COMMONS REGISTRATION ACT 1965

Reference No.2/D/2

In the Matter of Bachelors' Acre,
New Windsor, Berkshire.

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No.V.G.21 in the Register of Town or Village Greens maintained by the Berkshire County Council and is occasioned by Objection No.3 made by the Royal Borough of New Windsor and noted in the Register on 25th October 1968.

I held a hearing for the purpose of inquiring into the dispute at Reading on 10th October 1972, and at New Windsor on the following day. The hearing was attended by Mr. P.A. Simpson, solicitor for Miss D.E. Mellor, the applicant for the registration, and by Mr. Schiemann, counsel for the objectors.

Bachelors' Acre is a tract of open ground near the centre of the town of New Windsor and, despite its name, has an area slightly more than two acres. At the hearing there was some discussion as to the significance of the name, reference being made to its etymology and to the five meanings of the word "bachelor" contained in the Oxford English Dictionary. I would hesitate a long time before founding a decision as to the legal status of a piece of land upon its name. Indeed, a name can be positively misleading: cf. In the Matter of Lord's Waste, Winterton-on-Sea [1972], 9 C.L.25. There may be exceptional cases, but in this case I am unable to find any assistance from the name of the land.

The history of Bachelors' Acre is remarkably well documented, both in legal and literary sources. The parties produced a large number of copies of documents and extracts from printed books and very helpfully made no objection to the admissibility of any of them. However, upon careful examination of this material I have found that I can base my decision upon such of it as would be legally admissible in evidence, though I propose to refer to some of the literary material because it was dealt with during the course of the argument.

The earliest document referred to was a lease dated 6th October 1651, whereby the Mayor, Bailiffs and Burgesses of the Borough of New Windsor (now known as the Mayor, Aldermen and Burgesses of the Royal Borough of New Windsor and hereafter called "the Corporation") let to Richard Hale, citizen and leatherseller of London, for a term of forty years "all that parcell of Land and pasture ground with the Appurtenances called Batchelors Acre where the Butts were usually sett and made scituate in New Windsor". The original of this document does not appear to have survived. It was produced to me in the form of what seems to be not a copy, but a full abstract incorporating much of the wording of the original entered in the Corporation's Book of Leases.

It will be necessary to refer in more detail to the terms of this lease,

but before doing so it is convenient to observe that in 1651 there were some pits in the ground, for there was a covenant by the lessee to level the pits. This fact led R.R. Tigh and J.E. Davis in their Annals of Windsor (1858), ii.26, to surmise that Bachelors' Acre was formerly called "Pitts Field" and had still earlier formed part of a larger area called "The Worth". I was accordingly invited to consider the meaning of the Old English word "worth" or "wyrth". Quite apart from the general consideration that names are unsafe guides in matters such as the present, I am by no means satisfied that it can be inferred from the existence of pits in Bachelors' Acre in 1651 that Bachelors' Acre is to be equated with any part of "The Worth" or "Pitts Field". It appears from a lease and release dated 19th and 20th August 1687, cited by Tigh and Davis, op.cit., ii 369-70, that there was a field called the Worth or Pitts Field at that time. Since Bachelors' Acre had been known by that name at least 36 years before 1687 and there is no positive evidence of its ever having been known by any other name, it seems unlikely that it is to be equated with any part of the land still known as the Worth or Pitts Field in 1687.

Returning to the 1651 lease, the lessee covenanted that it should be lawful for the Corporation and all and every other person and persons to have access, recess, ingress and regress unto and from the ground to exercise and use shooting or any other lawful pastime for their recreation at all convenient times and that he would before 6th October 1652 make and set up in and upon the ground one sufficient pair of butts for the inhabitants of the town of New Windsor to shoot at. The lessee further covenanted to repair, amend, maintain, and keep the butts and not to dig or mine in the ground or do any other act or thing hurtful to the shooting or any other pastime there to be exercised for recreation of the people. There was also a covenant for re-entry if the lessee should make any fence or enclosure about the ground or do any act or thing that should be any let or hindrance of shooting or any other lawful exercise for recreation of the people and so adjudged by the Corporation.

The next relevant entry in the Corporation's Book of Leases is what appears to be a complete copy of a lease dated 24th June 1704, whereby the Corporation let to Anthony Moysey of New Windsor for a term of forty years Bachelors' Acre "wherein butts formerly stood". This lease contained covenants identical with those in the lease of 1651 save only that the references to shooting were omitted. There is also a minor difference in that the phrase "lawful exercise for recreation of the people" in the lease of 1651 reappears as "lawful exercise or recreation of the people". Of the two versions the latter seems likely to be the more accurate, since it occurs in what purports and appears to be a complete copy of the lease, while the former occurs in what on its face is no more than a very full abstract.

There then followed a lease dated 14th February 1749, whereby the Corporation let Bachelors' Acre "where the Butts formerly stood" to William Tyrrell of the Inner Temple for a term of forty years. The terms of this lease are identical in all material respects with those of the lease of 1704.

There is no evidence as to what happened in 1789 on the expiration of the lease of 1749.

The only reasonably certain event on Bachelors' Acre during the next sixty years is that on 25th October 1809, on the occasion of a National Jubilee, an ox was roasted whole and afterwards distributed to the poor inhabitants of Windsor. This was commemorated by an inscription on an obelisk erected on the land on 19th May 1810. The land was levelled and drained, the completion of the work being marked by a cricket match on 23rd July 1810.

The next lease of which there is evidence in these proceedings is one dated 26th June 1819 whereby the Corporation let Bachelors' Acre to William Perryman of New Windsor for a term of three years. This lease was made subject to the right, freedom, and privilege of the "Native Bachelors of Windsor" of exercising all lawful sports, games, and pastimes in, over, and upon the land at all times. The tenant covenanted not to break up or convert the land into garden or tillage or for any other purpose, but to continue it as pasture ground. The last letting of which evidence was adduced before me was to one George Cooper for three years from 1822. The actual lease is not forthcoming, but in the advertisement asking for tenders it was stated that the letting was to be subject to "the rights and privileges of the Bachelors of Windsor who are entitled to use the [land] for all lawful recreations and amusements".

Turning from the leases, considerable light is thrown upon the legal position by an Act of Parliament (53 Geo.III, c.158), which received the Royal Assent on 21st July 1813, and the Inclosure Award for the parish of New Windsor and the hamlet of Dedworth made under the powers of the Act. The Act, which is intituled "An Act for vesting in His Majesty certain Parts of Windsor Forest, in the County of Berks; and for inclosing the Open Commonable Land within the said Forest", differs somewhat from the usual run of Inclosure Acts of its period. It applied to the whole of eleven parishes, including New Windsor, and to parts of four others. The first part of the Act dealt with the inclosure of several open woods and waste lands, containing in the whole 24,000 acres, and two Commissioners were appointed for this purpose. It is quite clear that Bachelors' Acre was not included in this area, which was the subject-matter of ss.1 to 49 of the Act. S.50 recites that in addition to this area there were "divers open and common fields and commonable lands and waste grounds" in a number of parishes, including New Windsor, and that various persons, including the Corporation, were the owners and proprietors of messuages, lands, and tenements within the parish of New Windsor and the hamlet of Dedworth in that parish and as such were entitled to right of common and other interests in, upon, and over the "open and commonable lands and waste grounds" of the parish. As well as being entitled to such right of common, the Corporation, according to the recital at the beginning of the Act, also claimed some right and interest in or to the waste lands within the parish of New Windsor by virtue of certain charters or grants from some of the King's predecessors. S.50 of the Act went on to provide that all "open waste grounds, common fields, and commonable lands" in the several parishes should be divided, allotted, and inclosed in the manner provided by the General Inclosure Act of 1801 (41 Geo.III, c.109). A Commissioner for this purpose was nominated in respect of each parish, the Commissioner for New Windsor being named as James Fangoin, though his surname appears from other sources to have been Faugoin. By. s.65 of the Act of 1813 all rights of common of pasture or turbary over the lands

allotted were (with certain immaterial exceptions) to be extinguished.

In addition to making allotments to the persons entitled to rights of common, the parish Commissioners were required by s.73 of the Act of 1813 to make allotments to the lords of the manors in the parishes (other than the King) of two thirty-second parts of the commons and wastes within their manors in lieu of their rights to the soil of the whole of those commons and wastes.

The map attached to Faugoin's Award shows coloured green all the pieces of land with which he was dealing. One of these pieces of land is Bachelors' Acre, which can therefore be identified as being part of the "divers open and common fields and commonable lands and waste grounds" referred to in s.50 of the Act of 1813.

The events of 1809 and 1810 were organized by a number of persons calling themselves the Bachelors of Windsor. It appears from a pamphlet published in 1817, entitled Proceedings of the Committees of Bachelors of New Windsor, that they claimed that Bachelors' Acre was given to the Bachelors by "a Sovereign of England" for the practice of archery and other lawful sports. There is no evidence to support this claim. Furthermore, there is no evidence of any collective action by the Bachelors of Windsor before 1809, and it seems likely that those who initiated the proceedings adopted the name of the land which they sought to bring back into use as a playing field. Be that as it may, the passing of the Act of 1813 alarmed the Bachelors, who on 9th February 1814 appointed a committee to support their right by every legal method. The Chairman waited on Mr. Faugoin, the Commissioner, who said that he considered Bachelors' Acre as coming within the meaning of the Act and consequently liable to be enclosed as other waste lands. On 1st March 1814 a formal claim in writing was submitted to the Commissioner. This did not rely upon the alleged gift by "a Sovereign of England", but stated that the Bachelors prescribed and claimed the sole right, freedom, and privilege of exercising all lawful sports, games, and pastimes whatsoever in, over, and upon every part of the land, and protested against the Act being applied to the allotting, dividing, and inclosing any part of it.

The Chairman attended several of the Commissioner's sittings, the last of them being on 9th December 1816. At a subsequent interview the Commissioner was alleged to have informed the Chairman:-

> "That the Bachelors' Acre would be left precisely as it was, as he did "not consider himself authorised to interfere with it; therefore, the "New Windsor and Dedworth Inclosure Act would not in any way be applied "to it, nor any division of it authorised by him as Commissioner".

After this the Committee was dissolved. On 12th August 1817 the Bachelors celebrated the birthday of the Prince Regent by a Revel in what they termed "their" Acre, an event which it was proposed to continue annually, and on 21st September 1817 a final meeting was held at the Swan Inn, at which healths were drunk and congratulatory speeches were made.

The Commissioner, however, did not act in accordance with what were alleged to be his stated intentions. He made his Award on 29th October 1819.

In it he dealt with Bachelors' Acre in two parts. The smaller part, consisting of a strip of 0a. 3r. 31p. at the southern end, he allotted to the Corporation as lords of the manor of Windsor Underore in lieu of and as a full compensation for their rights to the soil of the respective commons and wastes within the manor. The larger part, consisting of 1a. 2r. 1p., he allotted to the Corporation in lieu of and as a compensation and satisfaction for their estate, right, and interest in and over the commonable and waste lands within the parish of New Windsor. The former allotment was authorised by s.73 of the Act of 1813 and the latter by s.50 of that Act.

Nevertheless, although he allotted Bachelors' Acre in his Award, the Commissioner did not purport to abrogate any right there may have been to use it for lawful sports and pastimes. The only rights extinguished by the Award were those of common of pasture and turbary by virtue of s.65 of the Act of 1813. As was decided in Forbes v. Ecclesiastical Commissioners (1872), L.R.15 Eq.51, a section in this form does not extinguish a right to use land for lawful sports and pastimes.

So far as the ownership of Bachelors' Acre was concerned, the Corporation thenceforth held it by virtue of their statutory title under the Act of 1813 and the Award of 1819 instead of as owners of the soil of the commons and wastes within their manor of Windsor Underore. Since 1819 they have held it freed from any rights of common of pasture or turbary, but still subject to any rights to use it for lawful sports and pastimes to which it was formerly subject.

It does not seem to be necessary to go into the subsequent history of the land in detail. It was used annually for "revels" until the 1840's. In 1847 there was a dispute about the digging of a well by the Corporation, which led to the Council unanimously passing a resolution:

> "That the Mayor be requested to arrange and confer with the Commissioners "of Pavement for a proper site in the Acre, so as not to interfere with "the enjoyment of the same by the inhabitants, and that permission be "given by the Council for the proposed breaking of the soil and erection "of the pump accordingly".

It appears from a newspaper report of 1875 that an attempt was then being made to revive the holding of sports in Bachelors' Acre and that the then Town Clerk advised that since there was no reference in the Inclosure Award about the Acre's being a recreation ground, the Corporation held it free from any such rights. This advice was contrary to the decision three years earlier in Forbes v. Ecclesiastical Commissioners, supra.

Since 1875 the Corporation has refused to recognise any recreational rights over Bachelors' Acre. From time to time proposals for building on it were propounded. In 1903 the Local Government Board refused to approve a proposed sale, stating that they were not satisfied that under the Act of 1813 the Corporation was free to sell without regard to the claim to the use of the land for purposes imcompatible with its use for building. Nevertheless, the Corporation has continued to refuse to recognise any right to use the land for recreation by the inhabitants of the town and it has not been so used.

In recent years it has been used as the playground of a neighbouring school and as a car park.

The next matter for my consideration is, therefore, whether I can be satisfied on the evidence that the inhabitants of the locality have a customary right to indulge in lawful sports and pastimes on the land. That Bachelors' Acre was used for archery and for other lawful pastimes from 1651 until the nineteenth century is clear. There being no evidence to the contrary in respect of the period before 1651, I am entitled to presume that this use of the land went back to the limit of legal memory in 1189. Indeed, not only ought I to be slow to draw an inference of fact which would defeat the claim, but it is my duty to presume everything that it is reasonably possible to presume in favour of the claim: see Mercer v. Denne, [1904] 2 Ch.534, per Farwell J. at p.556. I therefore find that Bachelors' Acre has been used for archery and other lawful pastimes from time immemorial.

The mere use of the land for lawful pastimes is not, however, sufficient in itself to prove the claim. In addition it must be shown that the user has been by the inhabitants of an area defined by reference to the limits of some recognised division of land, such as a town: see Co. Litt. 110b.

It is therefore necessary to consider next the evidence regarding the persons who have used Bachelors' Acre for the purposes of lawful pastimes. The lease of 1651 provided (1) that it should be lawful for the Corporation and "all and every other person and persons" to have access to the land for shooting or any other lawful pastime; (2) that the lessee should set up a pair of butts for "the inhabitants of the said town" to shoot at; (3) that the lessee should not do anything hurtful to any pastime to be exercised for the recreation of "the people"; and (4) that the Corporation could re-enter if the lessee should do anything to hinder the lawful exercise or recreation of "the people". These terms, with the exception of the second, were carried forward into the 1704 and 1749 leases.

Had the words "all and every other person and persons" and "the people" stood alone, I might have felt bound to hold that they were too indefinite to describe a class of persons who would be entitled to the benefit of a legal custom. These words must, however, be read in their context. Part of their context in the lease of 1651 is the covenant to set up a pair of butts for "the inhabitants of the said town" to shoot at. In my view, the proper construction of the expressions "all and every other person and persons" and "the people" in the lease of 1651 is as synomyns for "the inhabitants of the said town". This is a case for the application of the rule summarized in the maxim Verba generalia restringuntur ad habilitatem rei: see West London Railway Co. v. London & North Western Railway Co. (1851), 11 C.B. 254, per Parke, B. at p.356. Since the leases of 1704 and 1749 form part of the same series, I can see no reason for construing the apparently wide words in those leases in any different manner. It is not reasonable to assume that by omitting the words relating to the inhabitants of the town it was intended to give to the words in those leases any different meaning from that which they bore in the lease of 1651. On this construction, the leases are evidence that the inhabitants of the town had used Bachelors' Acre for shooting and other lawful pastimes from time immemorial. On the other hand, it would be possible to construe the lease of 1651 in a more limited manner and so to regard it as evidence of the use of Bachelors' Acre by the inhabitants of the town for only one lawful pastime, namely archery.

The use of the land by the inhabitants of the town for archery or for archery and other lawful pastimes from time immemorial is not by itself sufficient to prove the alleged custom. In addition it must be established that the user has been as of right. In my view the fact that the Corporation leased the land subject to such use is evidence that such user was as of right, for no prudent landlord would reduce the rent at which he could let his property by imposing upon his tenant an obligation to allow the property to be used by persons who had no legal right to do so. Adopting the words of Earl Cairns in Goodman v. Mayor of Saltash (1882), 7 App.Cas.633, at p.659 to the facts of the present case, it appears to me that there is no difficulty at all in supposing a grant of Bachelors' Acre to the Corporation by the Crown before the time of legal memory, with a condition in that grant in some terms which are not before me, but which I can easily imagine - a condition that the inhabitants of the town should enjoy this right, which as a matter of fact the evidence tells me they have enjoyed from time immemorial. Earl Cairns went on to say:

> "A grant of that kind, it appears to me, would be perfectly legal and "perfectly intelligible, and there would be nothing in it which would "infringe any principle of law . . . . . .
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> "I therefore agree that we are bound here to suppose a grant of the "kind which I have mentioned, that that grant would not be in any way "contrary to any rule of law, and that the privilege which the appellants "have enjoyed from time immemorial should be held to be founded upon a "title of this kind".

It is perhaps not without significance that in 1819 and 1822 the Corporation recognised that there was a right to exercise all lawful sports, games and pastimes on Bachelors' Acre. That they thought that the right was in the "Native Bachelors" rather than in the inhabitants at large does not seem to me to affect the matter. In their resolution passed in 1847 the Council correctly referred to the inhabitants.

Finally, it is necessary to consider the effect of the non-user of the customary right. A customary right differs from a right of common in that non-exercise of the latter can be regarded as an abandonment of the right by those entitled to exercise it. A customary right, on the other hand, can only be abolished by statute: see Hammerton v. Honey (1876) 24 W.R.603, at p.604. The only effect of non-user in a case relating to a customary right is that it may give rise to a presumption that the right never existed. Where the evidence of the existence of the right is as clear as it is in this case there is no room for such a presumption.

For these reasons I confirm the registration.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 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 6th day of November 1972

Chief Commons Commissioner