

COMMONS REGISTRATION ACT 1965

Reference Nos. 215/D/125 215/D/126 215/D/127 215/D/128

In the Matter of Pieces of Land West of and fronting on the River Severn and extending from both sides of the Old Bridge, Upton-upon-Severn, Malvern Hills District, Hereford and Worcester

DECISION

My decision is (stating its effect shortly) that none of the land east and south of a point near the Swan Inn should have been registered under the 1965 Act as common land. The disputes which have made it necessary to give this decision, the circumstances in which they have arisen, my findings and my reasons are as follows.

The disputes relate to the registrations at Entry No. 1 in the Land Section of Register Unit No. CL.106 in the Register of Common Land and at Entry No. 1 in the Land Section of Register Unit No. VG.45 in the Register of Town or Village Greens maintained by the Hereford and Worcester County Council, and are occasioned (D/125 and D/127) by these registrations being in conflict, (D/126) by Objection No. 96 to the CL.106 registration and (D/128) by Objection No.97 to the VG.45 registration, both made by Swiffen and Sons Limited and both noted in the Register on 3 August 1972.

I held a hearing for the purpose of inquiring into the disputes at Worcester on 1 July 1975. At the hearing, (1) Upton-upon-Severn Parish Council, on whose application the CL. 106 Entry was made, and (2) Mr John Bradford, on whose application the VG.45 Entry was made, were both represented by Mr G C Humphreys solicitor of Moore Brown & Dixon Solicitors of Tewkesbury, and (3) Swiffen and Sons Limited were represented by Mr A Evans solicitor of Adie Evans & Warner, Solicitors of Birmingham. The following persons who were not under rule 19 of the Commons Commissioners Regulations 1971 entitled to be heard, were represented as follows:-(4) Mrs Edith Nora Eugenie Williams of the Malt House, Upton-upon-Severn, by Mr R M Cliff solicitor of George Green & Co Solicitors of Cradley Heath, West Midlands; (5) Mrs Irene Annice Herbert of Severn House, Upton-upon-Severn, was represented by Mr P Marsh solicitor of Russell Livingstone Wood & Co, Solicitors of Malvern; (6) Mr Thomas Oxley of Old Walls, Waterside, Upton-upon-Severn was represented by Mr C L Whatley solicitor of Whatley Weston & Fox, Solicitors of Malvern, (7) Mr Noah Joseph Griffin of 8 Garden Walk, Upton-upon-Severn was represented by Mr R Penson, solicitor of Russell Livingstone Wood & Co, Solicitors of Upton-upon-Severn; and (8) Mr Nicholas Harold Kenneth Coleman and Mr Steven Price both of 27 Church Street, Tewkesbury as executors of Mr John Anthony Bowen deceased formerly of 6 Dunns Lane were represented by Mrs S A Hayes solicitor with Thompson & Badham, Solicitors of Tewkesbury.



The land ("the Unit Land") comprised in this Register Unit CL.106 is a strip between the River Severn on the northeast and the houses shops and buildings comprising Upton-upon-Severn on the southwest. One end is a point on the River Bank about 75 yards northwest of Upton Bridge ("the New Bridge": it takes the A440 road over the River). The other end is a point on the River Bank about a ‡ of a mile southeast of the New Bridge by a gate (Ham Gate) which leads into a large area of grass land by the side of the River, called Upper Ham. To a River user, the Unit Land and Upton-upon-Severn are on the west side, and I shall (as did many at the hearing) in this decision often use north, east, south and west as if the River instead of bending as it does by the Unit Land, flowed by Upton-upon-Severn from the north due south. Most of what was said at the hearing related to the part ("the Disputed Part") of the Unit Land which is about 200 yards long and which is south of the Swan Inn; this part is bounded on the west by a side road ("the Tarmac Road") which is a tarmacadam public highway known as (or being a continuation of) Dunns Lane (at the hearing sometimes called Waterside) leading from the High Street on the north and ending at Ham Gate on the South. The remaining part of the Unit Land ("the Undisputed Remainder") is for the most part either by the New Bridge or by the substantial stone structures on the west side of the River which are now all that remain of the Old Bridge (in line with the High Street); the Old Bridge which at one time took all the traffic from Upton-upon-Severn over the River was removed during or shortly after the 1939-45 war (I have no note or recollection of anyone ever telling me the exact date).

The land ("the VG.45 Land") comprised in Register Unit VG.45 is the same as (perhaps a little more or less than) the Undisputed Remainder and includes none of the Disputed Part.

The Rights Section and Ownership Section of both these Register Units are blank. The grounds stated in Objection Nos. 96 and 97 (both dated 9 July 1972) are the same, being as follows:—"1. This Objection is in respect of the land coloured pink on the plan annexed hereto. 2. The said land is part of the land comprised in Register Unit No. CL.106/VG.45. 3. The said land has been continuously in the possession of the objectors or their predecessors in title for upwards for 58 years as is proved by the title deeds thereto and by a statutory declaration made in 1966 by the person who was at that time owner in fee simple thereof. 4. The successive owners of the said land always looked upon it as private land and have exercised their rights of ownership such as its use as a private landing place for the mooring of private boats. 5. The said land was therefore not common land at the date of registration nor has it ever been common land/a town or village green". The land ("the Objection Land") coloured pink on the plan annexed is about 30 to 35 yards long and comprises the north end of the Disputed Part, opposite the land on which there now stands a block of 11 flats:

At the beginning of the hearing Mr Humphreys said that Mr Bradford did not wish to proceed with the VG.45 registration. Nobody present at the hearing claimed that I should not, and accordingly I shall, treat this registration as having been made mistakenly.

On behalf of the Parish Council Mr Humphreys produced from the County Archives the Upton-upon-Severn Tithe Apportionment Award (with map) dated 11 September 1843 and the Upton-upon-Severn and Ripple Inclosure Award dated 26 August 1863, and oral evidence was given by (1) Mr J Bradford who has lived in Upton-upon-Severn all his life (54 years), who is and has been for the last 30 years a member of the Upton-upon-Severn Parish Council and who is also a member of the Malvern Hills District Council and of the Hereford and Worcester County Council, (2) by Dr T A



Cooper who has lived in Upton-upon-Severn since 1947 and is chairman of the Parish Council, and (3) by Mr A Burghan who was born in Upton-upon-Severn 87 years ago, in 1909 joined the Army, was a member of the Upton Rural District Council for 27 years from 1930 and of the Parish Council for 15 years from 1957 and has resided for most of his life in Upton-upon-Severn. In the 1843 Award, plot 45 includes the Disputed Part, the site of the Tarmac Road, and the part of the Undisputed Remainder south of the Old Bridge; in the Schedule plot 45 is grouped with a number of other items under the heading "Roads, Water and Wastes" (all treated as non-tithable) and is in the column headed "Description" described as "common"; no owner or occupier is named. The Disputed Part, the Tarmac Road and the Undisputed Remainder are not dealt with by the 1863 Award at all; however on the map they are coloured brown as are all the other roads.

On behalf of Swiffen & Sons Ltd ("Swiffen"), Mr Evans produced the following documents:- (1) an appointment and release to uses dated 29 April 1812 in favour of Mr George Clarke, porter brewer of a "capital messuage...situate at the end of or near to a lane called Dunn's Lane...with the warehouses, vaults and counting houses thereunto belonging and adjoining or nearly adjoining Also two cottages... adjoining the warehouses...on the Eastern side...And Also a small plot...of ground adjoining the warehouse ... all ... which said premises ... are ... delineated on the plan thereof on the margin..."; (2) particulars of sale of property"belonging to the Messrs Clarke" (inferentially the basis of the sale completed by the below mentioned 1914 conveyance); (3) a plan and drawing (inferentially originally part of the 1914 Particulars); (4) a conveyance dated 7 July 1914 by which various persons claiming under the will of George Clarke Wine Merchant (he died 17 November 1873) in the undivided shares therein mentioned (as successors of his children) conveyed to Mr G M Rice corn merchant "Firstly All that piece of ... lands ... bounded on or towards the North by the River Severn...on the east by hereditaments belonging to John Biddle and on the west by the hereditaments secondly described ... and also All that ... dwelling house known as Waterside ... situate ... upon the said land which piece of land is...delineated on the plan endorsed...and thereon coloured buff...Secondly All that piece...of land adjoining the firstly described piece of land on the west and bounded on the North by the River Severn together with the warehouse ... and other buildings erected thereon...which said piece of land is...delineated on the said plan endorsed and thereon coloured pink Together also (so far as the Vendors have power to grant the same but not further or otherwise) with the right to and full benefit of the private landing on the bank of the River Severn coextensive with the hereditaments hereby conveyed"; (5) a statutory declaration made on 25 July 1966 by Mr W S Biddle; (6) a statutory declaration made on 3 December 1966 by Mrs E Rice widow of Mr G M Rice (inferentially he died before 1936, there being mention of an assent dated 16 March 1936); (7) a conveyance dated 29 July 1966 by which Mr W S Biddle (as personal representative of Mr William Biddle who died intestate) conveyed to Mr J A Bowen two pieces of land west of Waterside House coloured pink and blue on the annexed plan; (8) a conveyance dated 15 November 1966 by which Mrs E Rice conveyed to Mr J A Bowen the land known as Waterside House and other land, edged red on the annexed plan; (9) a conveyance dated 9 July 1971. by which Mr J A Bowen conveyed to P L Emms (Properties) Limited ("P.L.E.") the front part of the land which he had acquired under the 1966 conveyances; and (10) a conveyance dated 22 December 1972 by which P.L.E. conveyed to Sinclair Kemp & Co Limited ("Sinclair") the land described in the 1971 conveyance.

On behalf of Swiffen, oral evidence was given by Mr R G Stokes who is 47 years of age, has lived all his life in Upton-upon-Severn and who has for the last 7 years lived at the rear of Bankside House (adjoining Waterside House on the south) and who is now a factory worker and part-time caretaker of Waterside House. Additional oral evidence was given by Mr B A Pratley (son-in-law of Mrs Price; they have lived for the last 16 years at Severn House which fronts on the Tarmac Road about 100 yards



south of Waterside House and opposite part of the Disputed Part; and by Mr J R Williams who has lived at Malt House (this also fronts on the Tarmac Road opposite part of the Disputed Part and is next to Severn House and separated from Waterside House by Crimond Rose, formerly Rose Cottage, and Bankside House); he produced a conveyance dated 24 February 1969 to Mrs E N E Williams of Malt House.

Two days after the hearing I inspected the Unit Land, it having been agreed that I might do so unattended.

The Disputed Part and the Undisputed Remainder, now appear very different. Undisputed Remainder is near the end of the High Street, a busy and much used part of Upton-upon-Severn; it is several pieces of grassland pleasantly situated by the River, with seats, litter bins and baskets here and there, all inviting the public to sit, picnic and walk around and enjoy the view of the boats using the River and the surrounding country and providing an area free from much of the noise of the motor traffic nearby; to the casual visitor it would seem clear that he could walk over and otherwise enjoy the Undisputed Remainder without interfering with the private rights of any person. The Disputed Part is divided by fences of varying heights corresponding to the boundaries of the houses and buildings on the opposite side of the Tarmac Road, so it appears to be a number of different plots: some . having been recently planted with trees, some being well kept grass areas, some having flower beds and some apparently not being looked after very much if at all; to the casual visitor it would seem clear that (although he would if so minded have no difficulty in walking over much of the Disputed Part right down to the Water edge) he would because the fencing or the general lay-out of all the plots shows them all to be more or less private belonging in some way to the buildings on the opposite side of the Tarmac Road, (if he did so walk) probably be interfering with private rights; further it would be difficult if not impossible for him to walk along the Disputed Part from the north to the south without going from time to time to the Tarmac Road.

Mr Bradford said in(effect):- The Disputed Part when and for some time after he knew it was open land on which the public walked and picniced and from which they fished in the River; it was used for boat repairs; the grass was grazed by various persons (he mentioned the occupier of Bankside House, and of the Swan Inn, and also Mr Biddle). Opposite Waterside House on the Disputed Part there used to be an old lamp standard (gas): about 19 years ago much of Upton-upon-Severn was tidied up (prior to a visit by HRH the Princess Margaret), and this lamp standard with others in the town was replaced by standards made of concrete. In 1937 Mr Rice put up a fence opposite his land (Waterside House) and it was shortly afterwards pulled down by children and he never put up another. At a point near where Fisher Rou (a path) joins the Tarmac Road (about opposite the middle point of the Disputed Part) there used to be a tip; around the tip was where the boats were mostly repaired. These things did not much change after the 1939-45 war.

Dr Cooper said (in effect):- As he first remembered it the Disputed Part was used as a sort of recreation ground for the inhabitants of Upton and for visitors; at the weekends or on Bank Holidays, people used to sit about on it, picnic and play with their children; the River bank was convenient to sit on. All this without let or hindrance. In recent years the Disputed Part had been fenced (as it now is); this started about 1968 or 1969 (not before).



Mr Burghan said (in effect):- The Disputed Part had always been open to the public for fishing and boating. Mr Rice in 1937 put up a fence but the children kicked it down; it was about 2 foot 6 inches high. Mrs Shepherd who used to live at Rose Cottage (now Crimmond Rose) used to charge people (not locals) 2d for fishing; nobody interfered with the use of the land.

Mr Stokes described in a general way how the Disputed Land had been fenced and how he as caretaker had tried to prevent the public from using the Objection Land (it is now more open than the rest of the Disputed Part and is more attractive to the public being nearer the High Street) and how he had in recent years put up signs (notice boards) "PRIVATE".

Some of the statements made by Mr Stokes considered in isolation conflict directly with statements made by Mr Bradford, Dr Cooper and Mr Burghan. I think much of this apparent conflict was due to his manner of speaking; considering what he said as a whole, I conclude that he accepted their statements on all important matters; however this may be, if there be any difference between him and Mr Bradford, Dr Cooper and Mr Burghan, I prefer their evidence to his. My general conclusion on the oral evidence is that the present differences as outlined above between the Disputed Part and the Undisputed Part are of recent origin, starting from about 1968, and that until 1968 the Disputed Part was open unoccupied land on to which persons with small boats on the river could at most places easily land and over which persons could walk, picnic and do things to boats much as they pleased without finding any fence obstructing such activities.

The written evidence as to the appearance of the Disputed Land before living memory is to this effect:- In her 1966 declaration Mrs Rice described a "private landing" on the bank of the river which she and her husband (before her) had enjoyed since 1914; the plan she exhibits shows a narrow "Verge" between the "Road" and the buildings and shows the "Road" as going right up to the edge of the "River Severn." The 1914 Particulars and the 1914 conveyance plan show the whole area between the front of the buildings and the edge of the river as "ROAD"; and the drawing shows a landing stage not opposite but just south of the Waterside House building. As above stated the 1843 and 1863 plans show the Disputed Part and the site of the Tarmac Road as all one piece. The 1812 plan is smudged and the colouring of the Disputed Part and the site of the Tarmac Road does not clearly show that either or both were intended to come within the hereditaments therein particularly described. On appearance alone, I would suppose that before living memory, the Disputed Part (making allowances for changes recorded in general history) was always as described by Mr Bradford, Dr Cooper and Mr Burghan; in my opinion the written evidence provides no reason for supposing otherwise.

As to the grounds stated in the Objection:-

None of the evidence produced showed any title to the Disputed Part in Swiffen, and to this extent at least the Objection is wholly mistaken. Mr Evans said that Swiffen and Sinclair were associated companies, but he provided no information about this association or the association if any between P.L.E. who were owners of Waterside House when the Objection was made and Swiffen. However, I ought not I think to reject the Objection because of this mistake; there is nothing in the 1965 Act or the regulations made under it which requires an objector should have an interest in the land registered, and I shall accordingly read the grounds of objection as if P.L.E. were the Objectors referred to.



The documentary title of P.L.E. to the buildings and land west of the Tarmac Road opposite the Objection Land as regards the period before 1967 is in two parts: (i) the Clarke part, which is the greater part (nearly all), and (ii) the Biddle part, which is a very small part at the south end.

Although both the 1914 conveyance and the December 1966 conveyance described the land as "bounded by the river" the plan on both conveyances shows "ROAD" in between. Mrs Rice in her 1966 declaration says "The said property is separated from the bank of the River Severn by a public highway", apparently treating not only the site of the Tarmac Road but also the Objection Land as public highway: the "private landing" which she mentioned was identified on her exhibited plan as of being on the edge of the River". The plans on the 1914 and 1966 conveyances conflict with the description "bounded by the River Severn"; although under the presumptions applicable to conveyances of land fronting on highway, part of the site of the Tarmac Road may have impliedly passed --> by these conveyances, the particular description of the lands thereby conveyed should I think be read as indicating that they extended as far as the west side of the Tarmac Road and not up to the River edge; so neither conveyance in my view supports the conclusion that in any sense now relevant the Objection Land must have been in the possession of Mr and Mrs Rice in the same way as they were in possession of Waterside House. Further no pre-1967 document was produced which in any way supports the suggestion, implicit in the grounds of objection, that the Objection Land had been in the possession of Mr and Mrs Rice in some way distinct from the site of the Tarmac Road; I do not read the words "a right to a private landing on the bank" used by Mrs Rice in her declaration as meaning that she thought she was in possession of the bank itself as distinct from being in possession of a right to land on it.

In his 1966 declaration, Mr Biddle says (para.2) that his end of the Objection Land opposite his warehouse and land had "been used...with full...possession with the land and warehouse...for upwards of 30 years..." (para.3) that the same end of the Objection Land had been used for the purpose of upwards of 30 years last past of a mooring and all and every The riparian rights have been enjoyed...". If para.2 was intended to record a conclusion based on the facts stated in para.3, such conclusion is not I think in law justified. If para.2 is intended to record a conclusion based on other facts, I reject it, because such conclusion is not in accordance with the evidence of Mr Bradford and Mr Burghan and because I do not know the facts on which Mr Biddle relied when he deposed to it. Accordingly I do not accept Mr Biddle's declaration.

For the above reasons I conclude that Mr Bowen under the 1966 conveyance did not become entitled to the ownership of any part of the Objection Land and that none of his predecessors in title were ever in possession of it.

There was no oral evidence that either he or any of his predecessors "looked upon it (the Disputed Part) as private land" as alleged in the grounds of the Objection. Such a way of looking at it is contrary to the 1966 declaration of Mrs Rice, because she says that she regarded it as a "public highway", and also contrary to what I would infer from the evidence of Mr Bradford and Mr Burghan.

Whether P.L.E. and Mr Bowen before them as a result of the activities described by Mr Stokes entered into possession of the Objection Land after 1966 cannot affect the result of this case, because any such possession would not be long enough to establish any sort of possessory title.



For the above reasons I conclude that the Objection so far as it is based on the grounds therein stated fails, because the grounds (paragraphs 3 and 4) were not proved.

However Mr Evans contended that the evidence did not show that either the Objection Land or any other part of the Disputed Part was "wasteland of a manor" within the definition of common land as set out in section 22 of the 1965 Act, so (as I understood him) my conclusion on the grounds of objection did not matter.

This contention which was supported by Mr Cliff, Mr Marsh and Mrs Hayes, presupposes that P.L.E. or their predecessors or successors in title, and I suppose all the other persons owning property fronting on the Tarmac Road have been able to do what they have done since 1968 on the Disputed Part not because they have been owners but because neither the true owner (whoever he may be) of the Disputed Part nor anybody else has objected. The substance of the matter is I think that in about 1968 it occurred to the Parish Council and to many of the owners of the buildings fronting onto the Disputed Part that it could advantageously be tidied up; the Farish Council with this in view on 21 June 1968 made the application resulting in the registration now in question and about the same time or not long afterwards the various owners started to tidy up the Disputed Part as above described. It was not suggested that these owners knew anything until comparatively recently about the registration or that they tidied up the Disputed Part otherwise than in good faith; but of course tidying up by the Parish Council would be different.

There was no evidence that the Disputed Part was at any relevant time subject to rights of common such as are mentioned in the 1965 Act, so the only relevant words of the section 22 definition of "common land" are:- "means...waste land of the manor...but does not include...any land which forms part of a highway".

The case for the Parish Council is that historically the Disputed Part is within this definition. Having regard to the importance of the Disputed Part in relation to Upton-upon-Severn, it would not I think be in the public interest if I were relying on regulation 26 of the 1971 Regulations to confine myself to the grounds set out in the Objection. I conclude therefore that in the exercise of the discretion given to me by the regulation that it is just that I should deal with the Parish Council's historical case as it was presented on their behalf, and assume (as I have no reason to doubt) that there are no relevant historical documents other than the 1343 and the 1363 Award and that from time immemorial until about 1968 the Disputed Land has been open land freely usable by the public for obtaining access to the River and otherwise. But it would not I think be just to the Parish Council to pay any attention to any evidence of activities relating to any particular part of the Disputed Fart other than the Objection Land because of such evidence the Parish Council has had no prior notice.

Considering the case of the Parish Council in this way:— I attach no importance to the use of the word "common" in the 1845 Award; the Disputed Part was non-tithable, and the valuer had no need to describe its legal status accurately either as it was then or as it might be 100 years later. The characteristics of the Land from time immemorial have been:— (a) it was bounded on the east by the River Severn which has always been a public navigable highway; (b) it was either part of a piece of land crossed by a track (the site of the Tarmac Road) which has always been a highway or it was bounded on the east by a track which has always been a highway; (c) it is a narrow strip which the public has always been free to walk over as they pleased (I disregard fences erected by Mr Rice which were there for a short time); and (d) the public have always had cogent reason for crossing this strip to go from one highway to the other. These characteristics (bearing in mind that I had no evidence that anyone being or claiming to be a lord of any manor



had anything to do with the Disputed Part after 1863) in my opinion in law lead to only one possible conclusion: that the Disputed Part has always been highway.

Notwithstanding that this conclusion is not that for which either Mr Humphreys or Mr Evans or anyone else at the hearing contended, I should I think act on it. It is in accordance with the 1966 declaration of Mrs Rice who says: "The said property is separated from the bank of the River Severn by a public highway"; and having regard to the plan attached to the declaration, I read the word "bank" as meaning the edge or not much more than the edge of the River (a line which owing to the variations of water flow is not constant) and as not including the considerable area of the Objection Land.

So it is not necessary for me to consider whether the Disputed Part if it were not highway could be wasteland of a manor, and I express no view as to who is entitled to keep the Disputed Part tidy. There are many roadside verges which in accordance with legal principles established when traffic and social conditions were different are in law part of the highway and which now owing to vehicular traffic being practically confined to the tarmacadamed roads are left uncared for by anybody. It is I think clear that the problems to which these verges give rise are outside the scope of the 1965 Act, and I ought not I think merely because Swiffen have not raised this point to leave the Disputed Part registered under the Act merely because the public might derive some advantage from it being deemed to be something which in my view it is not. I conclude that I ought to direct its removal from the Register.

As to the Undisputed Remainder: - Before 1968 there was not much difference between this and the Disputed Part. But it was then different in some respects and it is possible that it had a different history before 1968. Certainly it has become different since 1968. Its present use is consistent with its being within the above-quoted definition and with it being within the scope of the 1965 Act. Nobody at the hearing suggested that it was not rightly registered and the evidence of the Parish Council (no doubt for this reason) was not directed particularly to it. In these circumstances I conclude that the registration of the Undisputed Part was properly made.

The register map shows the Unit Land continuous, and is not sufficiently detailed to indicate where the Undisputed Remainder should end and the Disputed Part should begin. On my inspection I was satisfied that there was a distinct break near the Swan Inn and that the Undisputed Remainder be treated as ending at the street lamppost opposite the front door of the house which is named the Unite House and which adjoins the Inn.

For the above reasons I refuse to confirm the Entry in the Land Section of Register Unit No. VG.45 $_{\rm an}$ d I confirm the registration in the Land Section of Register Unit No. CL.106 with the modification that all the land south or east of the said lamppost be removed from the Register.

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 1916 day of January

1976

a.a. Boden Fuller