



## COMMONS REGISTRATION ACT 1965

Reference No.27/D/6

In the Matter of Close House  
River Bank, Heddon-on-the-Wall,  
Castle Ward R.D., Northumberland

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No.VG.32 in the Register of Town or Village Greens maintained by the Northumberland County Council and is occasioned by Objection No.32 made by The University of Newcastle upon Tyne and noted in the Register on 27 August 1970.

I held a hearing for the purpose of inquiring into the dispute at Newcastle upon Tyne on 3 and 4 April 1973. The hearing was attended by Heddon-on-the-Wall Parish Council who were represented by Mr. C. J. Thompson solicitor of Wilkinson and Marshall Solicitors of Newcastle upon Tyne and by The University of Newcastle upon Tyne who were represented by Mr. D. J. F. Todd solicitor of Watson, Burton, Booth and Robinson Solicitors of Newcastle upon Tyne.

The registration was made pursuant to an application dated 2 May 1968 and made by the Parish Council. The grounds of objection were in the form dated 10 August 1970 as follows:- "1. The University of Newcastle upon Tyne is the owner of the land, the subject of this registration. 2. The said land was not, at the date of registration, a town or village green."

The land (the "Unit Land") comprised in this Register Unit is a strip about 10 acres in extent and about 1,050 yards long. It is bounded on the south by the River Tyne and on the north (except for about 120 yards at the west end) by the fence on the south side of the strip ("the Railway Strip") being the site of the now disused Railway (from Newburn about  $1\frac{1}{4}$  miles to the east to Wylam a little more than half a mile to the west). At the west end there is an inclosure ("the Street Houses Inclosure"; not part of the Unit Land) which is about 120 yards long, is south of the Railway Strip and is apparently occupied with the Street Houses (near by cottages north of the Railway Strip). The Unit Land and the Street Houses Inclosure together form a long triangle which at its east end is about 6 yards wide (5 yards of which is sand cliff down to the River) and which as you go west widens out to nearly 100 yards from the centre of the triangle to its west end.

On behalf of the Parish Council evidence was given: (1) by Mr. G. C. Watson who is aged 73 years, lived in the Parish from 1915 to 1970 and was a member of the Parish Council from about 1939 to about 1970, (2) by Mr. W. Charlton who has lived in the Parish since 1932 and lived at Street Houses from 1932 to 1939, (3) by Mrs. S. Nicholson who has lived in the Parish since 1960, (4) by Mr. B. Gibson who is 44 years of age and has lived in the Parish since 1929, (5) by Mr. R. R. Leftwich who has lived in the Parish from 1929 to 1948 and from 1958 onwards, (6) by Mr. I. H. Armstrong who has lived in the Parish for the last 12 years, and (7) by Dr. B. J. Selman who has been a member of the Parish Council since 1966 and who produced a statement (supported by documents) setting out the history of the Unit Land in some detail. The following signed statements were produced by Dr. Selman as evidence by the signatories: (8) by Mr. J. H. Jackson and Mrs. A. Shipley (they could remember for 50 years), (9) by Mrs. E. J. Mason (she has lived in Heddon for 70 years coming there when she was 21), and (10) by Mr. H. Tulley (he has lived in the



Village 74 years coming there when he was a young man; he lived at Street Houses from 1924 to 1926). On behalf of the University evidence was given by Mr. A. Blackburn who has been employed by them for the last 15 years as Estates Assistant. On 6 April 1973 I inspected the Unit Land, it having been agreed that I might do so unattended.

Along the Unit Land there is a footpath (much used) which runs between Newburn and Wylam, by the side of and not far away from the edge of the River; as a walk on a fine day, it must be one of the pleasantest and most enjoyable in the County. The Unit Land is rough grass and scrub land with trees of many different varieties in no obvious pattern. In the wider parts, there are other less used footpaths winding about the trees and around the edge of the River mostly leading nowhere particularly. I could take a motor vehicle along the Railway Strip (the rails had been taken away and the surface was loose stones); before the Railway was closed a few years ago, the Unit Land was generally inaccessible to all with vehicles (although a vehicle could get somewhere near by the road leading to Street Houses or by a track across the adjoining land on the north east); and may still be so because I know of nothing to suggest that the Railway Strip has or will become a public highway.

The Unit Land is and within living memory always has been a place for a walk, for gathering wild blackberries, for a bask in the sun, and for a picnic; particularly for those with children, because there is plenty of scope for Cops and Robbers among the trees and similar activities. Young people camp there from time to time, sometimes under a shelter made of brushwood, sometimes more comfortably in a tent. Children and adults with them kicked balls about and played simple games; but there has never been (the surface being too rough and uneven) any organised football cricket or other games such as are played seriously by adults and young persons on reasonably level grass land.

Dr. Selman produced:- (1) a statement which included a summary of historical information he had obtained from the Victoria County History and other books, (2) a copy of the footpath map made under the National Parks and Access to the Countryside Act 1949 (the footpath there shown along the Unit Land runs next to the Railway Strip and is now for much of its length overgrown), (3) Two aerial photographs from the University Collection taken in 1947, (4) a reproduction of the Ogilby Map (1715) showing a road roughly on the line of the Railway Strip, (5) a copy of a map (?1815) of the Close Estate from the collection made by Earl Ashbourne and now in the County Archives, (6) a copy of a map of Lord Carlisle's holdings in Heddon-on-the-Wall surveyed 1750 and redrawn 1799, (7) a booklet containing some pictures including a photograph of a nineteenth century painting of the Ascension Day Tide Stone Ceremony (mentioned below) and (8) a photograph of some of the principal participants near the Tide Stone on the last occasion the Ceremony was held.

Mr. Blackburn produced:- (1) An indenture dated 27 July 1909 by which Mr. C. Bewicke mortgaged the mansion house known as Close House and other lands in Heddon-on-the-Wall and Ovingham containing 657 acres 2 roods 24 perches particularised in the Schedule and delineated on the plan; the land so delineated is for the most part a large area adjoining the Railway Strip on the north, with eastern and western boundaries starting opposite the eastern and western boundaries of the Unit Land; the land so delineated included the whole of the Unit Land, the



Street Houses Inclosure and a comparatively small piece south of the Railway Strip and west of the Unit Land; the Schedule included "River Bank (acreage) 7.197".

(2) A conveyance dated 29 May 1945 by which the said Mr. C. Bewicke conveyed to his son Mr. C. Bewicke the Younger, Close House and other lands containing 680.069 acres as described in the Schedule and delineated on the plan annexed to the said mortgage; this Schedule was the same as the mortgage Schedule (the difference between 680.069 and 657a.2r.24p. being apparently due to the River Bank and Quarry Waste having been in 1909 added in manuscript to the indenture after it had been engrossed)

(3) A conveyance dated 8 March 1958 by which Mr. C. Bewicke conveyed to James R. Rutherford & Sons Limited ("Rutherford") the dwellinghouse Close House and the woodlands and parks held therewith containing 151.640 acres as delineated on the plan and particularised therein; the land so delineated included the whole of the Unit Land, the same small piece to the west of it, and half the adjoining bed of the River but did not include Street Houses Inclosure; in the Schedule the Unit Land was "O.S.77 area 1.564 and O.S.81 area 6.143," being described with 4 other pieces as "River Banks".

(4) A conveyance dated 16 May 1961 by which Rutherford conveyed to the Council of King's College Newcastle upon Tyne in the University of Durham the same 151.64 acres by reference to the same plan and under the same description.

(5) The Universities of Durham and Newcastle upon Tyne Act 1963 (1963 chap. xi) by which the land of King's College was vested in the University.

(6) The 1864/66 Ordnance Survey map (1/2500).

(7) The 1897 Ordnance Survey map (1/2500)

(8) The 1921 Ordnance Survey map (1/10,560) and (9) the 1963 Ordnance Survey map (1/2500).

Considered superficially this dispute has little substance. Mr. Blackburn has since 1961 known more or less about the use being made of the Unit Land by the inhabitants of the Village and as long as they behave (e.g. do no damage to the trees) he considers such use unobjectionable; the damage done occasionally by misbehaviour has so far been so small that it has never been worth while attempting to prevent it. So in the immediate future and possibly as long as the University is the owner of the nearby land north of the Railway Strip (this land is now being occupied for University purposes) it is likely that the inhabitants of the Village will continue to have the advantages which the Parish Council wish to preserve for them. Nevertheless the value to the University of their land will be diminished if the Unit Land remains registered as a Town or Village Green, so that properly considered, this dispute has some substance.

Mr. Thompson contended:- The Unit Land is within the definition in section 22 of the 1965 Act of a "town or village green", as being either "land ... on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes" or "land ... on which the inhabitants of any locality have indulged in such sports and pastimes for not less than twenty years". The parish of Heddon-on-the-Wall is a "locality". The persons, or most of the persons who used the Unit Land as above described were inhabitants of the Parish. When so using the land they were indulging in "pastimes" (passing the time agreeably).

Mr. Todd contended:- The persons who used the Unit Land as above described could not properly be said to do so as "inhabitants of a locality" or to have done so as "as of right". No "customary right" had been established.

All who gave oral evidence before me were I think describing as well as they could what they knew; the contrary was not suggested. Such differences as there were can be explained by the witnesses having been on the Unit Land at different



times and for different purposes. The evidence of witnesses (8), (9) and (10) is mostly to the same effect as evidence given orally; but I record (as Mr. Todd made this point) that because they could not be questioned, it would I think be unjust to treat their evidence as doing more than corroborating (although as it happens such corroboration is not required) the oral evidence of the other witnesses

As to the use being by the inhabitants of a locality:-

There cannot be a customary right for the inhabitants of several adjoining parishes to exercise a right of recreation over land situate in one of those parishes, Edwards v Jenkins 1896 1 Ch. 308. There cannot be a customary right for anybody (where ever he may inhabit) to visit land for inspection, instruction and general enjoyment, Attorney-General v Antrobus (the Stonehenge case) 1905 2 Ch. 188. A distinction is made between a claim that all the inhabitants for the time being of a parish have a customary right of exercising and playing sports and pastimes (which in law may be established) and a claim that all the persons for the time being in a parish have such a customary right (which in law cannot stand), see Edwards v Jenkins supra at page 311, quoting Fitch v Rawlings (1795) 2 Hy. Bl. 39. But some participation in the sport or pastimes by inhabitants of another locality is not decisive against a claim, because the Court in Fitch v Rawlings supra disregarded the argument that a customary right to play cricket was not established by the games played because one of the teams was ~~always~~ made up of visitors.

In this context the relevant facts are:- The Village of Heddon-on-the-Wall (as I scale the map) is between half and three quarters of a mile away from the Unit Land; there is no straight path between them; Dr. Selman said he could walk there in 20 minutes; returning would take longer because the Village is on a hill. The distance to Wylam is a little less, or much the same. The Unit Land although within the Parish of Heddon-on-the-Wall is near the boundary and its situation is not such that it appears to have any close connection with the Village. The use described was not organized either formally or informally as a Parish activity; Mr. Armstrong was the only witness who mentioned any organized use (i.e. he regularly took classes of children for bird watching from schools in Walbottle and Tynemouth). As above mentioned, the River side footpath from Newburn to Wylam runs the whole length of the Unit Land; it is a highway, and accordingly anybody can walk along it from anywhere. On the evidence before me I deduce that of all the persons who used the Unit Land, those who were inhabitants of the Parish of Heddon-on-the-Wall formed a large proportion possibly the majority, but the proportion of those who were inhabitants of other places was substantial; and these proportions were no more and no less than could reasonably be expected on purely geographical grounds. Of course any body who used the Unit Land for pastimes must have done so because to get there from his place of habitation was convenient and Heddon-on-the-Wall and Wylam being the nearest villages must have provided more convenient habitations than elsewhere. But against this, the common factor which brought all (except the very few) to the Unit Land for the pastimes described was, in my opinion, not their habitation of any particular place but their common desire to take a River bank walk in pleasant surroundings, and to do all such things as may usually be done on such a walk without objection from the owner of the land adjoining; in short they indulged in pastimes because they happened to be in, and not because they were inhabitants of, the parish.

So, for this reason, under the law in force before the 1965, I consider that no customary right for the inhabitants of the parish was established. I reject the suggestion that the 1965 Act as regards the 20 year period altered the previous



law; the words "the inhabitants of any locality" where they first occur in the definition have I think their pre-1965 meaning and where they secondly occur have the same meaning.

To establish a customary right by usage, the usage must be "as of right", see Beckett v Lyons 1967 1 Ch.449 and the cases cited. The same requirement is expressed in the section 22 definition in relation to 20 year period.

Nobody had ever asked for permission to use the Unit Land as above described. As to this, I am bound by the observations made by the Court of Appeal in Beckett v Lyons supra; which were to the effect that to show that permission has never been asked or refused, "is very far from showing that the exercise of the privilege was under claim of right ... that when the law talks of something being done as of right it means that the person doing it believes himself to be exercising a public right"; that the question is whether the act was done by a person who "believes himself to be exercising a right or was merely doing something which he felt confident that the owner would not stop but would tolerate because it did no harm" (per Harman L. J. at pages 468 and 469) and that a distinction must be made between the activities of a person doing something as of right and doing it as "a de facto practice which (he) rightly thought no one would find objectionable and which the owner ... in fact tolerated as unobjectionable" (per Russell L. J. at page 475). In considering whether customary right has been established by use, the question whether such use was "as of right" must I think be considered with the question whether the use relied on was indulged in by the inhabitants of the locality.

All who used the Unit Land were entitled to walk from one end to the other because it was a public footpath; the historical research of Dr. Selman suggests that there was between Wylam and Newburn additionally a bridle way and possibly a drift way for cattle; those who used the land were entitled to be there as members of the public using a highway. I am therefore only concerned with activities which go beyond those by law allowed to persons who are lawfully on a highway. Having regard to the nature of the Unit Land and its situation I consider that the persons concerned would rightly think that no one would find objectionable what they did and I accept the evidence of Mr. Blackburn that the University in fact tolerated what was done as unobjectionable.

Accordingly apart from the evidence mentioned below as to the "Liberty of Heddon" and to the Tide Stone Ceremony (both much relied on by Mr. Thompson) I conclude the use of the Unit Land as above described by the inhabitants of the parish was not as of right.

The Unit Land together with a piece of land ("the Rough Haugh") east of it has always been known as "the Liberty" or as "the Liberty of Heddon". The Rough Haugh is a strip of land about half a mile long between the Railway Strip and the River Tyne and adjoining the Unit Land on the east. The Rough Haugh has been registered as a town or village green under the 1965 Act and such registration being undisputed has become final.

At or near the west end of the Rough Haugh there is a stone about 3 feet high and 9 inches across marked "1783" and known as the "Tide Stone". The Tide Stone marks the boundary of the Port of Newcastle upon Tyne. From 1447 to 1955, the bounds of the Port have been beaten by the Mayor, Corporation, Judges and Guilds of Newcastle upon Tyne or their successors (in relation to the Port) the Tyne Improvement Commissioners as Port Authority. In old days the Ceremony was annual but for many years before 1955 it was approximately every 7 years.



The Mayor and other important persons were fully robed and travelled by boat (30 barges were mentioned) from the mouth of the River to the Tide Stone: landing there, the Mayor and other important persons kissed a village girl, set her on the Tide Stone and gave her a guinea.

Mr. Todd accepted that the Ceremony took place as could be seen or imagined from the photographs produced. Mr. Watson whose evidence I accept, said it was an occasion for "general festivities in the Village" and "a great day for the Village". No other witness (except Dr. Selman) mentioned the Ceremony; Dr. Selman had never himself seen it; in a long statement dealing with many other matters he describes the Heddon villagers as holding "over the whole of the Liberty ... an organized picnic and childrens games and sports following the ... Ceremony"; he was not questioned particularly about this statement; I do not read the words quoted as meaning that some committee or other authority in the Village organized a unified picnic for all the inhabitants, because, the Liberty being more than a mile long, this would not be possible; the head of each household may have organized a picnic for those living with him and considered himself free to hold the picnic anywhere in the Liberty.

The Tide Stone was the centre of the Ceremony; it is at least half a mile from the Unit Land. The population of Heddon-on-the-Wall has much increased since the 1939-45 war by the erection of three new housing estates; before the war it was (so Dr. Selman estimated) about 500. For such a population, the Rough Haugh without any of the Unit Land would provide space enough for the "festivities" mentioned by Mr. Watson so far as the villagers were concerned; although it may be that during the more recent Ceremonies sightseers from elsewhere have spread themselves around over the Rough Haugh, the Unit Land and elsewhere along the River Bank.

I reject the suggestion that I should from the appearance of the Unit Land and the Rough Haugh treat them both as one piece of land. They are different now (the Rough Haugh has been ploughed up but until recently it was grass land). In the 1921 Ordnance Survey map the Unit Land and the Rough Haugh are marked differently. In the documents of title produced by Mr. Blackburn, the Unit Land is distinct.

No document was produced in which the Unit Land and the Rough Haugh were described either together or separately as "the Liberty" and no evidence was given as to the meaning of the word locally except so far as could be inferred from the use actually made of the land so called.

I accept the submission by Mr. Thompson that the Tide Stone Ceremony and the local use of the word "the Liberty" are both indications that the Unit Land is or may be within the section 22 definition. But they are not I think more than indications which must be balanced against the contra indications from the actual use of the Unit Land as described earlier in this decision. Essentially the Tide Stone Ceremony is no more than a small part of a large customary activity associated with the Port of Newcastle upon Tyne; the participation of the parish of Heddon-on-the-Wall was incidental; as evidence of a village green in the parish on any land west of the Rough Haugh it is I think of little weight. There are a great number of possible reasons for calling a piece of land "the Liberty"; although I can imagine that land subject to a customary right of recreation might well be so called, the fact that a piece of land is so called as evidence that it is subject to any such right is I think of little weight. Balancing these indications



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against the contra indications I consider that the contra indications are of more weight. I conclude therefore that the Unit Land is not within the section 22 definition.

For the above reasons I refuse to confirm the registration. Mr. Todd and Mr. Thompson said that the University and the Parish Council were agreed that I should make no order as to costs whatever might be my decision.

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 1<sup>st</sup> day of August 1973.

*a. a. Baden Fuller*

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Commons Commissioner