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COMMONS REGISTRATION ACT 1965 Reference Nos 211/D/79-80

In the Matter of The Sands, Durham City, Co. Durham
(No. 1)

DECISION

These disputes relate to the registration at Entry No 1 in the Land Section of Register Unit No.VG.97 in the Register of Town or Village Greens maintained by the Durham County Council and are occasioned by Objection No. 4 made by the former City of Durham Council, and noted in the Register on 29 October 1970 and the conflicting registration at Entry No 1 in the Land Section of Register Unit No.CL.29 in the Register of Common Land maintained by the Council.

I held a hearing for the purpose of inquiring into the dispute at Durham on 2 July 1980. The hearing was attended by Professor B Smythe, the Chairman of the Sands Area Residents Association, the applicant for the registration, and by Mr Robin Campbell, of Counsel, on behalf of the Durham City Council, the successor authority of the Objector.

I was informed that it was not desired to support the registration of a part of the land comprised in the Register Unit indicated on a plan which was put in. It was also agreed that the remainder is subject to grazing rights belonging to the Trustees and Wardens of the Freeman of the City of Durham.

The land in question was formerly part of the episcopal estates of the see of Durham and was conveyed to the former Durham Corporation by an indenture made 20 December 1860 between (1) The Ecclesiastical Commissioners for England (2) The Mayor, Alderman and Citizens of the City of Durham. By articles of agreement made 3 November 1897 the Trustees and Wardens of the Freeman agreed to take the herbage growing on the land so that the land might be used as a public recreation ground, excepting and reserving for the use of the Freeman of the City the power for the Freeman to use and occupy the land for one full week prior to and one full week after Easter Sunday in each year for the purpose of carrying on Sports and Pastimes as the same had been carried on for several years then past and excepting and reserving on behalf of the Freeman the power to occupy and let sufficient space for the purpose of erecting a show, theatre, menagerie, circus, or place of similar entertainment. There was reserved a rent of £5 a year payable to the Trustees and Wardens to be in addition to the sum of £1 a year paid by the Council to the Freeman in respect of the fairs held on the land.

Since this agreement the land has been maintained as public walks or pleasure grounds under Section 164 of the Public Health Act 1875.

There is nothing in the agreement of 1897 to indicate that the land was then subject to any right of the inhabitants of the locality to indulge in sports and pastimes on it. It appears that the Freeman had used and enjoyed it for the purpose of carrying on sports and pastimes during the weeks before and after Easter Sunday, but not every inhabitant of the city was a freeman or entitled to be a freeman.

Professor Smythe did not contend that the inhabitants of the locality had a customary right to indulge in lawful sports and pastimes on the land, but he argued that the land fell within the third limb of the definition of "town or village green" in Section 22 (1) of the Commons Registration Act 1965 because the inhabitants of the locality had so indulged as of right for not less than 20 years.

There was evidence that the land had in fact been used for lawful sports and pastimes for many years, but there was nothing to show that any of the persons who had used it for that purpose were doing other than using a public walk or pleasure ground provided under section 164 of the Public Health Act 1875. Professor Smythe then argued that since a local authority can only act for the benefit of the inhabitants of its area, the public referred to in the Act of 1875 must be equated with the inhabitants of the area of the local authority.

I find myself unable to accept this argument. There is a clear and well-recognised distinction between members of the public and the inhabitants of a locality: see Hammerton v Honey (1876), 24 W R 603. There is nothing in the context of Section 164 of the Public Health Act 1875 to justify the construction of the phrase " Public Walks or Pleasure Grounds" as meaning "Walks or Pleasure Grounds for the exclusive use of the inhabitants of the area of the Urban Authority".

For these reasons I refuse to 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 25th day of July 1980

Chief Commons Commissioner