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ARTICLE

Village greens, commons land and the emergence of sports law in the UK

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Abstract This article traces the legal development of recreational rights surrounding village greens and, later, urban public spaces in the UK. The article highlights that at a critical juncture in the development of modern sport in Britain—in the mid-nineteenth century—the law helped embed not only just a space for sport in the emerging industrialised and increasingly urbanised environment, but also the place of sport in the Victorian era's evolving socio-economic landscape and, further, the relevant case law was the precursor for what is known today as sports law.

Keywords Recreation · Village greens · Sports law

1 Introduction

Trespass for breaking his close; the defendant prescribes, that all the inhabitants of the village, time out of memory…had used to dance there at all times of the year at their free will, for their recreation, and so justifies to dance there: issue was on the prescription, and a verdict for the defendant, and to save his costs the plaintiff moved in arrest of judgment, that this prescription to dance in the freehold of another, and spoil his grass, was void, especially as it is laid…at all times of the year, and not at seasonable times; and that 'twas also ill laid in the inhabitants, who although they may prescribe in easements…yet they ought to be easements of necessity, as ways to a church…and not for pleasure only, as this case is. Secondly, if it be good, it ought to have been laid by way of custom in the town, and not by prescription in the persons…..but by the Court, this is a good custom, and it is necessary for inhabitants to have their recreation.[1]

The above is an extract from the English Reports' account of legal proceedings from the mid-seventeenth century in which the claimant instigated an action against the inhabitant of an unnamed village in Oxfordshire for trespass of his freehold, private property. The extract needs some translation, both textual and contextual, and in that translation it reveals itself to be the precursor of jurisprudence that today is described as epitomising "sports law".

The "trespass" arose from village dances, which the claimant complained were not just a summer phenomena ("at seasonable times") in this particular village, but could occur at any time in the year and which always spoiled his grass. The defendant argued that, although the green space or "close" in question was enclosed (most likely by a hedge), the inhabitants of the village had, since "time immemorial", danced on this particular village green and thus had over time acquired the right to use it for recreational purposes.

The disputed right would now, in the technical language of property law, more properly be described as an "easement".[2] The acquisition process was by way of "prescription".[3] The claimant (who was obviously a man of status: owning the freehold to a property large enough to have an accompanying enclosure and having the means to sustain protracted litigation) countered that, although the

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[1] *Abbot v Weekly* (1665) 83 ER 357; 1 Lev 176.

[2] In plain language, an easement is right to cross (a right of way) or otherwise use someone else's land for a specified purpose.

[3] In this instance, prescription meant the acquisition of an easement by uninterrupted and unhidden use over a long period. Technically, the period entailed continuous and open use of the easement from "time immemorial", which was fixed in the legal memory of English common law at 1189, i.e. before the reign of Richard I.

villagers may benefit from an easement of necessity over another's private property, for example, to permit them to go to church, they should not benefit from a widely drawn easement for pleasure only. No court, the claimant argued, should recognise villagers' right to dance on another's ground at all times of the year. The Court of King's Bench held for the villagers holding that the right in question was customary in nature and a "good custom" at that because "it is necessary for inhabitants to have their recreation."

It is this recognition of a "right to recreation" that is the starting point for this article and, more broadly, how, over the following two centuries, the courts in England, through interpretation and application of common law principles, and later statute, had an influential and hitherto understated role in the birth of modern sport in Britain.[4] In this vein, this article traces the subsequent precedential pattern of *Abbot v Weekly* with regard to the development of recreational rights surrounding village greens and, later, urban public spaces in England. Moreover, and centrally, the article highlights that at a critical juncture in the development of modern sport in Britain—the mid-nineteenth century—the law helped embed not just a *space* for sport in the emerging industrialised and increasingly urbanised environment, but also the *place* of sport in the Victorian era's evolving socio-economic landscape.[5]

The *Abbot v Weekly* precedential trail ends at the turn of this century when the then House of Lords addressed the issue of the registration of village greens wherein proof of the playing of lawful sports, games and informal recreations was often integral to attempts by claimants to establish (or deny) user rights to the land in question.[6] Accordingly, this short article, which has begun with an account of the first reported case considering customary recreation rights—and, arguably, the first recorded "sports law" case in the UK—will end with reference to the small handful of genuinely sports law-related proceedings ever to make the jurisdiction's senior superior court.

Before that story is told, however, it is necessary to begin *in media res* by giving a brief overview of the social, economic and political factors which together ensured that the origins of many modern, codified sports can be traced to the values, morals and laws of mid-nineteenth century Britain.

2 The civilising process, law and the birth of modern sport

There is, no doubt, a correlation between the sophistication, frequency and range of organised sports events and the technological, economic and military power of the "host" society. Sporting events were, for instance, an integral and popular part of the societal calendars of Ancient Greece and Imperial Rome.[7] In contemporary terms, the four major leagues sports in North America continue to dominate sporting "rich lists" in terms of annual revenue streams and player salaries.[8] In the mid-nineteenth century, Britain and its Empire, as the world's leading industrial power, would leave an inedible mark on the development of contemporary sport. Dedicated leisure time and increased disposable income, allied to developments in communication and transport, meant that not only could most sections of Victorian society read about sports events more or less as they happened, but some could also easily travel to and cheaply attend these events. This rise in the popularity and accessibility of sport meant that some sports could sustain a professional code, augmenting basic revenue from gate receipts by attracting commercial sponsorships and thus in turn leading to the beginning of the mass "consumption" of sport.[9]

A number of other less tangible factors also helped nurture and sustain sport's first meaningful wave of "start-up" regulatory bodies, including the establishment of the Football Association in 1863; the Rugby Football Union (1871); the Yacht Racing Association (1875); the Amateur Athletics Association (1880); the Amateur Rowing Association (1882); the Amateur Swimming Association (1886); the Hockey Association (1886); the Lawn Tennis Association (1888); the Badminton Association (1893); and the Northern Rugby (League) Football Union (1895).[10] Three of these factors are noteworthy.

The first is that sport was seen by the governing and moneyed elite of the material time as providing a vital cathartic outlet for the industrialised and urbanised masses of era. Sport could be used with powerful symbolism to demonstrate a commonality between all in society and, simultaneously, deference to one's betters. The elite's education in the classics would have alerted them to the

[4] For a sports historian's view of the law's influence on the regulation of sport at the material time see Vamplew 2007 and Vamplew 2009. The author would also like to thank Professor Vamplew for his insightful comments on an earlier draft of this chapter.

[5] This chapter is informed by a similar, but much more erudite, account of the law's role in contribution to the birth of modern sport by McArdle 2000, chap 1.

[6] See, for example, *R (Beresford) v Sunderland City Council* [2003] UKHL 60; [2004] 1 AC 889.

[7] For a recent account of "ancient" sport, from Homer to Byzantium, see generally Potter 2011.

[8] See Sawer 2010 in an article that draws from sports finance data available at www.sportingintelligence.com.

[9] The research on the history and development of sport in Britain at the material time is voluminous. Nonetheless, three monographs that continue to reward on re-reading include Birley 1993; Holt 1990; and Vamplew 1988.

[10] For a witty review of how the British "invented" these sports, see generally Norridge 2008.

regular distraction of the Roman mob by the *panem et circenses* of imperially sponsored events at the Coliseum. Moreover, the folk history, among the landed elite, and in particular of the French Revolution, remained fresh, as epitomised by George Trevelyan's exaggerated lament, "if the French noblesse had been capable of playing cricket with their peasants, their chateaux would never have been burnt."[11] The self-serving and self-interested extent of the elite's interest in "sport for all"—to which the maintenance of the social and political status quo was in fact central—will be expanded upon later. For now, the socio-political catharsis provided by sport helps, to some extent, explain why from the mid-to-late nineteenth century the proletarianism and professionalisation of sport, epitomised by working class football, and otherwise completely at odds with the Corinthian ideal of the "gentleman amateur", was partly indulged.[12] Most symbolically of all, on 25 April 1914, that "indulgence" received the royal seal of approval when George V became the first reigning monarch to attend the FA Cup final. The year and timing of the gesture, as Europe and the world drew towards war, is, of course, hugely relevant. Those Burnley and Liverpool supporters in the 72,000 attendance at Crystal Palace would, a summer later, be asked to swap the terrace for the trench.

The second factor in the promotion of sport at the material time is captured in the cultural conditioning notion of "manly character". That concept encapsulated not only the historical connotations of practice at sport as a means of preparing men for war, but also Victorian ideals on masculinity, social Darwinism, muscular Christianity and even imperial superiority.[13] The manner in which sport was seen as a means of building character, learning about manhood and inculcating the habit of victory at home and abroad was seen to greatest effect in English public schools which understood that "through sport boys acquire virtues which no books can give them; not merely daring and endurance but better still temper, self-restraint, fairness, honour, unenvious appropriation of another's success and all that 'give and take' of life which stands a man in good stead when he goes forth in the world and without which, indeed, his success is always maimed and partial."[14]

The third factor in the promotion of sport can be set against the backdrop of the social, economic and political developments that marked the gradual decline in Europe of feudal, agrarian, kin-based societies and the beginnings of industrialisation and urbanisation, allied to centralised government. In short, as western societies became more advanced in terms of political and economic structure, Elias[15] (as later interpreted by Dunning and others) outlined how such societies had engaged in a parallel "civilising process" influencing personal, social *and* sporting relationships.[16] Put simply, Elias and Dunning contend that a lowering of the "threshold of repugnancy" towards acts of inter-personal violence had a significant influence on the development of modern sport.[17] During the nineteenth century, this civilising process, it is claimed, was an underlying feature in the development of a bourgeois model of sport whereby to fit in with the emerging "respectable" values of the (predominately) metropolitan middle class, popular sports of the pre-industrial era either had to submit to codification and rid themselves of their association with alcohol, gambling, violence, animal cruelty and the inobservance of the Sabbath, or face proscription.[18]

Central to this article is the contention that a fourth factor assisted in the development of modern sport, i.e. the general law and the judiciary. Arguably, during the half-century 1830 to 1880, the general law and the courts played an understated instrumental role in this civilising process through which "rational" recreations[19] and sport appropriate to the newly industrialised and orderly urbanised landscape of mid-nineteenth century Britain were promoted and formalised into what we today recognise as their modern form. Three examples of this process are noteworthy. First, the 1830s saw an increase in what might be called "pugilistic prosecutions", whereby the criminal law in various actions—assault, affray, riot or illegal assembly—was used both as an attempt to eradicate the practice of bare fisted fighting and coerce the prize fighting fraternity into adopting rules as regularised and sanitised (in relative terms) as the Queensberry Rules (1865).[20] Second, the 1830s also saw the proscription of numerous blood sports involving the baiting or fighting of animals contrary to the Cruelty to Animals Act 1835 and similar legislative provisions in 1849, 1876 and 1911.[21] Third, enforcement of Section 72 of the Highways Way Act 1835,[22] in

[11] Cited by Holt 1990, 268.

[12] See generally Hargreaves 1986. In the sport of rugby, this, essentially, class-based distinction led in the 1890s to the schism between rugby union and rugby league. See generally Collins 2006.

[13] See further Mangan 2011.

[14] Quoted by Haley 1978, 119.

[15] Elias 1978 and Elias and Dunning 1986.

[16] On this "reform of popular culture", see further Burke 2009.

[17] It must be noted that the Elias and Dunning's approach has been criticised for placing too much emphasis on a "violence reduction" rationale in the formalisation of sport at this time. Compare, for instance, Vamplew 2007, 161-171.

[18] See, for example, Agozino 1996, 163-188; Malcolm 2002, 37-57; and Sheard 1997, 31-57.

[19] See generally Bailey 1978.

[20] Anderson 2006, 265- 287.

[21] See Radford 2001, 33-98.

[22] The provision made it a criminal offence for any person to obstruct the highway by playing at "Football or any other Game on any Part of said Highways, to the Annoyance of Any Passenger or Passengers.".

conjunction with Section 54(17) of the Metropolitan Police Act 1839,[23] helped ensure that the "riotous rampage" that was pre-industrial football, often held on religious holidays or pattern days such as Shrove Tuesday, evolved into the "more domesticated, commercialised and spatially contained form"[24] that we recognise today.

In overall terms, the combined influence that the civilising process, the law and the courts had on sport at the material time assisted in suppressing traditional and dangerously unconstrained and improvised sports event, and transforming them into events that became as easily regulated and supervised as the blast of the factory whistle. Symbolic manifestations of this link can be found in the various Factory Acts of the era, which eventually led in most industries to the stoppage of work at 2 pm on Saturdays and thus, in turn, to the tradition of holding football matches 1 h later,[25] and also in the Bank Holiday Act of 1871 which, according to Walvin, was "a landmark in the emergence of modern leisure patterns for it transformed old religious holidays into secular days of recreation sanctioned by the state."[26] It must also be noted that these reforms were a unique experience in nineteenth century Europe—the five-and-a-half day working week was referred to as *la semaine anglaise*—and they go to understanding Britain's marked influence on the then development and, later, the spread of new forms of sport and recreation.[27]

The influence that the civilising process, the law and the courts had on sport was not confined to the mid-nineteenth century. As Hunt shows, it can be traced to and from the mediaeval era.[28] A statute in 1388 from the reign of Richard II, for instance, prohibited labourers from "playing at Tennis or Football and other Games called Coits, Dice, Casting of the Stone and other importune Games" on Sundays and holy feast/saint days[29] and similar statutes followed in 1477,[30] 1495,,[31] 1503,[32] 1511,[33] 1514[34] and 1541.[35] Variously, these "Unlawful Games" statutes—often supported by royal proclamation[36]—sought to prohibit "vain, dishonest, unthrifty and idle"[37] sports associated with alcohol, gambling, and vagrancy to the detriment of the practice of a sport such as archery, which in the absence of a standing army was seen as central to the realm's military preparedness for war.[38]

Finally, this essentially moral regulation of sport throughout the above ages (at no stage, even in the Victorian era, can it be said that a centralised, deliberative governmental "policy" on sport existed) prompted by the civilising process and facilitated by the law can be used to explain what type of sports were played or emerged at a particular time; how they were played and evolved in terms of rules and codification; when they were played such as on Saturday afternoons; and even who—labouring, middle or upper class—played a particular sport. The core of this short piece is—and using *Abbot v Weekly* as an example—to argue that the combination of the civilising process, the law and judgments of the courts of mid-nineteenth century Britain also had an influential role in where sport was played.

3 A place and space for sport and recreation

At first it must be clarified that the sport or recreations at issue are not the established or newly professional sports of the mid-nineteenth century, but what would now be called "grassroots" or recreational sport. The key question is where, in the absence of any central or local government support for sport and recreation, could such sport be played? What local facilities did the "Sunday league" footballers of the mid-nineteenth century or the local cycling or cricket or athletic club access and use?

In terms of infrastructure and facilities, sports such as horse racing, cricket and golf benefitted from their connections with the landed and moneyed elite of the era.

For instance, the site of Ascot racecourse (located just six miles from Windsor Castle in Berkshire and with an equine history stretching back to the reign of Queen Anne in the early eighteenth century) formally was secured through the Windsor Forest Enclosure Act of 1813, which entrusted heath land in the area into the ownership of the Crown with the proviso that it would be retained as a racecourse for public use: "which piece of Ground shall be kept and continued as a Racecourse for the Public Use at all times, as it has usually been."

Similarly, the history of Edgbaston cricket ground in Birmingham owes its origins to the fact that from the 1820s

[23] The provision made it an offence to "play at any game to the annoyance of the inhabitants or passengers" and it authorised a constable to take any person committing such an offence into custody without warrant.

[24] See further Vorspan 2000, 905-908.

[25] Walvin 1975, 50-56.

[26] Walvin 1975, 55.

[27] Huggins 2004 15-16.

[28] Hunt 1995, 5-29.

[29] 12 Ric 2 c6, Unlawful Games (1388).

[30] 17 Edw 4 c3, Unlawful Games (1477).

[31] 11 Hen 7 c17, Unlawful Games (1495).

[32] 19 Hen 7 c12, Unlawful Games (1503).

[33] 3 Hen 8 c3, Unlawful Games (1511).

[34] 6 Hen 8 c2, Unlawful Games (1514).

[35] 33 Hen 8 c9, Unlawful Games (1541).

[36] Hunt 1995, 19-21.

[37] 39 Edw 3 c23, Unlawful Games (1365).

[38] For the specific example of the attempts to proscribe football during the period, see Bushaway 1982, 250-252 and Dunning and Sheard 1979, chap 1.

onwards, the Calthorpe estate, the landowners of the eponymous suburb, imposed restrictive clauses in covenants for leasing land prohibiting the building of "low class" housing as well as "any workshops or other kinds of shops, nor any place or places for carrying on any trade or manufacture nor any brewshop, alehouse or tea garden."[39] Consequently, when in the mid-1880s Warwickshire Cricket Club asked to lease a 12 acre site in the area, then used as meadows, their request was granted because, according to Hignall, it created "a positive externality" that further enhanced the genteel nature of the suburb.[40]

Later still in the 1890s, Lowerson notes that as a golf club membership boomed among the middle classes, clubs sought to expand their use of commons land adjacent to urban areas as courses and driving areas—and particularly the sandy heathlands in the London area.[41] Objections, sometimes taking the form of legal proceedings, by locals, who enjoyed customary rights to ramble, play football or even graze animals on the commons, were regularly faced down by golf clubs which "had the advantage of their own commercial or professional experience, with solicitors members as key figures. They also had a sense of sporting aggression and the collective power of clubs to reinforce their encroachments."[42] In short, while golf clubs could collectively subsume the costs of defending a legal action, individual, local residents most likely did not wish to take the risks of having to pay the costs of instigating and sustaining legal proceedings. By the mid-1890s, the Commons Preservation Society, a national conservation body for commons areas, was reporting bluntly that "golf clubs practically monopolise the commons."[43]

By this decade, recreations favoured by the moneyed industrial elite as their gentleman amateur sport of choice benefitted both from the demise of the legal device that was the strict settlement, whereby the landed classes sought to tie their estates dynastically and the *noveaux riches'* financial capacity to lease or buy undeveloped green areas near urban centres.[44] Moreover, and as Baker observes, the great agricultural depression of the 1880s gave rise to "strong desires among landowners to be able to convert land into more profitable investments."[45] Leasing land in or near urban areas to emerging sports clubs was one such means of investment and indeed the desire to make the investment pay all year round for the benefit of members saw many cricket clubs adopt a "winter" sport, i.e. football.[46] An illustration of this pattern can be seen in the incorporation in 1894 of the Bath and County Recreation Ground Company, which leased 15 acres near the city from the Forster family, holders of the Bathwick Estate. According to the company's prospectus, its object was to develop grounds, on what is still colloquially known as "the Rec", in such a way "as to render it suitable for County Cricket Matches, Law Tennis Tournaments, Football Matches and other sports."[47]

Arguably, the most pertinent example of the relationship at the material time between those who owned land and were willing to sell it and those who had the money to rent or buy it to support their leisure interests occurred as far back as 1854 when a local land agent and chairman of Sheffield Cricket Club, Michael Ellison, arranged the leasing of an 8.5 acre site, later called Bramall Lane. This link between the estate of the premier ducal title in England and the stadium that is apparently the oldest major stadium in the world, still hosting professional football matches, epitomises this period in sports history. Moreover, the impact that the civilising/rational recreation process had on nineteenth century British sporting life is summarised neatly in the objects of the new company—the Sheffield United Cricket and Football Club Ltd—incorporated to buy Bramall Lane from the Duke of Norfolk for £10,000 on Ellison's death in 1899. The objects of the new company were stated to be:

> "To promote and practice the play of cricket, football, lacrosse, law tennis, bowls, bicycling and tricycling, running, jumping, physical training and the development of the human frame, and other athletic sports, games and exercises of every description, and any other game, pastime, sport, recreation, amusement or entertainment, but not pigeon shooting, rabbit coursing, or racing for money."[48]

Outside of these bourgeois models of sporting membership—the "incorporated club" and all the social and economic advancement that that term entailed for this

[39] Hignall 2002, 63.

[40] Hignall, 64.

[41] Lowerson 1995, 143-153

[42] Lowerson 1995, 148.

[43] Commons Preservation Society 1893-1896, 47.

[44] Under a strict settlement, the immediate "owner" of the estate had very limited means of generating revenue from the land by way of, for example, leasing or mortgaging it or part thereof. This meant that not only did strict settlements concentrate landholding within an ever-declining landed elite, but it also meant that many estates became financially unviable for lack of investment. The overall economic undesirability of this system resulted in legislative changes such as the Settled Estate Acts of 1856 and 1877, as supplemented by the Settled Land Acts 1882, 1890 and 1925.

[45] Baker 2002, 295.

[46] See Walvin 1975, 61-62 on the "cricketing" history of founding members of the football league (Derby County FC and Preston North End FC) and both Sheffield clubs.

[47] *Bath and North East Somerset Council v HM Attorney General and Anor* [2002] EWHC 1623 (Ch), para 9.

[48] Clareborough and Kirkham 1999, 12-13.

nascent middle class—the question remained as to where those not of that class might play sport. There were accessible and relatively inexpensive places to watch sport. For instance, leading football grounds of the era, many designed by the Scottish architect Archibald Leitch, were often reflective of, and integral to, the emerging functional urban landscape.[49] And yet, mass spectator sport was one thing; but if the personal, economic, health and moral benefits of this emerging notion of recreationalism were to gain any enduring societal traction, then mass participative sport would also have to be promoted and assisted in its development. In this, one of the great hindrances to "participative recreationalism", and one that would test the strength of Victorian social engineering to it limits, was something that for centuries before hand had been at the heart of British sport—the local pub.

4 Out of the village pub and onto the village green

As Collins and Vamplew note, it is "difficult to underestimate the importance of the drinking place to pre-industrial societies."[50] In England, the pub was long the fulcrum of village life: it served as a meeting place for socialising, doing business, finding work, travel and the organisation of everything from fairs to political activity. Collins and Vamplew estimate that by the sixteenth century, the alehouse was the main area for staging sports events in England with the grounds of such "disorderly houses or "places of publick entertainment", as a 1751 Act called them,[51] providing the space "in which sports as diverse as skittle, quoits, bowls, boxing, wrestling, tennis, foot-racing, cricket and any number of activities featuring animals could be staged."[52] The publican, the authors note, was often the organiser, promoter, bookmaker and, of course, caterer (drink and food) for the event.

The activities and mores of the "sporting pub" were at odds with the temperate, rule-bound values demanded in mid-nineteenth century Britain and during the period the "coercive weight of the law fell heavily on the public houses".[53] Two avenues of attack were opened: the regulation of the gambling and licensing laws. Many of the sports traditionally held in or adjacent to pubs were little more than adjuncts for gambling. Consequently, by targeting gambling in pubs—on pain of, at least, a fine or possibly the revocation of the publican's licence—traditional alehouse sports were discouraged. This process begun with offence contained in Section 21 of the Alehouse Act 1828 for those licensed publicans who "knowingly suffered any unlawful games or any gaming whatsoever". It continued with the catch-all offence provided in Section 1 of Betting Houses Acts 1853 and also included Section 17 of the 1872 Licensing Act, which, on its face, contained a strict liability offence of "suffering any gaming" on the licensed premises.[54]

The overall effectiveness and indeed the actual enforcement of the above legislation have been questioned.[55] In any event, the pub and publican were well placed to adapt in providing meeting places, playing fields and sponsorship for emerging football clubs.[56] Moreover, while it was all very well to attempt to restrict gambling in pubs in order that it might have an adverse affect on the sports events that took place on such premises ("the stick"), if patrons were to be attracted to the benefits of participating in sport, as opposed to the manifold attractions of having a social drink while watching and betting on the outcome of an event, then alternative, easily accessible venues would have to be provided ("the carrot").

In the mid-to-late nineteenth century in Britain, such alternatives came from a number of sources. One source has been mentioned already—cricket clubs looking for a winter sport to maintain income and membership. Others included sports facilities and outlets provided by the leading "gateways" into working class communities, such as churches and schools; by private entities such as those driven by charitable or philanthropic patronage; by voluntary organisations emanating from within working class communities themselves, such as factory teams and at workingmen's clubs; as a result of state (legislative) intervention; or the consequence of the (re)interpretation of existing common law principles on access to public spaces and the right to recreation.

What follows is a brief and separate outline of each "alternative source"—community gateways; private entities; and the legally protected right to recreation—though in reality at the material time local sports facilities and clubs emerged from a combination of these interrelated social institutions.

An illustration of this can be seen in an overview of the historical origins of Southampton FC.[57] In the early 1880s, the church curate at St Mary's in the city, a Reverend Arthur Baron Sole, established the St Mary's church

[49] See generally Inglis 2005. Leitch designed stands for Arsenal, Manchester United, Chelsea, Everton, Liverpool, Tottenham, Aston Villa, Hearts and Glasgow Rangers.

[50] Collins and Vamplew 2002.

[51] 25 Geo 2 c36, Disorderly Houses (1751).

[52] Collins and Vamplew 2002, 5.

[53] Vorspan 2000, 935.

[54] For an account of the related case law, see Vorspan 2000, 935-948.

[55] Miers 2004, 239-241 and at chap 9.

[56] Collins and Vamplew 2002, 10ff.

[57] See generally Chalk and Holley 1987.

football team. They played their matches on the adjacent Deanery field which also hosted cricket matches involving the Deanery Cricket Club and its winter offshoot, founded by local school teachers, called Deanery FC. Over the next decade or so, the church-based team evolved incorporating members of the young men's association at St Mary's Church (thus becoming St Mary's Young Men's Association FC) and possibly also members of Southampton Rangers, a team made up of shipbuilders working for Oswald & Mordaunt Ltd (thus becoming Southampton St Mary's FC from November 1885).

Initially, St Mary's (as they were known locally and hence the still-used nickname the Saints) played their matches on Southampton Common, where they had to compete for space with ramblers, pedestrian foot racers and even those locals entitled to collect berries on the common. Southampton Common, which has a history stretching back to the thirteenth century, was, in the immediate pre-industrial era, used mainly as an area for the grazing of cattle. In the 1830s, it had seen its long-term common rights threatened by the enclosure of the nearby Shirely Common. The Southampton Marsh Improvement Act 1844 protected its use for public recreation, including sport.

As for St Mary's FC, as it became more successful in local competitions and on entering the FA Cup in 1891, it began more frequently to hold matches at bigger grounds—such as the nearby County Ground, but also the Antelope Ground, which was owned in freehold by the church and which had been leased for cricket matches from the 1830s mainly to the predecessors of what is now Hampshire Cricket Club. On winning the Southern League in 1897, the club incorporated as a limited company and became Southampton FC. Shortly afterwards, it moved grounds to the Dell. One hundred and one years and one FA Cup later, ground was broken at a new stadium, which given its close physical proximity to the club's ecclesiastical roots, has been called St Mary's Stadium.

To reiterate, although, of course, not all local football clubs developed into one which could compete at the elite professional level, nevertheless aspects of the above potted history of Southampton FC, and the manner in which the club and its facilities evolved, are reflective of the influences that ensured that local sport and clubs became embedded in communities nationwide.

4.1 Gateways

In line with the belief in the benefits underpinning muscular Christianity—that a healthy body complemented a healthy, moral and religious mind—Walvin notes that in the mid-to-late nineteenth century, "churches provided the main entry into working-class communities" and that younger clergy in particular "seized on football as an ideal way of combating urban degeneracy" in such communities.[58] Consequently, churches, he claims, spawned hundreds of local football teams nationwide with many of the sport's most famous clubs beginning life as church teams and including 5 of the 12 founding members of the football league in 1888 (Aston Villa, Bolton, Burnley, Everton and Wolves). Moreover, as seen above in Southampton's case, fields attaching to churches often served as the initial home for sports clubs.

This adjacent land was often part of a church's "glebe", i.e. land serving as part of a clergyman's benefice and providing income. Although the freehold in such land rested with the clergyman, statutes dating from the Reformation restricted the alienation of such land. As demand for building and amenity development sites near urban areas increased in the nineteenth century, the law was relaxed. For example, under the Ecclesiastical Leasing Acts of 1842 and 1858, glebe lands could be let for a period of up to 99 years. In addition, the Glebe Land Act 1888 permitted the clergy to sell, exchange or gift such land under strict conditions and often to the benefit of the local "labouring classes" for allotments or a site for local amenities ranging from village halls to local water or sewage facilities or, sometimes, as recreational pitches for the emerging sports clubs of the 1880s.[59]

As again seems to be the case in Southampton, some of these churches were also connected locally through voluntary schools and with the impetus gained from the Education Act 1870, whereby the state extended elementary schooling opportunity nationwide. Walvin notes that this new state education system provided "public school and University men" with an opportunity to put their belief that "through sport boys acquire virtues which no books can give them" into practice through increased physical education instruction, the establishment of inter-school competitions and the founding of old boys football clubs or Edwardian-style boys clubs.[60] These school teacher-led initiatives, not all of whom, as Mangan and Hickey recently noted,[61] were of a privileged public school background "became of crucial importance in generating and maintaining youthful commitment to football, particularly

[58] Walvin 1975, 56.

[59] In terms of primary research on this point, it is well to note that from its establishment in 1889, the Board of Agriculture undertook annual reports of transactions, proceedings and other statistical data relevant to the Glebe Lands Act 1888 and on other related provisions, which also, indirectly, would have made land available for sporting and recreational purposes. See, for instance, the first of these reports in Board of Agriculture 1890, (5947) xxv 315.

[60] Walvin 1975, 59. See also Rose 1991, 140-141.

[61] See Mangan and Hickey 2009 on the "missing men" and their role as school teachers in the spread in popularity of association football at the material time.

among working-class boys whose recreational opportunities were limited."[62]

The broad influence of the manly character/muscular Christianity movement on English education was subsequently reflected in recommendations by the Royal Commission on Education 1886-1888, which called for the extension of systematised physical exercises, especially for schools in towns,[63] and later implemented through the Education Code of 1891, which for the first time imposed a duty of care upon the state for the physical welfare of children, thus encouraging sporting instruction, the building of adjacent playgrounds and outdoor activity.[64] Nevertheless, according to Rose, the percentage of time devoted to physical education remained extremely low in the immediate pre-war period—often no more than 15 min a week and mainly consisting of desk-bound imitations of War Office drills and marches.[65]

Moreover, the shallowness of the success of the manly character/muscular Christianity movement was revealed in the performance of the British armed forces during the Boer War of 1899–1902, which seemed to suggest a grave deterioration in the physical fitness of the average soldier. In a period of geopolitical uncertainty, the British Empire could no longer afford to be distracted or led by the gentleman amateurishness of what Kipling excoriated as "the flannelled fools at the wicket and the muddied oafs at goal" and some serious consideration had to be given to practical means of improving the physical well-being and hardiness of, in particular, the young urban poor in key population centres. Accordingly, and in moves that echoed Henry VIII's legislation in the 1500s promoting only those sports suitable to prepare men for war, Government reports in the immediate aftermath of the Boer War reinforced the need for schools to provide and maintain play areas; to integrate physical education meaningfully into the curriculum away from War Office instructions on drills and exercise and towards Swedish-style gymnastic drills; training more and better qualified PE teachers; and encouraging the much greater use of school and public playgrounds for organised games.[66] The Board of Education published the first Syllabus on Physical Exercise in 1904 and the syllabus—revised in 1905, 1909, 1919 and 1933 and with increasing emphasis on games and athletic competition—laid the foundation for the contemporary regulation of school sports in Britain.

4.2 Private entities

Walvin notes that trade unions and factory groups provided "an ideal base for working men to organise recreation in their spare time" and industrial football teams in particular mushroomed rapidly in the mid-nineteenth century in England, and especially in the north and midlands.[67] Shipbuilders were, as noted, part of the story of the foundation of Southampton FC, as were, for example, railway workers in the foundation of the oldest club in the current English Premier League, Stoke, (founded by workmen on the North Staffordshire Railway in 1863) and in the establishment of the Premier League's most successful club, Manchester United, whose origins can be traced back to 1878 and a team formed by workmen in the carriage and wagon department of the Lancashire and Yorkshire Railway Company at Newton Heath. In addition, these factory, trade union and industrial teams were also supported in a structural way by the emerging working men's club movement, which provided permanent playing and meeting facilities for local sports clubs.[68]

Moreover, and in line with the social philosophy underpinning rational recreationalism, a number of industrialists saw the social, economic and political benefits of sporting-related patronage. This ranged from increased goodwill and loyalty towards the company, to increased productivity as a result of spending more time at play than with alcohol and included an effort to distract workers from deeper political debate and wider trade union or party political organisation. Consequently, industrial benefactors were willing to underwrite the provision of recreational facilities for workers and the general public. For example, as early as 1851, Titus Salt, a wealthy Bradford industrialist, was ensuring that his model industrial village of Saltaire included sporting and recreational facilities for his mill workers and other workers in the village who might on occasion need a "good day out".[69] Furthermore, by the end of the century large industrial estate-type projects, such as the development of Trafford Park by the Manchester Ship Canal Company in the late 1890s, also involved the setting aside of recreational zones.[70]

[62] Walvin 1975, 59.

[63] See the Elementary Education Acts 1888, (5485) xxxv 1, 216, recommendation 110.

[64] Plans for newly built or fitted elementary schools were obliged, for instance, to provide for a playground. See Education Department's Code of Regulations, 1891 (6272) lxi 141, schedule IV, building rule 15.

[65] Rose 1991, 142-143.

[66] See the three volume *Report of the Inter-Departmental Committee on Physical Deterioration*. 1904 (2175) xxxii 1; (2210) xxxii 145; and (2186) xxxii 655.

[67] Walvin 1975, 60.

[68] For a review of the working men's club movement within the context of rational or participative recreationalism, see Bailey 1978, chap 5.

[69] Wigglesworth 1996, 65.

[70] See generally Nicholls 1996, 20-65.

In sum, and as seen above, the proselytisation of the social, economic, moral and political benefits of "rational recreation" by the industrialist and bourgeoisie classes of the mid-to-late nineteenth century was underpinned by a wide variety of motivations ranging from, on the one hand, a benignly paternalistic and genuinely altruistic interest in the benefits of recreation for all (i.e. a broad "societal" interest in promoting sport) to, on the other hand, a patronisingly manipulative and cynically self-interested promotion of rational recreation (i.e. a narrow "sectoral" interest). Amongst sports historians of the era, the sectoral motivation tends to be favoured as an explanation for the motivations underpinning the rational recreation movement. According to this approach, the rational recreation movement can therefore be understood from the perspective that, if the working class of the era kept drinking and pursuing violent sport then, in the absence of alternative leisure facilities, these activities might, as they had done on occasion in the past, collectively prove a seditious threat to the social and political status quo in the form of associated criminality such as rioting, affray, gambling, vagrancy, illegal assembly and civil disobedience.

Lowerson uses the example of the establishment of golf clubs–what he calls those bastions of "middle-class ambitions and anxieties"[71]—in the later nineteenth century to underpin this point on the manipulative and cynical interest of the few in the recreation of the many. In illustration, he cites the advice given by a leading figure in the sport during the era, Colt,[72] to golf clubs in trying, ostensibly, to reach agreements with local residents on increasing golf exclusive times and spaces on commons areas:

> "…two difficulties exist—the commoners and the commonable beasts. The commoners need at times a lot of tact—the commonable beasts an even temper and considerable patience. Both are apt to resent interference in their rights; the former retaliate at times by digging up the best putting green with their spades, and the latter by destroying it with their hoofs. The best plan to get over both difficulties is to encourage the commoners to play golf themselves, and, if a club be started for them, and the ways and means provided for them to enjoy the game, the manners of the commonable beasts are apt also to improve. In time an annual match can be held between the parent club and the commoners' club, and during the subsequent convivial evening leave may be obtained for making a few more necessary bunkers, even at the expense of the commonable beast. These hazards must, however, be made with discretion…pedestrians have a nasty way of objecting to being hit be a golf ball."[73]

Overall, whether this investment in, and the promotion of, sport by the emerging industrialised elite was, to paraphrase Tranter, for "health, prestige or profit", it has, no doubt, had an enduring and academically well-documented influence on sport in modern Britain.[74] Yet, there is one other underlying factor which contributed to the success of the rational recreation movement of the Victorian era and concomitantly the rise of modern sport. That motivation is one of "guilt" and, specifically, guilt on the part of the newly emerging industrialist and middle classes. How that guilt arose and how the law was used instrumentally to assuage that guilt is the focus of the remainder of this chapter.

5 The right to recreation: enclosure

As Cunningham observes:

> "For much of the eighteenth century in both town and country most people had access to some kind of public space: space which they might use individually—to walk on, to pursue game in, to graze animals on—or collectively—as the forum for political activity or communal entertainment. Such space was public in the sense that it was owned communally and belonged to everyone; hence everyone had equal rights to it."[75]

This notion of a public communal space is fundamental to, for instance, an understanding of *Abbot v Weekly* and both to the sense of grievance felt by the villagers at the attempt to restrict their use of the close and also to the empathy of the court towards the "good and necessary" custom of using the close for recreational purposes.

Nevertheless, and within a century of *Abbot v Weekly*, Cunningham notes that the extant landed elite had benefitted from a mass appropriation of public spaces for their own exclusive, private use, and "as a corollary to it, they frowned on and become suspicious of public gatherings of

[71] Lowerson 1995, 125.

[72] Henry Shapland Colt (1869-1951), who read law at Cambridge in the later 1880s, was a leading golf architect in the first quarter of the twentieth century. The Oxford Dictionary of National Biography notes that as a designer Colt was aware of the social tensions arising in England from the great expansion of golf as a middle-class game at the time. Although Colt promoted the development of working class clubs, the Oxford DNB notes that "this arrangement did nothing to challenge the social distinctions that were already entrenched in the game". See http://www.oxforddnb.com/view/article/41096.

[73] Colt 1912, 15-16.

[74] See Tranter 1998, chap 5.

[75] Cunningham 1980, 76.

the lower orders for whatever purpose."[76] In this, Cunningham is referring impliedly to the success of the enclosure movement, which had a profound impact on the evolution of the agricultural, economic and social landscape of England and Wales during the period in question—from the early eighteenth century to the mid-nineteenth century.[77] The enclosure process—facilitated by way of parliamentary enclosures, i.e. local, private or public Acts of Parliament called Inclosure Acts—involved the removal of "communal" rights, control and ownerships over the stated land and its conversion into a state where the owner had sole access and control of that land—often called "severalty" or unity of possession.[78] Generally, it is estimated that during the material period, just over one-fifth of England (7 million acres) was enclosed by way of these (5,000 or so) parliamentary enclosures, two-thirds of which was arable land and one-third common or wasteland.[79]

In abridged form, the purpose of the enclosure movement was twofold. In the first place, it was designed to address a perceived weakness in the then agricultural practice of farming scattered strips of arable land in large open fields. Accordingly, the enclosure movement was said to promote more compact, more productively farmed units of land. Second and similarly, so-called "waste" land (heath, scrub-, moorland, etc.) was earmarked for more productive use and, as the industrial revolution gathered momentum, commons located near expanding urban centres was seen as both a squander of valuable development land (housing, industrial or residential) and a "major source of social evils" given that such commons sometimes acted as a hiding and meeting place for criminals (petty thieves to highway robbers); illegal sporting events (bare fisted prize fights); and events linked with excess alcohol and gambling.[80]

The pressures that the enclosure movement gradually brought to bear on recreational uses of land of the kind protected in *Abbot v Weekly* can be seen in *Fitch v Rawling*, a case from the late eighteenth century.[81] In that case, the Court of Common Pleas noted that, although an *Abbott v Weekly*-type custom for "all the inhabitants of a parish to play at all kinds of lawful games, sports and pastimes in the close of another at all seasonable times of the year at their own free will and pleasure" could be upheld, a similar, if more widely drawn custom, "for all persons for the time being, being is said parish" lacked the "certainty" necessary for the validation of such a right. The underlying view of the court was that only the immediate parishioners or inhabitants of a specified locality should benefit from the customary right of recreation, otherwise—and this view was very much one that informed the courts more generally for the first half of the nineteenth century–the owners of such open, unenclosed property would, in effect, be divested of this land.[82]

By the mid-nineteenth century, this perspective can be seen in, and encapsulated by, decisions such as *Dyce v Hay*[83] where it was held, bluntly, that widely drawn, customary rights or easements of a recreational nature on behalf of the public generally would be "entirely inconsistent with the right of property."[84] Further, during the stated period from *Fitch v Rawling* in 1795 to *Dyce v Hay* in the 1850s, the courts used the legal technicalities surrounding the recognition of customary rights—to be validly recognised the custom had to be proved certain; reasonable in itself; commencing from time immemorial; and continued without interruption[85]—to restrict the recreational use not just of village greens, but even to limit access to, and the use of, beaches for swimming.[86] Moreover, and as noted previously in the context of the development of golf clubs in the period, individual local residents were unlikely to take the risk of meeting hefty legal costs to establish user rights to commons and thus such rights were "widely lost".[87] Reflecting on this process in 1865, a House of Commons Select Committee Report on Open Spaces decried the courts' restrictive interpretation and application of customary, recreational rights in the first half of the nineteenth century and went so far as to argue that legislation was needed to reverse the process and particularly so as to provide and protect

[76] Cunningham 1980, 76.

[77] What follows has benefitted from chapter 1 in Kain et al 2004.

[78] Private Enclosure Acts driven by the concerns of local, landed elites became a feature of the legal landscape from the 1750s and became so frequent that, for the sake of parliamentary efficacy, public general Enclosure Acts were thought necessary. The first of these appeared in 1801 and another in 1836 with a consolidating provision, later amended, in 1845.

[79] For further sources and maps, see www.nationalarchives.gov.uk/records/research-guides/enclosure.htm.

[80] Kain 2004, 4.

[81] *Fitch v Rawling and others* (1795) 126 ER 614; 2 Hy BL 393.

[82] For references to similar case law and principle see Vorspan 2000, 928-929.

[83] *Dyce v Hay* (1852) 1 Macq 305.

[84] *Dyce v Hay* (1852) 1 Macq 305, 309.

[85] See, for example, *Tyson v Smith* (1838) 112 ER 1265; 9 Al & Ed 406, 421.

[86] *Blundell v Catterall* (1821) 106 ER 286; 5 B & Ad 553. In that case, the Court of King's Bench held that, in the absence of custom or usage or prescriptive right and taking account that the shore in question was vested in an individual, the public had no common law right to bathe in the sea and to pass over the seashore, between the ordinary high and low water marks, for that purpose on foot or with horses or vehicles even where it could be done without creating any nuisance.

[87] Lowerson 1995, 148.

accessible recreational areas in an increasingly urbanised society.[88]

In a broader sociological analysis of the same period, Cunningham surmises that in the immediate pre- and early Victorian era, leisure had become "increasingly class bound" whereby what he calls the "leisure class" retreated to their fenced-off private enclosures to enjoy their pursuit of choice.[89] Nevertheless, he argues, by the end of the first quarter of the nineteenth century, some members of the middle class had become alarmed at a process that entailed the "privatisation" of certain socially acceptable leisure activities for the privileged few and the prohibition of many traditional pursuits enjoyed by many. Consequently, their accompanying guilt or, in a spirit of what might, appropriately, be called their sense of "fair play", some reformers sought to create a "new kind of public leisure" that would be communal in nature and in benefit. As stated earlier, these recreational activities, unlike those of the past—which had involved the baiting of animals or bare-fisted prize fighting or those which were little more than an excuse for riot and tumult (football) or excess gambling and alcohol—would be visible, controlled and rational in such a way as to be in tune with the emerging mores and values of Victorian Britain. If, however, this rational or participative recreationalism were to mean anything in substance—and if, for example, the moral, health and social objectives of increased sporting participation were to be realised—then *space* had to be provided for such pursuits and particularly in the rapidly emerging urban landscape of the period. In sum, the demand of land supply for factories and housing and the enclosure of commons and judicial restrictions on customary rights meant that green spaces within urban environments were being threatened and eliminated. A place for sport and recreation would have to be found, and quickly.

As early as 1833, contributions to the House of Commons Select Committee on Public Walks were highlighting the dangers associated with lack of space and amenities in urban areas throughout the country.[90] A Mr John Stock, a magistrate for the county of Middlesex, gave evidence to the Committee on the marked decline of open spaces for the "humbler" class of Londoners and in an evocative recollection remembered "the fields at the back of the British Museum being covered every night in the summer by at least from 100 to 200 people at cricket, and at other sports" but that now the increase of "building and enclosures" had seen the demise of such pursuits.[91] Mr Stock agreed forcefully upon questioning that formal places of exercise would "wean" the humbler classes from "public houses and drinking shops, into which they are now driven".[92] Similarly, a public health expert, a Mr JP Kay, complained that the "operative [working class] population of Manchester enjoys little or no leisure during the week" and on Sunday sank into "abject sloth", "listless apathy" and "reckless sensuality".[93] He concluded that the health of the lower classes of Manchester in the 1830s was "much depressed" by the combined influences of "municipal evils" and "constant toil" and that open park spaces adjacent to the city were needed for the healthful benefit of the populace as a whole.[94]

In overall terms, one of the Committee's recommendations summaries many of the points made immediately above and thus is worth citing at length:

> "Your Committee feel convinced that some Open Places reserved for the amusement (under due regulations to preserve order) of the humbler classes, would assist to wean them from low and debasing pleasures. Great complaint is made of drinking-houses, dog fights, and boxing matches, yet, unless some opportunity for other recreation is afforded to workmen, they are driven to such pursuit. The spring to industry to which occasional relaxation gives, seems quite as necessary to the poor as to the rich."[95]

6 The right to recreation: expansion

As Vorspan notes, this "conviction that open urban spaces would promote rational recreation and provide a counter-attraction to less deserving amusements persisted and indeed intensified as the [nineteenth century] advanced."[96] Again, a combination of private benefactors (e.g. the aforementioned Duke of Norfolk donated Sheffield its first public park in 1847)[97]; local and nationwide organisations (e.g. the Commons Preservation Society founded in 1865 and Britain's oldest national conservation society)[98]; and later the public purse (in the form of ratepayers' money) helped purchase and develop public parks and other amenities in urban areas.[99] The law was also used to secure open spaces for urban leisure activities with Parliament

[88] *First Report from the Select Committee on Open Spaces (Metropolis)*. 1865 (178) viii, 259.

[89] Cunningham 1980, 76.

[90] *Report from the Select Committee on Open Spaces*. 1833 (448) xv, 337.

[91] *Report from the Select Committee on Open Spaces* 1833, 18.

[92] *Report from the Select Committee on Open Spaces* 1833, 18.

[93] *Report from the Select Committee on Open Spaces* 1833, 18.

[94] *Report from the Select Committee on Open Spaces* 1833, 66.

[95] *Report from the Select Committee on Open Spaces* 1833, 8.

[96] Vorspan 2000, 915.

[97] Cunningham 1980, 151.

[98] Now called the Open Spaces Society. See further www.oss.org.uk/history.

[99] See Malcolmson 1973, 110.

enacting a series of provisions–the Metropolitan Commons Acts 1866–1878; the Public Health Acts 1875–1890; the Commons Acts 1876–1899; the Open Spaces Act 1890; and the Commons Act 1908–permitting, empowering and sometimes mandating local authorities to provide residents with dedicated areas to play games and enjoy general recreation.

In many ways, this legislative response could be deemed as a "counter-enclosure" movement with the underlying idea being to protect and manage—rather than enclose—common land in recognition of its value as an open space for recreation. Indeed, the beginnings of this regulatory movement can be marked by the enactment of the Inclosure Act 1845, which expressly tried to preserve existing greens and commons. Under the 1845 Act, permanent salaried Enclosure Commissioners were appointed with the power to issue enclosure awards without submitting them to parliament for approval. Further, the Commissioners allocated plots or allotments to locals which they considered to be a fair equivalent "in full and perfect satisfaction" of pre-existing open lands and common rights and which could be used securely by residents for the "playing of games or of enjoying other species of recreation."[100]

In parallel to these provisions, Vorspan highlights a broad and active judicial support for the preservation of municipal, recreational land.[101] Returning to the aforementioned Southampton Common and that city's local Marsh Act of 1844, the case of *Attorney General v Mayor, Aldermen and Burgesses of the Corporation of Southampton*[102] concerned an attempt by municipal officials to move a traditional cattle fair to an area located within the protected commons and specifically to site known as the "Cricket Ground." The court held that any attempt by the authorities to move the fair to the disputed site would violate the provisions of the 1844 Act, which mandated that the site be "put and kept" in proper condition for recreational purposes. In addition, and in due recognition of the recreational rights protected under the 1844 Act, Vice-Chancellor Sir John Stuart restricted the city authorities from further action upon the "Cricket Ground" by way of a perpetual injunction.

Later in the nineteenth century, Vorspan detects a similar judicial activism in support of recreational rights through a leniency in the application of the various criteria—certainty, reasonableness, immemoriality and continuity—that previously had hindered efforts by local residents to prove and protect the existence of customary recreational rights.[103] A case in illustration is that of *Warrick v Queen's College, Oxford*.[104] The litigation principally surrounded a dispute between the College, as the manorial rights holders to a common adjacent to the town of Plumstead in Kent, and the residents of the town. The commons, it was claimed, had been used for centuries by residents for various recreational and allotment purposes. From the 1850s onwards, the suburban growth of the town (and mainly consisting of workers from the Woolwich munitions factory in London who later helped establish Arsenal FC) led the College authorities to seek various ways of financially exploiting the land either by selling parts of it for building or, later, by leasing it to the War Office as an exercise grounds for the military. In the case at hand, the then Master of the Rolls found in favour of the customary rights of the town residents given the "distinct evidence that for a long time past the green had been used as a place of pastime by the inhabitants of the parish of Plumstead."[105]

In fact, by the early part of the twentieth century, reform of property law not only abolished the manorial system noted in the above litigation, but it also further sought to safeguard commons land and especially those "lungs of the city", i.e. commons adjacent to major urban areas. Section 193 of the Law of Property Act 1925, for instance, introduced a statutory right of public access to certain commons, whilst Section 194 of the same Act made it a requirement that ministerial consent would have to be obtained before any works that might prevent or impede access could be carried out on any common which remained subject to customary rights at the material time.

7 Conclusion

Mention of Oxford in the Warrick v Queen's College proceedings returns us neatly back to *Abbot v Weekly*. So as it was deemed "necessary" for the inhabitants of the unnamed Oxfordshire village of the mid-to-late seventeenth century "to have their recreation"; equally, it was deemed necessary, two centuries later, for the emerging town of Plumstead to have a dedicated space for sport. The comparison between *Abbot v Weekly* and Warrick v Queen's College, Oxford must, however, end there. The infrastructural, social, economic and political landscape of the southeastern corner of Britain, as in other parts of the UK, had, during the centuries in question, undergone a, at times, revolutionary change. Therefore, at first instance,

[100] Inclosure Act 1845, s30.

[101] Note the extensive case law cited by Vorspan 2000, 917-921.

[102] *Attorney General v Mayor, Aldermen and Burgesses of the Corporation of Southampton* (1858) 65 ER 957, 1 Giff 363.

[103] Note the case law collated by Vorspan 2000, 929-935.

[104] *Warrick v Queen's College, Oxford* (1870) LR 10 Eq 105.

[105] Disturbances and even riots about the use of Plumstead Common continued well into the next decade, and especially in 1876. See further Allen 1997, 61-77 and George 2011, 195-210.

although "the right to recreate" appears to have survived industrialisation, urbanisation and the huge technological advances of the era, there is, in fact, little substantial comparison between the recreations and sports pursued by the residents of Plumstead in the 1860s and those pursued on an irregular, spontaneous basis by the claimants in *Abbot v Weekly* in the 1660s. In short, village, suburban and inner city life in the Britain of the second half of the nineteenth century was increasingly planned, regulated and confined, and so were the sports and leisure activities its inhabitants pursued.

A pattern of litigation and legislation surrounding the right to recreate on the village green or on the local commons continued throughout the twentieth century. The Commons Registration Act 1965, for example, was a rather belated and limited attempt to deal, through a registration process, with the loss of commons land and principally as a result of the building of suburban houses, motorways and changes in agricultural practices in the post-World War II era. At the turn of this century, litigation again involving Oxfordshire-based residents, and concerning the use and designation of village greens, exercised the House of Lords in *R* v *Oxfordshire County Council (Ex p Sunningwell Parish Council)*[106] and *Oxfordshire CC v Oxford City Council*.[107] More recently, still the Commons Act 2006 and the Countryside and Right of Way Act 2000 included initiatives in respect of the registration of commons and village greens; the use and management of commons; and a new statutory right of access for open-air recreation to mountain, moor, heath, down and registered common land ("the right to ramble").

The first-named initiative—on registration of commons and village greens—which at its heart has been designed to protect land used for recreational purposes for the preceding 20 years, and thus preventing it from being developed, has been put under critical scrutiny recently in the UK Supreme Court—*Adamson & Ors v Paddico (267) Ltd*[108] [2014] UKSC 7 (5 February 2014)) *Barkas, R (on the application of) v North Yorkshire County Council & Anor*[109] In both, the balance appears to be tipping slightly towards the developers, as assisted by provisions in the Growth and Infrastructure Act 2013, and thus the gradual enclosure of village greens—the gravamen of *Abbott v Weekly* all those centuries ago—continues.[110]

Finally, to ramble too much more on the above path would overly distract from the principal point of this piece, which has been to highlight that at a critical juncture in the evolution of modern sport, i.e, at the zenith of the Victorian era, the law played a key instrumental role in facilitating the objectives of those influential few who, for various reasons (rational recereationalism, muscular Christianity, public health, etc.), took the view that participation in codified, regulated sport was, on balance, a good thing. Admittedly, there was little that was initiatory about both the sports-related judicial pronouncements and legislation of the Victorian era—the role of law was always only instrumental and consequential to other policy drivers and objectives; nevertheless, as the actions of William Webb Ellis and other public school boys have become somewhat exaggerated, even apocryphal, in the influence they might have had as the midwives of modern sport, the role of the law in assisting in the spread of organised sport at the material time has, in my view, been somewhat underplayed. In sum, what I have tried to do here is not just give an introduction to the legal history of what we now like to call "sport" but also to give an historical overview of what we now like to call "sports law".

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