



COMMONS REGISTRATION ACT 1965

Reference No. 92/D/1
92/D/2
92/D/3

In the Matter of South Gosforth
Quarry, in Gosforth U.D.,
Northumberland and Newcastle upon
Tyne County Borough

DECISION

These disputes relate to the registration at Entry No.1 in the Land Section of Register Unit No.VG.1 in the Register of Town or Village Greens maintained by the Newcastle upon Tyne County Borough Council and are occasioned by Objection No.1 made by Northumberland County Council, by Objection No.2 made by Newcastle upon Tyne County Borough Council and by Objection No.3 made by Gosforth Urban District Council and noted in the Register on 26 June, 9 July and 1 August 1969.

I held a hearing for the purpose of inquiring into these disputes at Newcastle upon Tyne on 5 April 1973. The hearing was attended: (i) by Mr. William Maidment Kyle in person (the registration was made pursuant to an application made by him on 8 May 1967), (ii) by the Northumberland County Council who were represented by Mr. J. Hunter, Assistant Solicitor in their Clerk's Department, (iii) by the Mayor Aldermen and Burgesses and Citizens of the city and county of Newcastle upon Tyne ("the Newcastle Corporation") who were represented by Mr. W. A. A. I. Kinloch solicitor in their Legal Advisers' Department and (iv) by the Gosforth Urban District Council who were also represented by Mr. Kinloch. It was agreed that I should hear all these disputes together. I inspected the land on 6 April 1973, it having been agreed that I might do so unattended.

The land ("the Unit Land") comprised in this Register Unit is (according to the Register) of about 7.91 acres being an irregular shaped strip of land, a little more than 500 yards long, through which runs the river Ouse Burn (from north to south). For about 200 yards of its west boundary the Unit Land (near the middle) abuts Hadricksmill Road between the car park of the Millstone Hotel on the north and No.19 Dene Terrace on the south. For a little less than 100 yards of its east boundary the Unit Land (its most northern part) abuts on Freeman Road. Much of the land is inaccessible on foot (at any rate without difficulty) because the ground is so steep or so overgrown; there had been rain before my inspection; it might be easier after fine weather, but always the less active would be confronted by difficulties over the greater part. The banks of the Ouse Burn are nearly everywhere steep and in the northern part of the Unit Land a pedestrian could only reach the water of the River by going down a steep and little used path. A vehicle could enter the Unit Land from Freeman Road but could not go for more than a few yards because the land drops down. A vehicle could enter the Unit Land from the south (by Craghall Dene) and pass along a track behind Dene Terrace to a bridge which there crosses the Ouse Burn, and then pass on the east side of the Ouse Burn to a point near the centre of the Unit Land; although there are near this track some flat pieces, appearing to have been level ground in front of a disused quarry face, the Unit Land away from the track is too steep and rough for a vehicle.



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At the commencement of the hearing it was agreed that a piece of land ("the Car Park piece"; said to be about 708 square yards) which forms part of the Millstone Hotel car park was wrongly registered.

The grounds of the objection stated in all three Objections were (in effect) that the part of the Unit Land delineated on the plan attached to the Objection was not village green at the date of registration. The part so delineated on behalf of the County Council was the part west of Ouse Burn except the Car Park piece and except the land south of the line of the north boundary wall of 19 Dene Terrace. The part delineated on behalf of the Newcastle Corporation was the whole of the Unit Land east of the Ouse Burn. The part delineated on behalf of the Gosforth Urban District Council was the part west of the Ouse Burn.

Mr. Kyle said that I should when considering whether the Unit Land was a town or village green regard it as all one piece. Mr. Hunter and Mr. Kinloch said I should regard it as three pieces of land (i) a piece ("the County Piece") being the part of the Unit Land which was mentioned in the Objection of the County Council and which was conveyed to the County Council by a conveyance dated 18 December 1933; (ii) a piece ("the Corporation Piece") being the part of the Unit Land which is mentioned in the objection of the Newcastle Corporation and which was conveyed to the Newcastle Corporation by a conveyance dated 8 May 1950 and (iii) a piece ("the U.D. Piece") being the part of the Unit Land which is west of Ouse Burn south of the County Piece and which (except a small area behind Nos. 18 and 19 Dene Terrace) was conveyed to the Urban District Council by a conveyance dated 28 September 1968.

Mr. Kyle who was born in 1934 and has lived all his life at 9 Dene Terrace gave evidence as follows:- From 1947 he had engaged in sports and pastimes without any hindrance as was the customary right of all the inhabitants of the adjacent South Gosforth, High Heaton, Long Benton and West Jesmond over the entire area of the Unit Land. The area is the Ouse Burn Valley; being a valley, it has two sides and is therefore one geographical area. Access has been continuous and open from both sides. He made his application for registration on this basis and so as to ensure that the customary practice for all people in the surrounding area to use the Unit Land for sports and pastimes and general relaxation should continue.

Mr. Kyle in cross examination said:- On the County Piece, he had played football (4 or 5 in his team). On the U.D. Piece, he had played cricket, football and other ball games. On the Corporation Piece, the sports and pastimes played were, cricket, football, butterfly catching, bird watching, collecting leaf mould, picking flowers and berries, walking and running, wandering about, scrambling on the steep sides; additionally he mentioned wrestling and archery. The locality the inhabitants of which were entitled to indulge on the Unit Land in sports and pastimes could not be defined precisely: Mr. Kyle pointed out on the map a "locality" being land more or less within one mile of the Unit Land.

He produced eight statements signed by and which he asked me to accept as evidence of, (i) Mr. J. P. Robson, (ii) Mrs. V. K. A. Little, (iii) Mrs. J. Dray, (iv) Mrs. M. MacLean (v) Mrs. R. E. Rowell, (vi) Mr. W. Denton, (vii) Mr. J. & Mrs. M. E. Bell and (viii) Mrs. M. Hansell. All the eight statements are in two paragraphs. In the first paragraph the signatory says in general terms that he or she has indulged in sports and pastimes on the Unit Land for not less than, or in excess of, 20 years. The second paragraph of each particularises in various combinations: walking, relaxing, picking/gathering wild flowers and blackberries, catching butterflies, exercising dogs



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off the leash, collecting leaf mould, fishing for tiddlers in the Ouse Burn, picnics, enjoying a breath of fresh air, and as a short cut between Freeman Road and Matthew Bank.

On behalf of the Objectors evidence was given as follows:-

(1) Mr. T. Simpson who had until three years ago (when he retired) been employed for 44 years in the County Council Highways Department, described how in 1948 and 1949 the County Council widened Hadricksmill Road on the west side of the County Piece, so that in the result the land between the Road and the Ouse Burn instead of being a cinder track, a three foot drop and then sloping down to the River became a footpath, a narrow grass verge, a wiremesh and concrete post fence, a flat piece of grass land and a much steeper slope down to the River.

(2) Mr. N. Robson, a member of the Gosforth Urban District Council, who came to live in West Jesmond in 1910 said:- When he was a boy he regarded the Unit Land as "Cow-boy and Indian County"; they entered the Unit Land north of the Millstone, paddled or crossed by the stone to the other side of the Ouse Burn. He had never seen anyone play cricket or football. It was obviously quarry land.

(3) Mr. D. Carr, who up to 31 March last (when he retired) had been employed by the Newcastle Corporation for over 44 years in their Parks Department and used to go to the Unit Land once or twice a week, said:- He had seen lots of children playing Cowboys and Indians and adults taking dogs for a walk; but no organised cricket, football or other games. Parts of the Corporation Piece (north of the words "Old Quarry" on the Register map) now appear flat; this is as a result of the works (now in progress) for laying a new sewer; formerly the ground there was thick with trees and shrubs and very hilly and you could not lay out a cricket or football pitch.

(4) Miss A. J. E. Arrowsmith, who is Deputy County Archivist in the County Record Office produced:- (i) a conveyance dated 18 September 1933 by which Mr. A. E. Bedson conveyed to the County Council the County Piece (together with some land near the road north of the Millstone P.H.); on the plan annexed, the northern part of the County Piece was marked "Quarry", "Old Mill" and "Old Mill Race". (ii) Three abstracts of title from which it appeared that the northern part of the County Piece had by an indenture dated 2 May 1898 been conveyed by Mr. F. Charlton to Mr. J. H. Graham and Mr. H. Engel equally and by a later indenture Mr. H. Engel conveyed his half share to Mr. J. H. Graham, that the southern part of the County Piece had by an indenture dated 1 November 1921 been conveyed to Mr. J. H. Graham and that the whole of the County Piece had by a conveyance dated 1 July 1930 been conveyed by Mrs. A. A. Brunt (his widow; he died 15 April 1923 and she remarried) to Mr. A. E. Bedson; on the plan annexed to the 1898 indenture the northern part of the County Piece was marked as "Garden" belonging to what was described as "the flour mill, saw mill, public house, soda water manufactory, dwelling house and other erections known as Hadricks Mill." On the plan annexed to the 1921 indenture, the southern part of the County Piece was divided into six pieces, five marked "Garden" and one marked "Vacant". (iii) The 1898 Ordnance Survey map (2nd edition) which showed a group of buildings "Millstone Inn, Hadricks Mill, Corn. Disused" and "Mill Race" and "Mill Stream" and to the South (the County Piece) as enclosed. (iv) The 1858 Ordnance Survey map (1st edition) which shows the northern part of the County Piece as garden of Hadricks Mill and the southern part as enclosed. Miss Arrowsmith said that Mackenzie's History of Northumberland (1825) states that there was a mill in this location probably from the 13th century. She also said that deeds



relating to the land deposited in the County Record Office belonging to the Society of Antiquaries go back to 1537 when H. Lyell transferred the land to W. Hatherwick and include a deed dated 1630.

(5) Miss J. W. Thompson who is a librarian of the Newcastle upon Tyne library, produced:- (i) History and Directory of Northumberland and Durham (1828 Vol.2) which at page 417 mentioned that a little below Haddricks Mill, "is a large stone quarry". (ii) A Heaton township plan (1844) with references annexed which showed the Corporation Piece as "plantation" And (iii) a plan (1838) from the Seymour Bell Collection of plans relating to Northumberland and Durham.

(6) Mr. W. E. Nugent who is employed in the City Engineer Department pointed out that the 1858 Ordnance Survey map showed that the Corporation Piece was wood or scrub land with quarries and that the only track was to the quarries leading from over Dene Bridge.

(7) Mr. W. McLeod who is employed in the Surveyors Department of the Newcastle Corporation explained the works now in progress for the laying of a sewer from north to south under the Corporation Piece and produced six photographs showing the land in June 1972 before the works started.

(8) Mr. L. Shepherdson who is Senior Assistant in the Newcastle Corporation Main Drainage Department said:- The first sewer under the Corporation Piece was made in 1880 for Gosforth and Long Benton. The second sewer was made in or before 1951. The sewer now under construction was part of a Scheme costing £1½ million, draining land at Fawder. Before the works were started the trees were surveyed and the Contractors were obliged to respect them and to reinstate the land on completion of the work.

(9) Mr. Kinloch (above mentioned) produced a conveyance dated 8 May 1950 by which the Corporation Piece including a strip leading up to Castle Farm Road was conveyed to the Newcastle Corporation; and (ii) a deed of gift dated 28 September 1965 by which Mr. W. G. Gunning and Mr. G. W. Gunning "being unable to make any profitable use of the same" conveyed the U.D. Piece (not including the land behind Nos.18 and 19 Dene Terrane) to the Gosforth Urban District Council.

I have to determine whether the whole or any part of the Unit Land is within the definition of "town or village green" in section 22 of the 1965 Act.

As to whether "inhabitants of any locality have indulged in (lawful) sports and pastimes as of right for not less than twenty years":-

Many persons have I think indulged in activities such as are particularised in the second paragraph of the said eight statements during the last 20 years on the Corporation Piece and incidentally on the U.D. Piece. As to whether these activities were "as of right", I am bound by the observations made by the Court of Appeal in Beckett v Lyons 1967 1 Ch. 449: 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 activities



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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). Apart from the use of the land as a short cut (a use with which I am in no way concerned; it is not a sport or pastime), the said activities were I find never "as of right". The Corporation Piece is of value for laying sewers, but for any other purpose has for many years been practically useless. It might be made useful by being landscaped as a public garden as has been done lower down the Ouse Burn or planted in some way, or otherwise altered; but until this is done, no ordinary owner would find the said activities objectionable. Mr. Carr who looked after it on behalf of the actual owner, the Newcastle Corporation raised no objection (sensibly I think) to such of the said activities as he noticed, but his indifference to them has I think no significance. Obviously the activities did no harm.

I do not accept the evidence of Mr. Kyle that persons indulge in football, cricket, archery or any other sport on the Corporation Piece or elsewhere on the Unit Land to any significant extent. He and perhaps a few others who share his interests may have bowled, hit or kicked a ball or shot an arrow there occasionally. However the Unit Land is generally unsuitable for any such activities; nobody playing there could sensibly think he was doing so as of right or because he was the inhabitant of a locality. I decline to accept the said eight statements as evidence of any indulgence in sports, pastimes or games beyond those particularly specified in the second paragraph; the signatories if they had given oral evidence before me would I think have qualified the generality of the statements made by them in the first paragraph in some relevant and important respect.

Except as incidental to the Corporation Piece, there was no evidence (save that of Mr. Kyle which I do not accept) of any significant use of the U.D. Piece in any now relevant way. From it there is no convenient access to the County Piece. Accordingly as regards the U. D. Piece, I find that none of the activities described in the evidence were as of right.

The County Piece includes the only substantial area of flat grassland which is anywhere in the Unit Land and which could for a moment be considered as suitable for sports or pastimes. But it is obviously unsuitable for any game played seriously or by any other than the very young, because the ball is likely to go over the fence onto the road or to disappear in the land sloping steeply down to the Ouse Burn. The fence which has stood since about 1948 obstructs access to the County Piece from Hadricksmill Road; a person climbing over it (when I saw it at one point it had been bent down so this was not difficult; Mr. Simpson said that until recently the fence had always been well maintained) could not sensibly think he was entering as of right. Nor could any person entering from behind Nos.18 and 19 Dene Terrace or from the Millstones Hotel car park, or from the Corporation Piece by paddling across or using a stepping stone in the Ouse Burn. I find therefore that any use made of the County Piece for sports and pastimes has never been, of right.

The Unit Land has for many years been surrounded by land developed for housing and as might be expected is used by children playing Cowboys and Indians; for such imaginative adventures it must be extraordinarily exciting. But it would I think be absurd to suppose that children so playing did so "as of right", within the meaning of this expression as explained in the above quoted observations of the Court of Appeal



In my view it matters not whether the Corporation Piece, the County Piece and the U.D. Piece are considered as one, two or three pieces of land; however considered, they are I find not within the last part of the section 22 definition.

As to whether "inhabitants of any locality have a customary right to indulge in lawful sports and pastimes":-

While I feel unable from the evidence of Miss Arrowsmith and Miss Thompson to form any very clear picture of the appearance of the Unit Land before the 1858 Ordnance Survey, I accept their evidence as showing that before the surrounding land was developed for housing in or shortly after the nineteenth century, it was all farm land and that the Unit Land so far as it was not garden land or enclosed it was a plantation or other rough land on either side of the Ouse Burn. Before such development, the locality suggested by Mr. Kyle as the extent of the customary right would have had even less reality than it has now. Even assuming that a locality could somehow be specified by reference to some parish or township existing at the beginning of the nineteenth century, I conclude from the documents produced by Miss Arrowsmith and Miss Thompson, that the inhabitants of it could not conceivably have ever indulged in sports and pastimes on the Unit Land, there being much more convenient land elsewhere, and that the existence of any such customary right has been disproved.

There was no evidence that any part of the Unit Land had ever been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality.

I conclude therefore that no part of the Unit Land is within the section 22 definition, and for this reason I refuse to confirm the registration.

Mr. Hunter and Mr. Kinloch asked for an order for costs. When inspecting the land, I tried to imagine (Mr. Kyle asked me to do this) what it would have looked like before the works for laying a sewer had started; and I have the photograph produced by Mr. McLeod. From its appearance at any time, nobody could I think sensibly describe the Unit Land as a "town green" or "village green" within any of the ordinary meanings of these words. Mr. Kyle acted unreasonably in attempting to maintain the registration after he knew of the formal objections made in 1969, and more so after the approaches made to him by the Newcastle Corporation (letters dated 18 and 20 May 1971) and by the County Council (letters dated between 6 and 24 March 1973). I shall accordingly order him to pay the Objector's costs in respect of these proceedings on County Court Scale 1 (being the Scale suggested by Mr. Hunter and Mr. Kinloch).

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

16th

day of

July

1973.

A. A. Baden Fuller

Commons Commissioner