COMMONS REGISTRATION ACT 1965

Reference No.45/D/23
45/D/24
45/D/25
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45/D/27
45/D/28

In the Matter of The Common or The Green and Moor End, Nun Monkton, Nidderdale R.D., Yorkshire West Riding

DECISION

My decision is that this land is a village green. 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 registration (a) at Entry No.1 in the Land Section of Register Unit No.CL.32 and (b) at Entry No.1 in the Land Section of Register Unit No.VG.21 in the Registers of (a) Common Land and (b) Town or Village Greens maintained by the West Riding County Council and are occasioned (D/23 and D/24) by these registrations being in conflict, (D/25 and D/26) by Objection No.524 made by the West Riding County Council and noted in the Register on 18 January 1971 and (D/27 and D/28), by the said registrations being treated as being in conflict with the registration at Entries No.1 to 24 inclusive in the Rights Section of the said Register Unit No.VG.21 and with the Entries identical with the last mentioned Entries deemed to be made in the Rights Section of the said Register Unit No.CL.32.

I held a hearing for the purpose of inquiring into these disputes at Harrogate on 1, 2 and 5 November 1973. At the hearing (1) West Riding County Council were represented by Mr. F. Pickersgill, (2) Nun Monkton Parish Council were represented by Major J. M. B. Barchard, their chairman, (3) Mr. P. E. H. Johnson was represented by Mr. J. J. Pearlman solicitor of Messrs. Pearlman & Co. Solicitors of Leeds, (4) Hogg Builders (York) Limited ("Hogg Builders") were represented by Mr. J. F. Yeomans solicitor of Messrs. Harrowells Solicitors of York, (5) Mr. T. B. Candeland was represented by Mr. T. S. Owen, solicitor of Messrs. Cornish Forfar & Allen Solicitors of Liverpool. The following participated in person in the proceedings either by addressing me on some point or by giving me their names as being persons in some way concerned:- (6) Lieutenant-Colonel G. E. M. Woolley, (7) Mr. W. H. T. Palmer, (8) Mr. J. Corcoran, (9) Mr. R. C. Burton, (10) Mr. J. S. Corfield, (11) Mr. J. Holgat (12) Mr. G. M. and Mrs. J. Ennis (13) Mr. B. Parkinson, (14) Colonel E. C. Mansel and (15) Mr. J. Towers.

All present at the beginning of this hearing agreed that I should hear all these disputes together.

Colonel Woolley in the course of his evidence handed me ten statements signed by the following persons, as containing information which they wished me to consider:- (1) Mrs. E. M. Barker, (2) Mrs. E. Burton, (3) Mrs. N. Wright, Mr. N. Wright and Miss M. Smith (to their statement was attached a copy of a page from the July 1911 Boroughbridge Deanery Magazine) (4) Mr. W. Wright, (5) Mr. A. J. Howes and Mr. K. Hammerton, (6) Mr. T. V. Hunter, (7) Mrs. E. Huby and Mr. F. Huby, (8) Miss W. Burton, Mr. G. Backhouse, Mr. W. Backhouse and Mr. and Mrs. T. Allen, (9) Mrs. S. Binns and (10) Mrs. M. Aykroyd.

On 3 November 1973 I inspected the land in the presence of Major Barchard, Mr. Johnson, Mr. Holgate, Mr. M. P. Hogg (managing director of Hogg Builders), Colonel Woolley, and others.

The said entries in the Land Section of both the said Register Units were pursuant to applications made by the Parish Council on 30 March 1967, one being for a common land registration and the other for a town or village green registration. The grounds of the said Objection made by the County Council are (as stated in the form):- "That the county maintained highway included within the area was not part of a Town or Village Green at the date of registration and should be excluded". The entries No.1-24 in the Rights Section are all in respect of the right to graze animals (or beasts) over the whole of the land comprised in these Register Units, the applicants, (their successors in title as notified in the Parish Council's letter dated 17 August 1973 in brackets), the number of animals, and the land to which the rights are attache being as follows:- (1) Colonel G. E. M. Woolley, four, Forge House (formerly Poplar House); (2) Mr. R. Arrowsmith, four, the Alice Hawthorn Inn and garth; (3) Mr. N. C. Burton, two, Lane End House; (4) Mrs. V. J. Burton (now Mr. J. S. Garfield), two, White Swan House; (5) Mr. J. Chapman (now Mr. A. and Mrs. J. Lloyd), two, Rosemary Cottage, (6) Mr. R. H. Crawshaw, two, Hatch End; (7) Mr. H. Godson, two, Barf House; (8) Mr. H. Hardy, (now Mr. P. E. Johnson) two, Rose Cottage; (9) Mr.J. Holgate, four, Leeds Garth, (10) Mr. E. M. Hill, four, Smithy Cottage; (11) Miss F. Horner, two, Plum Tree Cottage; (12) Mr. J. S. Hunter, two, Apple Tree Farm; (13) Mr. T. V. Hunter, two, Cundall's Farm (now known as West Side Farm); (14) Mr. P. H. Mark (now Mr. L. and Mrs. R. Irons), four, The Green, (as shown on a map); (15) Mr. J. H. T. Palmer, two, Church House; (16) Mr. S. Scott (now Mr. B. K. Andrews), four, Tesseymans Cottage; (17) Mr. S. L. D. Taplin (now Mr. P. and Mrs. M. Patrick), seven, Batman Farm; (18) Miss S. Werner (now Mr. J. and Mrs. Corcoran), two, Croft House; (19) Mr. C. Ray, two, Ebor House; (20) Miss I. Wright (now Mr. J. Towers), two, West House; (21) Miss M. Wright (now Mr. N. and Mrs. M. Makin), two, Shrubbery Cottage; (22) Mr. F. R. Ray, four, The Presbytery; (23) Miss J. Ray, two, Green Ridge; and (24) Mr. G. N. Ennis, three, The School House. The total number of animals which may be grazed under these rights is sixty-six.

The land ("the Unit Land") comprised in these Register Units contains (according to the Register) 18.65 acres. It is shaped like a "C" with a narrow central piece which roughly divides it into two parts: the northern part ("the Moor End Part") and the southern part ("The Buttery Pond Part").

The houses in the Village (or nearly all of them) front on the Unit Land. The Buttery Pond Part is almost completely surrounded by houses (including the Old School and the Alice Hawthorne Public House). The Moor End Part is surrounded by houses less densely and by fields.

The only motor road to the Village enters the Unit Land at the north west corner of the Moor End Part and runs across the Unit Land to end on the east side of the Buttery Pond Part; this road continues as a driveway or track (the Avenue) to the Parish Church, to a large dwelling house (the Priory), to some farms and other buildings and to landing places for boats on the River Ouse and the River Nid (these rivers join here).

The Unit Land apart from the Buttery Pond and some other ponds, the motor road and some tracks and footpaths, is all grass land, apparently regularly grazed. Southwest of the Buttery Pond there is a maypole ("the Great Maypole") about 55 (possibly more) feet high, painted green and white (two equal coloured spirals about one foot wide which wind round from the bottom to the top).

The general appearance of the Unit Land is extraordinarily attractive; it is obviously a valuable amenity for all who live near by and an attraction to visitors. The gently undulating grass, the pleasing character of the surrounding houses, (when I was there) the cattle grazing and the ducks on the Buttery Pond together produce an atmosphere of peace and contentment; but I was told that on some days in summer the appearance of the Unit Land with many motor coaches and cars parked on it is not so good.

For the reasons mentioned in the First Appendix, at an early stage in the proceedings it appeared that the only question which needs my decision is whether the Unit Land as a whole is a town or village green within the definition in section 22(1) of the Commons Registration Act 1965. This definition is (omitting words which could not be applicable): "means land ... on which the inhabitants of any locality have a customary right to indulge in sports and pastimes or on which the inhabitants of any locality have indulged in such sports or pastimes as of right for not less than twenty years".

I have in the Second Appendix summarised the proceedings at the hearing, mentioned the documents* (when hereinafter referred to marked*) produced, and stated the qualificati of Mr. Holgate, Mrs. Ennis, Colonel Woolley and Mr. Burton on whose oral evidence this decision is mainly based. Although these four important witnesses who had obviously all given much thought to the matters in question differed as to the inferences which I should draw from the documents produced and the events which they or some of them described, they did not differ as to the events themselves; indeed I was much assisted by the informal discussions which from time to time were held at the hearing for the purpose of resolving any possible differences which appeared to have arisen.

The use made of the Unit Land for recreational purposes more or less within living memory was as follows:-

(i) There is and was a cricket pitch ("the old cricket pitch") on the Moor End Part. Cricket was played there regularly before 1950 and perhaps for a year or two afterwards. Yorkshire came there in 1947 and 1948 to play, and a big cricket match was played for the benefit of Mr. Bill Bowes, the former England bowler; writing in 1964 to the Yorkshire Evening News from New Zealand, he wrote "even the village cricket at Nun Monkton in my native Yorkshire has not a lovelier setting", Simpson* page 17. Referring to the celebration of the Coronation of H.M. King George V "the next item on the programme was a Cricket Match ... between the village proper and the out lying farms ..." Deanery Magazine 1911 supra. On two occasions recently a comic cricket match was played on the old cricket pitch in fancy dress. Children (notwithstanding the discontinuation of adult cricket) have continued to play cricket during the summer holidays and at weekends on the old cricket pitch. Other parts of the Unit Land have always been used by children for informal cricket and ball games.

(ii) On Saturday nearest St. Peter's day (29 June) sports (mostly for children) are held on the Unit Land, south and south east of Buttery Pond opposite the Hawthorne Inn. These sports have been held annually as far back as anyone can remember. Recent they have been organized by the associaiton of parents and of friends of Nun Monkton School (sometimes not very accurately called the Parents and Teachers Association; "the P.T.A."). The sports and the below mentioned Guy Fawkes day celebrations are Mrs. Ennis said, "the two big events of the year".

(iii) Children dance round a maypole (not the Great Maypole) about 15 feet high placed as occasion requires in a permanent concrete socket on the Buttery Pond part near the

School; they do this as part of the recreational activities regularly organized by the School (who keep safe the pole and its attachments when not in use) and as part of the annual sports above mentioned. Additionally as part of the recreational activities organized by the School, during the lunch time and the middle of the afternoon break, children play informal cricket (generally on the Buttery Pond part but sometimes on the old cricket field) and rounders, run races and so forth on the Unit Land; the School playground (an area of tarmac not part of the Unit Land at the back of the School) is not [redacted] convenient for these activities; the children are also given on the Unit Land instructions in mathematical measuring, which they think fun. Although the only detailed description of these activities was given by Mrs. Ennis, I infer from the proved age of the School and its limited playground that these recreational school activities were similarly organized before her day.

(iv) Before 1939 an amusement fair was held regularly every year; roundabouts, coconut shys, swing boats, aunt sally, a rifle range, a penny on the mat, and so forth. Although mainly for inhabitants, visitors came from a wide area. The fair was known as the Village Feast, and it lasted for some days (perhaps for as long as a week, depending on the Fair Proprietors round), including the St. Peter's day Saturday on which the sports were held. The fair extended over most of the Buttery Pond part. After the 1939-45 war, the fair was held for one year, but was much smaller; there were no roundabouts or amusements requiring steam or electric power, such as had been provided before 1939; the Fair Proprietors brought a few childrens amusements turned by hand and little else. This much smaller fair may have come for one or two more years on the Moor End part; after that it ceased altogether.

(v) For as long as Mr. Burton could remember there has been annually a bonfire on the Moor End part on Guy Fawkes day. Recently under the organization of the P.T.A., the bonfire had been accompanied by fireworks (catherine wheels etc.) attracting many spectators.

(vi) About 20 or 30 years ago two brothers Messrs. Godson who lived in the Village laid out a small golf course on the Moor End part and this was used for one or two seasons.

(vii) Children in an unorganized way kick balls about and otherwise amuse themselves on the Unit Land; the ground is generally too undulating for serious football.

(viii) When the Buttery Pond freezes, informal ice hockey is played on it with shinty sticks etc.

Horse-riding was mentioned but only I think by those who were for common and who wished to rely on such riding being by permission. On the evidence I had, I cannot include horse-riding among the significant recreational uses of the Unit Land.

The question most discussed at the hearing and to which most of the evidence was apparently directed was: (a) whether the recreational use above described was or was not with the permission of the Lord of the Manor, it being contended that if such use was with such permission, none of the indulgence of the inhabitants in sports and pastimes could be "as of right" within the definition quoted above from the 1965 Act. The other discussed questions were whether any conclusion could be drawn from (b) the name by which the Unit Land was commonly called, (c) the long existence of the Great Maypole and (d) the appearance (apart from the Great Maypole) of the Unit Land. I will deal with questions (b) and (d) now because the considerations applicable to them are comparatively simple.

A number of documents were produced in which the Unit Land was referred to as "the

Common" and also a number (not so many) in which it was referred to as "the Green". Except in the 1965 Act a piece of land may in law and in common speech be both a common and a village green. Although the name may be of some significance in some cases when the other evidence is slight, in this case the other evidence is so voluminous that I regard the name by which the Unit Land has been known as without any significance.

The area used for the annual sports could be flatter and more convenient. The old cricket pitch could be better; the fielders (e.g. cover point while the batsman was at the west end) would have to be careful. There are areas (mostly on the Buttery Pond part) liable to flooding. There are large areas particularly on the Moor End part which could not be used for sports and pastimes, as generally understood. But as I am only concerned (see the last paragraph of the First Appendix) to say whether the Unit Land as a whole is convenient, it matters not that some areas of the Unit Land are not convenient, for sports and pastimes. Regarded as a whole, the Unit Land is in my opinion (although like many others village greens capable of improvement) very convenient. The test is not whether somebody living outside Nun Monkton and looking for a good village green would come to Nun Monkton (I think many would), but whether the persons living in Nun Monkton would regard the Unit Land as a convenient place for their sports and pastimes; no where else in or near the Village was suggested; this test the Unit Land in my opinion passes easily.

I shall in this decision assume that the succession of Lords of the Manor was as follows:- 1860 Mr. Isaac Crawhill until sometime before 1894; thereafter Mr. Walter John Crawhill until sometime between 1931 and 1933; thereafter with a possible gap of a year or two Mr. Robert John Barker until about 1947; thereafter Colonel George A. Aykroyd until his death in 1972. I say assume because although the expression "the Lord of the Manor" was frequently used at the hearing, it was evident that it was often used imprecisely, much as the word "Squire" (a word used by Mr. Burton in much of his evidence as almost interchangeable with the words "Lord of the Manor") may mean the person who lives in one of the biggest houses in or near a village, is or is reputed to be the owner (or at least interested in) much of the surrounding land and can be relied on to head the subscription list for any worth while village cause; in this imprecise sense Mr. Barker and Colonel Aykroyd were Lords of the Manor as above stated. From the 1925 and 1931 authorities* and the Mrs. Gray's history*, I find that Mr. Crawhill in 1925 and 1931 owned the Manor in the strict legal sense of the word (i.e. property which is or was properly regarded as an incorporeal hereditament), and that a manorial court in some way functioned up to about 1933. But I decline to deduce from the 1934 Sale Particulars* that the ownership of Sweet Hills Farm and the ownership of the Manor in some way became legally annexed so as always to pass together or to find on the informal statements* of Mrs. Barker and Mrs. Aykroyd and the sworn statement* of Mr. D. P. Aykroyd and in the absence of any documents of title or other evidence that either Mr. Barker or Colonel Aykroyd or Priory Farms (Nun Monkton)Limited ("the Farm Company"), of Mr. D. P. Aykroyd were ever owners of the Manor in the strict legal sense.

Even on the assumption made in the preceding paragraph, it does not follow that Mr. Crawhill, Mr. Barker and Colonel Aykroyd were successively owners of the Unit Land.

Whatever may be my decision, these proceedings will be followed by an inquiry as to the ownership of the Unit Land held under section 8 of the 1965 Act; this does not prevent me from considering and expressing an opinion on ownership so far as may be relevant in these proceedings held under section 5. Evidence was given about the

various acts done as described in the Third Appendix, apparently as indicating that Mr. Crawhill, Mr. Barker and Colonel Aykroyd had given, or were likely to give, or unlikely to give, permission for some recreational use on the Unit Land; but each act is also relevant as indicating that the person concerned was or was not owner. No documents of title dealing with the Unit Land specifically were produced; indeed having regard to the form of the 1934 Sales Particulars* (the Manor was included in Lot 1 with Sweet Hills Farm but with a proviso the Vendor was to be under no obligation to specify "the manorial rights" and the Unit Land was not specifically included in any of the 16 Lots many of which surrounded the Unit Land) I do not expect there to be any such document.

Major Barchard at the beginning of the hearing explaining the absence of Mr. D. P. Aykroyd, said that he had not yet registered ownership but was seriously contemplating doing so. Mr. D. P. Aykroyd in his sworn statement* no where says that he is or that his father Colonel G. H. Aykroyd ever was the owner of the Unit Land. I infer from the acts described in paragraphs (6) (7) and (8) of the Third Appendix that Colonel Aykroyd either never thought he was the owner or had doubts as to his ownership. Even assuming that the Unit Land was while the manorial court was functioning (before 1933) reputed to be appurtenant to the Manor, there was no evidence that it remained so thereafter. I decline therefore to find that Colonel Aykroyd was ever owner.

Nevertheless, I shall in this decision assume that the Unit Land was owned for an estate in fee simple in succession by the Lords of the Manor as above stated, because it may be that I am wrong in making no finding as to ownership, and because it would I think be unsatisfactory if I gave a decision against those for common merely on the grounds that relying on permission by the owner they have failed to satisfy me as to ownership (a thing which they might have been able to do e.g. by compelling production of the relevant documents of title).

It having been alleged that the annual sports and Guy Fawkes day activities were by permission of the Lord of the Manor, Mrs. Ennis in her evidence described how they have been organized since 1965 (when she became head teacher) by a Committee of the P.T.A., comprising the two teachers and ten inhabitants (parents). The Committee were "careful to ask everyone for help". Ropes and stakes were essential to prevent the spectators who were numerous at the Sports from obstructing the events and on Guy Fawkes day from getting into any danger area. The School had ropes which could be knotted together; stakes had to be got from somewhere. In her first two years, 1965-66 stakes were supplied by Mr. Jackson at her request; his son was at the School and his wife was on the Committee. As the years went on, the enthusiasm for these events increased. Mr. Bert Fishwick who is a mechanic employed by "Priory Farms" became treasurer of the P.T.A.; after that there was never any difficulty about the stakes; they were always in position where and when they were wanted, coming Mrs. Ennis supposed from Priory Farms and erected by workers employed by the Aykroyds in their free time on Saturday morning. In 1972 Mr. Taplin, recently appointed by the Aykroyds as a farm manager became a member of the Committee; he has a girl at the School; when the stakes were mentioned, he said "leave it to me Mrs. Ennis" and she did.

Mr. Holgate said that although for the annual sports, stakes and tarpaulins had on many occasions been borrowed from the Aykroyd Estate, other farmers (e.g. Mr. Jackson) had contributed.

Mr. D. P. Aykroyd in his said sworn statement* says:- "Each year Mr. Bert Fishwick, who is employed by me on the farm, has approached me at the time of the Sports Day which is normally held on the Common on the village Feast Day, usually the Saturday

nearest to the 29th June which is St. Peter's Day. I have always regarded Mr. Fishwick's approach to me to be not only for consent to use certain farm material for the Sports but also as one for consent to use the Common for the Sports. In exactly the same way similar approaches have been made for equipment for the Bon Fire and in providing this equipment Mr. Fishwick has been satisfied that the required consent for the holding of the Bon Fire on the Common has been granted".

To determine whether the provision of stakes as above described constituted permission in any relevant sense, I must consider in what sense the word "permission" has been used by the Courts in the various judgments which have been given as to the meaning of the words "as of right" (these words in the 1965 Act are not defined). The following quotations from judgments, are I think the most relevant:- "Enjoyment as of right must mean enjoyment had not secretly or by stealth or by tacit sufferance or by permission asked from time to time, on each occasion or even on many occasions of using it ..."; Denman C.J. in Tickle v Brown (1836) 4 Ad. & El. 369. " ... you must see why whether the acts have been done as of right, that is to say not secretly, not as acts of violence, not under permission from time to time given by the person on whose soil the acts were done. I say from time to time given, not that it should necessarily be yearly, but from time to time during the period the exercise during which is said to establish the right ... But in my opinion if there is permission from time to time given and accepted during the period relied upon, that does prevent ... the acts being done as of right ..."; Cotton L. J. De la Warr v Miles (1881) 17 Ch. D. 535 at p.596. "A temporary permission, although often renewed, would prevent an enjoyment from being "as of right"; but a permanent, irrevocable permission attributable to a lost grant would not have the same effect;" Lord Lindley in Gardner v Hodgson (1903) A.C. 229 at page 239. Although Denman C.J. when construing these words "as of right" relied on their context in the 1832 Act, the above quotations from the 1836 and 1881 cases have been treated as applicable to the words "as of right" when used with little or no context in the Rights of Way Act 1932, see Herstham v Coulston 1937 2 K.B. 77 and Jones v Bates 1938 2 All E.R. 235. Indeed that the words "as of right" are in the 1832 Act used in their ordinary sense, maybe deduced from the speech of Lord Macnaghten in Gardner v Hodgson supra at page 236. Further the judgments in Jones v Bates supra have been treated as applicable to the words "as of right" when used in the National Parks and Access to the Countryside Act 1949, Attorney General v Honeywill 1972 1 W.L.R. 1506.

My conclusion is that not everything or anything which can be described as "permission" within any one of the possible meanings of this word, is enough to prevent the act permitted being done "as of right": if this was so, the Judges quoted above would never have qualified the word "permission" as they did.

A simple example (A) of a permission effective to prevent the act being done "as of right" is where the act (e.g. a sports day, or other annual event) for which permission is requested will be begun and finished in a short time (say less than a year) and either the doers when requesting the permission somehow make it clear to the owner that if the permission is refused the act will not be done or the owner somehow makes it clear that an act if done must be considered as done pursuant to the permission. A simple example (B) of a permission which is not effective is when the act (e.g. the laying out of a permanent cricket pitch) for which permission is requested will effect some not easily reversible change in the land and the doers when requesting the permission make it clear that if it be granted they (e.g. the cricketers will act on the permission indefinitely without again asking for any further permission These examples can I think be deduced from the use of the word "permission from time to time" and "permanent irrevocable permission" in the above quotations. In example

(B), the determination of the question whether the permission can be revoked, i.e. whether the doers are acting not merely as of right but in exercise of a right is a quite separate matter.

From the words "given and accepted", I deduce that anyone who inactively watches from a distance some act being done is not giving an effective permission and that evidence that an owner has participated with the doers in doing the act in the absence of any evidence of surrounding circumstances is necessarily ambiguous; in certain surrounding circumstances the proper inference may be that the owner by such participation gives an effective permission, because the doers of the act knew or shou have known that in the absence of such participation, their act would not be lawful; in other surrounding circumstances the proper inference maybe that the owner is recognizing the doers have a right to do what they are doing whether or not he participates and that he is participating merely because quite apart from his ownership he thinks the act beneficial. The Judges above quoted did not I think intend to define all the circumstances which would constitute a permission effective to prevent the act being done "as of right" and it would I think be presumptuous of me to attempt to do so.

Applying the principles outlined above, Mrs. Ennis made it clear that the meeting of the P.T.A. Committee it never occurred to her or as far as she knew to anybody else that there was any possibility that either the annual sports or the Guy Fawkes day celebrations would not be held at all, and the behaviour of those present was quite inconsistent with any such thought. If the Aykroyds for some reason would not or could not supply stakes, there was never any reason why they should not be obtained from somebody else. On her evidence which apart from the sworn statement of Mr. D. P. Aykroyd, I would accept without hesitation, I would conclude that the annual sports and the annual bonfire were not in any sense by permission of Mr. D. P. Aykroyd, or anybody he represented.

My difficulty as regards his sworn statement is that I cannot imagine how he could "regard" the approach made by Mr. Fishwick as being an application for "consent to use the Common for the Sports" or conclude that when approaching him for equipment for the bonfire Mr. Fishwick had been "satisfied that the required consent for holding the bonfire on the Common had been granted." or think (if this is what Mr. D. P. Aykroyd intended me to think) that the annual sports and the annual bonfire had ever been, in any possible meaning of the word, by his "permission". But being informed that Mr. D. P. Aykroyd is a reasonable person I can only assume that he is either using the words in his statement in some sense which has so far eluded me, or that he is basing his conclusion on facts of which I know nothing. In these circumstances I regard his statement as unreliable, because it appears to me that he did not before swearing it give sufficient consideration either to what was stated in it or to the purpose for which it might be used. I decline therefore to make any order about his evidence under regulation 22 of the Commons Commissioners Regulations 1971 or, so far as the Civil Evidence Act 1968 may be applicable to admit his sworn statement in evidence in exercise of any discretion I may have under that Act. The paragraphs above quoted being the most important, I decline to attach any weight to the other paragraphs, and I accordingly reject his statement altogether.

Although Mr. Aykroyd's failure to give proper consideration to his statement is unfortunate, I should record that it is I think understandable. Major Barchard said that the statement had been sworn on the Sunday morning before Mr. D. P. Aykroyd

left the Village for business reasons, as a result of a telephone conversation in the afternoon of the previous day, and that Mr. D. P. Aykroyd, after consulting Mr. Fishwick had agreed to swear a statement prepared in this hurried manner, because he understood he would be helping the majority of the Village to achieve the result for which they had voted. To be more helpful than he was, he would (at least if he could prove from documents that he is Lord of the Manor) have had to spend a considerable time studying the documents and acquainting himself with the issues involved he was never under any obligation to do this. He was not represented at the hearing before me, so if he be the owner, by not contending that the Unit Land was not Green he has shown I think (although some of the inhabitants may not agree) some generosity to the Village; and it was mentioned that he was a generous benefactor of the Village not only in providing for the stakes but also in arranging for the Unit Land to be drained at his own expense and in other ways.

But it was said that the recreational use of the Unit Land was unobjectionable and did no harm. As to this I must not overlook the observations made by Harman L. J. and Russell L. J. (in relation to a claim that certain persons in Durham have a customary right to take coal off the foreshore): 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 believe himself to be exercising a right or was merely doing something, which he felt confiden that the owner would not stop but would tolerate because it did no harm"; that a distinction must be made between the activities of a person doing something as of right and doing it as "a de facto practice which (he) rightly thinks no one would find objectionable and which the owner ... in fact tolerated as unobjectionable", Beckett v Lyons 1967 1 Ch. 449 at pages 463, 469 and 475.

The recreational use made of the Unit Land was certainly orderly inoffensive and innocent, and in that sense was clearly "unobjectionable" and did no "harm". But in my view the Lord Justices were using the words in the context of what would normally provoke a landowner to take some action to protect his rights as owner of the land affected by what was being done. If the Unit Land had always been owned by one individual free from any rights of common, in my view the recreational use made of the Unit Land by the inhabitants would to such an owner be objectionable and harmful; any reasonable owner of an enclosed piece of pasture land would as of course take some action if the inhabitants of the Village were without asking him, to congregate on it to play cricket and to hold an amusement fair, annual sports, Guy Fawkes day celebrations on the scale on which the Unit Land was used; he would be able to object because he could take legal proceedings against the easily identifiable organizers; quite apart from the harm to the grass such an entry on land in private ownership would I think be far outside anything contemplated by the words above quoted. But the position on this point of the Unit Land is confused by the circumstance that the rights of the owner (now assuming him to be the Lord of the Manor) were always subject to the grazing rights of numerous commoners, so that as owner (I am here disregarding the suggestion made at the hearing that he had a customary right to graze four beasts on equal terms with the commoners) he would suffer little or no actual damage by any recreational use made of the Unit Land; and although, the commoners collectively would suffer actual damage from such use, being so numerous, each one of them individually would not suffer any damage worth noticing. This confusion cannot in my view affect the character of the recreational use made of the Unit Land; if an act done can properly be regarded as "as of right" when the entire ownership is in one individual it can I think still properly be so regarded if the ownership is numerous.

Except at a meeting (as below mentioned) held in 1909 in respect of the laying out of the old cricket pitch, it was not suggested that the common right owners had ever collectively or individually given any permission for the recreational use of the Unit Land. Of course many of these owners would have participated in the recreational use as inhabitants; as to such participation, the same considerations are applicable to it as are applicable to the participation of the Lord of the Manor.

Among the other acts said to prevent the recreational use being "as of right" were:- (i) Mr. Crawhill, (and perhaps Mr. Barker and for a short time Colonel Aykroyd too) received payments from the Fair Proprietors and Colonel Aykroyd told them to go away; as described in paragraphs (2) and (4) of the Third Appendix; and (ii) Mr. Barker and Colonel Aykroyd knew about and actively participated in the recreational use of the Unit Land by subscribing to the expenses of the annual sports and the Guy Fawkes day celebrations, by participating or at least knowing about the management of the School and (in the case of Colonel Aykroyd) by being president of the Cricket Club. I accept that in certain circumstances I could infer that these acts constitute a effective permission preventing the recreational use being as of "right"; but the acts considered by themselves are ambiguous and capable of another interpretation. The receipt of money from the Fair Proprietors was not necessarily adverse to any indulgence by the inhabitants in sports and pastimes; it was for their benefit that some payment should be made by the Fair Proprietors so that they had no right to come. Sports and pastimes do not cease to be as of right because they are organized and if the Fair Proprietors were not wanted (as is I think likely because the amusements provided after 1945 were so inferior to what had been provided before 1939), it was appropriate that Colonel Aykroyd should tell them so. Their participati in the recreational use may be simply, because they liked doing what they did. The significance of the acts must I think be determined in the light of all the evidence for and against the recreational use being "as of right".

In favour of the use being "as of right", I have:- The recreational use has lasted over many years. It has been extensive and organized. I infer that all concerned believe they were acting lawfully. There was no evidence that anybody had ever asked expressly or (except possibly as above mentioned) impliedly asked for permission. There was no evidence that anybody ever made any declaration either in writing or verbally that any recreational use was "By kind permission of" Mr. Crawhill, Mr. Barker, or Colonel Aykroyd or anyone else; I feel confident that if any such declaration had ever been made someone in the Village would have remembered and realised its importance in these proceedings and I should have been informed; I conclude that no such declaration was ever made. There was no evidence that any body ever thanked the Lords of the Manor for allowing the Unit Land to be used. The Unit Land is convenient for sports and pastimes and looks like a Village Green.

Balancing the considerations set out in the preceding paragraph against the various matters which those for common who have urged as showing the contrary, I conclude that the recreational use of the Unit Land as above described for at least 20 years before 30 March 1967 (the date of the application or registration) was as of right.

I reached the above conclusion without regard to the existence of the Great Maypole because Major Barchard asked me to do this. But if I consider the Great Maypole and the information I have about it as described later in this decision, I cannot imagine how any inhabitant participating in sports and pastimes on the Unit Land who gave any thought at all as the legality of what he was doing, could for one moment doubt that what he was doing was done "as of right".

My decision so far is enough to determine which registration I shall confirm, but as the existence and non-existence of a customary right was much argued before me, I will give my decision on this too.

As to customary right:- In 1666, the Court (K.B.) considered a claim that all the inhabitants of a village time out of memory had used to dance there (a close in Oxfordshire) at their free will for their recreation and held that this was a good custom observing that it is necessary for inhabitants to have their recreation; Abbot v Weekly 1 Lev. 176. In 1795, the Court held that a custom for all the inhabitants of a parish to play all kinds of lawful games and pastimes (the defendant had been playing cricket) in a close (at Steeple Bumpstead, Essex) at all seasonable times of the year at their free will and pleasure, was a good custom; Fitch v Rawlings 2 Hy. Bl. 393. In 1875, the Court held valid a custom to erect a maypole on the ground (Ashford Carbonell, Salop) and to dance around and about the same and otherwise enjoy lawful and innocent recreation, Hall v Nottingham 1 Ex. D.1. A regular usage unexplained and uncontradicted as of right over a period of 20 years is sufficient to presume the existence of a customary right, see Brooklebank v Thompson 1903 2 Ch. 344. So the considerations applicable to the two parts of the above quoted definition in section 22 of the 1965 Act overlap considerably. The main differences are (i) that a claim for a customary right may be supported by evidence other than usage; (ii) such a claim may be defeated if it is shown that at any time (perhaps more than 20 years before some use as of right has commenced) the custom could not then have existed; and (iii) that such a customary right can never be lost by non-use.

The Great Maypole is marked on all the O.S. maps* produced (1849, 1909 and 1967). It is mentioned by Speight* page 109, Bogg* page 35, Bulmer* (entry Nun Monkton), by Whitwell* page 7. The most detailed account is in the history* by Mrs. Wray; it was accepted at the hearing she is a reliable historian (the Mr. Poulter she mentions long after the events of 1878 lived in the Village and was the chairman of the 1935 Parish Meeting); I have set out in the First Appendix what she wrote including as an addendum a statement by Major Barchard bringing her history up to date.

It was said that the Great Maypole was no more than a flag staff (its only current use flags are flown on appropriate days) or an ornamental pole. Every witness who gave evidence before me and every document, in which it is mentioned called it a "maypole"; and this in my view is what it is. To me it proclaims to every person who comes to the Unit Land: "This is a Village Green, on which the inhabitants of this Village can indulge in sports and pastimes as of right". Major Barchard contended that it only does this way to a lawyer, particularly to a lawyer who knew of the cases above cited. While I agree that it may speak more clearly to some than others, and speak to some not at all, I am I think only concerned with how it would speak to persons interested in the existence or non-existence of a customary right; to such persons (the custom of dancing round the Maypole is such a well known custom in rural England) the Great Maypole in this Village whould I think speak clearly enough.

It was said that the Great Maypole is of no significance because it was not erected "as of right" the only possible inference from Mrs. Wray's history* being that everything done in 1878 as described by her was with the permission of the Lord of the Manor. I

agree that his permission must be inferred, but any such permission is I think within example (B) above supposed: it was as if the Lord of the Manor had permitted the inhabitants to erect a notice "This land isa Village Green": neither he nor anybody else could have contemplated that he could in a few years take it away.

It was said that the Great Maypole has lost its significance because for many years it has been non-operational. In 1894 it was"nearly 50 years since the pole was decorated and Merry May-Day celebrated in the old fashion style", Speight* page 110. Mrs. Ennis had seen an old picture showing the Great Maypole surrounded with a seat and shrubs. It is on a small eminence which in parts is uneven, so that to dance around it anything but a stately measure by adults would be exhausting. So now the Great Maypole cannot be regarded as anything but a symbol. But as a symbol seems to me to proclaim the status of the Unit Land more clearly, than it would if it were operational.

I see no reason limiting the symbolic assertion by the Great Maypole to anything less than the whole of the Unit Land.

In considering whether a customary right exists I am concerned what has or may have happened from time immemorial. The layout of the Village surrounding as it does the Unit Land accords with the plan adopted in numerous villages in England. The 1607 map* (although it does not mark the Maypole) shows the general layout of the Village as it now is. The Unit Land is omitted from the 1767 Act* and the 1776 Award* made under it, indicating that although it may then have been common land there was some good reason why it should not be enclosed. The 1849 Award* which apparently dealt only with the tithe payable in respect of land not inclosed under the 1767 Act*, omits any reference to the Unit Land indicating that at that time it was in a special position.

There is an ancient custom known as "Rising Peter" described by Mrs. Gray* page 18; she wrote as set out in the Fifth Appendix. There was some uncertainty at the hearing as to how far if at all this custom is now practised, but some present seemed to think that by digging in the right spot, "Peter" could still be found.

Then it was said that the cricket at least could not be played pursuant to a customary right because before 1909 the cricket was played in a field near the Unit Land and that the old cricket pitch was made after a meeting of the common right holders had given permission. Mr. Burton said that he had been told this by his father; ~~that~~ "it was a terrible job getting the cricket pitch from the common right holders." Mr. Burton who had for many years been on the committee of the Cricket Club agreed when asked that there had never been any suggestion at any meeting that cricket could only be played (because he was chairman of the Club) by the permission of Colonel Aykroyd. He held the view that all play was under the permission granted in 1909, by the Common right holders; (it was mentioned that for many years the pitch had been enclosed against their cattle). In my view any such permission by the common right owners as described by Mr. Burton would not negative the existence of a customary right; it is a permission within example (B) above supposed. Indeed I go further, from the more than 40 years cricket played since 1909 and the absence of any attempt by the common right owners to stop cricket being played, I infer that the permission given in 1909 was intended to be irrevocable and as indicated by Lord Lindley *supra*, I am obliged by law to presume that the common right owners executed a grant (which has since been lost) by which they granted (or confirmed) to the inhabitants the right to play cricket on the old cricket pitch for ever; and "the law will adopt a legal fiction that such a grant was made, in

spite of any direct evidence that no such grant was in fact made" for Buckley L.J. in Tehidy v Norman 1971 2 Q.B. 528 at page 552.

I reject the argument based on the Local Government Act 1894 that because the Parish Meetings and the Parish Council do not appear on the Minute Book* at any rate until recently, to have taken interest in the Unit Land that I should infer that there was no village green within the meaning of that Act; section 6 does not deal with all "Village greens" but only with those in respect of which the overseers etc. had power etc. On the information I have it is I think unlikely that the section ever applied to the Unit Land and certainly no significance can I think be attached to it not occurring to any person in the Village that it might.

On the above considerations, I conclude not only (as already mentioned) that for 20 years at least before 30 March 1967 the inhabitants of the Village have indulged in sports and pastimes on the Unit Land as of right, but also that they have a customary right to indulge in sports and pastimes on the Unit Land.

Accordingly, I confirm the registrations in the Register of Town or Village Greens and refuse to confirm the registrations in the Register of Common Land. My confirmation will apply to the registrations not only in the Land Section but also in the Rights Section: and the registration in the Land Section will (for the reason mentioned in the First Appendix) be modified by adding to the description of the land registered the words: "excluding therefrom the County maintained highways".

I have not in this decision recorded the various contentions and arguments submitted to me by Mr. Pearlman (for Village Green), and by Mr. Yeomans and Major Barchard (for Common), with a view to not making this decision longer than it already is. The number and variety of points dealt with on this decision is some indication of the number and variety of the submissions they made to me; and I cannot conclude this decision without thanking them for the time and trouble they have taken in this matter and mentioning particularly Major Barchard who as chairman of the Parish Council undertook a task which must at times have been exceptionally difficult, particularly as he only realised after the commencement of the hearing that those for Common had to contend not that they got a Common but that they had not got a Village Green.

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.

FIRST APPENDIX

(Matters not in issue)

Mr. Pickersgill produced a map showing the parts of the Unit Land which the County Council claimed were highways (the said motor road across the Unit Land, a short length of road off it to the south west, and two footpaths along or near the boundary of the Buttery Pond part); he said that on the assumption that I decided to confirm the registration of the Unit Land as a town or village green, the County Council would be satisfied if I directed that to the description of the land in the Register there should be added the words: "excluding therefrom the County maintained highways". All present at the hearing agreed (on the same assumption) to this modification. Having stated that I would act on this agreement, I heard no evidence or argument in

relation to the objection of the County Council. Mr. Pickersgill explained that if I decided to confirm the registration of the Unit Land as Common Land, the County Council would not ask for any modification, because they were satisfied that they would be sufficiently protected by sections 21(2) and 22(1) of the 1965 Act.

The registrations at Entries Nos.1-24 of the Rights Section come before me as disputes because (a) by reason of the conflict between the common land and the town or village green Land Section Entries, each Entry is treated as an objection to the other, see regulation 7 of the Commons Commissioners Regulations 1971, and (b) an objection to a Land Section Entry is treated as an objection to all entries in the Rights Section, see subsection (7) of section 5 of the 1965 Act. All present at the hearing agreed that whatever might be my decision as to the Unit Land being common land or a town or village green, I should confirm the registrations at the said Entries Nos. 1-24 in the Rights Section. There is I think no reason why I should in the circumstances of this case investigate disputes which are by regulation 7 and subsection (7) to be treated as having arisen; this regulation and subsection are I think intended to provide protection in quite different circumstances. Accordingly having stated that I would act on this agreement, I heard no evidence or argument as to the validity of the said Entries in the Rights Section.

The definition of "common land" in section 22(1) of the Act of 1965 Act expressly provides that "common land" does "not include a town or village green ..."; so if I am satisfied that the Unit Land is a town or village green, I need not consider whether the Unit Land could but for the words above quoted from the definition be (as it could be under the general law apart from the Act) at the same time both a town or village green and common land. If I am not satisfied, it necessarily follows from the agreement above mentioned about the entries in the Rights Section that the Unit Land (being subject to rights of common) would be within the definition of common land in the said section 22.

At the commencement of the hearing Major Barchard told me that at a Parish Meeting it was resolved (53 for and 9 against) "That the Chairman of the Parish Council (meaning himself) should ... inform him (meaning the Commons Commissioner) that by a great majority of the people present at a Parish meeting on 16 October 1973, the wish of the village is that our Common shall be registered as Common Land and only as Common Land". In view of this resolution, I record that in my view my decision on the question at issue must be in accordance with the evidence produced and the law applicable; I am only concerned with the wish of the majority to the extent that their known reasons for their wish throw some light on the question: is the Unit Land within or not within the above quoted definition.

During my inspection and on the last day of the hearing I asked whether any person contended that I should or could find that part only of the Unit Land was a town or village green, and all persons present agreed that the Unit Land could not sensibly be divided and that accordingly my decision should be that either all or none of it is a village green. This agreement accords with my own view; the Unit Land appears to be one piece of land and it could not I think be sensibly divided into more than one piece for any purpose with which I am concerned.

SECOND APPENDIX

(Course of proceedings and documents produced)

Major Barchard (for Common) explained that those of the Village who wanted the Unit Land to be Common Land were he thought for the most part concerned with control; they

did not want control to be transferred to someone who might be non-agricultural minded; he outlined the case against the Unit Land being Village Green. Mr. Yeomans (on behalf of Hogg Builders), Mr. Towers, Colonel Mansel and Mr. Owen (on behalf of Mr. Candeland) said they were for Common.

Mr. Pearlman (on behalf of Mr. Johnson), Mr. Holgate and Mr. & Mrs. Ennis were for Village Green. Mr. Pearlman outlined the case for the Unit Land being such.

Mr. Johnson (for Village Green) produced conveyances dated 17 October 1968 and 26 October 1971 under which he became entitled to Rose Cottage as successor in title to Mr. H. Hardy; all present agreed he was entitled to be heard as a person who had succeeded to an applicant for registration of a right of common. He produced the following documents which he had collected:- (1) Nidderdale by H. Speight (a 514 pages printed Historic, Scientific and Descriptive Account; 1894); (2) From Edenvale to the Plains of York by E. Bogg (a 345 pages printed local history; undated; mentions 1887 Jubilee and probably published soon after); (3) copy (from the Borthwick Institut of Historical Research, York) of the Nun Monkton Tithe Apportionment Award confirmed 6 April 1840 and of the plan dated 1838 referred to; (4) copy (from the County Record Office) of the Nun Monkton Inclosure Act 1767 (7 Geo. 3. cap xxxi), of the Award dated 14 March 1776 made under it and of the Award map; (5) an 1848 O.S. map; (6) an 1909 O.S. map and (7) The History of Nun Monkton by Mrs. J. Wray (22 pages of typed foolsca mentions that Rev. H. G. Cutter ceased to be incumbent in 1968 and so was presumably written afterwards; Mrs. Wray was assistant teacher and then head teacher at the Villa School until 1957 when she retired; she still lives in the Village but is now [redacted] elderly).

Mr. J. Holgate (for Village Green) gave oral evidence. He is 65 years of age, came to Moor Monkton (the adjoining Village) in 1924, has lived in Nun Monkton since 1950, became a member of the Parish Council when it was formed in 1956 or 1957, was chairman for 3 years until 1973 when he retired from the Council. He produced (1) Bulmers History of Topography and Directory of North Yorkshire Part II (published 1891); (2) 1954 Sales Particulars of the Nun Monkton Estate (vendor Mr. A. S. Hakins); and (3) the Minute Book of the Parish Meeting of the Township of Nun Monkton from 1920 onwards He has been involved in a large number of Village activities. He gave me a full and detailed description of the recreational and other uses made of the Unit Land and of the circumstances as he knew them.

Mrs. Ennis (for Village Green) gave oral evidence. She came to the Village in 1953 as a supply teacher at the School; she taught full time from 1957 and was head teacher from 1964 until her retirement on 31 August 1973. She described the recreational use of the Unit Land by children and adults, much of which she had helped to organize. Her husband, Mr. Ennis (for Village Green) produced the August 1956 issue of Yorkshire Life Illustrated containing an article by Mr. A. Simpson (formerly chairman of the Parish Council; now deceased) entitled "Nun Monkton" Yorkshire's Prettiest and Friendliest Village"; he supplemented his wife's evidence in various ways.

Mr. Parkinson (a local resident) read me a statement in which he said (stating its effect shortly) that he was neither for Common nor for Village Green, but was very concerned with the misuse of the Unit Land, meaning its use for parking coaches bringing fishermen at weekends.

Major Barchard (conducting the case for Common) produced (1) a copy of a 1607 map of Nun Monkton from Mediaeval England and Aerial Survey (Old Maps and New Photographs)

Beresford 1958; (2) a copy of part of a deed relating to Shrubbery Cottage; and (3) a 27 pages booklet entitled "Day Dreams in a Priory Garden; A masque written and arranged for presentations by the villagers of Nun Monkton and others" (written by Captain Whitworth as a script for a pageant held in the Priory Garden in 1930).

Colonel Woolley (for Common) gave oral evidence. He first went to live in the Village in 1958. He produced (1) a 8 pages booklet: The Story of Nun Monkton by C. W. W. (Major C. W. Whitworth) 1938; (2) an O.S. map (revised 1967) 1/2,500; (3) an O.S. map (1909 edition) 1/2,500; (4) Duties of Pasture Masters on Dockmire, Nun Monkton 1904; (5) an O.S. map 1892, 1/2,500; (6) a map of part of Yorkshire (including Nun Monkton, Knaresborough and Boroughbridge) endorsed"Published according to Act of Parliament 25 March 1772 by Jefferys"; (7) the ten statements mentioned earlier in this decision and (8) a document headed "Court Leet" and including "List of Offences o pains," the Method of Procedure" and "List of Plain Ditches" (part of a record prepare by Miss M. Oakley, teacher at the School from 1930-1937 and head before Mrs. Ennis). He gave me a history of the use of the Unit Land as he had known or discovered it as a Common in association with the Manor. He referred me to Common Lands of England and Wales by W. G. Hoskins and L. Dudley Stamp; 1963.

At the beginning of the last day of the hearing (Monday 5 November) Major Barchard handed me:- (1) a statement sworn by Mr. D. P. Aykroyd; (2) a statement signed by Mrs. A. Mansel; and (3) a statement signed by Mrs. C. Crawshaw. All these had been made on the previous day (Sunday).

Mr. R. C. Burton (for Common) then gave oral evidence. He was born and has lived in the Village for the last 63 years (except 18 months in 1951). He is and has been ever since the Parish Council was formed 15 years ago a member: he is also a member of the Rural District Council. His father (Mr. W. Burton) was (as he remembere Assistant Overseer (as such responsible for the rating accounts), local tax collector, responsible for the census, bailiff to the Nun Monkton Court Leet, secretary of the Cricket Club, and chairman of the Parish Meeting. He produced:- (1) An authority dated 13 July 1925 and signed by Mr. C. H. Cobb as steward of the Court Leet of the Manor of Nun Monkton addressed to Mr. W. Burton to summon the Freeholders ... etc. "that ... they appear at the Court Leet, View of Frankpledge and Court Baron of Walter John Crawhill Esquire Lord of the said Manor ..." on 24 July 1925; (2) A letter dated 27 July 1931 from Mr. Cobb to his father enclosing a similar authority to summon a court on 7 August 1931; and (3) two cards (one dated 1949 and the other dated 1950) containing the seasonal programme of Nun Monkton Cricket Club and the name of the "Officials" including "President Col. Aykroyd". He gave me a full and detailed description of the recreational and other uses of the Unit Land and the circumstances as he knew them.

Colonel Mansel (for Common) gave oral evidence about a wall which had been erected and later taken down by Mr. Badler.

Mr. M. P. Hogg gave oral evidence as to the circumstances in which Hogg Builders built a house on land fronting on the Unit Land near Croft House, by reference to a statemen he put in. Hogg Builders thought that there would be a right of way to the house from the main road through the Village either across the Unit Land or across the Unit Land and part of the land held with Croft House. As a result of taking materials to the house on the basis that such a right existed, two actions had been commenced against Hogg Builders in the County Court, one by the owner of Croft House alleging interferen

with his land and the other by the County Council alleging interference with the Unit Land; in these actions interlocutory injunctions had by consent been granted pending the outcome of these proceedings under the 1965 Act.

The hearing concluded with submissions by Mr. Yeomans for Common, by Mr. Pearlman for Green and by Major Barchard for Common.

THIRD APPENDIX

(Acts of ownership or indicating permission had or might or might not be given)

(1) Mr. Crawhill after a heavy rainstorm would not allow a threshing machine to enter Buttery Farm (just north of Buttery Pond) across the Unit Land because it might damage the surface.

(2) Mr. Burton remembered his father going round the amusement fair collecting the dues from the Fair Proprietors for the privilege of coming, he understood that his father handed the money to Mr. W. J. Crawhill and he recollects being told that Mr. Crawhill gave some of it, possibly all of it, to the Sports. Mrs. E. and Mr. F. Huby in their statement* said the sum paid was one shilling.

(3) In 1929 Mr. Burton was employed by Captain Whitworth as his horse and cart man. Captain Whitworth had just come to live at the Priory and was minded to lay out the lawns with turf from the Unit Land. He approached Mr. W. J. Crawhill. In the result a meeting of the commons rights holders was held to decide the question; their decision was that Captain Whitworth should be allowed to take the turf provided it was filled in again and levelled up. He accepted, and the place (near Hogg Builders new building) was levelled up and reseeded and is now good permanent pasture.

(4) After the 1939-45 war, Colonel Aykroyd told the Fair Proprietors (or their representatives) that they were not wanted any more. I make this finding notwithstanding that the only evidence of what Colonel Aykroyd did was hearsay (i.e. that Mr. Holgate and Mr. Burton were both told independently about it) because they were both satisfied that Colonel Aykroyd did this. Mr. Holgate said that his informant (one of the Fair Proprietors) had told him that Colonel Aykroyd mentioned the noise; I infer from the rest of Mr. Holgate's evidence that he did not certainly think that the noise was the only or one of the reasons Colonel Aykroyd gave or held at the time, accordingly I make no finding on this point.

(5) Colonel Woolley's house fronts on the Unit Land and access to his garage is obtained from a track running parallel with his frontage. He found that he could not conveniently get his car out of his garage, so as to aline it along the track without backing across the track onto the grass land beyond; such grass land was often very soft so that the car sank into the ground and left an unsightly mark. He consulted Colonel G. H. Aykroyd; at the time Colonel Woolley believed him to be the Lord of the Manor but did not tell Colonel Aykroyd that he consulted him for this reason. Following the suggestion of Colonel Aykroyd, Colonel Woolley removed a portion of the grass, substituted hard core for the soft ground underneath and replaced the grass on top, so that in result he can now back his car over the grass without sinking it in the grass and (as he does not do this very often) without damaging the grass.

(6) In about 1958 the Parish Council was approached by the York Area Telephone Manager about some proposed works on the Unit Land. At the time some members of the Parish Council thought Colonel G. H. Aykroyd had rights as Lord of the Manor; Mr. Holgate himself thought his permission was needed for digging turf or felling trees (but not for sports and pastimes). Colonel Aykroyd attended a meeting at which the proposed telephone works were under consideration; he said he was reluctant to take part in any discussion concerning rights on the Village Green (meaning the Unit Land) because he could find no title to them.

(7) In about 1959 Mr. T. Hunter thought an elm tree near his house was dangerous and asked the Parish Council if they would cut it down. They consulted Colonel G. H. Aykroyd for his permission; he said he did not feel he could grant permission as he had not sufficient title. Ultimately Mr. Hunter cut down the tree; there was no evidence as to what happened to the timber.

(8) In about 1963 or 1964 a large poplar on the Moor End part was blown down by the wind. The Parish Council arranged for timber merchants to take this away and received from them £5. for the timber. About the same time another tree (opposite Mr. Taplin's house, now owned by Mr. Patrick) was thought to be unsafe and so the Parish Council arranged and paid for it to be felled. The Parish Council offered to pay Colonel G. H. Aykroyd the £5 received for the black poplar timber; but he waived any claim he might have to this £5, and as a result the money was retained by the Parish Council to help offset the higher charge for felling the Taplin tree.

(9) Mr. Holgate after describing the events mentioned at subparagraphs (5), (6), (7) and (8) above, said that from then onwards the Parish Council "tended to disregard Colonel Aykroyd as regards any trees and any holes we might dig "in the Unit Land". Mr. Burton when asked why members of the Parish Council did not suggest approaching the Lord of the Manor about some stone which had been deposited on the Unit Land at about the time Hogg Builders were building their building, said that at the time the Parish Council could not find the Lord of the Manor and that starting about 8 or 9 years ago the Parish Council had "assumed custody" of the Unit Land. In about 1968 the Parish Council requested (? told) Mr. Sadler to pull down a wall which he had recently erected near Syke House encroaching (so the Parish Council considered) on the Unit Land and this he did; this request was made without reference to the Lord of the Manor.

Notwithstanding the informality of the discussions described in paragraphs (6), (7) and (8) above, I am satisfied that Colonel Aykroyd meant and was understood by the Parish Council to mean that he claimed no title to the Unit Land in the sense that he was not legally entitled to permit or object to anything which the Parish Council considered should or should not be done on it; Mr. Holgate and Mr. Burton (both members of the Parish Council at the relevant times), although they used different words to describe the resulting position as they saw it, were, as outlined in subparagraph (8) agreed that as a result of Colonel Aykroyd's attitude, the Parish Council about 8 years ago (while respecting the grazing rights of the Commissioners) in effect took over the Unit Land. I think it unlikely that the word "ownership" was used by Colonel Aykroyd in connection with these matters, but nevertheless from his declaimer I conclude that he did not consider himself as owner. I think it unlikely that the Parish Council ever considered that they had or could become "owners

but nevertheless about 8 years ago they while respecting the grazing rights acted as owners, or at least acted as persons entitled to control the Unit Land. Bearing in mind Colonel Aykroyd's disclaimer to the Parish Council and Mrs. M. Aykroyd's statement mentions his concern only with grazing rights, I conclude that when advising Colonel Woolley about his garage access, he was not asserting his own ownership but considering what course would be least likely to offend those entitled to grazing rights.

I infer that Colonel Aykroyd when he requested the Fair Proprietors not to come any more as described in paragraph (4) was acting on behalf of the inhabitants, and that they did not want the Fair Proprietors to come any more because the amusements they provided after the 1939-45 war were so much inferior to what had been provided before; if Colonel Aykroyd had then intended to assert his ownership, he would I think have done something more afterwards; any such intention is inconsistent with his 1958, 1959 and 1964 disclaimers.

Having regard to the amount of the payments mentioned in paragraph (3) above and the way Mr. Crawhill was reputed to have used what he received, I am not persuaded that he was asserting ownership rather than acting on behalf of all the inhabitants generally in preventing the Fair Proprietors from ever establishing a right against the Commoners and the inhabitants; if as owner he wanted to make a profit from the Unit Land he could have charged more; even assuming that Mr. Barker received similar payments (nobody said he did, but it is I think likely) I am not persuaded that his attitude was any different from that of Mr. Crawhill; generally I regard the events described in paragraphs (1) (2) and (3) above as being too remote and too uncertain on which to base any conclusion relevant to this case.

FOURTH APPENDIX

(The Great Maypole)

Mrs. Wray wrote as follows:-

"Nun Monkton Maypole"

During the middle ages and the suceeding periods in history, all village activities centred round the village green and the maypole. Almost every village possessed one, and it was a cherished possession. Tradition says that a new oak maypole was erected in 1793. An old painting in the possession of my brother dated about 1848 shows a maypole on it. This was possibly the one erected in 1793. In 1878 a new maypole was erected the other evidently having been blown down.

The Vicar, the Rev. Septimus Crawhall, was the originator of the scheme and he gave most of the money for the purchase of the pole. The rest was raised by public subscription. A meeting of the villagers was called and Mr. John Poulter, senr. was given the sum of £1 to cover his expenses and was instructed to go to Hull to make enquiries as to price, size, etc., of a suitable pole. The £1 was for lodging for the night, etc., Mr. Poulter was met by an old friend Mr. Seth Lupton who lived in Hul and who gave his visitor free lodging. They made the necessary enquiries and also spent the £1 on liquid refreshment. On his return Mr. Poulter reported to the Vicar and a pole was purchased for £25. It was a Norwegian pine tree. It was despatched to Marston Moor station and it was an unshaped block. A wood wagon left Nun Monkton at 3.30 a.m. to collect it but did not arrive back until 6.30 a.m. the next morning. The greatest difficulties were experienced in turning corners at Marston Moor and at

Poole Lane End.

The pole was shaped and painted by Mr. Poulter and his sons and men, and it was raised by a hand winch and ropes borrowed from Beningbrough Hall. At the meeting to audit the accounts, the Rev. Septimus asked Mr. Poulter to present a statement showing exactly how the £1 given to him was spent. The statement was handed in later, but needless to say the exact method of expenditure was not accurately given as Mr. Lupton had provided accommodation free and the £1 had been spent on liquid refreshment. This account was given to me verbally by Mr. John Poulter son of the above who followed his father as village joiner.

"The erection of the new Maypole"

The new maypole was set about 10 ft. deep in the earth with a height above ground of 70 ft. It was painted in black and white spirals and was erected at the village feast. The steamers "City of York" and "Lady Elizabeth" carried 300 people from York and many people came from surrounding villages. There were 8 vicars present from adjoining parishes. There was tea on the Green and the Priory gardens were thrown open. The May Queen was Annie Wright who had been selected because she was the cleverest girl in the school. She was carried in a chair round the village, the procession being headed by the York Model Brass Band. Races were held and dancing took place on the green.

On January 2nd 1925 this maypole was blown down in a great gale. While on the ground it was repainted by Mr. J. Poulter and Mr. Cooke and the length was reduced by 8½ ft. Tenders were invited for the re-erection, but none were forthcoming, so Mr. Tom Wood, threshing machine proprietor, offered to do it. This he did most successfully with the help of the village men. The present height is about 66 ft. with above 8½ ft. sunk in the ground. This was in June 1925.

On Nov. 1st 1937 a meeting was held (Mr. Robinson, chairman, Mr. R. Burton, hon. secy) to discuss the repainting of the maypole. The sum of nearly £5 had been left over from the Coronation festivities and this sum was to be used for repainting. The matter was left in abeyance until more money could be raised. In July 1939 a York firm painted it in green and white spirals. It took a week and a day to complete the work. Scaffolding was erected to reach the top. The tip and vane were done in gold leaf. Unfortunately there was a thunderstorm every day of that week and the men were wetted through every day.

The following is the balance sheet of the Fund.

Receipts		Payments	
Balance from Coronation	4 - 6 - 1	Mr. Cooke/new iron	0 - 1 - 5
Whist Drive 3.12.37	3 -10 - 3	Use of hall	3 - 0
Raffle of Cheese	1 - 0 - 0	Messrs. Dodsworth	16 - 0 - 0
Whist Drive 21.1.38	1 -12 - 2		
ditto 18.2.38	1 -16 - 0		
Collection Village Box	1 - 9 - 5		
Whist Drive 6.6.40	1 -13 - 0		
Raffle	5 - 0		
Interest from Bank	12 - 6		
	16 - 4 - 5		16 - 4 - 5

In 1878 a flag was bought and used until Captain Whitworth replaced it in 1935 (Silver Jubilee) and Col. Aykroyd and Mr. A. C. Crowther between them paid for the repainting of the Pole and the purchase of a new flat for the Coronation of Queen Elizabeth II.

On the 5 November, 1953, the front gate of the Alice Hawthorne Inn was seen on top of the maypole, 68½ feet from the ground. It was later removed. (Mischief Night)".

Addendum

Major Barchard (to bring Mrs. Wray's history up to date) said that recently the Great Maypole was taken down repainted and re-erected at a cost of £103 collected at the Bus Stop mostly from visitors.

FIFTH APPENDIX

(Rising Peter)

St. Peter's Day, June 29th, is the Feast Day in Nun Monkton and a correspondent writing in the Daily Herald in 1868 stated that it was customary in former years to observe a Festival known as "Rising Peter", but that it was almost absolete in 1868.

According to the writer - "The festivities extended over a week, and the same procedure was observed year after year.

On the Saturday evening preceding the 29th a company of parishioners headed by fiddlers and players of other instruments went in procession across the Great Common to Maypole Hill where there was an old sycamore tree, for the purpose of "Rising Peter", who had been buried under the tree after the last St. Peter's Day. This effigy of St. Peter, rudely carved in wood and clothed in a fantastic fashion was placed in a box and conveyed to a neighbouring house (possibly the Inn) where it was exposed to view and kept there until the following Saturday, when another procession formed and St. Peter was reinterred. This was called "Burying Peter".

On the evening of the first day of the Feast young men went through the Village with large baskes for the purpose of collecting tarts and cheese cakes and eggs for mulled ale, all being consumed at the above ceremonies. Afterwards - dancing, sports and suppers took place in the Village every day while the Feast lasted.

Dated this 11 th day of February 1974.

a. a. Baden Fuller.

Commons Commissioner