COMMONS REGISTRATION ACT 1965

Reference No. 35/D/1

In the Matter of Bridge Green,
Hargrave, West Suffolk

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No. V.G.2 in the Register of Town or Village Greens maintained by the West Suffolk County Council and is occasioned by Objection No.O/4 made by t Rt.Hon.Earl of Mar and Kellie, The Hon. David Erskine and the Hon.Robert Erskine (in the objection called "Erskine West Suffolk Estates" and "Erskine Estates" and in this decision called "the Objectors") and noted in the Register on 19th November 1968.

The registration was made pursuant to an application by the Hargrave Parish Council ("the Council") dated 3rd January 1967 and signed by its Clerk, I.M. Carlisle. The objection was dated 7th November 1968 and the grounds were in effect that the land formed part of Hargrave Hall Farm which belonged to the Objectors and that "the objectors and their predecessors in title have from time immemorial let the whole of the farm shown coloured pink (on the attached plan) on an agricultural tenancy".

I held a hearing for the purpose of inquiring into the dispute at Bury St.Edmunds on 25th and 26th April 1972. The hearing was attended by the Council who was represented by Mr. A.D. Sherriff of Bankes Ashton & Co. and the Objectors who were represented by Mr. B. Cohen of Gross & Co. I inspected the land on 28th April 1972 having towards the conclusion of the hearing been requested by Mr.Sherriff to do this and having been informed by him and Mr.Cohen that notwithstanding Regulation 27 of the Commons Commissioners Regulations 1971 they were agreeable to my inspection being unattended.

In this decision for convenience I call the land the subject of this reference "Bridge Green", bearing in mind that at the hearing the significance of the land being so called was a matter of controversy.

Before calling his evidence, Mr.Cohen informed me that the Objectors had sold Bridge Green (with other land) to Mr. F.G. Gittus and that as it might be that Mr. Gittus had no entitlement to be heard, he, Mr.Cohen was present as representing the Objectors.

The Council produced a copy of an instrument of apportionment of the rent charge payable in respect of the Parish of Hargrave in lieu of tithe. The copy was held by the Council and appeared to have been certified as a true copy and sealed by the Tithe Commissioners on 1st July 1841. The instrument was approved by the Tithe Commissioners on 30th June 1841, and must, I think, have been made under the Tithe Act 1836. Applying the principles set out in Knight v. David [1971] 1 W.L.R. 1671, the instrument in my view establishes (a) that in or shortly before 1841 Bridge Green therein mentioned (which notwithstanding that its area as therein stated differs from that marked on the modern Ordnance Survey, I identify as the

same as the Bridge Green the subject of this reference) was then properly described as a "Waste", was then not in the occupation of any person, had then no known owner and was not then tithable; (b) that a number of pieces of land therein stated to have an area of 209a 3r 27p (which I identify as the same in all now relevant respects as the farm, exclusive of Bridge Green, let by the 1941, 1954 and 1965 leases below mentioned and described in the objection as "Hargrave Hall Farm") was then owned by the Marquis of Bristol, was then occupied by John Payne and was then tithable, and (c) that no one then thought that the Marquis of Bristol was the owner of Bridge Green. From these circumstances I infer that Bridge Green was not then let by the Marquis of Bristol (who the Objectors claimed was their predecessor in title) either with what is now known as Hargrave Hall Farm or at all. I conclude therefore that the second part of the objection dated 7th November 1968 as regards the words "from time immemorial" has been disproved at least up to 1841.

The Objectors produced a manuscript Book with a title page "Bristol Estates, West Suffolk, draft Field Book" in the centre and "C.H. Donne, Dec. 08" in the right hand bottom corner. This book had 109 pages and appeared to contain a detailed description tenancy by tenancy (including land in hand) and field by field of the Bristol Estates, including at page 48 "Hargrave Hall Farm: Morley Benjamin". On this page Bridge Green is included in the Farm as follows:-

"51)		(1.055
	Bridge Green Pasture	
52)		(1.314"

Although I find that "C.H. Donne" was written on the title page by Mr. Donne who was agent for the Marquis of Bristol from 1909 to 1920, he did not in my view by so writing his name having regard to the word "draft" immediately above his writing, intend to record that everything in the book was factually correct. Further it is not, I think, evident that the manuscript entries on page 48 were made before Mr.Donne wrote his name. I do not therefore regard the book as legally admissible evidence that the tenancy of Hall Farm of Mr. B. Morley (which I find began about 1903 and ended in 1941) was, whether it was oral or in writing, expressed to include Bridge Green. Further I do not regard the letter dated 30th September 1941, notwithstanding that I find that it was signed by Mr. B.Morley, and contains the words "I am handing the farm over to my son Henry Jacob who will take over in the usual way" to be evidence that the tenancy of Mr. B. Morley was expressed to include Bridge Green in the same way as the 1941 lease to Mr. H.J. Morley was expressed. I conclude therefore that as regards the period 1841 to 1941 the Objectors on this point have not proved (any more than the Council have disproved) the second part of their objection.

The Objectors produced counterparts of (a) a tenancy agreement ("the 1941 lease") dated 1st October 1941 and made between F.W.F. Marquis of Bristol, and Mr. H.J. Morley, (b) a tenancy agreement ("1954 lease") dated 24th November 1954 and made between T. Marchioness of Bristol and Mr.H.J. Morley and (c) a tenancy agreement ("the 1965 lease") dated 17th September 1965 and made between (i) General Accident Fire and Life Assurance Corporation and Lady P. Macrae and (ii) Mr. P.D. Morley, and I find that Mr. H.J. Morley

and Mr. P.D. Morley were successively tenants of the Hall Farm under these leases from 1941 to 1969. In all these leases "Bridge Green" was included in the parcels without any apparent difference or distinction from the rest of Hall Farm and to this extent therefore the second part of the objection dated 7th November 1968 has some factual support. But in my opinion such support is insufficient by itself to negative the claim of the Council that Bridge Green is a village green within the definition in section 22 of the Act. Although the leases may be some evidence (to be considered along with the oral evidence below mentioned) that Mr. H.J. Morley and Mr. P.D. Morley occupied Hall Farm to the exclusion of use by the inhabitants of the parish for sports and pastimes, they are not, I think, conclusive evidence of this.

In my opinion there is no reason why a village green over which the inhabitants of a parish have rights should not be let by the owner of the land, and the circumstance that the letting is not expressed to be subject to such rights does not, I think, have the effect of overriding or terminating them or prevent the letting taking effect subject to them.

The Objectors at the hearing put forward as their main ground of objection that the possession of the Bridge Green by successive tenants of Hall Farm had in fact been exclusive of any indulgence by the inhabitants of the parish in any lawful sports or pastimes as of right. It was not contended that this ground of objection was not open to the Objectors and I record that if such a contention had been made, under Regulation 26 of the Commons Commissioners Regulations 1971, I would have thought it just, whether or not the objection dated 7th November 1968 can properly be read as including this ground, to allow the Objectors to put it forward.

To this ground of objection the oral evidence of the 8 witnesses of the Council and the 7 witnesses of the Objectors was mainly directed. This evidence was in conflict on many important matters.

Bridge Green (according to the Ordnance Survey Map) has an area of 2.369 acres. A road from the Village crosses it from south to north; this road after passing over a bridge (situate approximately at the centre of Bridge Green) forks to the north east to the Rectory and the Church and to the north west to Hargrave Hall. Bridge Green is on the Village side (the south) unenclosed: the road itself is also unenclosed: so any person from the Village using the road and wishing to go anywhere on Bridge Green would meet no obstruction.

I find that the inhabitants of the parish did in fact on Bridge Green indulge in lawful sports and pastimes as follows:- (1) Mr. H.R. Smart (aged 82 lived in Hargave all his life) as a boy played about and took part in "sports" there, took part in Sunday School treats there and in a St.Valentine's Day children's share-out there (of money collected in the parish); since his boyhood the Green has been similarly used. (2) Mr. F.J. Pettitt (aged 75 lived in Hargrave from when he was very small except while in the Army) spoke of Sunday School parties and "sports" there, of children playing and "people" riding there. (3) Miss C.E. Wallace (born 1924 and lived at Hargrave until 1933) remembered playing there as a child. (4) Mr. F. Morley (born in 1917

at Hargrave Hall, was brought up and lived there with his father Mr. B. Morley who was tenant from 1903 to 1941 (and still lives in Hargrave) said children played there. (5) Mrs. P.M. Carlisle (who lived at the Old Rectory from 1947 to 1970) said many different children had for over 20 years played on the Green, horses and ponies were ridden on it (she identified the riders as inhabitants and mentioned that her children put up jumps) and occasionally the Red Cross Society had organised rounders (after 1964), the Boys Brigade had camped, people from Hargrave picnicked and once the local youths started a motor-cycle circuit (discontinued only because of complaints about the noise). (6) Mr.P.D. Morley (born in 1931, tenant of Hargrave Hall from 1964 to 1969 and son of the previous tenant Mr. H.J. Morley) said any one could play games and walk there and also spoke to much the same effect as Mrs. P.M. Carlisle, supra. (7) Mr.D.C. Knight (aged 28 lived all his life at Hargrave apart from 5 years) as a boy with other children used Bridge Green as his habitual playground for cowboys, indians and unorganised cricket and also played games organised by Mrs. P.M. Carlisle and the Boys Brigade. I accept the evidence of these 7 witnesses on the points above referred to and otherwise (except that I do not in all respects agree with the opinion some of them expressed as to the extent of the rights of the inhabitants which could be deduced from the use they thought had been made of Bridge Green). The activities they described referred to activities by the inhabitants (or their children) of the same area variously referred to as "the Village", "the Locality" and "the Parish".

Mr. H.R. Smart and Mr. F.J. Pettitt were not cross-examined as to what they meant by the word "sports". I find that cricket, football and other games indulged in by the children and other inhabitants were (and could by reason of the unevenness of the ground only have been) of an informal kind; cricket and football as played seriously by youths and adults on well mown or reasonably flat fields would, I think, always have been quite impossible on Bridge Green.

I prefer the evidence of Mr. H.R. Smart (above mentioned) to that of his elder brother Mr. H.G. Smart (aged 84). The elder said that "games" were never played on Bridge Green having in mind, I think, cricket and football played seriously. Further his evidence was somewhat diffused (which I ascribe to his age and not because he wanted to be unhelpful) and I am therefore unable to rely on much of what he said.

Mr. W.G. Harriott was principal agent of the 4th Marquis of Bristol and of his personal representative from 1951 and was as such concerned with Hall Farm until 1957; during his agency his principals were until 1957 in possession of the rent of Hall Farm and he was directly concerned with the negotiation of the 1954 lease. Mr.P.A. Laws was from 1947 (and still is) principal agent for a succession of persons (including the Objectors) who all have some connection with the Marquis of Bristol, and have for convenience been called "the Erskine Estates": during his agency until 1971 his principals were in possession of the rent of Hall Farm and he was directly concerned with the negotiation of the 1964 lease. Mr. Harriott and Mr. Laws had seen the Field Book above mentioned and the 1941 and 1954 leases (which all showed Bridge Green as part of Hall Farm).

It never occurred to either of them that Bridge Green because it was called a "Green" was or might be a village green. Mr. Marriott said that the activities of the inhabitants such as were alleged by the Council's witnesses were most unusual on the Bristol Estate, although it was not uncommon for farmers to allow children to play on the land as long as nobody did it as of right. Mr. Laws who visited Hall Farm perhaps as often as twice a year and who had known it professionally for 25 years (apart from a short interval) said he had never seen anyone disporting there and stated in general terms that he was sure that there was no village green there today or at the time of the tithe map (1841). The evidence of Mr. Marriott and Mr. Laws failed to convince me of the falsity of the evidence given by the witnesses of the Council relating to the use made of the Green. Mr. Marriott and Mr. Laws may not have been there when the events described by these witnesses happened, or if they were there, they may, I think, by reason of the belief they had acquired from the Field Book and the leases as above mentioned, have not memorised what they saw because they did not realise its possible significance; against the detailed evidence of these witnesses, I cannot, I think, attach great weight to the general statement of Mr. Laws about there being no village green. The statement I can, I think, treat as no more than an expression of his opinion (not admissible in evidence) of what he deduced from the information (much less than I have had) available to him about Bridge Green.

I am, I think, unable from the failure of Mr. L.C. Smart (who was born in 1921 and lived in Hargrave since he was eight years old) to notice the activities of the inhabitants of the parish in relation to Bridge Green as described by the witnesses of the Council, to infer that these activities did not happen: he was, I think, more interested in serious football which he had played for 25 years than in sports of the kind for which Bridge Green was and is suitable.

I considered the evidence of Mr. A. Phillips and Mr. A.N. Murkin to be unreliable.

The use which, as I have found, was made by the inhabitants of the parish cannot be considered to be made "as of right" merely from the evidence of Mr. H.R. Smart, Mr.Pettitt, Miss Wallace and Mr. Knight that they asked no one for permission to do what they did and were never turned off and of Mrs. Carlisle that she asked no permission for the games she organised. I am bound by the observations made by the Court of Appeal in Beckett v. Lyons, 1967 1 Ch. 449: which were to the effect 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 that the owner would not stop but would tolerate because it did no harm" (per Harman L.J. at pages 468 and 469) and 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 thought no one would find objectionable and which the owner .... in fact tolerated as unobjectionable", (per Russell L.J. at page 475).

Mr. H.R. Smart said that as a boy he would not have played in meadow land near Bridge Green as "that was all farm". Mr. F.J. Pettitt said that we

(meaning, I think, himself and all other members of the parish) always thought of it as a "Green" meaning that it could properly be described as a village Green. Mr. F. Morley said that he had grown up with the idea that it was "common land" meaning (as he explained) that it was never fenced because it was "common ground" that anyone in the village could graze there and anyone could walk there but no one could plough it up; he had the impression that Bridge Green was public property and the public had every right on it; with reference to children playing there, he said that his father was strict but he just could not do anything about it. Mr. P.D. Morley said that the village had rights over the green of grazing and to walk, play games, to walk over it and do what they liked on it and that children would not have been allowed to play on the enclosed part of Hargrave Hall Farm. I reject the suggestion that I should discount what Messrs. F. and P.D. Morley said that they and their relatives did because it was inconsistent with the leases held by Messrs. B., H.J. and P.D. Morley in that if the parish had rights of grazing and using the Bridge Green it was not worth including it in a tenancy and in that their conduct was generally inconsistent with the terms of the lease; it was not put to Mr. P.D. Morley that his lease was negotiated on the basis of the rent being at so much an acre; further I think it unlikely that they would have considered the terms of the lease as being significant in relation to the rights of the inhabitants.

The absence of any hedge or fence along the southern end of Bridge Green is, I think, significant. Mr. F. Morley said that when he was about 12 years old (1921) he tried to fence this end to make it easier to keep cows on Bridge Green, and as soon as his father, Mr.B. Morley saw it he told him to take it down. Mr. P.D. Morley put a post and wire fence at this end and on complaints being made took it down almost immediately. Mr. H.J. Morley who used to graze cattle on Bridge Green, in a conversation with Mrs. Carlisle said it would be most convenient to have a fence there (because it would prevent cattle straying on the road and save the expense of employing someone to prevent this). Mr. Marriott said he was surprised that there was no fence. On the evidence and from what I saw during my inspection I find that it would have been advantageous to the owner of Hall Farm to fence the southern end of Bridge Green. I conclude that Messrs. B., H.J. and P.D. Morley all considered that they were by reason of some local law applicable to Bridge Green obliged to leave the southern end unfenced for the benefit of the inhabitants. I reject the argument that the obligation was consequent on a highway passing over the Bridge Green from north to south: there would, I think, never have been any practical difficulty as regards access to the Church and the Rectory to the owner and occupier of the Hall Farm coming to some arrangement about a gate or (in more modern times) a cattle grid.

For the Council it was argued (and for the Objectors contra) that the name "Bridge Green" by which the land now under consideration had been and was now being called provided some ground for supposing that the inhabitants had rights over it usually found over village greens; Mr. Laws thought that the significance of "Bridge Green" was a combination of a bridge and meadowland. But it is, I think, of some relevance to this case that the word "green" as a matter of ordinary English has as one of its principal meanings: "a piece of public or common grazing land ....: a village green", see Oxford English Dictionary. Although I would not without other evidence conclude that any

piece of land was a village green merely because it appeared to be such and was called a "green", nevertheless when I inspected Bridge Green I found that upon a consideration of its name alone it seemed to be more probable than not that it was or (it appearing to have been encroached on by the adjoining occupiers) had been a village green: meaning not the sort of thing which is sometimes illustrated in a glossy Christmas calendar, but the sort of piece of grass land on which it would be convenient for villagers to gather together to watch or participate in informal athletics, games and amusements (such as pony riding competitions). Approaching it from the east the road turns abruptly north and ceases to be narrowly confined by hedges and widens out to what has the appearance of being an open space having a use distinctive from that of the adjoining agricultural land; the gates into it from the east and the west and the gaps in the hedges indicate that at present some use is made of Bridge Green by those entitled to the adjoining fields but this did not remove the impression that it was in some way distinct from such adjoining land.

My conclusion from the considerations set out in the four preceding paragraphs is that the use made by the inhabitants of the parish of Bridge Green within living memory can properly be ascribed to the circumstance that it was in accordance with its name a village green in the sense current before the 1965 Act and that such use was as of right.

Use as of right for a period within living memory raises a rebuttable presumption that such use continued from time immemorial. In this case the presumption is, I think, reinforced by a consideration of what Bridge Green would have been at the time of the instrument of apportionment. On my irspection many of the buildings described as cottages in such instrument appeared to have been replaced (I was told in evidence many had been rebuilt) by buildings more appropriately described as "houses"; I got the impression that in 1841 the Hall and the Rectory must in relation to the other dwellings in the village have been more important than they are now and would then have been more a centre of village life so that the inhabitants would then be more likely than now to want to use Bridge Green for recreational purposes. The Church has Norman work in it and I deduce that there has been a church on the site from time immemorial.

In my opinion therefore the Council has established that the inhabitants of the parish of Hargrave have a customary right to indulge in lawful sports and pastimes on Bridge Green.

In forming this opinion I have for the reasons indicated, disregarded the following matters which were discussed at the hearing.

It is, I think, unnecessary for me to determine whether, as some of the witnesses thought, the inhabitants of Bridge Green would have had if the 1965 Act had never been passed, any grazing rights over Bridge Green. The definition in the Act of a town or village green is (so far as relevant to this case) limited rights to "indulge in lawful sports and pastimes".

Although there was at some time during the tenancy of Mr. B. Morley a muck heap at the north end of Bridge Green, the evidence about its size and duration was vague. There was no evidence that it interfered with any use

any inhabitant of the parish wanted to make of Bridge Green, I think it unlikely that it ever did so.

Mr. P.D. Morley for a period put up a low fence near and for a substantial part of the west side of the road which runs north and south across Bridge Green (this fence continued along the western part of the south side of Bridge Green) for the purpose of keeping in pigs grazing there. The pigs were housed in the adjoining field and were admitted to the land so enclosed through a gate. He considered he had no right to put up this fence permanently but might do so temporarily; although he did not remove the fence as soon as he originally intended he did nevertheless remove it when he left (at the end of his tenancy) in October 1969. Witnesses were uncertain as to the exact period for which the fence was up and I find the duration was between 18 months and two years. The pigs were not grazed there all the time the fence was up; they were, I think, not there for sufficiently long period to do the turf any permanent damage or any temporary damage likely to interfere with the use of Bridge Green by the inhabitants for recreational purposes. There was no evidence that either the fencing or the pigs ever interfered with the use any inhabitant of the parish wanted to make of Bridge Green, and I think it unlikely that they ever did so.

Mr. Gittus who is and has been from 1971 in possession of the rent of Hall Farm as successor of Erksine Estates and who told me that Bridge Green was included in the letting to Captain Buller-Long of Hall Farm house and some of the fields formerly tenanted by Mr. P.D. Morley, said that he had for some years owned other land in the neighbourhood and had given friends of his, being some of the persons Mrs. Carlisle said she had seen ride there, permission to ride over any of his land. Although I have no reason to doubt his title to Hall Farm, neither his title nor the title of the Erskine Estates was ever proved by the production of title deeds. But even assuming that Bridge Green is now vested in Mr. Gittus for an estate in fee simple (the Council did not claim the ownership), I am not satisfied that the persons to whom he gave permission to ride over his land and who before he was owner were accustomed to ride over Bridge Green ceased to do so as of right merely because he became the owner of Bridge Green.

The evidence about the much heap, the fences erected by Mr. P.D. Morley to keep in his pigs, and the permission granted by Mr. Gittus does not, I think, assist the Objectors to establish their main grounds of objection. Any other ground founded on this evidence would, I think, be outside the objection dated 7th November 1968, and it would, I think, not be "just" (within the meaning of Regulation 26) to allow the Objectors to put it forward.

For the reasons set out above I confirm the registration and order the Objectors to pay the costs incurred by the Council in respect of these proceedings. At the hearing the Objectors and the Council agreed that if I should think fit to make such an order I should specify as the scale of County Court costs applicable that which was notified to the Clerk of the Commissioners as having been agreed between them and that if no such notification were received I should not specify any scale. My order as to costs will be drawn up accordingly.

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.

a. a. Baden Fuller.

Dated this 31st day of May 1972.

Commons Commissioner