



In the Matter of Badenhill Common,
Tytherington, Avon.

DECISION

This dispute relates to the registration at Entry No. 1 in the Land section of Register Unit No. CL 56 in the Register of Common Land maintained by the former Gloucestershire County Council and is occasioned by Objection No. Ob 2 made by Brock Bros (Transport) Ltd and noted in the Register on 17 February 1969.

I held a hearing for the purpose of inquiring into the dispute at Bath on 14 July 1978. The hearing was attended by Mr P Clayden, solicitor, on behalf of the Commons, Open Spaces and Footpaths Preservation Society, the applicant for the registration, Mr N Micklem, Q.C., on behalf of the Objector, Mr J Petch, solicitor, on behalf of the Northavon District Council, and Mr W T Humphries, the Clerk of the Tytherington Parish Council.

The Objection relates to only a part of the land comprised in the Register Unit. Mr Clayden stated that he did not wish to support the registration in so far as it related to the land the subject of the Objection, and Mr Petch and Mr Humphries agreed with that course. Mr Micklem, however, asked me to refuse to confirm the registration in respect of the whole of the land comprised in the Register unit on the ground that none of it fell within the definition of "common land" in section 22(1) of the Commons Registration Act 1965.

There is no entry in the Rights section of the Register Unit, so that the land can only fall within the definition of "common land" if it is waste land of a manor.

Mr Clayden supported the registration by relying upon a deed of declaration made 24 February 1932 by Mr Hardwicke Lloyd Hardwicke, therein described as lord of the manor of Tytherington. It was recited that the land comprised in the Register Unit consisted of unenclosed waste lands belonging to the manor of Tytherington, and it was declared that section 193 of the Law of Property Act 1925 was to apply to the land until Mr Hardwicke or his personal representatives or assigns should by deed revoke the deed. The deed has not been revoked.

Mr Micklem drew my attention to the judgment of the Court of Appeal in Att. Gen. v Brock Brothers (Transport) Ltd (1972) unrep. on an appeal from a judgment of His Honour Judge Forrest given at the Thornbury County Court in July 1971. The proceedings were instituted by the Attorney General in September, 1970 on the relation of the former Thornbury Rural District Council and claimed various declarations and consequential relief (including mandatory injunctions) in respect of certain works which the defendants had admittedly carried out on the land the subject of the objection. One of the basic allegations of the plaintiffs was that this bit of land was at all material times part of the larger area of about 3 acres 3 perches constituting and known as Baden Hill Common, being the land comprised in the Register Unit.



The activities of the defendants which led to the institution of the proceedings against them had proceeded uninterruptedly for several years entirely without protest of any official kind, though what they did was literally "on a hill-top" and visible for all to see. The Brock family had started their transport business at Baden Hill in a small way in 1946; in 1950 they started erecting an office block; in 1952 they put sleepers around a parking area; later they erected a big workshop, for which planning permission was granted by the former Gloucestershire County Council on January 28, 1960; and they planted a boundary of saplings. The same year they also installed two petrol pumps and the former Rural District Council granted them a licence to install a 1,000 gallon petrol storage tank, a licence which has been annually renewed ever since. Between 1961 and 1963 they tipped on sloping land before covering with hard core the resulting levelled area, and the Parish Council's Minutes of November 27, 1961, recorded that "It was reported that Brock Brothers had carried out tidying-up operations on their site at Baden Hill Common to the Council's satisfaction." In 1967 a second office was erected and in 1968 a light standard was put up. Throughout the years, the land so dealt with by the defendants had been utilised by them in connection with their transport business.

The Court of Appeal, reversing the judgment of Judge Forrest, held that the land the subject of the Objection was not waste land of the manor of Tytherington and that the deed of declaration had no legal effect. Although only the land the subject of the Objection was directly affected by this decision, the ratio decidendi was equally applicable to the remainder of the land comprised in the Register Unit.

Although the Objector is not entitled to rely on any ground not stated in the Objection, I have power under ref. 26 of the Commons Commissioners Regulations 1971, if I think it just in all the circumstances, to allow the Objector to put forward such additional grounds of objection as appear to me to be material.

The decision is Att.-Gen. v. Brock Brothers (Transport) Ltd is res judicata only in so far as the land the subject of the Objection is concerned and only against the Northavon District Council as successor to the former Thornbury District Council. It would therefore be open to the Commons, Open Spaces and Footpaths Preservation Society and the Tytherington Parish Council to contest the matter de novo. However, if the evidence adduced before me was exactly the same as that adduced before Judge Forrest, I should be bound to follow the decision of the Court of Appeal on the law to be applied to that evidence. On the other hand, the Society and the Parish Council might be able to adduce further evidence, and without knowing what that evidence might be, it is impossible to hazard a guess at what the ultimate outcome might be.

It is apparent from the judgment of the Court of Appeal that to allow the Objector to contend that none of the land comprised in the Register Unit fell within the definition of "common land" in section 22(1) of the Act of 1965 could lead to a lengthy and expensive hearing. It does not appear that the Objector has any practical concern with the part of the land which is not the subject of the Objection, except possibly in so far as it might afford scope for the extension of the activities which led to the proceedings in Att.-Gen. v. Brock Brothers (Transport) Ltd.

Having regard to all these circumstances, I have come to the conclusion that it would not be just to allow the Objector to put forward a contention that the land not the subject of the Objection is not "common land" as defined in section 22(1) of the Act of 1965. In coming to this conclusion I am not



unmindful of the fact that it will result in leaving on the Register land which, on the material before me, appears to be unlikely to be "common land" as defined in section 22(1) of the Act of 1965. I do not, however, feel troubled by this consideration, since the scheme of the Act is not to ascertain whether all land registered is properly registered. In the absence of a valid objection, a registration becomes final under section 7, however nonsensical it may be. It often becomes apparent during hearings concerning the ownership of unclaimed land under section 8 of the Act that the land ought never to have been registered in the first place, despite which the registration has become final in the absence of any valid objection. If this case is another example of the inclusion in the Register of land which would on investigation turn out to have been wrongly included, it will be no injustice to the Objector.

For these reasons I confirm the registration with the following modification:- namely the exclusion of the land the subject of the Objection.

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 4th day of August 1978

CHIEF COMMONS COMMISSIONER