



Commons Registration Act 1965

Reference No. 1/D/6

In the Matter of Harrold Green, Harrold,
Bedford R.D., Bedfordshire

DECISION

This dispute relates to the registration at Entry No. 1 in the Land section of Register Unit No VG.3 in the Register of Town or Village Greens maintained by the Bedfordshire County Council and is occasioned by Objection No.29 made by Mr Henry Cleaver Lay and noted in the Register on 24 September 1970.

I held a hearing for the purpose of inquiring into the dispute at Bedford and at Harrold on 12 and 13 December 1972. The hearing was attended by Mr. Lay who was represented by Mr. W.S. Northey solicitor of Messrs Sharman & Trethewey Solicitors of Bedford, by Harrold Parish Council who were represented by Mr. H.B.R. Tusting one of their members and by the Bedfordshire County Council who were represented by Mr. J A Kiernan one of their staff.

The registration was made on an application dated 23 March 1967 and made by Harrold Parish Council ("the Council). The grounds of objection were as follows:- "I object to the registration of the southern piece of land included in the above registration as this forms part of my property known as Harrold Mill, which I have owned for 45 years. When I purchased the Mill only a small part of the southern piece of land was dry land as the remainder was the Mill Pool. I filled in approximately one half of the Mill pool from soil from the ditch on the East side of land which was cleared periodically. The remainder of the Mill pool is still covered by water, although included in the registration. The portion of this land which has always been dry land is now overgrown but has been cultivated in the past by my tenant of the Mill House, but this has been empty for the past 6 years or so. I constructed a concrete bridge across the ditch on the East side of this land to gain access to further land I own to the East many years ago. During the 70 years that I have known the property the public have never had any rights over the southern piece of land included in the above registration."

Oral evidence was given on behalf of the Council by Mr A L Thew who is 69 years of age and has lived in the Village all his life and by Mr Tusting who is 70 years of age, a member of the County Council (for the Harrold Division) and on behalf of Mr Lay ("the Objector") by Mr Lay himself (he is 86 years of age) and by his wife Mrs E M Lay (she is 82 years of age and was born in the Village). The following documents were produced from the County Record Office:- The Harrold Inclosure Act 1797 (37 Geo 3 Chap.113), the Award dated 1 August 1799 made under such Act, a map ("Map C") described as "of the Parish of Harrold, made in the time of the Inclosure 1796-1799 by Richard Gee", a map ("Map E") described as "Copied from the Commons Award Plan by Thomas Brown November 1820", a map apparently a tracing of some map made at the time of the Award, and a map ("the 1902 Map") being the Ordnance Survey Map Second Edition).

I inspected the land on 13 December in the presence of Mr Northey and Mr Tusting and immediately afterwards concluded the hearing in the nearby hall.



For the purpose of exposition it is convenient to consider the land comprised in this Unit as divided into two: (i) a piece, ("the Disputed Area"; being "the southern piece" mentioned in the grounds of objection quoted above) now for the most part covered with water (a pool off the River Ouse) and for the remaining part covered with rough vegetation, apart from a stream ("the Stream") flowing across the north east corner; and (ii) a piece ("the Undoubted Green") now an attractive and well kept village green. The Undoubted Green is crossed diagonally by a road (not included in this Unit) and is bounded on the north by the High Street, on the west and east by roads or paths fronting on the adjoining buildings or lands and on the south by an inclosure ("Mrs Rootham's Garden"), by a line ("the Entrance Gap") part of the northern boundary of the Disputed Area and by land ("the Mill Front Land") which lies between the buildings ("the Mill Buildings" comprising the Mill and the now unoccupied dwelling houses to the north) and the wall ("the Wall"; of which more below) which forms the west boundary of the Disputed Area. The Disputed Area is bounded on the north (being here land) by Mrs Rootham's Garden and the Entrance Gap, on the west by the Wall, on the south (being here water) by the north bank of the island which lies between the mill stream (on the north) and the main river (on the south), and on the west by land ("the Objector's Further Land", being so described in his grounds of objection) belonging to the Objector and the water (part of the river) fronting on the Objector's Further Land. Surrounded by the Undoubted Green is a group of buildings ("the Isolated Buildings") which are not included in this Unit; so that the Undoubted Green at its north (the High Street) end appears to be broad and open; walking south it divides round the Isolated Buildings becoming two comparatively narrow strips; walking further south, these two strips join up into one strip ending on the north boundary of the Mill Front Land and the Entrance Gap (being the north end of the Disputed Area).

By the 1797 Act, the Commissioners, after making an allotment for manorial rights, were required to "divide, set out, and allot all the Residue and Remainder of the said Lands and Grounds in the said Parish of Harrold, hereby directed to be divided and inclosed (except a certain Green or Plot of Ground lying in the Town of Harrold aforesaid, called or known by the Name of Harrold Green, which said Green shall for ever hereafter remain open and uninclosed for the Holding of Markets and Fairs as heretofore, and shall be subject to such other Purposes and Common Rights, and be under such Rules and Regulations as the said Commissioners shall, in and by their Award, order, direct and appoint) unto and amongst the several Proprietors thereof and Persons interested therein, in such

I accept the statement made to me that the 1799 Award (a very lengthy Document) did not contain any Rules or Regulations relating to the Green.

From Map C and Map E, I can identify the Undoubted Green as part of the land in the 1797 Act called "Harrold Green"; these maps show the Disputed Area as water (except perhaps a piece of negligible size at the north end). The 1902 Map, being the map on which the Register map appears to be based, shows part of the Disputed Area north of a line ("the 1902 Line") as land and as part of the Undoubted Village Green and the rest of the Disputed Area as water. Now the south edge of the hard bank ("the High Level Bank"; at least two or three feet above the winter river level) is south of and in places as much as 15 feet south of the 1902 Line and the south edge of the soft bank ("the Low Level Area; a few inches above the winter level of the River) is further south in places as much as another 25 feet or more.

The Undoubted Green has on it a memorial column, an octagonal market building and a round house; the remainder is grass land (with some paths). Its general appearance



is attractive and as a Village amenity is of great value. Towards the south on either side of the Isolated Buildings its appearance deteriorates a little, but it is still attractive. Across the Entrance Gap, the Disputed Area is by comparison very rough riverside land and (considered by itself) of no very obvious value for sports and pastimes or any other public use. But if the exact extent of the public right over the Disputed Area could be certainly established (as perhaps it maybe under the 1965 Act), it could I think in conjunction with the Undoubted Green be developed further for some use advantageous to the public. Against this, the Disputed Area would be of value for private development to anyone who owned it and the Objectors Further Land. The concrete bridge over the Stream, provides vehicular access to the Objectors Further Land, from the High Street across the Undoubted Green through the Entrance Gap and across the Disputed Area. It was accepted that I am concerned, not to determine which of these alternative possible developments is more expedient but whether the Disputed Area is within the definition of a "town or village green" in section 22 of the 1965 Act as was contended by the Council.

A striking feature of the Disputed Area is the Wall above mentioned. No witness remembered it being built, and I infer that it is (as it appears to be) at least 75 years old. It starts a little to the east of the gate from the Undoubted Green into the Mill Front Land. At the west end of the Entrance Gap it turns at right angles to the south, thus forming a brick wall corner. Continuing south, the level of the top of the wall drops until the wall appears to disappear into the ground. It reappears again at the Low Level Area acting as a retaining wall to the higher Mill Front Land on the west; the Low Level Area and the water from the river being on the east. Near to or across the Low Level Area there is a small culvert, apparently for surface water. Opposite the wheel or site of the wheel of the Mill there is a large sluice; further south there is a second large sluice; these two sluices were fully open when I made my inspection and there was passing through them a very large volume of water being a substantial part of that being carried down in the River Ouse.

On behalf of the Objector it was suggested that I should deduce from a map dated 31.8.72 and produced on his behalf that the Register did not clearly show the west boundary of the Disputed Area. On such map the line of the west boundary is shown as being rather straighter than the line of the Wall. The map appears to be a ten times enlargement of the 1902 Map and does not purport to be a survey of every feature marked on it. The line of the Wall, even where it disappears under the ground (it must I think still be there), is I think clear enough. As I construe the Register this line is the east boundary of the land registered and such land extends up to but does not include the Wall.

Mr Thew in his evidence said:- He lived on the Green from 1906 to 1927 and was at the Village School (marked on the Register Map); the Green was their playground. The children went right down to the waters edge where they sometimes fished (tiddlers) He remembered pitching a tent there. The Entrance Gap was always open; there has never been any fence or gate across it. This use of the Disputed Area was never objected to by occupiers of the Mill; Mr C Beck, Mr J M Armstrong and Sir J Anderson. Mr Tusting in his evidence confirmed that of Mr Thew, and said:- He remembered children playing on the Disputed Area having frequently seen them when himself fishing nearby in the River. The difference between the Council and the Objector arose when the Objector made the concrete bridge about seven years ago over the Stream enabling vehicles to cross from the Disputed Area to the Objectors Further Land. The Objector in his evidence said:- He had known the Mill and the area around it for 70 years. He had claimed ownership of the Disputed Area for 40 years. He mentioned a number of things in support of this claim and of his claim that the public had no rights over it.

In view of the direct conflict between the evidence given on behalf of the



Council and that of the Objector I must state which I prefer. Having considered what the Objector said when giving evidence and his manner of saying it against the other evidence given to me and what I saw when I inspected the land, I am of the opinion that his evidence is unreliable. Having somehow convinced himself that he ought to be the owner of the Disputed Area, he has I think (probably by reason of his age) confused the history of the land as he thinks it ought to have been if he is and always has been owner with its history so far as it could properly be inferred from matters which he had himself seen and heard. Mrs Lay, although obviously anxious to support the Objector in everything he said, lived since her marriage at Northampton (except 1915-18 when he was in the Army) and at the nearby villages of Carlton (1918-38) and Odell (since 1938) and had never been concerned to observe what happened at the Disputed Area; I do not regard her evidence as confirming any statement which the Objector made to me and which apart from her evidence I consider unreliable. I accept the evidence of Mr Thew and Mr Tusting.

In a letter dated 10.3.67. the Objector writing to the Council with reference to their published intention of registering the Disputed Area under the 1965 Act said: "My deeds show, and state quite clearly that this belongs entirely and exclusively to the Mill Property...". The only deeds of the Objector produced at the hearing were: a conveyance dated 19 December 1946 by Mr R J Rootham to the Objector of the Objectors Further Land and a duplicate conveyance dated 1 September 1972 of the Mill Buildings and other land including the Mill Front Land but not including the Disputed Area. No deeds such as were mentioned in the letter of 10.3.67. were produced and I can I think properly infer that the Objector had no deed which in any way supported his claim to be the owner of the Disputed Area. I conclude that the Objector is not and never was the owner of the Disputed Area.

On behalf of the Objector it was said: ownership does not matter; it is enough that the Disputed Area could not be within the definition of section 22 of the 1965 Act; Map C and Map E showed that in 1797 it was water and could not therefore then be subject to any customary right for the inhabitants to indulge in sports and pastimes; it could not now be subject to any such customary right because such indulgence must have started after 1797; the use of the Disputed Area by children as described by Mr Thew and Mr Tusting was insufficient to satisfy that part of the definition which referred to indulgence as right for not less than 20 years.

In my opinion if the greater part of a piece of land is properly registerable under the 1965 Act the whole is registerable notwithstanding that the piece may include outlying parts on which nobody has or is even likely to indulge in sports and pastimes; e.g. the whole of a cricket field is registerable including the rough land outside the boundary line of the game, if such rough ground forms part of the same piece of land. It was conceded that the Undoubted Green was properly registerable under the 1965 Act (a concession rightly made I think because, the 1797 Act is evidence that the land was then and therefore still is subject to a customary right to hold markets and fairs and accordingly it is likely that the inhabitants also have a customary right to indulge in sports and pastimes, see Wylde v Silver 1963 1 Ch 243); so the question is whether the Disputed Area is part of the same piece of land.

A gradual accretion of land from the water belongs to the owner of land gradually added to; see Theobald, Law of Land (2nd edition 1929) page 238 and the judgment in Brighton v Hove 1924 1 Ch. 372. The cases cited in Theobald mostly relate to accretion of land from the sea; but the same principle is applicable to accretions from a river, see Foster v Wright (1878) 4 C.P.D. 438 at page 448. As an exception to this general rule land recovered from the water by works of reclamation belongs to the person doing the works, see Attorney General for South Nigeria v Holt 1915 A C 599. The



cases show that I must if I can find whether or not the accretion was gradual and imperceptible, see Penang v Beng Hong Oon 1972 AC 425 at page 434.

I consider first accretion after the 1902 Map was made.

I do not accept the evidence of the Objector that the land that has in his time accrued to the Disputed Area has resulted from his filling up of the Mill Pool from soil from the Stream. He was unable when asked to give any particulars of this, although on being prompted by his son he mentioned that several loads of rubble from some works being done north of the Green had with his permission been deposited on the Disputed Area. Mr Tusting said that the Stream formerly (before proper drains were made) carried much industrial waste; even allowing for the soil etc from time to time removed by men employed by the relevant authority being very considerable, it would I think not be enough to account for the Low Level Area. Mr Thew and Mr Tusting spoke of discontinuance of the use of the Mill as a mill, of river works being done by Sir J Anderson, of the new management by the River Board and of the blocking of the gap in the island (this gap is shown on the Register map as still existing immediately south of the Disputed Area). I find that the accretion since 1902 resulting in the southern edge of the Low Level Area being where it now is, was gradual and imperceptible, consisting of alluvium carried down by the River Ouse: the soil etc removed from the Stream may have contributed, but not I think significantly; the soil etc would not have stayed where it was put unless the flow of the water from the River Ouse was such as to deposit alluvium rather than to remove soil. The High Level Bank is too high and too hard to consist of alluvium gradually carried down by the River Ouse and must have resulted (as Mr Northey contended) from some direct human action. The loads of rubble and the soil etc from the Stream would I think be enough to explain the southern part of the High Level Bank: but this deposit was not I think done by the Objector as a work of reclamation such as was considered to be decisive in Attorney General for South Nigeria v Holt supra, but was no more than a convenient disposal of unwanted material by employees of contractors and local authorities, beneficial not only to the Objector but also to whoever might be interested in the Disputed Area, but without any significant contribution by the Objector. Further the High Level Bank must I think have been formed on low level land which had previously been formed by a gradual and imperceptible deposit of alluvium from the River.

In my opinion the accretions after 1902 accrued to the front of the Disputed Area north of the 1902 line, not to the Mill Front Land. I do not accept the Objectors statement that there was formerly a brick wall across the Entrance Gap the foundations of which can be seen "if you dig down"; the corner of the Wall near the Entrance Gap shows no signs of ever having been joined by any other wall; I could easily remove with the toe of my shoe, a piece of brickwork said to be part of this foundation, revealing soft soil underneath, the brickwork having apparently been placed there so that the feet of pedestrians passing through the Entrance Gap would not sink into the mud. I accept the evidence of Mr Thew and Mr Tusting that access to the Disputed Area was always open and unfenced from the Undoubted Green and that children used it as they described.

The Objector said that children would never have played on the Disputed Area because the teacher at the school warned them it was dangerous to do so; and Mrs Lay spoke of receiving such a warning while at school. While it would be dangerous to fall into the River Ouse from anywhere on the Disputed Area and particularly near the outflow from the two sluices and the teacher may well have so instructed all children, the activities of children described by Mr Thew and Mr Tusting were not dangerous and only the cautious or timid would I think have kept away from the Disputed Area altogether because of the risk of falling into the River.



The water part of the Disputed Area may be described as "the Mill Pool" if from the description no more is to be inferred than that the sluices from what is or was the Mill Wheel, debouch into it: but the description is inaccurate, if used (as it is in the grounds of Objection) as the basis of an inference that the water part of the Disputed Area appears to belong to the Mill. The River Ouse divides into two streams and the Mill is constructed near or across the northern stream. The water part of the Disputed Area is at its south end, an important part of the River Ouse and is at its northern end a pool off the River.

I conclude that this pool, and the alluvium deposited on its northern shore belongs to the land north of the 1902 Line.

I now consider accretion before the 1902 Map was made.

On Map C and Map E, Harrold Green is shown as a piece of land numbered "162" and the Mill a building to the north of it and the land held with it is shown as a piece of land numbered "166"; the Mill Front Land and Mrs Roothams Garden are on both maps included in the piece number "162". On Map C a building is shown where the Isolated Building now is although it appears to be smaller. There are other slight differences between the two maps as to the Green and the Mill, but bearing in mind that the maps were prepared to show the allotments made (the Green was not allotted) these differences do not I think affect evidentiary value of the maps in this case, as showing that in 1797 the Green had an extensive river frontage extending along the present site of Mrs Roothams Garden, of the Disputed Area, and of the Mill Front Land, that the Mill was constructed across (as it still appears to be) a substantial part of the River and that the Green had wide access to a pool off the River. Having regard to the description in 1797 Act of the use of the Green for markets and fairs the advantages of access to such a pool are obvious; it may be that goods were brought from up or down the river by boat to the Green and that the sudden lowering of the top of the Wall mentioned above was to provide a wharf.

From a consideration of Map C, Map E, the 1902 Map, and the land as it now is, I conclude that the present restricted and narrow access through the Entrance Gap from the Undoubted Green to the Water of the river, is not because persons using the Undoubted Green have since 1797 by user acquired no larger access but is because persons using the Undoubted Green had in 1797 a large and ample right of access to the water of the river, and have since tolerated encroachments (particularly the Isolated Buildings and Mrs Roothams garden) restricting the access to what it now is. The tolerating of these encroachments, has not I think limited the right of access over what was left. Indeed the fact the encroachments were made so as to leave some access shows that the right of access was important.

I conclude therefore that the process of accretion before the 1902 Map was made was essentially the same as the process which occurred as I have found afterwards.

It follows I think that the Disputed Area is part of the same piece of land as the Undoubted Green. Land added by accretion to adjoining land takes the character of and becomes subject to the same customs as the adjoining land, see Theobald supra and Mercer v Denne 1904 2 Ch. 534. Accordingly the inhabitants of the Village have on the Disputed Area the same customary right to indulge in lawful sports or pastimes, as they have on the Undoubted Green. I need not therefore consider whether the playing of children on the Disputed Area as described by Mr Thew and Mr Tusting could properly be regarded as indulgence by the inhabitants of sport or pastimes as of right.



There was no evidence or argument as to whether the southern boundary of the water part of the land registered under the 1965 Act should be the middle line of the northern branch of the River Ouse, or (as drawn on the Register Map) the northern edge of the island or elsewhere. If I am against the Objector (as I am) in thinking that the land part of the Disputed Area is town or village green, it is I suppose of little practical consequence where the boundary of the water part is drawn. In the absence of any evidence or argument I shall not alter the boundary of the water part as drawn on the Register map.

For the above reasons I find that the whole of the Disputed Area is properly registerable under the 1965 Act and accordingly I confirm the registration without modification.

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 six 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 5th day of March 1973

a. a. Baden Fuller

Commons Commissioner