COMMONS REGISTRATION ACT 1965 Reference No. 206/D/202

In the Matter of Towan Green, St. Merryn
North Cornwall D.

DECISION

This dispute relates to the registration at Entry No 1 in the Land Section of Register Unit No.VG.631 in the Register of Town or Village Greens maintained by the Cornwall County Council and is occasioned by Objection No. X 955 made by D Bennett and noted in the Register on 19 May 1972.

I held a hearing for the purpose of inquiring into the dispute at Truro on 19 June 1978. The hearing was attended by Mr J J Hooper of Messrs. Macmillans who appeared for Miss D M Francis the successor to the objector and Mr R F Merrick appeared for the St.Merryn Parish Council.

The land in question is just over 1.69 of an acre situate at Towan which is in the parish of St.Merryn. It is divided into two by a B road which was "made up" in about 1920. The area west of the road is 0.69 of an acre on which is a pond 0.6 of an acre in area.

The Parish Council claim that the whole of this land is a village green and in support of this claim G R Rabey, A C Hawkins M/S E M Bellers and L A Laight gave evidence.

Mr Laight is the Councillor for the Ward of St.Mary on the Cornwall District Council and said he had known Towan Green intimately for 10 years He said he had always understood that children played on the green as common right and he had never seen anyone turn them away. This evidence adds nothing to that given by the other three witnesses mentioned above. These three witnesses all spoke of children playing on Towan Green, their activities included kicking a football about, playing with cricket bat and ball, fishing for newts in the pond, and skating on the pond on the rare occasions when it was frozen. The Green is about 800 yards from the school attended by children from Towan and St. Merryn. This evidence was uncontradicted and I find as a fact that throughout living memory children have played on the green and there had never been any objection to their so doing. There was some evidence of an occasional picnic and the picking of blackberries involving adults but no evidence of any adult ever having indulged in any lawful sports or pastimes on the land in question.

There was no evidence of any customary right and if the land is to have the status of a village green as defined by the Act of 1965 the inhabitants of a locality must have indulged in lawful sports and pastimes on the land as of right for not less than 20 years.

I have underlined the three elements in the definition which must be fulfilled in order to establish that land is a village green and in my view the parish failed to establish any of these three essential elements.

Inhabitants of a locality M/S Bellers had been a member of the parish council and for some period chairman and she had also served as the clerk to the Council. She said in evidence that it never occured to her that the land was a village green before the Act of 1965 came into force. The question as to whether the land was available for use by persons other than inhabitants of the parish has never arisen. She was under the impression that the parish owned the land, it was neglected during the 1939/45 war and cleared subsequently and the council planted some trees on it.

The question as to who owns the land was not before me and I am careful not to express any view as to the ownership of the land. Even if the Council does own the land it does not follow that the inhabitants have a right to use the land for sports and pastimes, the parish council may permit or restrict any such use and no evidence was given that the Council ever considered that the inhabitants of the parish had any such right.

As of right In my view it is fanciful to suggest that school children playing on this land ever considered that they were doing so 'as of right' still less as of a right enjoyed by them as inhabitants of the parish. In my view the children played on the land because the owner whether the council or some other owner tolerated the activities. A privilege enjoyed by tolerance will not be opposed by a benevolent owner so long as it does not harm but if the privilege is claimed as a right it will be opposed.

Lawful Sports and Pastimes In my view this phrase on its true construction requires the land to be used for some defined activity and not merely as a place where children find it convenient to play. I did not have the opportunity to inspect the land but the photographs which were produced satisfied me that the land could not be used as a football or cricket ground.

It is the nature of children to play on any convenient open space and I take the view that the legislature never intended that children just by playing should confer rights on all the inhabitants of a locality. If this were the case almost every open piece of land would be a village green as for example beaches.

Mr Merrick referred me to two decisions under the Act of 1965. Bridge Green and Gleaston Green D C C 15 and 16. The evidence in these cases did include activities of an organised nature, ~~many~~ organised and participated in by adults, there was more than casual play by children. The case of the Village Green Waddingham D CC 14 is very similar to the instant case. In that case the Chief Commissioner held that there was a customary right for children to play, but the point taken by the objectors was that only the children from certain houses had the right to play and not all the children from the village. The Chief Commissioner accepted the evidence that all the children played and since the existance of a right was not contested confirmed the Registration. He did say that it was extremely unlikely that the Juris Prudential question as to whether they were playing as of right ever entered the childrens heads. The impression I get from the Chief Commissioners decision is that the objectors have failed on the point argued by them at the hearing. The Chief

Commissioner felt he had no alternative but to confirm the registration. This case was one of the earliest cases under the Act of 1965 and for the reasons given above is in my view distinguishable from the instant case.

Mr T J Bennett gave evidence on behalf of the objectors, he lived during the eight years immediately preceeding 1963 at the adjoining property between the ages of 8 and 11. He did seek to establish that the children who played were his friends, but in cross-examination he conceded that children played without any invitation by him, or Mrs Phillips, his grandmother. He said a caravan site was established in the area in 1955 and that children on holiday played on the land. Some evidence relevant to the question of ownership and not relevant to the status of the land was given and I have deliberately refrained from referring to such evidence.

For these reasons stated above I refuse to confirm the registration.

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 14th day of August 1978

L. D. Lettis

Commons Commissioner