COMMONS REGISTRATION ACT 1965 Reference No. 219/D/8

In the Matter of Bodsham Green,

Elmsted, Kent

DECISION

This dispute relates to the registration at Entry No. 1 in the Land Section of Register Unit No. VG 84 in the Register of Town or Village Greens maintained by the Kent County Council and is occasioned by Objection No. 125 made by Mr W H Dowsett and noted in the Register on 15 January 1972.

I held a hearing for the purpose of inquiring into the dispute at Maidstone on 6 June 1979. The hearing was attended by N Charlesworth, Solicitor, on behalf of the Elmsted Parish Council, the applicant for the registration, and by Mr R Campbell, of Counsel, on behalf of the Objector.

The land comprised in the Register Unit is situated on either side of the road passing through the village of Bodsham. The Objection relates only to the eastern part of the land bounded by the main road, the road leading to Great Holt Farm, the Timber Batts Inn and the Bodsham Church of England Primary School.

At the present the land the subject of the Objection consists partly of an area with a hardcore surface in front of the Timber Batts Inn used as a car park, partly of a grassed area used as a beer garden for the Inn, and partly of a small area within the curtilage of the school.

This arrangement is comparatively modern. The earliest evidence relating to the land in question produced at the hearing was the Tithe Apportionment Map and Award for the Parish of Elmsted made in 1840, where the whole of the land the subject of the Objection is shown as No. 279 and described as "Timber Yard" in the ownership and occupation of Sir John Edward Honeywood, Bt. It appears from the map that the land was then fenced against the roads, but the land is shon as open to the roads on the 25" to the mile Ordnance Survey Map of 1907. Although the scale is small, there appears to be three buildings shown on the land on the 6" to the mile Ordnance Survey Map of 1876. I should at this point mention, in order to show that I have not overlooked it, the statement in a work entitled A Saunter through Kent with Pen and Pencil by Charles Igglesden (no date, but internal evidence shows it to be later than 1924) in which it is stated that the land facing The Prince of Wales was the scene of bull-baiting during the eighteenth century. I regard this as of no evident value.

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Statements made by a number of elderly people were put in as evidence. Some of them remembered the land in question when they were small children during the closing years of the reign of Queen Victoria. In those days the girls from the neighbouring school used to play on it during school hours, the boys having a playground of their own on the other side of the school.

Those who mentioned the girls from the school playing on the land did not mention any other use of the land, but Mr C E Lilley, who was a few years younger, having been born in 1900, recollected that during his schoolboy days the land was used regularly by the Evington Estate. Timber felled on the estate was brought to the land, where it was sawn up and used for general maintenance. For this purpose there was a saw-pit about 6 feet deep.

On some occasion outside contractors who had mechanical steam saws were brought in. After the timber had been sawn up, it was stacked on the land and removed by the Estate as and when required. Mr Lilley said that the sawing went on for a good part of the year and for long periods there were fairly considerable quantities of timber stacked on the land. This activity ceased when the Evington Estate was sold in Lots in 1916. The Timber Batts Inn, then known as The Prince of Wales, was Lot 3, but the land in question was not included in any Lot. Mr Littey said that after the sawing ceased the saw-pit gradually filled itself in and brambles grew over the land. Mr Lilley's statement is contradicated by those of Mrs H Argar (born in 1889) and Mr J H Worrell (born in 1890), both of whom stated that they could not remember the saw-pit. Perhaps it is not without significance that Mr Lilley is described in his statement as a retired woodman, so perhaps he took an interest in timber even as a schoolboy. Mr Lilley's recollectic is to some extent supported by the evidence of Mr E A Aming, who said that in 1961 there were on the land a bank of earth and a hollow full of rubbish.

Giving the best consideration that I can to the somewhat conflicting statements, I have come to the conclusion on the balance of probabilities that after the land ceased to be a timber yard it continued to be used by the Evington Estate until 1916 for the sawing and storage of timber.

This use of the land by the Evington Estate was not, however, exclusive. The girls from the school played on it and after school hours girls living in Bodsham played there. There was a large ash tree with a seat round it, to which some of the customers of the Inn took their drinks. Sometimes there was a meet of the foxhounds, and for some years there was a bonfire on 5 November.

After the Estate was sold, the girls from the school continued to use it as their playground until they were provided with a playing field about 1939, and the Bodsham children continued to play on it out of school hours. The tree became dangerous and was blown down some time in the late 1940's. The annual bonfire was organised by the Inn-keeper and a collection was made for it, but this had ceased by 1952. The hounds continued to meet in front of the Inn from time to time. As motor cars became more common, visitors to the Inn and houses in the neighbourhood parked on the land. In the Autumn of 1953 an oak tree was planted at the end near to the school to commemorate the Coronation.

By 1961 the land had got into a very rough and untidy condition. In that year Mr E A Aming purchased the freehold of the Inn and set about improving it, changing the name from The Prince of Wales to The Timber Batts. Mr Aming wanted also to acquire the land in front of the Inn, but he could not find the owner. He convened a meeting to try to ascertain the owner. This meeting was attended by the rector, the Clerk of the Rural District Council, the schoolmaster, a representative of the County Council Roads Department, and a representative of the Parish Council, but none of them was able to throw any light on the question of ownership. Mr Aming explained how he wanted to improve the land and it was suggested that he should be the custodian, though that had no legal significance.

With the blessing of those who had attended the meeting, Mr Aming proceeded to level the land by bulldozing the bank of earth into the hollow, which seems to have been the site of the saw-pit, and he removed the rotten stump of the old ash tree. The County Council macadamised the road, leaving a small area to be taken over by Mr Aming. Mr Aming then grassed an area to the east of the inn, which he took into use as a beer garden, and he put hardcore on the land in front of the inn

so that it could be used as a car park. A small area to the east, including the Coronation oak, was taken into the school curtilage, and a garage for the schoolmaster was built on part of it. Mr Charlesworth stated that he was instructed to consent to the exclusion of this small area from the Register Unit. Nobody complained about any of this work: indeed, Mr Anning said that he had a lot of praise. Since 1961 there has been no material change: the land is now as it was then.

In order to fall within the definition of "town or village green" in Section 22(1) of the Commons Registration Act 1965, land must fall into one of three categories. These are:- (1) land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality; (2) land on which the inhabitants of any locality have a customary right to indulge in lawful sports or pastimes; and (3) land on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years.

There was no suggestion that this land had ever been allotted by or under an Act of Parliament, so it is only necessary to consider whether it falls within either of the other two categories.

A customary right for the inhabitants of a locality to indulge in lawful sports or pastimes on land must have existed from time immemorial, that is to say, before the accession of King Richard I in 1189. Although it is not necessary that there should be actual evidence of the position before 1189, the evidence must be such that the existence of the right at that time can be inferred from it. In this case there is no evidence as to the use of the land before 1840, when it was occupied by Sir John Honeywood as a timber yard. I find it impossible to infer from the evidence that there was in existence before 1840 some customary right of the inhabitants to indulge in lawful sports and pastimes which had been wrongfully interfered with by Sir John or one of his predecessors in title having taken over the land as a timber yard.

In the absence of any such customary right, it is necessary to consider whether this land falls into the third category of land on which the inhabitants of any locality have indulged in lawful sports and pastimes as of right for not less than 20 years.

Mr Charlesworth said that he did not support the registration on the basis of organised sports or games. He sought to support it on the wider ground that the evidence shows that from as early as the closing years of the reign of Queen Victoria the land has been a meeting place and a conversation point for the villagers, including the children who played there, and has been generally regarded as a village green. In my view, this is far too vague to constitute a right known to the law. However, it seems to me that there is an even more concrete obstacle in Mr Charlesworth's path. The definition in the Act of 1965 requires the right relied on to have been enjoyed for not less than 20 years. Putting the case for the registration at its highest, enjoyment of the right relied on extended from the late 1890's until 1961. Although this period is well over 20 years, it will not satisfy the definition, since in order to do that the period must not be less than 20 years immediately before the passing of the Act on 5 August 1965. This was the unanimous view of all the members of the Court of Appeal in New Windsor Corporation v. Mellor, /1975/ Ch. 380. Although the land in question in that case was held to be subject to a customary right, so that the remarks about the 20-year period were, strictly speaking, obiter dicta, in view of the unanimity of the members of the Court of Appeal, it would not be right for me to express a different view on this point, even if I felt tempted so to do.

For these reasons I refuse to confirm the registration. Mr Charlesworth and Mr Campbell each applied for costs in the event of their respective clients being successful. Mr Campbell relied upon a letter dated 6 April 1976 in which the Objector's then Solicitors set out in some detail the evidence to be relied on in support of the Objections. Mr Charlesworth said that the Parish Council had supported the registration in the public interest and drew attention to the fact that the Objector is not the owner of the land in question. After considering these submissions, I have decided to make no order as to costs.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 6 weeks from the date on which notice of the decision is sent to him, require me to state a case for the decision of the High Court.

Dated this 27th day of July 1979

[signature]

Chief Commons Commissioner