal of hesitation I have come to the conclusion that the judge's construction is to be preferred. It is scarcely necessary to say that it is only with the greatest diffidence and regret that I have differed from my lord, Simon Brown LJ.

63. Of course the respondents can only prevail if Mr Harrison is permitted to withdraw his concession. My provisional view is that the appellants would not suffer any injustice if he were allowed to do so. That done and as already indicated I would dismiss this appeal.

Lord Justice Sedley:

64. I agree with the entirety of the judgment of Simon Brown LJ, subject only to the following remarks.

65. While it is disappointing to be precluded from referring to the diverting chapter of social history contained in Hansard's record of the hereditary peerage of the United Kingdom debating in 1930 how to keep the new and growing swarm of motor tourists off their land, it must be right that the principle that penal statutes are to be narrowly construed intervenes to resolve any ambiguity without resort to Hansard. But it seems to me conclusive against construction *ejusdem generis* and in favour of an open category of which common land and moorland are merely examples that moorland was not a term of legal art when Parliament introduced it. It was simply a way of describing large tracts of unenclosed land which invited trespass. If there were an ambiguity, it would not follow that the resolution of it had to be accomplished by devising a genus where there was none. The right way might be simply to submit that the land specified in the charge is neither common land nor moorland nor land which can be demonstrated to be of the same kind; and like the other members of the court I see great difficulty in making such a submission about a village green.

66. The Parliamentary genesis of what is now s.34(1)(a) does, however, help to explain why the provision is apparently capable of having the curious effects pointed out by Mantell LJ in paragraph 54 above. Such effects are a well-known characteristic of interpolations made in Bills to meet special interests. It has to be left to the good sense of prosecutors and – if necessary – courts not to use such provisions, or let them be used, for purposes for which they were plainly not intended.

67. I agree with Simon Brown LJ that the concession was rightly made that to drive across a footpath is to drive on it. It might be that a single such incursion does not matter, but repeated crossing of a footpath by motor vehicles is destructive of the protection which the path's status is designed to ensure. Since you cannot construe s.34(1)(b) so as to permit the first of these without also permitting the second, the answer has to be that it permits neither.

68. Lastly, I agree that – as Simon Brown LJ holds in paragraph 34 - the question whether a prescriptive private right can ever be acquired over publicly dedicated land such as a village green does not fall to be answered on this appeal, not having been canvassed below. It may be that the factual basis for the argument is in any case not present here; but it seems to me an important question, and I would not want to see it marginalised without full consideration in a suitable case. For the present I do not share Simon Brown LJ's scepticism about its viability in law.