



COMMONS REGISTRATION ACT 1965

Reference Nos. 226/D/40 to
54 inclusive

In the Matter of five pieces of land
all forming part of The Village Green,
Abthorpe, South Northamptonshire District,
Northamptonshire

DECISION

These 15 disputes relate to the registrations at Entry No. 1 in the Land Section and at Entry Nos. 1 and 2 in the Rights Section of Register Unit No VG 147, No. VG 148, No. VG 149, No. VG 150 and No. VG 151 in the Register of Town or Village Greens maintained by the Northamptonshire County Council and are occasioned by Objections No. 96, No. 97, No. 98, No. 99 and No. 100 made by Northamptonshire County Council and noted in the Register on 8 August 1972 and by Objections No. 119, No. 120, No. 121, No. 122 and No. 123 made by Abthorpe Parish Council and also noted in the Register on 8 August 1972.

I held a hearing for the purpose of inquiring into the dispute at Northampton on 7 February 1979. At the hearing (1) Mr J W Glover on whose application the Land Section registrations were made attended in person; (2) Abthorpe Parish Council were represented by Dr L V Sanger, one of their members; and (3) Northampton County Council were represented by Mr P D Coleman, an assistant solicitor with the Council.

In the middle of the Village of Abthorpe, there is to the north and west of the Churchyard an open area comprising, made up of carriageways (suitable for motor vehicles), pieces of grass covered land, and various footpaths (some wide some narrow). This open area (I treat it as bounded by the front walls of the buildings and gardens fronting onto it) is irregularly shaped being from northeast to southwest about 130 yards long and in part from southeast to northwest up to 50 yards wide. There being some difference as to whether it could properly be described in whole or part as a village green or in whole or in part as highway, for the purposes of exposition I will call it "the Disputed Area". Of the Disputed Area, five parts of it ("the Unit Lands") are the lands (separately registered) in Register Units Nos. VG 147 to 151 inclusive; the Unit Lands are for the most part, but not entirely grass lands; they are all open to the rest of the Disputed Area.

In the Rights Section of each of these Register Units there are two registrations (both made on the application of Mr R J Chapman) of (1) for the villagers the right attached to the Parish of Abthorpe of each villager of Abthorpe to graze one horse or pony and one beast; and (2) as owner of the Post Office the right attached to the Post Office to graze one horse or pony and one beast. The grounds of the County Council's Objections (the same in all cases) are:- "the land comprised within this Register Unit was not town or village green at the date of registration because it then formed part and still forms part of the public highway". These Objections although expressed to relate only to the Land Section registration, also put in issue the Rights Section registrations, see sub-section (7) of Section 5 of the 1965 Act. The grounds of the Parish Council Objections (the same in all cases) and relating only to Rights Section Entry No. 2) are:- "Objection is made on the ground that the applicant is resident at the given address. His rights of common are therefore protected by Entry No. 1, that is he is a villager. Entry No. 2 is therefore considered redundant, and it is submitted that the entry should be expunged."



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In a letter dated 12 July 1977 to the Clerk of the Commons Commissioners, the Clerk of the Parish Council said that they had formally resolved to withdraw the objections (Nos. 119, 120, 121, 122 and 123) referring to Rights Section Entry No. 2. However I have a letter dated 17 January 1979 from Arnold, Howes & Co, solicitors of Towcester saying that Mr Chapman had instructed them to take no further action but to leave the matter to be resolved either between the County Council and the Parish Council, or to be determined by the Commons Commissioner. In the result by far the greater part of the hearing was taken up with the Land Section registrations supported by the Parish Council and opposed by the County Council, and I was left to determine the validity or otherwise of the Rights Section registrations on the evidence (or lack of evidence) given about them, more or less incidentally.

For the Parish Council oral evidence was given: (1) by Mr J W Kendall who has lived all his life (born 1920) in the Village (except wartime National Service), (2) by Mr S Simpson who is now and has been since 1969 clerk of the Parish Council, and (3) by Dr Sanger who has been a member of the Parish Council since 1976. In the course of their evidence were produced the documents specified in Part I of the Schedule hereto, including 8 affidavits (PC/23-30), which were submitted as written evidence by the deponents. For the County Council oral evidence was given: (1) by Mr N Robinson who is and has for the last 10 years been area surveyor for Towcester (Area No. 3) of the County Council Highways Department, and has been in their employ at Towcester for the last 25 years; and (2) by Mr D G Nightingale who is the Rights of Way Officer for the County Council, has been concerned for them in common registration matters since 1965 and been in their employ since 1949, and who, having been born and at school at Towcester knows the area of the Unit Land quite well; in the course of their evidence were produced the documents specified in part II of the Schedule hereto.

Two days after the hearing I inspected the Unit Land.

In the absence of any evidence that the Unit Lands were ever allotted by or under any Act I am concerned only with the second and third part of the definition of "town or village green" in Section 22 of the 1965 Act. Because the evidence for and against the Unit Lands being within these parts of the definition was the same, any mention in this decision of land on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes should (except while the context otherwise requires) be treated as a reference to land on which inhabitants have so indulged for not less than 20 years.

In the 1965 Act, the definition of "Common land" may be contrasted with that of "town or village green", in that the former expressly excludes "any land which forms part of a highway", and the latter contains no such exclusion. Nevertheless Mr Coleman contended (as seems to be implicit in the objections of the County Council) that in law land could not at the same time be highway and subject to a customary recreational right. ~~This contention is supported by an~~ observation on page 1 of Pratt and MacKenzie on Highways (21st edition 1967). However at page 19 it is said (rightly I think) that land may be dedicated as highway subject to market rights; and it seems to me therefore that likewise land may be dedicated as highway subject to customary recreational rights. In my view the contention is not supported by Pratt and MacKenzie. There are many village greens crossed by footpaths which appear to be public (and may therefore be



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highway) and which are when the green is used for recreational purposes obstructed; I see no reason why this should be illegal; in the absence of any authority I, on the reasoning of the judgments in the cases relating to markets quoted by Pratt and MacKenzie, conclude that land may at the same time be both highway and subject to a customary recreational right, and it is I think irrelevant that questions may arise as to whether the right of public passage has priority over or is subject to the customary right of recreation.

Although Section 10 of the 1965 Act contemplate that a decision of a Commons Commissioner (if not varied on appeal) shall for certain purposes be conclusive, it is clear from Section 21 that any decision of mine that land is not a highway is not conclusive. So if I base my decision about the Unit Lands being subject to a customary recreational right on my opinion as to whether they are or are not highway, the strange result will follow that if I am against the County Council they can disregard my opinion while if I am in their favour they can take the benefit of it. Having regard to these considerations I refrain in this decision from expressing an opinion as to any part of the Unit Lands being highway.

Nevertheless, because as a general rule recreational use of land is incompatible with highway use, I accept for the benefit of the County Council that all the evidence given on their behalf intended to show that the Unit Lands are highway is admissible and relevant to the question (within my jurisdiction) as to whether they are subject to a customary recreational right. In my view their grounds of objection are wide enough to allow them to give this evidence; but in case this view is wrong, I record that I would have allowed any amendment needed.

The maps of before 1820, of 1826, and of 1834 (CC/1, CC/2 and CC/3) show the Disputed Area as one piece, without any indication that it was or could have been divided into pieces subject to different incidents. Later maps show (by dotted lines) the Disputed Area to be divided apparently by carriageways, tracks or footways substantially (but not in every respect) as they now are. The Unit Lands correspond closely the parts apparently enclosed by dotted lines on OS Map 1974 (CC/5) which appears to have been based (so far as now relevant) on some earlier edition. Between and by the Unit Lands there now run two well made up carriageways ("the Principal Roads") together forming a Y in part surrounding the VG151 land and the Church Yard. The Principal Roads appear to be highway suitable and apparently much used by all sorts of vehicles; I assume, nobody having suggested otherwise that they are at least to the extent of the made up carriageway, highway. For the inhabitants to indulge in sports and pastimes on the Principal Roads would now and in recent times (say since 1945), if not actually impracticable be likely to be considered by the road users to be a purposeless nuisance; so I am not surprised that the Principal Roads were not included in any 1965 Act registration. From the maps produced and the appearance of the village (new buildings etc) I accept the contention of the County Council that the Principal Roads would not until recent times have been as wide and as distinct as they now are and were probably in earlier times (say before 1914/1918 war) little if anything more than rough tracks sufficient for village purposes. So it may be that if the question I am now considering had been the subject of legal proceedings at the time of the 1828 Inclosure Award the Court would then have had no reason at all for deciding that the parts of the Disputed Area now shown on the Register Map as the Unit Lands and no more were then subject to a customary recreational right or for deciding that the whole of the Principal Roads as they now are (to the exclusion of the rest of the Disputed Area) was then highway; but this consideration in my view is not



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reason for my giving a decision in accordance with the old maps and ignoring all that has happened since; as to this, see *Copstake v West Sussex* 1911, 2Ch.331, cited in *Attorney General - Baynon* 1970 Ch. 1, at page 15.

Mr Robinson said in effect:- Although only the Principal Roads and some other comparatively small strips of the Disputed Area have been tarmacaded or otherwise made up for vehicular or pedestrian use, the Highway Department has for the 25 years he has been in it, always regarded the whole of the Disputed Area as highway and it was so shown on the maps they used. The County Council had arranged for the grass growing on the Unit Land and for the footpaths crossing the Unit Lands to be maintained.

Mr Robinson was asked numerous questions, and his evidence was detailed. I accept that much of what he said is evidence against the Unit Lands being subject to a customary recreational right; in my opinion, whether or not it is sufficient to establish that the whole or any part of the Unit Lands are highway, it is not conclusive against their being subject to a customary recreational right, and is no more than (although in this respect important) some evidence ~~against~~, which I must balance against the other evidence given at the hearing for such a right.

Mr Kendall described the recreational uses made of the Disputed Area as he knew. While he was at the school (near the Disputed Area's north-east end) the children played there and sports were organised particularly the 100 yards racing highjumping and hurdles; they also played informal cricket and football. And for adults there were Village Fetes and nearly every year the Abthorpe Feast (roundabouts, swingboats and side-shows, such as coconuts and shooting). And there was maypole dancing by children helped and watched by adults. There were associated activities such as saluting the flag on Empire Day, and services attended by the British Legion by the War Memorial (situated just within the Church yard by the VG151 land).

These activities are mentioned or referred to in the said affidavits, one of whose deponents (Mr Gostelow) takes them back to when he was a boy more than 78 years ago. The School Records (PC/17-20) although when considered by themselves gives little indication of what was actually done on the Disputed Area, when ^{SAW} read in conjunction with the evidence of Mr Kendall and the said affidavits ~~at least~~ I think that the activities they describe or mention must have gone back at least to 1908. The account book entry (PC/31) is consistent with there having been roundabouts ~~in~~ 1899.

That some of the children at the school came from Slapton (a nearby village whose children share the Abthorpe School) does not I think prevent me ascribing the activities of the children to a customary right for the inhabitants of Abthorpe. Nor is such an ascription prevented because the Village Fetes and feasts described were attended by persons from other villages; and ~~I think~~ that they were organised for Abthorpe.

I see no reason why I should not give full effect to the evidence put before me by the Parish Council and conclude as I do that the inhabitants of Abthorpe have indulged in sports and pastimes on the Disputed Area from time immemorial.



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As to the part of the Disputed Area used for these activities, it is I suppose likely that they were not always limited to the part of the Disputed Area which as the Unit Lands, have been registered under the 1965 Act. It may be that when the 1826 map was made and before the 1828 gift by the Duke of Grafton that these activities extended over the land which he gave to the church and which is now part of the Church yard (it is ~~part~~ higher than the Unit Lands and is now unsuitable for recreational purposes); may be these activities at one time extended over the whole or part of the strips of land which are now tarmacaded and which I have called the Principal Roads. But having regard to the principles set out in *Copestake v West Sussex* supra, I consider that I can treat these activities as extending whatever would be their natural boundary in 1969 (the date of registration). I infer that the Disputed Area at that time, apart from the parking bay north of the Church which was mentioned in the evidence, appears much as now. ^{The} boundaries of the Unit Lands as drawn on the register map are appropriate to the recreational activities as of the date of registration. I see no reason for excluding the made up footpaths and tracks; they are either for local convenience or of very minor importance and their temporary obstruction for recreational purposes would cause very minor inconvenience and would be tolerated almost as ^{of course} by any reasonable person concerned.

Balancing the evidence for and against the Unit Lands being subject to a customary recreational right, in my opinion the scale tips in favour of the Parish Council. My decision is therefore that a customary right for the inhabitants of Abthorpe to indulge in sports and pastimes on the Unit Land has been proved. It necessarily follows that I also conclude that for 20 years before 5 August 1965 (the date of the 1965 Act) the inhabitants of Abthorpe have indulged in sports and pastimes as of right. Accordingly I confirm Land Section registrations of all these registered units without any modification.

The Rights Section registration at Entry No. 2 of each of these Registered Units is of a grazing right attached to the Post Office. There was no evidence to support this right and the present appearance of the Post Office and of the Unit Lands is such that it is unlikely that any such right has ever, at any rate recently, been exercised. The grazing right registered at Entry No. 1 for each villager is, if the registration is treated as a complete description of the right, not recognised by law. There was no evidence of any grazing by the villagers or by any one else of the Unit Land; and no evidence on which I could infer that in respect of any grazing the villagers acted in a corporate capacity or pursuant to any charitable trust; and I am therefore unable to think of any way in which the registration could be amended so as to be both recognised by law and supported by the evidence. In these circumstances my decision is that none of the registrations in the Rights Sections of these Register Units was properly made, and accordingly I refuse to confirm any of them.

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.



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SCHEDULEPart I: Produced by or on behalf of Parish Council

PC/1	1955	W G Hoskins. The making of the English Landscape (Penguin Book 1970, 326 pages). See pages 60 and 61.
PC/2	1849	William Whetton & Co. General & Manorial History and Directory of Northampton. See page 549 for Abthorpe Parish.
PC/3	-	Enlargement of OS map 1/500, showing the Unit Lands.
PC/4	?1828	Copy dedication and consecration by the Bishop of Peterborough of part of waste land of Manor of Abthorpe on 2 April 1828 granted to the Vicar of Abthorpe by George Henry Duke of Grafton.
PC/5	1823(?1832)	Extract from Inclosure Award map.
PC/6	1825(reproduced 1865)	Extract from (?) Tithe (? Award) map.
PC/7	1832	Extract from Abthorpe Award relating to a public drain or watercourse which discharges by means of a spout on the Church Green.
PC/8	-	Photograph 3" x 3" showing horse, man and aged motor car.
PC/9	-	Framed photograph about 12" x 8" showing village well in front of Church.
PC/10	-	Old picture postcard (Abthorpe 12) showing man seated on low brick wall by pump on VG160.
PC/11	-	Old picture postcard (Abthorpe 11) showing VG149
PC/12	-	Old picture postcard (Abthorpe A4714) showing War Memorial and VG151, VG149 and part of VG148.
PC/13	-	Old picture postcard showing children dancing around maypole on VG149.
PC/14	-	Old picture postcard showing children group in front of school.



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- PC/15 - Old picture postcard showing children in front of War Memorial.
- PC/16 1934/39 Old photograph (3¼" x 2½") showing Queen of May outside Blacksmith house (Miss Kendall).
- PC/17, 18, 19, 20 1908 to 1957 Extracts from School Log Book mentioning Abthorpe Feast almost annually from 1917 to 1934 and from 1947 to 1954 and 1957, and also May Day and/or Maypole dancing, Empire Day, and Sports festival.
- PC/21 - Press cuttings from County Record Office and County Library.
- 1 June 1901 Northampton Herald, Abthorpe Club Festival: Band played.
- 4 July 1902 Northampton Mercury: Abthorpe. Dancing on the Green.
- 18 May 1923 Northampton Mercury: Abthorpe. May Day celebrations: school children proceeding to village green crown May Queen: performance of Maypole dances, country dances.
- 1 June 1928 Northampton Mercury: Abthorpe Empire Day: hoisting flag on Village Green, May Day School march to Village Green and Queen of May.
- 17 May 1929 Northampton Mercury: League of Nations Meeting on the Green.
- 1931 Northampton Mercury: Abthorpe. Concert on the Green.
- PC/22 June 1940 Parochial Magazine for Rural Deanery of Brackley Abthorpe. Joyce Barford was crowned May Queen of the Village Green.
- PC/23-20 inclusive February 1979 Affidavits with exhibited statements by -
- Mr C H Costelow
- M/s I E L Balderson
- Mr R C Rush
- Mr R E W Snelson
- Mr J H Foster
- M/s M E Hulbert
- M/s E M Kelcher
- Mrs D M Swann



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PC/31	7 Oct 1899	Entry in Parochial account recording Billings Steam roundabouts standing on the Green - 5/-.
PC/32	1977/78	Electoral List (Registration Unit of Abthorpe) as 210 voters.
PC/33	29 March 1933	Letter from County Council to Parish Council suggesting a compromise.
PC/34	May 1972	County Planning Office: a plan for Rural Development: Part 7 (reprint of original 1969 production with amendments): 43 pages foolscap. Map at page 15 shows registered village greens of Abthorpe.
PC/35	June 1967	Map sent to Parish County by County Council bas on recent OS map 1/2500.
PC/36, 37 38	1978	Coloured photograph (5" x 3½") showing recreational activities.
PC/39	2 September 1977	Letter South Northamptonshire District Council to Parish Council.

Part II: Produced by or on behalf of County Council

CC/1	Before 1820(?)	An undated map from County Archives "NOT PROVED Shows stocks and well.
CC/2	18 May 1826	Abthorpe Inclosure Award made under 4 Geo 4 c. 5 with map attached. Shows Disputed Area without distinguishing Unit Land.
CC/3	1884	OS Map 6" = 1 mile. Disputed Area open and undivided and shows Church Yard without Duke of Grafton's gift.
CC/4	1900	OS Map (2nd edition) 1/2,500. Shows Disputed Area divided.
CC/5	1974	OS Map 1/2,500: SP 6446 - 6546.
CC/6	1929-1930	Road transfer by Towcester Rural District Council to County Council.

Dated this 21st —

day of May — 1979

a. c. Bain Fells

Commons Commissioner