



COMMONS REGISTRATION ACT 1965

Reference No. 219/D/2

In the Matter of The Downs, Herne Bay, Kent

DECISION

This dispute relates to the registration at Entry No 1 in the Land Section of Register Unit No. VG.181 in the Register of Town or Village Greens maintained by the Kent County Council and is occasioned by Objection No. 17 made by the former Herne Bay Urban District Council and noted in the Register on 11 May 1970.

I held a hearing for the purpose of inquiring into the dispute at Folkestone on 22 January 1980. The hearing was attended by Mr K Lewison, of Counsel, on behalf of Mr J H McDermott, the applicant for the registration, and by Mr J Laws, of Counsel, on behalf of the Canterbury City Council, the successor authority of the Objector.

The land comprised in this Register Unit adjoins the Esplanade at Herne Bay. The eastern part of it was conveyed to the former Urban Sanitary Authority of Herne Bay on 15 July 1881 subject to a covenant to keep it as a public promenade and recreation ground for the use of the residents in and visitors to Herne Bay. The western part of the land was conveyed to the objector on 20 March 1901 to the intent that it should be kept and maintained as an open space for the use and enjoyment of the public forever, and on 13 April 1901 another small part was conveyed to the Objector to the same intent. The whole of the land is subject to bye-laws with respect to pleasure grounds made by the Objector under section 164 of the Public Health Act 1875.

It is thus apparent that any use of the land by the inhabitants of Herne Bay for lawful sports and pastimes since the conveyances of 1881 and 1901 is explicable by the fact that it has been open to the public under the Public Health Act 1875. Therefore, the land does not fall within the third limb of the definition of "town or village green" in Section 22(1) of the Commons Registration Act 1965 as land on which the inhabitants of a locality have indulged in lawful sports and pastimes as of right for not less than twenty years, since the period of twenty years has to be that before the passing of the Act in 1965: see New Windsor Coron v Mellor (1975) Ch.380 at p.391.

Mr Lewison submitted in the alternative that the acquisition of the land for public pleasure grounds under the Act, 1975 was an allotment of the land under that Act for the exercise or recreation of the inhabitants of the locality so as to bring it within the first limb of the definition of "town or village green" in S.22 (1) of the Act of 1965. This limb of the definition concerns chiefly land which was set aside under the Inclosure Acts: see New Windsor Coron v Mellor Supra at p.387. The word "allotted" is, in my view, not apt to describe the acquisition of the land by a local authority for public pleasure grounds, nor is the use of a public pleasure ground to be equated with the exercise or recreation of the inhabitants of a locality, which imports a special right in such inhabitants.



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This leaves for consideration whether the land falls within the second limb of the definition as land on which the inhabitants of the locality have a customary right to indulge in lawful sports and pastimes. This necessarily involves the existence of such a right before the land came to be used as a public pleasure ground.

In my view, if the land was a town or village green when it was acquired for use as a public pleasure ground, the acquisition did not have the effect of abolishing the rights to which the land was then subject. There are statutory provisions which authorise the acquisition of land subject to rights of common, but such provisions have no application to customary rights unless there are express words to that effect see Forbes v Ecclesiastical Commissioners (1872) L.R.15 Eq.51; New Windsor Corpn v Mellor, Supra, at p.387. It is therefore necessary for me to consider whether the evidence supports Mr Lewison's contention that the inhabitants of the locality had a customary right to indulge in lawful sports and pastimes on this land before it was acquired for a public pleasure ground.

Mr McDermott has done a considerable amount of research into the history of the Downs and has collected some useful and interesting material dating from before the first local authority acquisition in 1881.

It appears that recreational use was being made of the land before 1881. The New Guide to Herne Bay, published in 1875, contains the following passage at p.8:-

THE EAST CLIFF, situated beyond the confines of the old town, a parade of an altogether wilder character, is not inappropriately styled "THE DOWN". Here invalids who cannot make excursions inland may take advantage of the many rustic seats dotted in every direction on these grassy slopes, and enjoy at leisure the exhilarating sea breezes, and the fine expansive view across the bay below.

According to A Visitors' Guide to Herne Bay published in 1859, pp.24-25:-

It is a pleasant change from the stroll along the beach to ascend the rising ground at either extremity of the Parade. At the eastern end, you come immediately on The Downs, which though narrow, extend for miles along the coast. Gradually ascending, they form at first an easy slope of greensward, dotted with brakes of furze and heath, and falling away to the level of the beach. Seats planted on the green turf are liberally provided, and no healthier spot can be imagined for exercise and recreation. Here children gambol in freedom and safety in the sea breeze; and after the plunge of bath or bathing machine, of which there are stations just below, nothing can better help to circulate the blood than the bracing walk on the Downs.

Samuel Bagshaw's History of Kent, published in 1847, pp.218-219, described the development of Herne Bay as a watering place. In 1818 it consisted "only of a few cottages built round a green", but by 1831 the Herne Bay Pier Company, which was incorporated by the Act 1 Will. IV, c.xxv, had begun to build the pier. In 1833 an Act "for paving, cleansing, lighting, watching, repairing, and improving a certain portion of the Parish of Herne" (3 & 4 Will. IV, C.CV) was passed. By 1847 Bagshaw was able to describe Herne Bay as "a delightful and fashionable watering place", saying:-

The Hotels and Inns, on a scale of elegance and magnitude, afford every comfort and convenience to the frequenters of watering places; and the numerous lodging houses always in requisition during the season, are fitted up with an eye to taste and family comfort.



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An undated painting, which must be earlier than 1831, since the pier is not shown on it, shows a crop of what appears to be corn being harvested on the land. The earliest piece of information concerning the Downs which Mr McDermott has found is in A Saunter through Kent with Pen and Pencil by Charles Iggulden, published in 1908. Iggulden does not state the source of his information, but he gives the story of two soldiers from the military signalling station at Herne Bay fighting a duel on the Downs in 1818.

On this evidence Mr Lewison invited me to draw the inference that this land had been used by the inhabitants of Herne Bay for lawful sports and pastimes as of right from time immemorial. As stated above, I do not consider that the use made of the land since it became a local authority public pleasure ground has any relevance to this question. Looking at the earlier evidence, I find myself unable to infer that the recreational use had existed from time immemorial, for on the balance of probabilities it did not start until Herne Bay began to develop as a watering place in the second quarter of the nineteenth century.

Apart from the question of when the recreational use began, I am not satisfied that the land was so used by the inhabitants of the locality as a matter of right. The impression made on my mind by the evidence is that this was a piece of land to which members of the public used to resort, mainly to walk and sit, and that there was some casual playing by children. There is nothing to indicate that the inhabitants of an identifiable locality made any use of the land different from that of the public at large. Still less is there anything to indicate that the inhabitants of any locality claimed any legal right to indulge in lawful sports and pastimes on the land. The evidence seems to me to indicate that such recreational use as was made of the land was by the general public with the good-natured acquiescence of the owner. This is far short of satisfying the definition of "town or village green" in Section 22 (1) of the Act of 1965.

For these reasons I refuse to confirm the registration.

Mr Laws asked for an order for costs should the City Council be successful. I do not consider this to be an appropriate case for an order for costs. Mr McDermott has no proprietary interest in the matter, and I am satisfied that he applied for the registration in good faith as a public-spirited member of the community.

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 21st day of February 1980


Chief Commons Commissioner