COMMONS REGISTRATION ACT 1965

Reference No.19/D/5

In the Matter of Four pieces of land
at Sevenoaks Weald, Kent (No.1)

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No.C.L.56 in the Register of Common Land maintained by the Kent County Council and is occasioned by Objection No.31 made by Mrs. L.M. Kidd and noted in the Register on 24th July 1970.

I held a hearing for the purpose of inquiring into the dispute at Canterbury on 15th November 1972. The hearing was attended by Mr. E.C. Cox, the Deputy Clerk to the Sevenoaks Rural District Council, which applied for the registration, and by Mr. G.le B. Kidd, solicitor, for Mrs. Kidd.

The Objection relates to only one of the four pieces of land comprised in the registration, namely that numbered (ii) in the Register and there described as "to the west of Thickets Wood", and further identified as tinted pink on the plan referred to in the Objection. This piece of land is a long strip bounded on one side by a road and having a width of about 20 ft at one end and at a bulge at the other end a width of about 60 ft. The Trustees of the Knole Estates have been provisionally registered as the owners of the land.

The land in question is (with other land not relevant to these proceedings) regulated by a Scheme made by the Rural District Council under the Commons Act 1899 on 17th September 1925 and amended by subsequent Schemes made on 21st February 1963 and 15th September 1966. It would appear, therefore, to have been possible for an application to have been made under section 11 of the Commons Registration Act 1965 for an order exempting this land from the provisions of that Act relating to registration. However, no such order was applied for, and my duty is now to consider whether this land falls within the definition of "common land" in section 22(1) of the Act of 1965. Although the land must have been a "common" within the meaning of the definition in section 15 of the Act of 1899, it does not necessarily follow that it is "common land" as defined in section 22(1) of the Act of 1965, since the two definitions are differently worded. The difference is so wide that, whereas a town or village green is included in the 1899 definition, it is expressly excluded from the 1965 definition.

I heard several witnesses who had known the land in question for many years. It does not seem to be necessary to go into their evidence in detail. Suffice it to say that there was no evidence that this land is subject to any rights of common and that, while there was some rather shadowy evidence that it might possibly be manorial waste, I am, in the absence of any evidence as to the extent or lordship of the manor, far from being satisfied as to this.

This is sufficient to dispose of the case, but since Mr. Kidd submitted that the status of this land was settled in 1925 when the Scheme was made, I ought to deal with this point as well. This Scheme appears to me to go to the root of the matter. It is provided by Article 5 of the Main Scheme:-

> "The inhabitants of the District /i.e. the Sevenoaks Rural District/ "and neighbourhood shall have a right of free access to every part "of the Commons and a privilege of playing games and of enjoying other "species of recreation thereon, subject to any byelaws made by the "Council under this Scheme".

This Article was inserted in the Scheme in pursuance of the powers contained in section 7(3) of the Commons Act 1876 and section 1(2) of the Act of 1899.

A right of the inhabitants of the Rural District to play games and enjoy other species of recreation could bring the land within the definition of "town or village green" in section 22(1) of the Act of 1965 if the other requirements of that definition are satisfied. If so, it could not be "common land" as there defined, since town or village greens are expressly excluded from the definition of "common land".

I have therefore to consider three possibilities. The first is that this is land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality. The second is that this is land on which those inhabitants have a customary right to indulge in lawful sports and pastimes. The third is that those inhabitants have indulged in such sports and pastimes as of right for not less than twenty years.

As to the first possibility, the land has certainly been set aside (to use a neutral expression) for the recreation of the inhabitants of the Rural District under an Act, namely the Act of 1899. The question to be considered is whether it has been "allotted" within the meaning of section 22(1) of the Act of 1965. The word "allotted" indicates to a lawyer at first sight that reference is being made to an allotment under an inclosure Act. Had the expression been "allotted and awarded", which is that used in section 15 of the Inclosure Act 1845 in relation to the setting aside (again used as a neutral expression) of land for the purposes of exercise and recreation in lieu of a town or village green, there could have been no room for doubt that the kind of Act referred to in section 22(1) of the Act of 1965 was an inclosure Act. It may be that such a limited meaning need not be given to the word "allotted" when it is found in isolation. However, all the meanings of "allot" given in the Oxford English Dictionary relate to some form of division or distribution of a whole in several portions. It seems to be a misuse of the word "allotment" to apply it to the procedure under section 1 of the Act of 1899, which is to "make a scheme for the regulation and management of any common". Whether or not the expression "allotted by or under any Act" in section 22(1) of the Act of 1965 is to be construed as relating solely to an allotment under an inclosure Act, I find myself unable to interpret it as applying to the making of a scheme under the Act of 1899.

I now turn to the question whether the inhabitants of a locality have a customary right to indulge in lawful sports and pastimes on this land. That any such indulgence since 1925 has been of right is beyond doubt, but

that is a statutory right and not a customary right. The question is whether there has been indulgence by customary right.

The evidence relating to sports and pastimes was very meagre. Mrs. Kidd said that she played on the land as a child for some years after 1925, at which time the land belonged to a Mr. Philps, who sold it to Mrs. Kidd's mother about 1957. On the other hand, Mr. K.G. Green, who has lived in Sevenoaks Weald for the last twenty-five years, said that he had never seen children playing on this land. There is no inconsistency between the evidence of these two witnesses, since they relate to different periods of time, but if this evidence stood alone, the playing by children after 1925 would have been solely referable to the right created by Article 5 of the Scheme. However, it seems to me to be permissible to supplement Mrs. Kidd's evidence by the fact that the land could not have been made the subject of a Scheme under the Act of 1899 had it not already been a "common" as defined in section 15 of that Act. The expression "common" there includes any land subject to be inclosed under the Inclosure Acts 1845 to 1882 and any town or village green. There is no evidence that this land was in 1925 a common in the legal sense of the word. For it to have been land subject to be inclosed, it would have had to be subject to rights in persons other than the owner to enjoy profits à prendre of some sort. There is no evidence that any such rights have ever existed. On the other hand, the facts are quite consistent with the land's having been a town or village green in 1925 or, in other words, bearing in mind that the definition of a town or village green at common law is slightly different from the definition in section 22(1) of the Act of 1965, that it was subject to the customary rights of the inhabitants of some locality to play lawful games on it and to enjoy it for the purposes of recreation. Therefore it may be that Article 5 of the Scheme was not an innovation, but a continuation in statutory form of a right which previously existed by custom. While there is no evidence that this was the case, given that in 1925 the land was a common as defined in section 15 of the Act of 1899 and must therefore have been either land subject to be inclosed under the Inclosure Acts 1845 to 1882 or a town or village green, I cannot shirk the issue by saying that I am not satisfied that it was either. My duty is to find on the balance of probabilities which it was. Applying this test, I find that it was a town or village green. I appreciate this is a very artificial finding, but it seems to me that it is one which the law requires me to make.

If I am right in finding that the land was a town or village green and therefore subject to a customary right of the inhabitants of the locality to indulge in lawful sports and pastimes on it before the making of the Scheme of 1925, the fact that Mr. Kidd was unable to prove indulgence in lawful sports and pastimes for twenty years or more ceases to be a difficulty in his path, for a customary right cannot be lost by non-user.

For these reasons I have come to the conclusion that this land is a "town or village green", as defined in section 22(1) of the Act of 1965, and is therefore excluded from the definition of "common land" in that sub-section. I accordingly refuse to confirm the registration in so far as it relates to the land the subject of the Objection.

Mr. Kidd asked that, should I so decide, I would order the Rural District Council to pay Mrs. Kidd's costs. I do not think that it would be right to make any order for costs in this case. I cannot describe the registration as frivolous or vexatious. The land could have been registered as a town or village green. That the registration as common land has been defeated on a technicality seems to be but a barren victory for Mrs. Kidd, for the land is still the subject of the Scheme under the Act of 1899, and it does not seem to me that Mrs. Kidd's position would have been prejudiced in any practical way if I had been able to see my way to confirming the registration as common land.

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 December 1972

Chief Commons Commissioner