COMMONS REGISTRATION ACT 1965

Reference No. 219/D/18

In the Matter of Millsole Green, Harvel, Meopham, Kent

DECISION

This dispute relates to the registration at Entry No. 1 in the Land section of Register Unit No. VG 139 in the Register of Town or Village Greens maintained by the Kent County Council and is occasioned by Objection No. 209 made by Kent County Council and noted in the Register on 31 July 1972.

I held a hearing for the purpose of inquiring into the dispute at Maidstone on February 6 1972. The hearing was attended by Mr J Carley the Chairman of Meopham Parish Council on whose application the registration was made: there were no other appearances. Mr Carley asked for the registration to be confirmed, and a written request by the Kent County Council for such confirmation was available at the hearing

In these circumstances 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 12th day of March 1979

L J Morris Smith

Commons Commissioner

COMMONS REGISTRATION ACT 1965

Reference Nos 219/D/19
219/D/20
219/D/21
219/D/22

In the Matter of Rodmersham Green, Rodmersham, Swale District, Kent

DECISION

My decision is that this land is a village green. The disputes which 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 registrations at Entry No 1 in the Land Section of Register Unit Nos CL. 14 and CL. 106 in the Register of Common Land and at Entry No 1 in the Land Section of Register Unit No VG. 166 in the Register of Town or Village Greens maintained by the Kent County Council, and are occasioned by these registrations being in conflict. There are no Entries in the Rights Sections of these Register Units and only one Entry in the Ownership Sections, being of the ownership of Leslie Doubleday Limited of the CL. 106 land.

I held a hearing for the purpose of inquiring into the disputes at Sittingbourne on 19 and 20 May 1976. At the hearing (1) Leslie Doubleday Limited on whose applicati the CL. 106 registration was made, were represented by Mr L Skingley solicitor of Winch Greensted & Winch Solicitors of Sittingbourne, (2) Rodmersham Parish Council on whose application the CL. 14 registration was made were represented by Mr L I Jones their clerk and Mr D F Ward their chairman; and (3) Mrs A Wilks on whose application the VG. 166 registration was made attended in person.

These disputes relate to three pieces of land situate at the junction of Green Lane, Bottles Lane, and Stockers Hill, in the middle of an area called Rodmersham Green. One of the questions being whether these three pieces are together called or can together properly be described as Rodmersham Green, I shall in this decision call them (1) the Main Piece, (2) the South Piece and (3) the Smallest Piece. The Main Piece is approximately triangular (the south part of its east side is irregular); on its south side (about 150 yards long) it is open to Green Lane, and on its northwest side (nearly straight, about 250 yards long) it is bounded for the most part by the front walls and fences of numerous lands occupied with buildings (mostly dwelling houses); at its southeast corner there is, at a lower level than the rest, a pond now much overgrown. The Main Piece is crossed by tracks and paths providing access to the various buildings which front on it. The South Piece (about half the area of the Main Piece) is on its northwest side open to Green Lane (being here on the other side of the Lane from the Main Piece) and on its west side open to Bottles Lane (here, on the opposite side stand the Fruiterers Arms public house, and some cottages or dwelling houses and a farm house and buildings. On the South Piece there is a pond along much of its east side. The Smallest Piece is also on its northwest side open to Green Lane; it is separated from the South Piece by Rodmersham County Primary School; there is a track across it providing access to the Village Hall.

The CL. 14 land comprises the South Piece and the Smallest Piece. The CL. 106 land comprises the Main Piece. On the copy map supplied to me relating to the VG registration, the Smallest Piece although distinctly outlined is uncoloured; in this decision I am assuming (and this was agreed at the hearing) that the VG. 166 land comprises the Main Piece, the South Piece and the Smallest Piece.

At the beginning of the hearing Mr Skingley said that his clients were not concerned with the South Piece and the Smallest Piece, and Mr Jones said that the Parish Council although they applied for the CL. 14 registration had now changedtheir mind, and supported the VG. 166 registration so far as it affected the South Piece and the Smallest Piece. So I indicated that unless some question was later at the hearing raised about these Pieces (none was), I would refuse to confirm the CL. 14 registration and confirm the VG. 166 registration at least as regards the South Piece and the Smallest Piece.

In the result the greater part of the hearing was taken up with a consideration of the Main Piece. In support of the CL. 106 registration evidence was given (1) orally by Mr G L Doubleday, in the course of which he produced the documents listed in the First Schedule hereto, (2) by Mrs C I Carroll (written statement dated 13 May 1976 sent to Winch Greensted & Winch), (3) by Mr C F Barrett (affidavit sworn 14 May 1976), (4) orally by Mr A E Barrett, and (5) by Mrs C Williams (written statement dated 20 December 1972). In support of the VG. 166 registration evidence was given (6) orally by Mrs Wilks in the course of which she produced the documents listed in the Second Schedule hereto, (7) by Mr H Sage, Mr E Neeves, Mr F Packham, Mr P W Barrett, Mrs W H Miles, and Mrs A Ash (written statements produced by Mrs Wilks), (8) orally by Mrs G E M Ferguson who produced the documents listed in the Third Schedule hereto, (9) orally by Mr J Caryer, (10) orally by Mr G R Turcan, who produced the documents listed in the Fourth Schedule hereto, (11) orally by Mr Robert Turcan, and (12) by Mrs G Jay and Mr E Ardizzone (written statements produced by Mrs Wilks). Because Mrs Wilks had raised matters not put to Mr Doubleday when he first gave evidence, he was recalled. Mr Jones, because Mrs Wilks had referred to the minutes of the Parish Council, produced the Minute Book for the meetings from 1894 to April 1957; no other evidence was given by the Parish Council although Mr C F Barrett was a member for about 24 years including a period as chairman, Mr G R Turcan is now and has been for the last 30 years a member, and Mrs Ferguson was from 1961 to 1976 a member. Further Mr G L Doubleday was a member himself before the 1965 Act.

Between the first and second day of the hearing I inspected the land.

At all material times Mr G L Doubleday has been authorised to act generally on behalf of Leslie Doubleday Limited. Nobody at the hearing suggested that there is any difference relevant in this matter between them; accordingly in this decision I use the expression Mr Doubleday as meaning either himself personally, or the Company or himself acting as agent for the Company, as the context may require.

The registrations were made in the following circumstances. Following the publication of the 1965 Act, there were discussions between Mr Doubleday and the Parish Council at which those present concluded that these pieces of land ought to be registered as common land. The South Piece and the Smallest Piece were reputed to be in the Manor of Milton Regis of which the Lord was or is Mr Wykeham Musgrave or his successors in title; because they took no part in the discussions

the Parish Council said they would make a CL application which they did on 31 July 1967. The Main Piece was reputed to be in the Manor of Rodmersham of which Mr Doubleday (or his company) was the Lord; because he had taken some part in the discussion he said he would make a CL application and did so on 28 March 1969. These registrations came to the notice of Mrs Wilks who resides at Whitstable; she is (so she told me) a long-standing member of the Commons Open Spaces and Footpaths Preservation Society and as such was alerted to the need to help with Commons registrations by seeking out any lands which might have missed claims for registration; she met some of the residents of Rodmersham, but finding no local willing to make an application for a VG registration, included these pieces of land in an application she made on 24 September 1969. Since then she had made attempts to resolve the disputes resulting from her registration, for example she attended a meeting at Maidstone on 26 July 1973 at which there were present Mr Doubleday and his solicitor and two officers of the County Council, but her attempts had been unsuccessful.

It was at the hearing if not expressly at any rate impliedly suggested that prior to the registration there was some agreement between the Parish Council and Mr Doubleday which precluded the Parish Council (and possibly also such persons as were in 1967 and 1969 members of it) from appearing at the hearing before me to support the CL registrations. In fact, at the hearing Mr Jones and Mr Ward as representatives of the Parish Council were neutral. I need not I think consider the circumstances relating to registration in any detail; I can see no reason to criticise the Parish Council or any of their members in respect of anything said at the hearing; the views they may have expressed in 1967 and 1969 as to the legal position cannot help me to determine which of the conflicting registrations now under consideration ought to stand. Under the Act and the Regulations made under it, a non-resident such as Mrs Wilks may apply for and support a registration. She will (as far as I know) derive no personal benefit from it. Fortunately for me (and perhaps fortunately for her too), no suggestion was made at the hearing that my decision as to costs or otherwise should be affected by the circumstance that she is a non-resident without any personal interest in these proceedings; indeed it soon became evident that however lacking in local support she may have been when she applied for the VG registration, she had by the date of the hearing acquired considerable support from local residents of repute.

Mr Skingley at the commencement of the hearing, after drawing attention to the definition of "town or village green" in the 1965 Act, which so far as relevant is:- "Land...on which the inhabitants of any locality have a customary right to indulge in lawful sports and pastimes or on which the inhabitants of any locality have indulged in such sports and pastimes as of right for not less than 20 years", said he was not contending that there had not been some recreational use of the Main Piece by the inhabitants; his first contention was that any such use had not been "as of right", because it had been by permission of the owner of the land; he also contended that any recreational use for which the permission had not been asked was use of such an unobjectionable character that it could not be properly regarded as being "as of right". Before dealing in detail with the evidence given for and against these contentions and with the legal principles applicable to them, I should record the happy circumstance which makes these proceedings in one respect unusual. Mr Doubleday said that whatever might be the result of

these proceedings he would ——→ permit the Main Piece to be used for recreational purposes as it had been in the past and ~~-~~ cooperate with the Parish Council in preserving and maintaining the Main Piece for the benefit of the Village. And Mr Jones on behalf of the Parish Council confirmed that they had always had harmonious relationships with Mr Doubleday and his father Sir Leslie Doubleday (he died about 18 months ago) and that the Council reciprocated the sentiments which Mr Doubleday had expressed. Mr Jones also said that the Parish Council did not challenge the claim of Mr Doubleday to the Lordship of the Manor of Rodmersham and as such to be the owner of the Main Piece; the only question was how the Main Piece should be registered having regard to the evidence given.

In the foregoing circumstances it seemed that at any rate as regards the immediate future the way in which I decide this case may be of little consequence to anyone. However at the hearing I was asked (and I am by the 1965 Act required) to give a decision.

Although I am not in these proceedings under section 5 of the 1965 Act concerned to give a decision as to ownership, I must nevertheless consider ownership so far as it bears on the permission contentions made by Mr Skingley. The 1902 conveyance, the 1926 vesting deed and the 1932 and 1963 conveyances show that the Manor of Rodmersham passed successively to Mr Robert Mercer, who died in 1917, to his executors and trustees, to Mr Robert Mercer his grandson, to Sir Leslie Doubleday (in 1932 Mr L Doubleday), and finally to Leslie Doubleday Limited (Mr G L Doubleday). The Main Piece is not particularly mentioned in any of the said deeds, nor is it comprised in any of the land certificates produced; but it could nevertheless pass by section 6 of the Conveyancing Act 1881 or by section 62 of the Law of Property Act 1925 if it belonged or appertained or was reputed to belong or appertain to the Manor. Many of those who gave evidence spoke of the concern of the Lord of the Manor with the Main Piece, and I am therefore satisfied that in these proceedings I ought to proceed on the basis that the ownership of the Main Piece passed successively with the Manor as above stated.

Some of the evidence about permission goes back before the time Mr Doubleday was said to be concerned to give or withold it. I shall consider first the alleged permissions with which he was or could be concerned, being (1) Mr Doubleday's "permission" for the Village Fetes being held for about six years, in and after 1961; (2) Sir Leslie Doubleday's "permission" for the construction of a concrete cricket pitch; (3) Mr Doubleday's participation in the Fete to celebrate the coronation of Her Majesty the Queen; (4) Mr Doubleday's participation as chairman of the School managers of the use of the Main Piece by the children of the school during or between school periods or while they were to some extent under the control or supervision of the teachers; and (5) the "unobjectionable" use of the Main Piece at other times for informal games either by children at the school and out of school hours or by young persons who had left school.

To determine whether the things done by Sir Leslie Doubleday and Mr Doubleday constitute permission in any now 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 judgements 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 CJ in Tickell v Brown (1836) 4 Ad. & El. 369. "...you must see 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 persons 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 periods relied on, that does prevent...the acts being done as of right..."; Cotton LJ in De la Warr v Miles (1881) 7 Ch.D.535 at 596. "A temporary permission, although often renewed, would prevent an enjoyment being 'as of right'; but permament irrevocable permission attributable to a lost grant would not have this effect"; Lord Lindley in Gardner v Hodgson (1903) A.C.229 at p.239. Although Denman CJ when construing these words "as of right" relied on their context in the Prescription Act 1832, the above quotations when used 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 Merstham v Coulston (1937) 2 KB 77 and Jones v Bates (1938) 2 All England E.R. 235. Indeed that the words "as of right" are in the 1832 Act used in their ordinary sense, may be deduced from the speech of Lord McNaughten 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 Honeywell (1972) 1 WLR 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.

As to customary right:- In 1666 the court (KB) 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 and for their recreation and held that this was a good custom observing that it is necessary for the inhabitants to have their recreation; Abbott v Wheatley 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 seasonal times of the year at their free will and pleasure was a good custom; Fitch v Rawlings 2 HyBl 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 Brocklebank v Thompson (1903) 2 Ch 444. So the considerations applicable to the two parts to the above quoted definition in section 22 of the 1965 Act overlap considerably. The main differences are (i) 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) such a customary right can never be lost by non-use.

In the light of the judgments above referred to, I consider (1) the permission for the six Fetes.

Mrs Ferguson dated these as being 1961, 1962, 1963, 1964 (?)1965 and 1968, and produced the 1961 and 1962 programmes; she was the Hon Secretary of the Fete Committee for 4 or 5 of the Fetes (1961-64); she never requested permission and the need for permission never occurred to her or to the Committee. On the other hand Mr C F Barrett who was chairman of the 1968 Fete Committee at a meeting on 28 May 1968 proposed that such a request be made, and later made it.

Mr Doubleday said (in effect):- Generally he considered that for any organised activity on the Main Piece, his permission was necessary, and had always been requested. As regards the six Fetes particularly: for one or two, the request may have been by word of mouth anddealt with similarly; for the others he had a brief letter from someone explaining the activity, and had briefly replied agreeing. He had not kept the letters relating to the Fetes, but produced 1971 and 1973 letters relating to a proposed road widening and a proposed sewage pumping station on the Main Piece and a 1967 letter from the vicar requesting (mistakenly) his permission for a seat on the South Piece. The draft of his reply to the 1967 letter (including the words "I readily agree") was scribbled on the letter, and I understood it was the sort of thing he would have written in every case.

I accept the evidence of Mr Doubleday that for each of the six Fetes his permission was requested by some inhabitant and given as he described. But this does not I think show that each of the Fetes was by his permission in any now relevant sense. By the words "given and accepted" used in the judgments above quoted, I deduce that a person does not give an effective permission merely because he inactively watches from a distance an act being done, and that a simple example of a permission effective to prevent an act being done "as of right" is where the act (eg a sports day or some 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 the act if done must be considered as done pursuant to the permission. The Judges above quoted did not I think intend to define all the circumstances which could constitute a permission effective to prevent an act being done "as of right", and it would be presumptuous of me to attempt to do this. As I see it the question to be answered is not whether Mr Doubleday said to any inhabitant something which might be regarded as a permission, but whether the inhabitants who came on to the Main Piece to enjoy the Fete did so "under permission" of Mr Doubleday: meaning I think whether an informed observer would so describe what they did.

In the particular circumstances of this case, this question is not easy to answer, because neither Mr Doubleday nor anyone else ever contemplated what might have happened if he had said No. Except when asked in 1968 about a stall for the Swale Footpath Association (he thought this inappropriate with stalls to raise money for the Village), he never queried anything, and he told me that he would never have refused permission for a Fete. The Footpath Association's request is irrelevant because the stall having nothing to do with the inhabitants of the Village indulging in sports and pastimes, may well have required his permission as owner. Also irrelevant are the similar requests for permission to widen roads or build a pumping station.

I must consider this question in the context of Mr Doubleday's contention that the Main Piece is historically waste land of the Manor of Rodmersham and therefore common land. For registration purposes under the 1965 Act, land which is a village green cannot also be common land; but apart from the Act, the whole or some part of the waste land of a manor can be and often is also a village green on which the inhabitants have a customary recreational right. If the Main Piece was not common land within the meaning of the 1881 and 1925 Acts, it would not have passed with the Manor, and Mr Doubleday would not now be the owner. Quite apart from the contention, I would conclude from the deeds and manorial documents produced and from the present appearance of the Main Piece and the apparent age of the buildings fronting onto it, that the Main Piece has from time immemorial been land quite different from any of the surrounding lands formerly owned by Mr Mercer Snr and now owned by Mr Doubleday as his ultimate successor; so different that an inhabitant could, without knowing exactly what rights if any he had because it was waste land of a manor, reasonably think, unless somebody told him otherwise, that he could lawfully go on it for recreational purposes.

Of Mr Doubleday or anybody else ever having told anybody that without his permission, the Fetes would not be lawful, there was no evidence at all. Mrs Ferguson who was for 4 years responsible as Hon Secretary of the Fete Committee knew nothing of it. That the 1968 Fete Committee asked him for permission is an indication, but it is not I think enough by itself; I decline from the general observations in the affidavit of Mr C F Barrett to infer that he did anything to make it clear to those who came to the Fete that but for his conversation with Mr Doubleday there would have been no Fete.

Neither of the programmes produced contained any words such as:- "By kind permission of Mr Doubleday". There was no evidence that he was ever thanked by anyone for allowing the Main Piece to be used for the Fetes. I am sure that if any such acknowledgement or thanks had been given, I would have been told, and I find that there was none.

Mr Doubleday would not be bothered by the lack of any such thanks, his disposition being (so I would say) always to do what he could to further any meritorious Village activity: the law on the question I am now considering operates against a person with such an agreeing disposition, because a permission to be effective must carry with it an expressed or implied understanding that the act permitted would not be done without the permission and could not be done again without a further permission.

There being no expressed understanding, I must consider his permission in the light of the appearance of the Main Piece when the Fetes were held. If the Main Piece had then been part of a garden apparently appurtenant to a dwelling house, or had been an enclosed field accessible only through a gate and apparently appurtenant to a farm, it may be that I would without hesitation conclude that every inhabitant who went onto it in the course of a Fete must have known or be deemed to have known that he did so with the permission of Mr Doubleday as owner. But the Main Piece has never so appeared. It has always been open to the inhabitants to go on as they pleased, and has (at any rate during living memory) always appeared to be a village green, such as exist all over the country and on which inhabitants have from time immemorial had a customary right of recreation. Additionally for the last 20 years there has

been a cricket pitch (as to which see below) in a prominent position on the Main Piece. I cannot imagine how any inhabitant coming on to the Main Piece to enjoy a Fete could possibly think or be deemed to think that he was doing this by permission of anyone.

Having considered all the circumstances as best I can, my conclusion is that none of the six Fetes were with the permission of Mr Doubleday in any now relevant sense.

As to (2) the concrete cricket pitch:-

Mr C F Barrett who has been chairman and secretary of the Rodmersham Cricket Club for about 15 years said (in effect):- About 20 years ago the Kent Playing Fields Association offered to lay down a concrete cricket wicket on the Green. It was called a Don Bradman practice wicket; he attended a meeting on the Green when the matter was discussed and Sir Leslie Doubleday's permission was sought and obtained.

Mr Doubleday said that he remembered his father telling him about the incident, although he was not present at the meeting. The Kent County Playing Fields Association wanted to help people to play cricket better.

The Pitch is still there. It is about 9 yards long and about 5 feet wide. For cricket, the concrete is covered with matting. I had no evidence as to how long it was used, but I infer it was used at least until the new Cricket Ground (about ½ a mile to the southwest) was opened about 8 years ago. Mr Doubleday said that he had considered suggesting to the Parish Council that it be dug up; the circumstance that the new Cricket Ground being much better would now be preferred by all the Village cricketers, does not I think affect the legal result of the permission given by Sir Leslie Doubleday 20 years ago.

I infer that the permission so given was a simple: "I agree". It was not suggested that after the Playing Field Association had paid for the Pitch, Sir Leslie Doubleday would ever have thought of revoking his permission and forbidding the inhabitants from playing on it. In my opinion the permission he gave was a "permanent permission" such as was mentioned by Lord Lindley in 1903, supra, and accordingly did not prevent the use made under it being as of right.

Lord Lindley spoke of a "permanent irrevocable permission properly attributable to a lost grant". I would not I think be extending his meaning if I considered these words equally applicable to a permission properly attributable to a customary right. Cricket has always been an important village recreation; by the 1795 decision it was shown that a customary right to play the game (and other games) is legally recognised. In my opinion Sir Leslie Doubleday by giving this permanent permission was providing strong evidence that the Main Piece was then subject to a customary right to play cricket (and other games) on the area near the middle of which the concrete pitch was made.

As to (3) the 1953 Coronation Fete and (4) the use by the School children during School hours or under School supervision:-

In these cases Mr Doubleday said he never was asked for or gave permission; it was unnecessary, so he claimed because he was chairman of the Fete Committee and chairman also of the School Managers.

From the judgments above referred to I deduce that in relation to the question whether an effective permission has been given, evidence that an owner has participated with the doers in doing the act alleged to have been permitted the absence of any surrounding circumstances is necessarily ambiguous; in certain surrounding circumstances the proper inference may be that the owner by such participation give an effective permission, because the doers of the act knew or should have known that in the absence of any participation, their act would not be lawful; in other surrounding circumstances the proper inference may be that the owner recognises 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.

As regards the Coronation Fete, I will assume (as is I think likely) that on the programme Mr Doubleday's name appeared as chairman of the Committee organising the Fete. It was not suggested that he ever told the Committee that but for his chairmanship there would be no Fete, and I am unable to conclude that by acting as chairman he in any now relevant way on behalf of his father Sir Leslie Doubleday gave permission for the Fete to be held on the Main Piece.

As to the use by the children from the School:- Being between the South Piece and the Smallest Piece, the School buildings and the small area of surrounding land has a divisive effect; so much so that I conclude that the School was built on land which was formerly part of the Green. Its situation is such that I cannot imagine how teachers unless the point was brought expressly to their attention, could think that they could not properly take the children on to the Middle Piece and (at any rate the older children) also on to the Main Piece. There was no evidence that Mr Doubleday had while acting as chairman of the School Managers ever explained to the other Managers that the children's activities on the Main Piece which were to their knowledge being arranged by the teachers would not take place if he ceased to be chairman. I conclude therefore on considerations similar to those set out above, that there was never any now relevant permission applicable to the children playing on the Main Piece under the supervision of their teachers.

As to (5) playing by children out of School hours by young persons who had left school:-

It was not suggested that these activities were with the permission of Mr Doubleday so I have only to consider whether they can be regarded as so unobjectionable that they cannot in law be regarded as of right.

Considering whether the activities under heading (5) above and also the activities under the other headings cannot be as of right because unobjectionable, I must not overlook the observations made by Harman LJ and Russell LJ (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 "believes himself to be exercising a right or was merely doing something, which he felt confident 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 pp 468, 469 and 475.

As to the use being unobjectionable, clearly the recreational use made of the Main Piece was orderly, inoffensive and innocent, and in that sense was clearly "unobjectionable" and did no "harm". But in my view the Lords Justices when giving judgment in Beckett v Lyons 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 Main Piece had been free from any customary rights, the recreational use made of it by the inhabitants as above described would to such an owner be objectionable and harmful; any reasonable owner of land would as of course take some action if the teachers at the local school encouraged the school children to use his land for their amusement or if some local committee held a fete on his land: he would be able to take legal proceedings against easily identifiable organisers.

So, being of the opinion that the Fetes and the playing by children were both objectionable and without permission (within the now relevant meaning of these words), it follows that these inhabitants were indulging in sports and pastimes as of right. Whether or not the out-of-school-hour activities of the children and the activities of the young persons who had just left school would be as of right if there had been no Fetes, no flower shows such as are below mentioned and no playing by school children under the supervision of teachers, such activities considered in conjunction with the rest, support the conclusion that the Main Piece was being used as of right by the inhabitants for recreational purposes.

There remains therefore for me to consider the recreational use made of the Main Piece before Mr Doubleday became personally concerned.

Mr A E Barrett who is 71 years of age and has lived in the Village all his life being secretary from 1927 to 1939 of the Rodmersham Garden Society said (in effect):- As to the shows of his Society (which as I understood had certainly taken place every year while he was secretary on the Middle Piece and the Main Piece), he had always asked the Steward of the Manor (Mr Dixon, and afterwards Mr Knocker) and they had insisted that the Green should not be damaged by the erection of the stall and Mr Knocker used to come afterwards and inspect.

Mrs Ferguson spoke of there having been flower shows on the Main Piece from when she first knew the Green until 1935 or 1936.

Mr Caryer who until 1957 (apart from 9 years in the RAF) had lived on the Green said he remembered (?been told about) there having been a fair (swing boats, coconut shies etc) on it to celebrate the Coronation of HM King George V and also a similar celebration (he ran in the races) of the 1918 Peace. He said: "I never knew of permission being asked to use the Green but I was never secretary of the Garden Society or anything entailing me knowing anything about this; but I rather think the attitude then was that the Lord of the Manor was approached for permission for functions merely as an act of courtesy and reminder that the function would be taking place and that his patronage would help; he might contribute a trophy for an event; that was the idea". He was speaking of the time when Mr Mercer was Lord of the Manor.

TURN OVER

Mr G R Turcan who is aged 62 years spoke of the football he had played in the evenings on the Green, of the flower shows organised on the Green from the late 20's until 1934.

Additionally, I treat the oral evidence about the use of the Main Piece by the children of the School as extending back as far as living memory.

The oral evidence as to the use made of the Green is confirmed by the written evidence, but there is some conflict as to "permission". I do not accept the statement of Mr C F Barrett that "it has always been the custom to seek permission for its (the Green) use from the existing Lord of the Manor"; such statement is inconsistent with the oral evidence (mentioned above in this decision) that no permission was sought for some of the use of the Green. In my opinion the observations above quoted from the evidence of Mr Caryer, whether or not they can be regarded as evidence, fairly summarise the position as I infer it from what he and others said. I think it very likely that Mr Robert Mercer and his grandson, and Sir Leslie Doubleday were all approached before any organised event took place on the Green; it would be natural to seek their advice and help. I am not persuaded that any permission by Mr Dixon or Mr Knocker amounted to anything more than a concern on behalf of the owner that the surface of the Main Piece would not be damaged. Generally, having had detailed evidence from Mr Doubleday and others as to permission and as to use being unobjectionable in relation to things done recently while he was owner, I decline to reach any different conclusion on less precise evidence in relation to things done some time ago while Sir Leslie Doubleday and Mr Mercer were owners.

It was not suggested that I can make any distinction between the various parts of the Main Piece. Indeed the apparent recreational area is the most prominent part and any use of this area can properly be ascribed to the whole. Accordingly my finding is that for 20 years at least before the passing of the 1965 Act the inhabitants of Rodmersham have indulged in sports and pastimes on the Main Piece as of right and also that they have a customary right to do this.

For the reasons stated earlier in this decision the evidence I had was not directed particularly to the South Piece or the Smallest Piece. However from their appearance and from such evidence as I had about them I conclude that they and the Main Piece are one piece of land to which my said finding is applicable. Accordingly I confirm the registration in the Register of Town or Village Greens and refuse to confirm the registrations in the Register of Common Land.

TURN OVER

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 SCHEDULE
(documents produced or referred to by Mr G L Doubleday)

GLD1	-	Land Certificate Title No K 182846 relating to Rodmersham House, proprietor Leslie Doubleday Limited
GLD2	-	Land Certificate Title No K 175960 relating to farm lands; proprietor Mr G L Doubleday
GLD3	1932	Abstract of title of Robert Mercer to the Rodmersham Estate containing 462 acres 2 roods 2 perches, commencing with a conveyance dated 16 July 1902 to Robert Mercer (he died 13 February 1917) and including a vesting deed dated 29 April 1926 in favour of his grandson Robert Mercer (he attained 21 on 18 May 1923).
GLD4	9 April 1932	Conveyance by Robert Mercer with the concurrence of trustees of the Settlement made by the will of his grandfather, Robert Mercer (his son the vendor's father Charles Bertram Mercer died 31 December 1926) to Leslie Doubleday
GLD5	14 March 1963	Conveyance by Sir Leslie Doubleday to Leslie Doubleday Limited of (1) the Manor of Rodmersham and (2) the dwelling house known as Rodmersham House
GLD6	1902	Manor of Rodmersham; Quit rent receipts and counterfoils book.
	1907-1919	Similar book
GLD7	1902-1940	Minute book of the Court Baron 1902, 1907, 1913, 1919, 1925, 1928 and 1931 entries made by J Dixon and final entries on 29 May 1940 made by J Knocker
GLD7 (bis)	19 October 1967	Letter from Rev J W Spencer to Mr Doubleday with his draft reply
GLD8	10 June 1968	Copy minute of meeting of Village Hall Committee held on 24 May 1968 signed by C F Barrett
GLD9	22 November 1973	Letter Kent County Council to Winch Greensted & Winch enclosing copy letter 28 November 1969 from County Divisional Surveyor to G Doubleday and copy letter 16 December 1969 in reply

GLD10	29 October 1971	Letter Swale Rural District Council to Leslie Doubleday Limited about pumping station
GLD11	-	Plan showing South Piece and Smallest Piece in red, on which witness marked adopted roads
GLD12	13 May 1976	Letter Mrs G I Carrol to Winch Greensted & Winch

SECOND SCHEDULE
(documents produced or reffer to by Mrs A Wilks)

AW1	-	Statement prepared by Mrs Wilks for purpose of this case (including summary of relevant entries in Parish Council minutes from 25 March 1896 to 18 April 1913)
A	16 May 1976	Statement signed by Mr Henry Sage of Pond Cottage
B	16 May 1976	Statement signed by Mr E Neeves of 15 Fruiters Close
C	16 May 1976	Statement signed by Mr F Packham of 16 Fruiter Close
D	16 May 1976	Statement signed by Mr P W Barrett formerly of 3 The Green
E	16 May 1976	Statement signed by Mrs W H Miles of 8 Stocker Brow
F	16 May 1976	Statement signed by Mrs A Ash (schoolmistress 1932-1939)
AW2	?1840	Extract Tithe Award Schedule "Owners round the Green (Landowners): Held in Common (Occupiers) 141 (No. on plan): Common and Pond (Descriptic Pasture (Cultivation)" and extract from Tithe map
AW3	October 31 1974 November 21 1974	Letters from I M Carver to Mrs Wilks
-	13 February 1974	Letter from Ordnance Survey to Mrs Wilks
-	1965	Printed pamphlet entitled The Green Village in its European Setting by Dr Harry Thorpe FS. of the University of Birmingham

THIRD SCHEDULE
(documents produced by Mrs Ferguson)

GEMF1	23 September 1961	Programme (6d): Rodmersham Fete and Grand Social
GEMF2	2 June 1962	Programme (6d): Sittingbourne Carnival Queen will open Rodmersham Fete and Grand Social
GEMF3	3 August 1964	Cash account of Rodmersham Fete: Receipts and donations £263-15-0. Expenses £50-16-10

FOURTH SCHEDULE
(documents produced by Mr G R Turcan)

GRT1	-	Statement prepared by himself
GRT3	19 May 1976	Statement by Bessie F Patrick about her authorship (with Lady Doubleday) 19 years ago of pamphlet on Historic Rodmersham

Dated this ~~[illegible]~~ 21st day of August — 1976

a. a. Baden Fuller

Commons Commissioner