COMMONS REGISTRATION ACT 1965

Reference No. 9/D/9

In the Matter of Top Jetty, Woody Bay, Martinhoe, Devon

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No. V.G.67 in the Register of Town or Village Greens maintained by the Devon County Council and is occasioned by Objection No.2 made by Mrs.Elsie Frances Smith and noted in the Register on 4th December 1968.

I held a hearing for the purpose of inquiring into the dispute at Barnstaple on 29th March 1972. The hearing was attended by Mr. M.R. West, the applicant for registration, and by Mr. Rawley, counsel for Mrs.Smith.

This case must be unique in the true sense of that much abused word. The land the subject of the reference is at the top of a small headland on the north coast of Devon. Until the events hereafter to be mentioned it was in its natural state and there is no evidence as to how, if at all, it was used.

The events material to these proceedings began on 24th June 1889, when the Pier and Harbour Orders Confirmation (No.1) Act 1889 (52 & 53 Vict.c.xliii) received the Royal Assent. This Act confirmed the Woodda (sic) Bay Pier Order 1889. By this Order Benjamin Greene Lake was made the undertaker for carrying the Order into execution. Section 2 of the Order authorised the construction of the following works:-

1st. An approach road or embankment commencing at a point 17 yards or thereabouts south of the southern end of the landing slip at Woodda Bay thence extending in a curved line in a northerly to a north-easterly direction for a distance of 160 yards or thereabouts and terminating there; and

2nd. A pier causeway or jetty at the point of termination of the approach road or embankment extending in a north-easterly direction in a straight line for a distance of 100 yards or thereabouts and terminating there.

Instead of proceeding with these works, Mr. Lake promoted the Woody (sic) Bay Pier Order 1895, confirmed by the Pier and Harbour Orders Confirmation (No.1) Act 1895 (58 & 59 Vict.clxix). This Order authorised the construction of an open pier constructed of piles and only 80 yards long. There is no mention in this Order of the approach road or embankment authorised by the 1889 Order, but section 3 of the 1895 Order authorised the making and maintenance in the lines and situation shown on the deposited plan and sections the pier and works with all necessary works, accesses, and conveniences. A "proposed approach road" is shown on the plan and sections deposited with the Clerk of the Peace for Devon on 27th November 1894. This approach road is shorter and in a different position from the approach road or embankment authorised by the 1889 Order. The land over which the approach road shown on the deposited plan was to be constructed is clearly the land the subject of this reference.

The 1895 Order was followed by the Wooda (sic) Bay Pier Order 1898, confirmed by the Pier and Harbour Orders Confirmation (No.1) Act 1898 (61 & 62 Vict. c.xcvi). By this Order Mr.Lake was replaced as undertaker by the Wooda Bay Pier Company Ltd. Section 5 of the Order authorised the construction of another pier commencing at the seaward end of the pier described as "already constructed under the authority of the Order of 1895". It does not appear that this extension was ever constructed.

There was produced a photograph showing the pier and the retaining wall of the approach road indicated on the deposited plan. There is visible in the photograph a building at the landward end of the approach road which could be the toll-house for the collection of the rates which Mr. Lake was empowered to levy for the use of the pier and works by section 8 of the 1895 Order.

The pier is not now in existence, having been pulled down in 1902 after extensive damage by the elements. The land the subject of this reference, now known as the Top Jetty, is grassed over and has a few trees or shrubs growing on it. There is a wall across its seaward end and another wall with a spiked iron gate in it across its landward end. The enclosure of the Top Jetty is completed by lateral walls which may well have been originally erected when the Top Jetty was the means of access to the pier. The wall on the western side is fitted with land drains and is built straight up from the beach against the side of the jetty. Since the disappearance of the pier persons (to use a neutral expression) have from time to time fished in the sea while standing on the Top Jetty.

Mr. Rawley took the point that the Top Jetty is an artificial construction and therefore could not properly be described as a town or village green. I cannot accept this argument. The retaining walls are in law annexed to the freehold, so that the whole of the Top Jetty is "land" in the legal sense of the word, and under section 4(1) of the Commons Registration Act 1965 any land can be registered as a town or village green.

Having regard to its history, the Top Jetty clearly cannot fall within the first part of the definition of "town or village green" in section 22(1) of the Commons Registration Act 1965, but Mr.West argued that it fell within the latter part of the definition by being land on which the inhabitants of a locality have indulged in lawful sports or pastimes as of right for not less than twenty years. Mr.West said that the sports or pastimes on which he relied were sea fishing, sketching and bird watching.

There was no evidence that the fishing on which Mr.West relied was for commercial purposes, so I am willing to find that the fishing on which he relied is a pastime. I feel some doubt about whether sketching and bird watching fall within the definition, but it is not necessary for me to come to any conclusion about this, since the fishing is a sufficient foundation for Mr.West's argument, while the evidence about the other activities is very meagre. It is now necessary for me to consider whether the persons who have fished can properly be described as the inhabitants of a locality and whether they have indulged in fishing from the Top Jetty as of right for not less than twenty years.

Evidence relating to the persons who fished and the circumstances in which they did so was given by a large number of witnesses, some of them orally, some by affidavit, and others by written statements which were put in by consent. Fortunately, although there were so many witnesses, there was no substantial conflict between them.

I turn first to consider the evidence as to the habitations of those who have fished from the Top Jetty. Of the witnesses who gave evidence about their own fishing, three were resident at Woody Bay at the time when they fished, five were resident at Lynton, one at Parracombe, and one at Barnstaple. Of other persons said by the witnesses to have fished from the Top Jetty, one came from Martinhoe (in which parish Woody Bay is situate), five from Lynton, and unspecified numbers of others from Lynton, Barnstaple, Bratton Fleming and other unspecified places.

Mr.West did not give any definition of the locality of which those who had indulged in fishing from the Top Jetty were inhabitants. He quoted a passage from Halsbury's Laws of England (3rd edn), xi.165 that the area in which a custom is alleged to exist must be defined by reference to the limits of some recognized division of land, as for instance a town, a hundred, a parish, a manor, a township, a borough, a vill, a hamlet, ~~and~~ a city, a liberty, several manors, a county, or an honour. The only such division of land which the fishermen of Top Jetty had in common was the county of Devon. However, they all lived in the north of the county within a comparatively short distance of Woody Bay, and I find myself unable on that evidence to hold that the inhabitants at large of the county of Devon have fished from the Top Jetty. Mr.West, however, while not pinning himself to any particular locality, suggested that the locality could be defined as the area within a radius of, say, 15 to 18 miles from Woody Bay. In my view, I have no jurisdiction to do this. As Buller J. pointed out in Fitch v. Rawling (1795), 2 Hy.Bl.393, a custom relating to lawful recreation must be confined to individuals of a particular description. On the evidence before me, I find myself unable to identify those who have fished from the Top Jetty as inhabitants of any particular locality.

Although I cannot accept the loose interpretation of the word "locality" which Mr.West urged upon me, it is right that I should consider the other requisites of the relevant part of the statutory definition of "town or village green". In the first place, the inhabitants of a locality must have indulged in their lawful sport or pastime as of right. As Mr.West rightly said, the expression "as of right" connotes the three elements usually expressed in the Latin tag: Nec vi, nec clam, nec precario.

During the period immediately following the removal of the pier there was no wall at the landward end of the Top Jetty, so there was uninterrupted access for those who wished to fish from the seaward end. Between World War I and World War II Mr. S.G.R. Holman, a predecessor in title of the Objector, built a wall with a wooden gate in it across the landward end kept the gate locked. He put seats round the walls and used the Top Jetty as what was described as "a private place for the Manor House". Mr.Holman tried to keep trespassers off the Top Jetty, though he was not always successful. There were two or three occasions during World War II when Mr.Holman told Mr. H.Medway,

who gave evidence at the hearing, and some of his companions that they had no right to be there, but Mr.Medway and his friends took no notice and went on fishing. On at least one occasion Mr.Medway told Mr.Holman that he was going to carry on as he had always done. Later Mr. Medway was interviewed at his home in Lynton by a police officer, though neither Mr.Holman nor the police took any further action and Mr.Medway continued with his fishing.

Mr.Holman sold the Manor House to Captain Broome in 1945. In or after 1952 the seats and gates were pulled down and most of them thrown into the sea. During the late 1950's the Manor House was empty until it was purchased by the Objector's husband at the end of 1959.

At a time as to which there was some conflict of evidence, but which I find on the balance of probabilities was in 1962, the Objector and her daughter and her late husband increased the height of the wall by 2 ft to about 6 ft above the top of the Top Jetty and hung the present spiked iron gate in the gap in the wall at the landward end where Mr.Holman's gate had been.

This gate has since been kept padlocked. A placard stating that the Top Jetty was private property was fixed to the gate and a sign-post with a similar legend was fixed about two or three yards inside the gate. At various times the notice on the gate has been removed and on occasions the whole sign-post has been removed.

The only evidence as to fishing after the gate was locked was of one witness who climbed over the wall, one who climbed over the gate, one who found that he could undo the lock with one of his own keys, one who even went as far as to lift the gate off its hinges, and three who borrowed the key of the padlock from the Objector.

It thus appears that during the period between the removal of the pier until Mr.Holman built the wall at the landward end of the Top Jetty fishing took place without interference. The exact date when Mr.Holman built his wall is uncertain, but since he is known to have been a man anxious to preserve the privacy of his property generally, it is likely that he built the wall early in his period of ownership, which began in 1919. Between this time and when he sold the property in 1945 Mr.Holman tried to stop fishing from the Top Jetty. It is, however, material to observe that when faced with Mr.Medway's refusal to desist, even after being interviewed by a police officer, Mr.Holman took no further steps and could be said to have acquiesced in Mr.Medway's continuing to exercise what he claimed to be his right. Then there was a period during the late 1950's when there seems to have been no interference with anyone who wished to fish. Finally, those who fished from 1962 onwards either did it with the consent of the owner or by forcible entry.

Accordingly, the only periods during which fishing could have taken place as of right were between 1902 and 1919, or possibly a few years later, during World War II, and during the later 1950's. However, the most that can be said of the first and last of these periods is that there is no evidence of permission being asked or refused. That does not show that the fishing was done under a claim of right: see Alfred F. Beckett Ltd v. Lyons [1967] Ch.449, per Harman,L.J. at p.468.

I now come to the last element in the statutory definition - that the indulgence as of right should have been for not less than twenty years. Whatever may have been the position during earlier periods, there has been no fishing as of right since 1962. Mr.Rawley argued that the twenty-year period required by the Act is that immediately preceding the registration of the land as a town or village green, which was in 1968. Mr.West, on the other hand, said that any period of twenty years would do. Unlike section 4 of the Prescription Act 1832 and section 34 of the Highways Act 1959, section 22(1) of the Act of 1965 does not specifically provide that the relevant period should be that next before the matter being brought into question. The Act of 1965 being silent on this point, it is permissible to look at what the law on this topic was before the passing of the Act: see Heydon's Case, (1584) 3 Co.Rep.7a. Customary rights to use land for lawful sports and pastimes have been known to the law for many centuries. The legal position before the passing of the Act of 1965 is summarised in Halsbury's Laws of England (3rd edn), v.406, where it is stated that the essential characteristic of a town or village green is that by immemorial custom the inhabitants of the town, village or parish should have acquired the right of playing lawful games thereon and enjoying it for purposes of recreation. This definition is carried forward into the Act of 1965 by the words "on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes", which immediately precede the words now under consideration. In practice, the existence of an immemorial custom is an inference to be drawn from evidence of user as of right through the whole period of living memory. It cannot, as I understand the position, be said to be essential that the evidence of user must come down to the last possible moment, but if there is any substantial period of non-user before the matter comes to be litigated it is permissible to consider the length of the period and, if known, the reason for it, for the non-user may justify an inference that the previous user was not as of right: see Hammerton v. Honey, (1876) 24 W.R.603. In this case we know the reason for the non-user as of right since 1962. It was the locking of the gate. Since then the only fishing of which there is evidence has been either vi or precario. From this I draw the inference that the earlier fishing was not as of right.

For these reasons I refuse to confirm the registration.

Finally, I come to what is perhaps the most difficult of the questions in this case - that of costs. Mr. Rawley asked for costs against Mr.West should I decide to refuse to confirm the registration. Mr. West said that he ought not to be ordered to pay costs if he lost, because he had made the registration in good faith in order to protect the interests of the inhabitants of the locality. Should he be successful, Mr.West left the question of costs to my discretion.

I accept that Mr. West made the registration in good faith, and the length of this decision indicates that I do not regard it as frivolous. Furthermore, I do not take the view that costs in proceedings under the Act of 1965 should necessarily follow the event. It would be contrary to the public interest if

> "Some village-Hampden, that with dauntless breast
>
> "The little tyrant of his fields withstood",

who might be a person of very modest means, were to be deterred from appearing in support of what he beleived to be the rights of himself and his fellows similarly situated. I have, however, and I must confess not without some hesitation, come to the conclusion that Mr.West cannot properly be described as a"village-Hampden". His address in the registration dated 26th June 1968 is at Wraxall, near Bristol. The address given in his proof of evidence, which he put in by agreement with Mr. Rawley, is in London. Mr. West's connection with Woody Bay is that in 1956 when he was 12, his father bought Woody Bay Cottage, about 80 yards from the Top Jetty, as a holiday house. As a boy, Mr. West used to spend several weeks a year at Woody Bay Cottage with his family, in addition to several week-ends, and he and his two brothers learned about fishing tackle and bait from the fishermen whom they met on the Top Jetty. This continued until the gate was locked in 1962, when he would have been about 18. He seems to have accepted the locking of the gate and did not fish from the Top Jetty any more, though, no doubt, he resented his exclusion. There is, however, no evidence that his resentment was shared widely, if at all, by the inhabitants of Woody Bay. Only one of his witnesses had an address in Woody Bay. His other witnesses were people living in various other parts of Devon, together with one each from London, Wolverhampton, Banstead and Minehead. Mr.West obviously put a great deal of work into preparing his case which, like Mr. Rawley, he presented very clearly and very fairly, but I am left with the feeling that it was his case and his alone. He must, in my view, be classified not with a "village-Hampden", but with that other well-known character, the "officious bystander". As such, I am afraid that he must suffer the consequences of his lack of success. This was a substantial case, and in my view the proper order is that Mr. West pay Mrs. Smith's costs on County Court Scale 4.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 6 weeks from the date on which notice of the decision is sent to him, require me to state a case for the decision of the High Court.

Dated this 22nd day of May 1972

Chief Commons Commissioner