



COMMONS REGISTRATION ACT 1965

Reference No. 219/D/4

In the Matter of a strip of land between H.W.M.O.T and the Seawall, Promenade, or Cliff Edge, forming part of West Beach, Whitstable Beach, Tankerton Beach and Swalecliffe Beach, Whitstable, Kent

### DECISION

This dispute relates to the registration at Entry No. 1 in the Land Section of Register Unit No. VG 167 in the Register of Town or Village Greens maintained by the Kent County Council and is occasioned by Objection No. 146 made by the former Whitstable Urban District Council and noted in the Register on 5 July 1972.

I held a hearing for the purpose of inquiring into the dispute at Folkestone on 22 and 23 January 1980. The hearing was attended by Mr P Clayden, Solicitor, on behalf of Mrs A Wilks, the applicant for the registration and Mr J Laws, of Counsel, on behalf of the Canterbury City Council, the successor authority of the Objector.

The land comprised in the Register Unit consists of two lengths of beach lying respectively to the east and west of Whitstable harbour and divided by a comparatively short length which is not the subject of the registration.

The eastern and western lengths differ some what in character. Much of the eastern length was purchased in parcels at various times from 1904 onwards by the Objector and consists of what may be termed ordinary sea-side pleasure beach. The western length is the property of the Whitstable Oyster Fishery Company, which derives rents and profits from it.

Mr Clayden based his case on the second limb of the definition of "town or village greens" in Section 22(1) of the Commons Registration Act 1965, i.e. land on which the inhabitants of a locality have a customary right to indulge in lawful sports and pastimes. Such a right has been known to the law for centuries, but it is carefully restricted. It cannot exist as a right in the public generally, but must be confined to the inhabitants of a particular district: see per Kay J. in Bourke v. Davis (1889), 44 Ch.D.110, at page 120.

Evidence which I have no hesitation in accepting was given by a number of inhabitants of Whitstable that for many years they had resorted to both lengths of the beach for what one of the witnesses described as swimming, sun bathing, drinking tea, eating ice-creams and generally relaxing. The Official Guide to Whitstable described it as "an unspoiled holiday haven", and contains a number of pictures showing the beaches as much frequented. It would be surprising if all the people shown in these pictures as enjoying the pleasures of the beaches were resident in Whitstable. One of the witnesses said that no attempt has been made to restrict public access to either of the lengths of beach comprised in the Register Unit.

Mrs Wilks said that it is difficult to see how visitors could have come here in any numbers until the railway arrived at Whitstable from London in 1860. Therefore,



however, visitors long before there was a railway. In Robert H. Goodsall's, Whitstable, Seasäher and Swalecliffe, published in 1938, which Mrs Wilks said is considered to be the most authoritative book on local history, there is a copy of an advertisement by a bathing machine proprietor in 1768, which states "N.B. Private Lodging, to be had very genteel and ready-furnished. A good Turnpike-road from Whitstable to Canterbury" (p.114). In an advertisement for the sale of two new-built houses in 1775 it is stated: "The above tenements are well calculated for the Reception of small families who visit Whitstable in the Summer Season for the convenience of bathing in the sea." (p.116).

Mr Clayden argued that as one goes back in time the possibility of the use of the beaches for recreation by non-residents gets less and less, and that the previous use would have been by local people. I find it impossible to draw an inference from the evidence before me that before these beaches became places of resort for both visitors and local residents, they had been places where the local residents had indulged in lawful sports and pastimes in the exercise of some customary right. Any such right must have originated before the time of legal memory, i.e. before 1189. If a state of affairs has existed throughout the period of living memory, it must be presumed to have existed before 1189, unless there is evidence that it did not or could not exist at any time since that date. Therefore, if it is to be presumed that local residents disported themselves on these beaches before 1189, it must equally be presumed that visitors also did so, for there is no evidence that they did not or could not do so. It is in fact highly unlikely that either local residents or visitors used these beaches for recreation before 1189. Such evidence as there is relating to visitors is earlier than that relating to residents. Perhaps the residents, who were described at the end of the eighteenth century as "thriving, though of an inferior condition in life, and course (sic) trades . . . . and above all the illicit trade of smuggling" (Goodsall, p.112) were fully occupied in catering for the visitors. However, this may have been, there is, in my view, a legal presumption that both visitors and residents were using these beaches before 1189, and no customary right can be founded upon such a presumption.

For these reasons I refuse to confirm the registration.

Mr Laws asked for an order for costs should his clients be successful. Mrs Wilks has no proprietary interest in the matter. She made the registration in good faith as a public-spirited member of the community, and there has been nothing in her conduct of the matter to call for an order for costs.

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

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day of

February

1980

Chief Commons Commissioner