COMMONS REGISTRATION ACT 1965

Reference Nos. 35/D/14
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In the Matter of North Meadow Common, Sudbury,
Babergh D., Suffolk

DECISION

These 14 disputes relate to Entry No. 1 in the Land Section and to Entries Nos. 1 and 2 in the Rights Section of Register Unit CL.58 in the Register of Common Land maintained by the Suffolk County Council and to Entry No. 1 in the Land Section and to Entry No. 1 in the Rights Section of Register Unit VG.81 in the Register of Town or Village Greens maintained by the same County Council, and are occasioned by these Entries being in conflict with each other and by Objections Nos. 26 and 36 made by Mr R.W. Wardman as chairman of the Trustees of the Sudbury Common Lands Charity and noted in the Register on 15 July 1970.

I held a hearing for the purpose of inquiring into these disputes at Sudbury on 26 and 27 June 1974. At the hearing, (1) the Trustees of the Sudbury Common Lands Charity ("the Trustees"); Entry No. 1 in the Land Section of Register Unit No. CL. 58 was made pursuant to the application of Mr Wardman as their then chairman; the present trustees are Messrs E.A. Essex, A.H. Moore, H. Banham, C.J. Grimwood, Miss E.M. Mead, Messrs R.G. Playford, R.C. Oliver, G. Mabby, F.W. Robe, H.R. Hills, J.W. Bitten and A.H. Smith; one vacancy) were represented by Mr K.W. Wardle solicitor of Steed & Steed Solicitors of Sudbury; (2) Mr S.J. Blackwell (Entry No. 1 in the Land Section and Entry No. 1 in the Rights Section of Register Unit No. VG. 81 were made pursuant to his applications) was represented by Mr A.C. Phillips solicitor of Bates Wells & Braithwaite Solicitors of Sudbury; (3) Mr A.W. Berry and (4) Mr C.D. Berry (Entries Nos. 1 and 2 in the Rights Section of Register Unit No. CL. 58 were made pursuant to applications made by them respectively) attended in person; and (5) Suffolk County Council as registration authority were represented by Mr I.W. Whittaker solicitor of their Legal Department.

On behalf of the Trustees, Mr Wardle produced the Sudbury Common Lands Act 1838 (1 & 2 Vict. cap. xxxiii), and evidence was given orally (1) by Mr R.J. Marshall (his firm, Steed & Steed, of which he is the senior partner, have acted as solicitors for the Trustees for the last 20 years; he produced a printed pamphlet dated 1911 edited by T.M. Braithwaite and entitled "Sudbury Common Lands: A Synopsis of the Title Deeds", and a copy of a scheme for the administration of the Sudbury Common Lands Charity approved by an order of the High Court made on 6 May 1897 in an action entitled "Attorney-General v. the Mayor, Alderman and Burgesses of the Borough of Sudbury: reference A. 930"); (2) by Mr G. Cook (he is and for something like 35 years has been clerk of the Trustees: he produced a "Keep to the Footpath" notice; a press cutting from the Suffolk & Essex Free Press dated 26 March 1931, being a notice warning those damaging grass etc of prosecution; a press cutting of a notice dated 22 April 1940 being a similar warning; some letters showing that in 1949 the Sudbury Borough Council for an annual payment of 1/- accepted from the Trustees a licence to use a footpath from the Old Bathing Place Bridge to Melford Place; a letter dated 5 November 1946 in which the Council asked the Trustees for permission to place a seat in North Meadow; some letters showing that in 1966 the Council accepted from the Trustees at a token rent of £1 the Old Bathing Place site as an amenity for the public; some letters dated 1969 in which the Council offered with the permission of the Trustees to clear out the ditches; the Trustees Accounts (summarised) for the year ending 30 September 1973, and a notice dated February 1945 sent to all freemen), (3) by Mr B.S. Bitten (he is 78 years of age, has lived in Sudbury all his life and for the last 40 years lived in Melford Road from the garden of which he has a view over North Meadow), (4) by Mr R.C. Cliver (he is and since the death about 4 years ago of Mr Wardman has been chairman of the Trustees, has been a Trustee for about 20 years, and was Mayor of the Borough in 1959), and (5) by Mr C.J. Grimwood (he is a freeman of the Borough, vice-chairman of the Trustees and chairman of the Sudbury Freemens Society). Mr Wardle also relied on an affidavit sworn on 21 June 1974 by Mr S. Willis (he is now 72 years of age, was Ranger of the Trustees from about 10 years ago until about 2 years ago) and on a statement produced by Mr Cook and dated 20.6.74 and signed by Mr J. Porter and a statement produced by Mr C.J. Grimwood, dated 27 June 1974 signed by his aunts Miss G.M. Grimwood and Miss M.E. Grimwood.

The right registered (CL. 58) on the application of Mr A.W. Berry is (not attached to any land):- "The right (i) to depasture two beasts and (ii) of fishing, hunting and hawking over the whole of the land comprised in this register unit"; the right registered (CL. 58) on the application of Mr C.D.Berry is substantially the same. The grounds stated in Objection No. 36 are:- "No such rights exist except in accordance with the scheme for the administration of the Common Lands Charity dated 6 May 1897 and then only for the benefit of freemen and wives of freemen in accordance with regulations made by the Trustees". Mr A.W. Berry gave oral evidence and Mr C.D. Berry made some observations.

The right registered (VG.81) on the application of Mr Blackwell is (not attached to any land): "A right to take fish over the whole of the land comprised in this register unit". The grounds stated in Objection No.26 are: "This land is not a Town or Village Green within the meaning of the Act".

Oral evidence was given on behalf of Mr Blackwell by Mr D.J. Morley (during the last 3 years he has lived in a house in Melford Road which overlooks North Meadow). Oral evidence was also given by Mr Blackwell himself (he was the Borough Surveyor from 31 December 1956 to 31 March 1974: he produced a 60 page foolscap stencilled book dated July 1972, entitled "Sudbury's Heritage", written and prepared by himself, being a collection of notes and evidence and historical background to his registration of North Meadow and other land as town or village green within the meaning of the 1965 Act). Mr Phillips in support of Mr Blackwell's registration put in 317 statements signed by as many different persons as being evidence by such persons; these statements are dated December 1970 or January or February 1971; each is stencilled form but with blank spaces and alternatives for manuscript alterations and additions: each subscriber states how long he had been resident in Sudbury, states his wish to support the registration of (among other meadows) North Meadow as a town or village green and makes — other statements which I shall discuss in detail later in this decision.

On the day after the hearing I walked over most of North Meadow accompanied by Mr Oliver and Mr Blackwell; I also looked at the Peoples Park (about half a mile to the east) and the three other pieces of meadow land hereinafter mentioned.

The land ("North Meadow") comprised in Register Unit Nos. CL.58 and VG.81 is the same, being a wide strip of land containing (the areas given in this and the next paragraph are estimated from the 1956 O.S. map) about 45½ acres; its west boundary (about ¼ of a mile) is the River Stour, and its east boundary (a little longer) is (north part) the Melford Road and (south part) the stream (or drain) by the backs of the gardens of about 80 houses which front on the Melford Road. On about 2 acres at the north and there are some black poplars (planted about 20 years ago); the rest is meadow land which is now and has for many years been grazed by cattle. The built up part of the Borough of Sudbury lies on the other side of the Melford Road to the east and to the south. There is easy access on foot from this built up part, at the south end (a footbridge crossing and a footbridge recrossing the River), in the middle (near the last house on the west side of the Melford Road) and at the north end; so in the result notwithstanding it is necessary to climb over a stile or go through a wicket gate it is practically possible for persons wanting air and exercise to walk over any part of it: for such persons North Meadow must be very attractive; the contrast between the quiet rural nature of North Meadow and of the surrounding land on the west and the busy urban nature of the adjoining land on the east is striking. Obviously North Meadow is an amenity for those living near and elsewhere in Sudbury.

North Meadow is geographically continuous with three other pieces of meadow land, all apparently very similar: (a) a piece ("Fullingpit") containing about 23½ acres and comprising Little Fullingpit Meadow and Great Fullingpit Meadow; (b) a piece ("Freemens") containing about 23 acres and comprising Freemens Great Common and Freemens Little Common; and (c) a piece ("Kings") containing about 19 acres divided by the railway embankment and comprising Kings Marsh.

These three pieces have been registered under the 1965 Act (a) Nos. CL.59/VG.82, (b) Nos. CL.60/VG.83, and (c) Nos. CL.61/VG.84 respectively. There are I understand unresolved disputes about these three pieces similar to those I am now considering, but as these disputes are not now referred to me I am not concerned with them directly. However, because the history of North Meadow is linked with the history of the other three pieces, and because they are all managed by the Trustees, it would be unrealistic to disregard them altogether.

The money value of North Meadow, Fullingpit, Freemens and Kings, (they are all very near the more important parts of the built up area of Sudbury), must, assuming that they could be sold for building purposes (nobody suggested that they would or could —— be sold for such purposes), —— be enormous. They are now an open space and as such, for the inhabitants of the Borough have an immense amenity value. It is therefore not surprising that there are many inhabitants of Sudbury now interested in these pieces of land and particularly interested in the —— disputes relating to North Meadow which I am now considering.

The 1911 Synopsis includes:- A charter undated (? 1260) and made by Richard of Clare, Earl of Gloucester and Hereford and a charter dated 3 Ed. 3 (1330) and made by his descendant Elizabeth de Burgh, Lady of Clare by which he granted and she confirmed his meadow of Portmannescroft and of Kingsmere in the suburbs of Sudbury, to the Burgesses and the whole community of Sudbury. The 1911 Synopsis also includes an indenture dated 23 September 1731 by which J. Knight conveyed "8 acres of freehold meadow ground ... in a certain meadow called Earls Meadow otherwise Fullingpit Meadow ... TO HOLD the same unto the said Mayor and Burgesses of the Borough of Sudbury to and for the use benefit and advantage of themselves and of all other freemen who are or shall hereafter be free of the land belonging to the said Borough for ever.

The 1938 Act recites "Whereas there are in ... Sudbury... certain Arable Lands and also certain Meadow or Pasture Lands called North Meadow, Great Fulling Pit Meadow and Friars Meadow which are subject to the Exercise of Shackage and Commonage for certain Periods of the Year, which Right of Shackage and Commonage is now and has for a great Number of Years been exercised by those Inhabitants and Burgesses to whom the said Mayor ... (etc of Sudbury) have granted the Right of turning out cattle on certain common Meadow or Pasture Lands called Little Fulling Pit Meadow, Portmannescroft and the Kings Marsh ... and whereas additional Whole Year or Common Pasture Land might be provided for the use of such inhabitants, if the said Mayor, Aldermen, and Burgesses were authorised to accept from any Proprietor or Proprietors of such Arable Lands, as an Equivalent for the Release and Discharge of such Arable Lands from such Shackage and Commonage ...". It was by the 1938 Act enacted (in effect) that any owner of any Arable Land could require the Corporation to release his land from the right of shackage provided he compensated the Corporation by conveying other land (or paying money) to the Corporation; the Act set out a form of conveyance by which any such land could be conveyed to the Corporation; and (section XIX) "that in case any Lands so to be conveyed to the said Mayor ... shall ... be other than Meadow or Pasture Land, then the Council shall cause the same ... to be converted ... into Meadow or Pasture Land; and the same ... shall be held by the said Mayor ... to be used and enjoyed by the inhabitants of the said Borough entitled to exercise such Shackage and Commonage in like Manner as the other Common Meadow or Pasture Lands within the said Borough are used and enjoyed and subject to such Regulation ..."

The 1911 Synopsis contained three conveyances dated 13 September 1841, 21 August 1844 and 7 December 1846, being conveyances under the 1838 Act of Arable Lands, parts of what is now North Meadow.

The 1897 scheme provides:- (para 1) The Sudbury Common Lands Charity shall be administered by the body of Trustees therein constituted; (para 3) The Common Lands of the Charity as described in the Schedule (this Schedule included "North Meadow ... 41 A.1 R. 0 P") "are hereby vested in the Official Trustee of Charity Lands and his successors in trust for the Freemen for the time being of Sudbury, according to the provisions of this Scheme"; (para 31) "The Persons entitled to the benefit of this Charity are the Freemen who are for the time being on the Freemen's Roll of the Borough kept by the Town Clerk, as provided by the Municipal Acts and the Widows of such Freemen, including those who do not reside in the Borough ..."; (para 32) "Each Freeman is entitled to depasture two beasts on the lands of the Charity during the year, and each widow is entitled to depasture one beast on such land during the year, each Freeman and Widow paying to the Trustees such sum per beast as shall be fixed from time to time by the Trustees" ..."; (para 33) "If the number of beasts for depasturing of which application is made and granted during any year is less than the number fixed as a limit, the Trustees shall sell the right to grazing so far as surplus grass is concerned or shall at their discretion cause the surplus grass to be made into hay and sold"; (para 34) "Existing rights of pasturage over or of recreation in or [illegible] the common lands of the Charity shall not be prejudicially affected by this Scheme, but the Trustees may from time to time make regulations for the exercise of such rights"; (Para 35) "The accounts of the Trustees ... The balance of money received in any year, after paying for officers, rates and management, shall be divided among the Freemen and Widows who have not depastured any beasts during the year, and have not sold or parted with their right to do so, so that each such Freeman shall be entitled to twice the amount to be paid to each Widow".

For some years before 1940, North Meadow was grazed by the cows of local milkmen; they did this by paying the Freemen and exercising their rights ——————————→ under paragraph 32 of the 1897 Scheme; if any of the Freemen making this arrangement was worse off in the share out under paragraph 35, the milkmen made up the difference. In about 1946, there was a meeting attended by about 20 or 30 Freemen; at that time there were about 140 Freemen on the Roll; those present at the meeting favoured the Trustees every year selling (under paragraph 33 of the Scheme) the right of grazing on North Meadow, and this is what they have done ever since. After the meeting (possibly earlier) grazing by Freemen of their own beasts discontinued. The qualification for entry on the Roll of Freemen (locally known as the Cocket Book) is and for many years has been, being the son of a Freeman, being born in the Borough and having personally attended the Mayor to demand admission (a demand which the Mayor was not entitled to refuse any otherwise qualified person) to the Roll. The number of Freemen since 1946 has got less, there being for the year ending 30 September 1973 60 Freemen and 24 Widows qualified under the Scheme. In that year from the income of the Charity, £8 and £4 was under paragraph 35 of the Scheme paid to each Freeman and each Widow.

In the course of the hearing, Mr Phillips asked questions of those giving oral evidence for the Trustees suggesting (in effect as I understood the questions) that the legal position and management of the Trustees was extraordinary and not in the best interests of the inhabitants of the Borough. As to the legal position: in a catalogue of all charities (mostly concerned with the relief of poverty and sickness and the advancement of religion and education) the Sudbury Common Lands Charity may be extraordinary; but it is not unique; the validity in law of charities which benefit regardless of need, a section of the inhabitants of a locality was recognised generally by the House of Lords in Goodman v. Saltash (1882) 7 A.C. 233 and particularly as regards freemen by the Court of Appeal in re Norwich (1889) 11 Ch. D. 298. As to management; although some persons may think that the Trustees solution to some of the problems (many would I think have been very perplexing) arising were not the best possible, for my part I decline to criticise any of their decisions which it was at the hearing said they had made. In my view the suggested obsolete nature of the Charity and the possibility of some benefit resulting to the inhabitants of Sudbury by some amendment of the 1897 Scheme, has no relevance to any question which I have to determine. But as the suggestions were made I record that in my view those who gave oral evidence on behalf of the Trustees did so fairly and to the best of their knowledge and belief, and I accept their evidence as such.

It was established (this was not I think disputed) that the Trustees and their predecessors under the 1897 Scheme are now and have been for many years in possession of North Meadow as managing trustees under the Scheme, and that North Meadow has been ever since the Scheme was made, vested for an estate in fee simple in the Official Trustee of Charity Lands as successor in title of the Mayor Aldermen and Burgesses of the Borough of Sudbury ("the Corporation"). At the hearing nearly all the discussion and evidence was directed to the question whether North Meadow should be registered in the Register of Common Land or registered in the Register of Town or Village Greens (it was not suggested that North Meadow should be registered in neither Register). Apart from the 1965 Act, land may at the same time be both common land and a town or village green; however it is clear from section 22 that for the purposes of the Act, land which is a town or village green cannot be common land. So I will consider first whether North Meadow is a town or village green within the section 22 definition 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 twenty years".

In my opinion the reference to "existing rights ... of recreation ..." in paragraph 34 of the 1897 Scheme, although some evidence that in 1897 somebody thought that such rights might exist, is not evidence that they did exist or evidence that the rights which it was thought might exist were customary rights such as mentioned in the definition. Further the mere fact that 317 persons signed the statements above mentioned in support of the registration of North Meadow as a town or village green by itself provides no evidence that North Meadow is within the definition.

In each of the 317 statements, the subscriber says that he has done one or more of the following activities (the numbers in brackets indicate the number of subscribers who did ———— each activity):- (a) Exercised dog (196); (b) Played ball games including cricket or football (161); (c) Sat (215); (d) Sunbathed (151); (e) Slept (69); (f) Picnicked (155); (g) Paddled in the river and streams (179); (h) Swum in the rivers and pools (120); (i) Played childrens' games and chases (178); (j) Been on school outings (124); (k) Been on Scout Guide or Cadet outings and exercises (81); (l) Been on cross country runs (82); (m) Collected flowers, conkers, blackberries, etc (198); (n) Flown model aeroplanes or kites (87); (o) Taken part in snowball fights (174); (p) Ice skated on frozen meadows (123); (q) Launched and moored boats and canoes from the banks (114); (r) Done bird and animal watching (147); and (s) Ridden horses or ponies (24). The 317 statements were either obtained by Mr Blackwell (and possibly some others) by personal application or as a result of the spontaneous interest of the subscriber who when visiting the Public Library found a heap of such forms available for his signature.

Mr Phillips argued (in effect):- First, all the activities (a) to (s) are within the words "sports and pastimes" in the above quoted definition and because each subscriber has on the form stated that he has been a resident of Sudbury it follows that at least 317 inhabitants of the locality have indulged in sports and pastimes as required by the definition. Secondly, because in each form the subscriber answers "No" to the two questions "I have received or seen a written warning from the Clerk to the Trustees not to use these meadows for any purpose?" and "I have been prevented by a ranger employed by the Trustees from using these meadows?" and because I should not properly conclude that the subscribers did the activities they mentioned as trespassers, it follows that the indulgence in sports and pastimes was "as of right" as also required by the definition.

As to the first argument:-

In 1795 the Court made a distinction between a claim that all the inhabitants for the time being of a parish have a customary right of exercising and playing in sports and pastimes and a claim that all the persons for the time being in a parish had such a customary right, holding that the former claim was known to the law and could be established but the latter claim was not recognised by law and could not be established, see Fitch v. Rawlings 2 Hy. Bl. 393. This case was accepted as correctly stating the law in Edwards v. Jenkins 1896 1 Ch. 308. In my opinion it still states the law and I am bound by it. The distinction may at first appear somewhat fine, and it is easy to imagine occasions when it would be difficult to say whether a person participating in a sport or pastime was doing so because he was an inhabitant or because he happened to be in the locality. But although in any particular case it may be difficult to say which side of the dividing line it comes, the distinction itself is I think clear enough. For example a person who plays in or watches a village cricket match is on one side of the line; he does not expect to play or watch first class cricket (although of course some village cricket is of a very high class), but expects in addition to the pleasure of cricket he will have the pleasure of meeting other inhabitants in the village; he participates as an inhabitant. But a person who goes for a walk for air or exercise, or picnics in some quiet place with his family is on the other side of the line, because his

activities have nothing to do with the other inhabitants. The distinction is in effect recognised by section 193 of the Law of Property Act 1925: by this section members of the public have rights of access for air and exercise over certain commons; to exercise these rights a member of the public need not be a local inhabitant.

In my opinion the law — determined in Fitch v. Rawlings [6] be applicable to evidence in support of a claim of a customary right is equally applicable (that [6] in support of a claim that land is within the last part of the above quoted definition relating to indulgence in sports and pastimes "for not less than twenty years".

I conclude therefore that I am not concerned to determine whether any or all of the activities (a) to (s) mentioned in the 317 statements do or do not come within the words "sports and pastimes", as these words are commonly used in isolation and independently of the words "the inhabitants of any locality"; I am concerned to consider whether the activities mentioned are within these words when used in the composite expression "the inhabitants of a locality (Sudbury) have indulged in (lawful) sports and pastimes". None of the 317 statements contain anything dealing with this question, and on a consideration of such statements alone I can form no idea as to how the subscribers if they had given oral evidence before me would have amplified their statements if they had been asked to deal with this aspect of the matter. Mr Blackwell in his book — "Sudbury Heritage" says: "The inhabitants at large and their children have indisputably used these commons for recreation as of right since their existence"; however in his oral evidence he made it clear that this statement was based on his researches and the general information acquired by him as Borough Surveyor and as a resident; he did not describe how he or anybody else had actually used North Meadow; in my opinion neither his general statement nor any of his other evidence provides any factual support for either of the arguments of Mr Phillips. Mr Morley described how he walked out with his children and a dog over North Meadow; along the footpath to Brundon, by the River, and round and about; ever since he had moved to Sudbury he understood North Meadow, being common land, he had a right to do what he described; indeed when he bought his house, one of the attractions was that he was told that North Meadow was a permanent open space he never mentioned section 194 of the Law of Property Act 1925, but in my opinion his activities can be ascribed to that section, and do not amount to anything which can properly be described as pastimes indulged in by an inhabitant of, rather than by a person who happens to be in, Sudbury, within the meaning of the distinction made in Fitch v. Rawlings supra.

It was not I think disputed that many persons in Sudbury have done the things described as activities in the 317 statements (it was said that I should not accept these statements without qualification, because there had been no opportunity to cross-examine the subscribers). From what I saw of North Meadow, I conclude that many of the activities must have been done; the temptation and the opportunity to do them and the practical impossibility of stopping them, were all very obvious when I walked over North Meadow.

But I cannot conclude that these activities were indulged in by the inhabitants of Sudbury in any now relevant sense. It is perhaps possible to imagine circumstances in which persons could properly be described as exercising a dog, sitting, sunbathing, sleeping, picnicking, paddling, swimming, snowballing etc as inhabitants, but normally people do not do these things as inhabitants; they do them because they happen to be in a place where it is possible and pleasurable to do them. Such activities as School, Guide, Cadet, Outings and exercises are perhaps as often as not organised so as to properly come within the description of sports and pastimes indulged in by the inhabitants of the locality; but they are not necessarily within this description any more than taking a dog for a walk, and I decline on the unexplained contents of the 317 statements to draw any conclusion as to the nature of any of these last mentioned activities in any now relevant sense.

As to the second argument:-

As to the meaning of the words "as of right", 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 "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).

In my opinion the above observations show that I am in no such dilemma as was put to me by Mr Phillips, that I can properly conclude that the subscribers of the 317 statements did not do the activities mentioned "as of right" without at the same time finding that they were trespassers or that they are unreliable witnesses.

The substance of the mattter is I think that all or nearly all the activities mentioned are the sort of activities which many respectable people with an interest in the countryside do on agricultural land belonging to others, which they rightly think no one will find objectionable and which the owner in fact tolerates as unobjectionable. The matter was I think well put by Mr Oliver when he said: "We have to live with our neighbours". It may be that the trustees are because of their local interests, more tolerant than others would be, but any such tolerance cannot I think be held against them.

The above quoted observations of the Court of Appeal in my opinion show that the answers "No" given to the above quoted questions from the 317 statements are very far from showing that the activities mentioned were as of right. Whether they were must I think be determined on the other evidence.

The evidence led by the Trustees showed that North Meadow has not as far as the witnesses knew been used for organised games or recreation except with the permission of the Trustees and that the only permission given was for the South Suffolk Agricultural Show and for certain Old Time (Caravan) Rallies. North Meadow is not suitable for organised games; Mr Morley's description (which accords with what I saw) was to the effect:- It is rough under foot, and you could not play cricket or any games requiring a bounce; you just knock a ball around.

The Trustees have always been concerned with grazing North Meadow. Mr Oliver said that the grazing on North Meadow (although the grass may not look nice because of the patches of nettles) is good for cattle except for cows in calf (there are too many stray dogs). Mr Willis said he had remonstrated with children playing on the grass insisted they should keep to the public paths, and had stopped people with model aeroplanes because it frightened the cattle. Mr Cook described how the Trustees were concerned with grazing; although as a boy he played there, the Ranger would not allow boys on the grass until after the cattle had eaten the first feed. North Meadow has always been fenced as it now is; his oral evidence was confirmed by the notice and the two press cuttings produced as above mentioned.

On appearance alone it is most unlikely that persons would as of right engage in sports and pastimes on North Meadow Fullingpit, Freemens, and Kings; they contain much too large an area; there is no apparent reason for selecting North Meadow or any part of North Meadow as being the area over which any such right exists or could exist.

As above stated the Trustees are in possession of North Meadow.

The matters mentioned in the preceeding paragraphs are all indications that any recreational activities such as are mentioned in the 317 statements were not done as of right. I have evidence which could (having regard to Beckett v. Lyons supra) be regarded as indicating the contrary. So even assuming that any of these activities (e.g. School and Scout outings) could properly be regarded (in accordance with the first argument) as sports and pastimes indulged in by the inhabitants of Sudbury, they were not such as to support (in accordance with the second argument) the existence of any customary right to indulge in them or the inclusion of North Meadow in the last part of the above quoted section 22 definition. I cannot think of any better arguments than those put forward by Mr Phillips in favour of North Meadow being properly registerable as a town or village green. In my opinion it should not have been so registered.

The right to take fish registered on the application of Mr Blackwell, in the Rights Section of the Register of Town or Village Greens does not automatically fail if North Meadow is not a town or village green, because such registration could be transferred to the Register of Common Lands. As registered the right is in gross (i.e. personal to Mr Blackwell); but he explained that he made the registration as a Burgess and with a view to preserving the rights of, and without any intention of benefiting himself above other Burgesses. However there was no evidence in support of the registration either as it stands or as it would be if it was modified so as to make it applicable to Burgesses; for the reasons given above, I do not regard such of the 317 statements as contained a "Yes" to the question: "I have fished from the river banks in these meadows?", as providing any such evidence.

After some discussion Mr Phillips said that Mr Blackwell was not pressing me to confirm this registration, and I need therefore say no more about it.

Mr A.W. Berry contended that the Freemen of the Borough had rights of pasture, fishing, hunting and hawking quite apart from the 1897 Scheme.

In support of this contention, he referred me to the 1838 Act particularly section XIX, to the Municipal Corporations Act 1835 sections 2 et seq., by which the rights of freemen are preserved, and to the subsequent Acts (Municipal Corporations Act 1882 sections 201 et seq., Local Government Act 1932 sections 159 et seq., and Local Government Act 1972 sections 248 et seq.) successively replacing the 1835 Act; he quoted from a Charter of H.M. King Charles 2, from a report of the Judges to the House of Lords on the Bill which ultimately became the 1838 Act, from a report of a meeting of the Town Council held in 1859 and from the certificate of the Charity Commissioners given to the High Court before the commencement of the proceedings which led to the 1897 Scheme. He also gave me some information as to his great uncle Tom (a freeman) having been in 1857 and 1859 acquitted of alleged poaching by claiming he was a freeman and about the activities of his uncle Henry.

Messrs A.W. and C.D. Berry made it clear that their registerations were made as Freemen and to protect the rights of Freemen; they never had any intention of getting a benefit for themselves which could not be shared with present and future Freemen. They also said they were not suggesting that the Trustees as now constituted would be likely to stop any Freemen depasturing cattle.

Nevertheless, there may be much substance in the point raised. If the right of each Freeman is only as a beneficiary under the 1897 Scheme or as an object of the Charity thereby regulated, his rights might perhaps be prejudicially affected by some order (e.g. one altering the Scheme or allowing a sale) of the High Court or of the Charity Commissioners. If he has a right outside the Scheme and the Charity, he might perhaps prevent any sale which has not been made with the consent of all the Freemen. It was said that the Trustees in 1969 disposed of Friary Meadow to the Corporation, and that the Freemen and their Widows got more in the annual share out, because the income of the proceeds increased the income of the Charity; Mr Blackwell pointed out that if this result could properly be regarded as a precedent for what might happen to the capital of the Charity if all its lands were so disposed of (nobody suggested that any of the Trustees had this in mind), the position of the Freemen would be something like that of the shareholders of a property company.

The evidence given in 1956 to the Royal Commission on Common Land about Chipping Sodbury (vol. 13), about the Freemen of Huntingdon (vol. 27) and about the Freemen of Newcastle-upon-Tyne (Appendix) indicates the variety of the questions and of the possible answers in cases in some respects resembling that of Sudbury. Although it is clear that I have no jurisdiction to express any opinion as to how these questions might be answered should they ever be raised in Sudbury before those who have jurisdiction, I must nevertheless deal with the point raised (as so far

it directly affects registration under the 1965 Act.

In old times many commons were grazed on a town or even a county basis, see W.G. Hoskins & C.D. Stamp on Common Lands of England and Wales (1962) chapter I. But in 1607, the Court held that as a general rule, rights of common cannot be owned by a fluctuating class of persons, see Gateward's Case, Cro. Jac. 152, and it was in 1874 treated by the Court of Appeal as a settled rule that you cannot have a right of taking a profit from land vested in a shifting body of persons like the inhabitants of a town or the residence of a particular district, see Sewers v. Glasse L.R. 7 Ch. 456 at page 465. Exceptionally to this general rule, a class of inhabitants such as freemen may take if the Court can find that there is a valid charitable trust for the benefit of the locality, see Goodman v. Saltash supra and re Norwich supra.

Applying the principles outlined above, it follows I think that unless the Freemen of Sudbury have rights in their capacity as persons entitled to benefit under the Sudbury Common Lands Charity, they as Freemen cannot have any rights at all.

As regards grazing, although the documents made before 1860 do not particularly mention the charitable nature of the rights ascribed to Freemen, it had before the 1897 Scheme was made become clear law that such rights could only be supported if they were charitable. In my opinion such rights so far as they then existed are now regulated by the 1897 Scheme. So far as not regulated by that Scheme or any other Scheme which may be substituted for it, the rights claimed by Messrs Berry do not in my opinion exist, because in law they cannot exist. Quite apart from these legal considerations, there was no evidence that any Freemen had since the Scheme was made ever exercised any grazing rights except under the Scheme. I cannot base any finding on Mr Berry's vague description of the nineteenth century activities of his uncles.

As regards fishing, hunting, hawking no such rights are mentioned in the 1897 Scheme. The documents which mention such rights which were referred to by Mr Berry, so far as I can judge their effect from the statement he left with me, could as well be rights held by the Corporation as part of their corporate property as be rights held by the Corporation on a charitable trust for the Freemen. The absence of any mention of these rights in the 1897 Scheme in my view shows that when the Scheme was made any such rights were either considered to be non existent or to be corporate property. Whether if they were then corporate property they are still vested in the Corporation or have been abandoned because they were considered worthless or for any other reason, I am not now concerned. Quite apart from these legal considerations there was no evidence that any ~~other~~ rights had been exercised within living memory by any Freeman.

I conclude therefore that Objection No. 36 succeeds apart from two minor points. First, the Freemens' rights are not (as stated in the objection) "in accordance with the Scheme"; they are as beneficiaries under the Charity regulated by the Scheme; there may be a difference; the Scheme might be altered; the Charity save as otherwise allowed by Statute, continues forever. Secondly, the reference in the Objection to regulations made by the Trustees" may be misleading; the Trustees have never made any rules or byelaws applicable to the Freemen in the sense in which the word "regulations" is commonly understood; although of course North Meadow has in a sense been "regulated" by the way the Trustees have managed it.

Mr Wardle indicated that the Trustee had no objection to the Rights Registration of Messrs Berry remaining on the register provided it is modified so as to give effect to Objection No. 36 and he conceded that even if the registration was not confirmed, the Trustees would nevertheless give effect to the grazing rights of the freemen in accordance with the 1897 Scheme. As a general rule, a registration in a Rights Section which is agreed by the proved owner of the land for its validity requires no further evidence in support. However as the rights claimed are unusual and are claimed on behalf of Freemen generally, I should think in this case consider whether they are in law "rights of common" within the definition in section 22 of the 1965 Act.

In 1813, it was decided that a pauper who as a Freeman of Alnwick was entitled to a common of pasture on a Moor had no estate in the land within the meaning of the Poor Act 1663 and was therefore legally removeable, see R.v. Warkworth 1 M & Selwyn 472. In the course of the case, Le Blanc J. said: "this is not in strictness a right of common, nor can it properly be said to be a tenement; it is a mere franchise ... not falling within the legal definition of a right of common". In R.v. Belford (1829) 10 B & C. 54, the earlier case of R.v. Warkworth was treated as deciding no more than that a freeman entitled as such to local privileges has no estate legal or equitable in land.

The possibility of freeman having a "share" of "the common lands" is recognised in Section 2 of the 1835 Act, section 205 or the 1882 Act, and Section 262 of the 1933 Act.

As a general rule, a possible object of a Charity cannot properly be regarded as having any "rights"; he cannot except as a relator in an action by the Attorney-General bring proceedings to obtain benefits. But a freeman is exceptional in this respect, and may commence proceedings alone, see Halsbury Laws of England (4th edition) vol. 5 para. 938 and Prestney v. Colchester (1882) 21 Ch. D. 111; although some of the observations in this case and in Stanley v. Norwich (1887) 3 T.L.R. 506 based on it, may require reconsideration in the light of re Norwich (1889) supra, it is I think still the law that a freeman may bring proceedings alone, see the observation of Lord Denning in Wyld v. Silver 1963 1 Ch. 243 at page 257.

Having regard to the above considerations, I am of the opinion that the above quoted dictum of Le Blanc J. in relation to the 1663 Act, does not oblige me to construe the 1965 Act (the subject matter of which is quite different) otherwise than in accordance with the natural meaning of the words "rights of common" as used in 1965. The Freemen under the Sudbury Common Lands Charity have privileges which can sensibly be described as "rights"; the 1897 Scheme in paragraph 32 refers to the Freeman's "right of depasturing". And these rights are I think rights of common within the natural meaning of these words.

Accordingly, I conclude that the rights of the Freemen of Sudbury notwithstanding that they can only take effect as objects of the Charity, are properly registerable under the 1965 Act.

As to the registration of North Meadow as Common Land:- As a general rule, a registration in the Land Section which is made on the application of the proved owner of the land, for its validity (provided that it is conceded or established that the land is not a town or village green) requires no further evidence in support, because only the owner could be adversely affected, and the registration must in the ordinary way be beneficial to the public. However as Mr Marshall in his evidence very candidly indicated that when advising the Trustees to apply for the registration, he had had some doubts, I think I should record that North Meadow being in my opinion subject to rights of common for the reasons above set out, is within the definition of common land in the 1965 Act and therefore registerable under it.

Summing the matter up, for the above reasons, I refuse to confirm the registrations at Entry No. 1 in the Land Section and at Entry No. 1 in the Rights Section of Register Unit No. VG.81 in the Register of Town or Village Greens, I confirm the registration at Entry No. 1 in the Land Section of Register Unit No. CL.58 in the Register of Common Land without any modification and I confirm the registrations at Entries Nos. 1 and 2 in the Rights Section of the said Register Unit No.CL.58 with the following modifications:- For all the words in column 4 of the said Section, relating to each of the said two Entries, there shall be substituted in each case, the words "The right of every Freeman for the time being on the Freemens Roll of the Borough of Sudbury to graze two beasts and of every Widow of every such Freeman to graze one beast in his or her capacity as a person entitled to the benefit of the Charity called "The Sudbury Common Lands Charity" and now being administered and managed in accordance with a Scheme approved of the High Court of Justice (Chancery Division) on 6 May 1897".

I record that in preparing this decision I am much indebted to Mr Wardle and Mr Phillips for the trouble they took in presenting the documents facts and arguments on which they relied. I record also that although I have decided against Mr Blackwell I found his book "Sudbury Heritage" helpful and interesting, and that in my view the questions which were raised by him or on his behalf were proper for public discussion at an inquiry such as I held. I am relieved of having to consider whether I should because he was unsuccessful order him to pay any part of the costs, because since the hearing, the Solicitors for the Trustees have written to the Clerk of the Commons Commissioners saying that the Trustees are content that each party should bear his own 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 29th day of November 1974

a. a. Baden Fuller

Commons Commissioner