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COMMONS REGISTRATION ACT 1965

Reference No 214/D/113

In the Matter of Medstead Village Green, Medstead, East Hampshire District, Hampshire

DECISION

This dispute relates to the registration at Entry No 1 in the Land Section of Register Unit No VG43 in the Register of Town or Village Greens maintained by the Hampshire County Council and is occasioned by Objection No OB593 made by the said Council and noted in the Register on 17 March 1971.

I held a hearing for the purpose of inquiring into the dispute at Winchester on 20 March 1977. At the hearing (1) Medstead Parish Council on whose application the registration was made, were represented by Mr M Rich of counsel instructed by their clerk, and (2) Hampshire County Council were represented by Mr E Mason their senior assistant solicitor.

The land ("the Unit Land") in this Register Unit contains (according to the Register) about 12.147 acres, is situated southwest of and near to the Village, and comprises two pieces. One ("the West Piece") is approximately triangular, contains according to the OS map 4.969 acres, and is bounded on the northeast by Roe Downs Road (also called Middle Road) and on the west by South Town Road. The other ("the East Piece") is four sides, contains 7.178 acres and is bounded on the southwest by Roe Downs Road (being opposite the West Piece) and on the north by Hussell Lane. It was agreed that the said road boundaries of the Unit Land (as now provisionally registered) should be considered as being the nearer edge of the now made up carriageway of these roads (all public highways, tarmacadamed for use by motor vehicles generally). The grounds of the Objection are: "Land was not all village green at the time of registration. Public, footpath No 35 crosses it, a 6 ft verge is claimed as highway, as shown on the plan attached". The attached plan indicates 6 ft verges where the Unit Land is bounded by Hussell Lane, Roe Downs Road (both sides except a very short length at the south end) and South Town Road. At the beginning of the hearing Mr Rich and Mr Mason were agreed that the said footpath as shown is a public footpath being FPNo 35 on the definitive map and need not be excluded from the registration.

In support of the registration oral evidence was given by Mr M L Congdon who is clerk of the Parish Council and has lived in the Village since 1966, and Mrs K M King who has lived in Medstead since 1935. In the course of his evidence Mr Congdon produced; (a) a lease dated 4 July 1901 by the Ecclesiastical Commissioners for England to Medstead Parish Council for 99 years from 25 March 1891 (b) a conveyance dated 9 July 1955 by the Church Commissioners of England as Lord of the Manor of Arlesford to the Parish Council of Medstead, (c) 19 recently taken photographs ($4\frac{1}{2}$ ins x $3\frac{1}{2}$ ins) showing various parts of the Unit Land, (d) map (based on OS 1/2500 1977 ed.) showing from where the photographs were taken and (e) declarations made and signed before a JP on 17/18 March 1979 by Mr A S Cray who came to live in Medstead in 1940, was shortly afterwards elected to the Parish Council on which he served for 30 years, much of the time as chairman, by Mrs M L Smith who came to live in Medstead when she was 4 years old (1913) and lived there ever since (except 1961-64), and by Mrs D M Lailey who was born in Medstead (she remembered about 50 years ago) and has lived there ever since (except 1937-47).

In support of the Objection, oral evidence was given by Mr D Whale who is clerk of the works with Hampshire County Council and was from 1973 to 1978 Highways Superintendent and by Mr E W Stratton who is Assistant Divisional Surveyor of Hampshire County Council and who from 1951 to 1958 was in the same position as Mr Whale now is. Shortly before this evidence was given Mr Mason agreed that the parts of the Unit Land to which no objection had been made were within the definiti of a town or village green in Section 22 of the 1965 Act. In the course of this evidence, there were produced from the County Archives the following:- (a) Map of Hampshire (1825 and 1826) C & J Greenwood in 5 sections, 1 in = 1 mile; (b) OS map 1870, 6 ins = 1 mile; (c) OS map 1909, 1/2.500; and (d) Tithe Award (with map) confirmed 30 September 1845. As explaining the attitude of the County Council and the importance of these proceedings, Mr Mason produced two Circular letters dated 19 April 1967 and 2 July 1969 from Ministry of Transport sent to all County Borough and Urban District Council's in England.

Three days after the hearing I inspected the Unit Land.

Of the many questions discussed in this short hearing (about 4 hours), that which best indicates the essence of this dispute is I think: whether the circumstance that the County Council as Highway authority has regularly cut the grass within about 6 ft of the edge of the carriageway of the said three roads is enough (a) to establish that these 6 ft strips are highway and if so (b) to establish also that they cannot therefore properly remain registered under the 1965 Act as town or village green. About the primary facts spoken to by the witnesses there was no conflict, and I accept all they said. The conflict was as to the inferences to be drawn from these facts; the correctness of these inferences is a matter of law to be decided (subject to appeal) by myself, so my disagreement with any of these witnesses is no reflection on them as to their credibility or otherwise.

The question above formulated at first sight may seem trivial; nevertheless I am satisfied it is important. To the Parish Council, because in 1974 the County Council purposed to make a footpath within the West Piece along the side of Roe Downs Road, and got so far as to clear away some bushes and other vegetation on or overhanging the line; although it may be that such a footpath is needed, the terms on which the land is taken by the County Council as highway authority may be affected by this decision. To the County Council as highway authority, because there are other similar lands in the County, so this is, so Mr Mason said, a test case; the widening or improvement of roads by or over village greens being a matter frequently under consideration ; and perhaps generally also because as a Commons Commissioner I have seen many objections the grounds of which are the same as those above, and the resulting dispute not compromised (as many, perhaps nearly all have been) have never before been so carefully argued or presented.

The first primary fact is the nature of the Unit Land itself. For local recreation it is convenient, being near the Village and reasonably level, and having a good cricket field (with pavilion) and a good football pitch, and having on it swings etc for children. These recreational areas are surrounded by others (parts of the Unit Land) which add to their amenity value as well as their recreational value; included is a village hall. The Unit Land considered by itself is of attractive appearance, and the views from it nearly everywhere are pleasing. Of the lands under the 1965 Act registered as a town or village green, the Unit Land is well above the

average, and is perhaps one of the best. In these respects the Unit Land is pleasantly unusual. In all other relevant respects its history and surroundings are usual such as might be applicable anywhere in the Country to a similar piece of land.

The three roads were at the beginning of living memory one track flint roads, being two tracks (made by the iron cart tyres) with grass between, but one track roads in the sense that if two carts met, one would have to leave the road. Now they are well made tarmacadam roads taking easily a line of ordinary motor traffic in both directions, and I find that at the commencement of the 1965 Act these roads were as now, in all relevant respects. Exactly how and when the roads changed was not distinctly proved; Mr Stratton remembered the improvement in 1951 of Roe Down Road which probably resulted in some widening but he gave no details. In my view the details do not matter; I find, like many other similarly situated roads in the country, that these former flint roads were widened first some time between 1920 and 1939 and then again some time after 1945 and before 1952. The 1825 map shows t Unit Land and the surrounding roads together as one piece of land with overall boundari much as now. The 1845 Award Map shows the roads distinct from the Unit Land and both are by the Award treated as non tithable. The 1909 Map shows the Unit Land much as now (the village hall and pavilion not marked) but the surrounding land has since this map was made, much changed. I find that the Unit Land and the said three roads have together been land open to the public from time immemorial. The distinct marking of the roads on the said maps in my view does no more than indicate the then apparent edges of the carriageway or cartway, and provides no evidence that these edges were further apart than they now are.

Mr Whale and Mr Stratton who together cover the period from 1951 onwards, said that up to 6 ft had been regularly mown by the County Council as highway authority, at first with a scythe and sickle, later by machine. Their evidence must be read with th qualification apparent on the photographs produced and on my inspection that not all vegetation within the 6 ft was cut because there are substantial bushes in Hussell Lane nearer to the carriageway than 6 ft and because some bushes by Roe Downs Road were cut in 1974; but this qualification is only applicable for a very short length of the strips now under consideration, and I need not therefore deal with it particularly. If by law the 20 year period before the date of objection (30 September 1970) or the commencement of the Act (5 August 1965) is requisite it may be the evidence of Mr Stratton does not go back far enough. However, I am inclined to infer from his evidence that the mowing he described started sometime before 1951 and I record that if any point had been made about this (none was) I would have adjourned the proceedings to enable the County Council to obtain evidence so as to fill up any pre-1951 gap. I am not prepared in the absence of evidence to infer that there was any mowing before 1939; Mrs Smith remembered the grass being knee high; the probability is that in the 1920s when the traffic was much less, the grass was kept in order by grazing.

I suppose that for some time after each of the mowing operations of the County Council, the line of what they had cut would have been apparent enough. When I made my inspection there was no visible line marking the extent which had been mowe and I infer that the grass beyond at any rate recently has been mown similarly by othe I have no evidence as to the maintenance by the Parish Council as the rest of the Unit Land although I infer that from the present state of the cricket pitch and the football field that those concerned or interested in these recreational activities must have done much. On the information put before me at the hearing

and from what I myself saw, I find that the mowing operations of the County Council have never resulted in the 6 ft strips having the appearance of being in any iow relevant sense distinct pieces of land separate from the rest of the Unit Land.

There has never been a footpath within the Unit Land near to and parallel with any of the said three roads. I reject the suggestion that pedestrians, with or without childrens prams, children, [redacted] dogs etc, would to avoid being hurt by vehicular traffic instead of walking along on the carriageway, have chosen to walk within the 6 ft strips now claimed by the County Council. Pedestrians from the Village with a destination beyond the Unit Land would find the carriageway most convenient for walking, and if compelled to leave it by a juggernaut (an expressi used at the hearing for the very heavy long vehicles which have recently appeared on our public roads) would I think return to the carriageway as soon as possible, because the 6 ft strip nearly everywhere is too rough and uneven. Pedestrians from the Village without a destination (eg walking for pleasure) might like to leave the carriageway as soon as possible or be provoked to do so by a passing juggernaut but in any such case they would go beyond the 6 ft strips onto the rest of the Unit Land which for walking, with children particularly, is far more attractive; this point was made by Mr Congdon and emphasised by Mrs King in their evidence; although upon the photographs produced at the hearing I then found this point difficult, on my inspection I was satisfied that it was valid.

As to the inferences to be drawn from the facts above summarised and to the law applicable, my opinion is as stated in the next /2 paragraphs.

The definition of a "town or village green" in Section 22 of the 1965 Act (unlike that of "common land") does not expressly exclude highway. Land may be both highway and subject to a right to hold a market, see Pratt and Mackenzie on Highway (21st Edition 1967)page 19; upon similar considerations to those set out in the case there cited land may be both highway and subject to a local customary recreational right. This is in accordance with common experience; for many village greens are crossed by footpaths (in law highways) which are for recreationa purposes temporarily obstructed without anyone objecting to the inconvenience (often very little) thereby caused; this view of the law is implicit in the above recorded agreement about FP No 35. Questions could arise as to whether the public right of passage in relation to the local right of recreation (a) has priority, or (b) is subject or (c) according to the circumstances or what is reasonable or on some other test is sometimes one and sometimes the other; a court if need be, always can (although it may sometimes be difficult) determine these questions.

Nevertheless as a general rule evidence tending to show that land is highway is also evidence tending to show that it is not a town or village green, because highway use (eg frequently by motor vehicles) may be inconsistent with local recreational use. So I ought, I think to read the grounds of objection in this case as permitting the evidence and arguments put forward on behalf of the County Council (I would consider it just to allow any amendment they needed).

Sections 10 and 21 (2) of the 1965 Act show that nothing in this decision can be conclusive as to these 6 ft strips not being a highway; so in a sense the County Council in these proceeding might win but cannot lose. The Sections in my view indicate that as a general rule a Commons Commissioner should not concern himself

with "highway considerations"; and I have seen a number of registrations of common land without anybody attempting (by objection or otherwise) to specify the numerous highways (mostly footpaths) which cross it. However sometimes the form of objection is such that the Commons Commissioner cannot avoid expressing an opinion; in this case I consider that I ought to because as I understood Mr Mason, the County Council want me to do so.

In my opinion the mowing of grass by the Highway Authority is not a "user ... enjoyed by the public ..." within the meaning of Section 34 of the Highways Act 195[illegible] Nor in my opinion is the occasional use by the public of the 6 ft strip when they go from the carriageway onto it for the purpose of avoiding injury by a passing juggernaut (quite apart from the circumstance that in this case the public has ever been compelled to do this until recently).

That the carriageway is now wider than it used to be may perhaps indicate that the highway was always wider than the one track roads described by Mrs Smith. It cannot however be inferred from this that the highway is from time to time always wider than the carriageway or that the highway was dedicated on the terms that it can always be widened as the traffic demands. The 1824 map is not by reason of its age either decisive or more cogent than maps made or other things done subsequently; the extent of highway must be determined by reference to the circumstances existing at the time when the question as to its extent arises (in this case 1970); Copestake v West Sussex 1911 2 Ch 331, and see the reference to it in A-G v Beynon 1971 Ch 1 at page 15.

At common law there is a rebuttable presumption that a highway between fences extends up to the fences. In this case the presumption if applicable would lead to the inclusion of all the Unit Land in the highway; it was not suggested that the presumption had not been rebutted at least as regards the rest of the Unit Land. I know of no similar or corresponding presumption extending to 6 ft in the case of highway crossing unfenced land; if there had been, it would I think have been noticed by the judges who decided Easton v Richmond 1871 L R 7 QB 69.

Having regard to the agreement that the rest of the Unit Land is within the Section definition of a town or village green, I have no evidence (apart from its present appearance) about its use or as to within which of the three branches of the definition it is. No award having been produced, I infer that it has not been "allotted by or under any Act". A recreational use, unexplained and uncontradicted as of right over a period of 20 years is sufficient to presume the existence of a customary right, see Brocklebank v Thompson 1902 2 Ch 444; so the considerations applicable the other two branches of the definition overlap considerably. I infer that I am here dealing with land which is subject to a customary right of recreation and therefore (perhaps by a legal fiction) as having been subject to such right from time immemorial. Although by reason of the village having been in the past smaller and of changes in social habits, sports and pastimes indulged in by the local inhabitants may in past times (eg before 1914) have been rather differ from now, I can I think properly assume that a substantial area of the rest of the Unit Land has been used for local recreational purposes, such as cricket and football from time immemorial.

The line of the cricket field boundary as it is now laid out is from the nearest road, Roe Downs, some distance. The well mown area is a little nearer, and the les well mown area is nearer still. The distance between this last mentioned area and the road is more than 6 ft and has on it in places trees and bushes.

As between the cricket area and Hussell Lane the distances are larger and there are more trees and bushes. The layout of the West Piece with its football pitch is similar although it is generally rougher.

Notwithstanding that these non-recreational areas are not as well maintained as the rest, they have great amenity value and have some recreational value (at least incidentally). The mowing of the 6 ft strips by the County Council would not interfere with any recreational use (incidental or otherwise) of the Unit Land and would always be unobjectionable to any reasonable person; indeed it was not suggested that the Parish Council have in the past objected or would in the future be likely to object to such mowing; for generally mowing would carry out the purpose for which the Unit Land is held.

In my opinion the Section 22 definition of a town or village green is wide enough to include not only the area of land on which the inhabitants of a locality actually indulge in sports and pastimes but all such surrounding appurtenant or incidental land can fairly be regarded as the same piece of land.

The County Council by mowing 6 ft strips have done nothing to make them a different piece of land in the sense of the preceding paragraph. The Unit Land (including these 6 ft strips which except after the mowing have no distinct appearance at all) appear to be all one piece of land, and so I infer it always has been. My conclusion is that the whole of the Unit Land was properly registered as a town or village green.

Notwithstanding that my opinion as to the 6 ft strips being highway may be obiter and of no practical effect, for the reasons above stated I give it as follows:- The grass mowing by the County Council is some evidence in support of highway and as such is admissible; but must I think be balanced against the contrary evidence that at no time had these strips been used by the public for the purpose of passing and repassing. The contention about mowing as I understood Mr Mason is because the County Council could not lawfully mow these 6 ft strips unless they were highway, the Parish Council and others must be taken to have accepted their highway status and therefore the mowing is cogent and should be decisive. In this connection mention was made of the Guide Posts and the Major Road Ahead sign where the said three roads join. In my opinion, owners of land and others who make no protest about highway authority mowing are in no such dilemma as is suggested. The highway authority who f highway purposes does something which they believe to be unobjectionable and to which in fact no objection is made, are not necessarily doing anything "as of right", see Beckett v Lyons 1967 1 Ch 449. The only possible inference from the absence of any Parish Council objection is that they consented, but their consent would not amount to a dedication of the strips as highway. If subsequently as a result of the mowing, the 6 ft strips become so attractive to pedestrians that paths are formed on them, th may as a result become highway. If the guide posts and other road signs remain there long enough, the County Council may under the Limitation Act 1939 become the owners of the immediately surrounding land. It is I think unrealistic to ascribe the failur of owners to object to mowing of their land by the County Council to their concern to make the highway safer for passing and repassing. Mowing improves the appearance of the land, and although the County Council may perhaps be unable to justify spendin highway money on improving appearances, the relevant question is not why they do the mowing but why the owners find it unobjectionable, see Beckett v Lyons supra. The County Council workers (lengthmen they used to be, and in some parts of the country still ar called) are welcome because they make the roadside pleasant; indeed many of them once they have a sycthe in their hand or a mowing machine under them need very little

encouragement to cut almost anything, if its removal is wanted by the locals to make th roadside a pleasanter place. The County Council case as I understood it rests on mowing only; in my opinion this is not enough, if they have not established that the 6 ft strips are highway.

At the hearing, mention was made of the electricity poles; on the evidence given and from lack of time during my inspection I can make no finding about them. I record that it was not suggested that the necessary wayleave were granted by the County Counci and that the 1955 Conveyance suggests that they were granted by the Church Commissioner for England. If I had thought that in law circumstances relating to these poles could have been decisive or even of some significance, I would have granted an adjournment to enable me to make a finding about them in detail. From what I saw of them on my inspection my present opinions that no finding I could have reached would (assuming, I have correctly as above stated the legal considerations applicable) have affected my conclusions. Similar considerations are applicable to any underground Post Office cables (not so visible) there may be.

For the reasons set out above I confirm the registration without any modification.

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 14th day of September 1979.

A. A. Baden Fuller

Commons Commissioner