



COMMONS REGISTRATION ACT 1965

Reference No.5/D/3

In the Matter of Kinsley Moss,
Norley, Cheshire.

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No.C.L.9 in the Register of Common Land maintained by the Cheshire County Council and is occasioned by Objection No.3 made by Mrs. H.C. Ingram, Mr.C.C. Posnett, and Mr. H.W. Burrell, and noted in the Register on 2nd January 1969.

I held a hearing for the purpose of inquiring into the dispute at Chester on 15th May 1973. The hearing was attended by Mr. F. Blain, the Clerk of the Norley Parish Council, which applied for the registration, and by Mr. J. Fitzhugh, Q.C. for the Objectors.

There being no entry in the Rights Section of the Register Unit, Mr. Fitzhugh took the point that the land in question cannot fall within the definition of "common land" in section 22(1) of the Commons Registration Act 1965 as land subject to rights of common. Mr. Fitzhugh argued that by the operation of section 1(2)(b) of the Act and article 2 of the Commons Registration (Time Limits) Order 1966 any rights of common over the land ceased to be exercisable after 31st March 1970 because they had not been registered. This being so, Mr. Fitzhugh argued that as a matter of law I am bound to refuse to confirm the registration in the Land Section of the Register Unit unless there is evidence to bring the land within the second limb of the definition of "common land" in section 22(1) of the Act as waste land of a manor not subject to rights of common.

In my view the answer to this point is to be found in section 10 of the Act, which provides that the registration of any land as common land shall be conclusive evidence of the matter registered, as at the date of registration, except where the registration is provisional only. I construe this section as imposing on a Commons Commissioner to whom a disputed (and therefore provisional) registration has been referred the duty to base his decision whether to confirm the registration, and so make it become final under section 6(1) of the Act, upon the position as at the date of registration.

The only provision in the Act relating to the process of registration as common land is section 4(1), by which a registration authority is required to register any land as common land on application duly made to it. Section 4(5) makes every registration provisional in the first place, but while the Act provides in sections 6(1) and 7(1) for the conversion of provisional registrations into final registrations, there is no requirement that land subject to a final registration shall be registered a second time: all that is required is that the registration authority shall indicate in the register the fact that the registration has become final: see sections 6(2) and 7(2). I therefore construe the phrase "the date of registration" in section 10 as meaning the date on which the registration is made under section 4(1) and not



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the date on which the registration becomes final under section 6(1) or section 7(1), as the case may be.

The date of registration in this case was 31st March 1967. I therefore propose to decide this case by considering whether there was any right of common in existence on that date, it not being contended by Mr. Blain that the land in question was waste land of any manor.

Mr. Blain based his case for the existence of a right of common upon an inclosure award made on 17th December 1819 under an Act for inclosing the Forest of Delamere passed in 1812 (52 Geo. III c. cxxxvi). This Act was amended by two Acts passed in 1814 and 1818, but the provisions of the amending Acts have no relevance to the present case. There was produced to me a copy of what purported to be the Act of 1812, but with the sections unnumbered, which indicates that the document is a copy of the Bill. For the purposes of this decision I have used a copy of the Act as printed by the King's Printer with the sections numbered.

Although there is some discrepancy between the map referred to in the inclosure award and the register map, it appears that the registration is intended to comprise the land numbered 71 on the award map. This land is described in the award as a "moss pit or turbary". The Commissioners stated that they had found it impracticable to drain it so as to make it sufficiently dry to be used for arable or pasture land, and they awarded and set it out to remain open and uninclosed to be held and enjoyed by such person or persons as before the passing of the Act of 1812 had of right held, used or enjoyed it. This they were empowered to do by section 50 of the Act.

After the award of 1819 there is a gap in the evidence adduced before me until an indenture dated 18th September 1919 made between (1) Sir Philip Henry Brian Grey Egerton; (2) Oswald Mosley Leigh and John Cullimore; and (3) Robert Harold Posnett, whereby certain land was conveyed to Mr. Posnett. It appears from the plan drawn on the indenture that the land comprised in this indenture included the whole of the "moss pit", but not quite the whole of the land shown on the register map. The conveyance is not stated to be subject to any rights of other persons. There is also a statutory declaration, made jointly by John Cullimore and Frank Richmond on 13th September 1919, that the land conveyed had been in the possession of the vendor, who had been in receipt of the rents and profits since 1st September 1891. For many years the land conveyed to Mr. Posnett has been let to angling clubs.

This evidence is somewhat unsatisfactory, since it does not disclose how or by whom the land was held and enjoyed before the passing of the Inclosure Act or how it was acquired by the predecessor in title of the 1919 vendor. It is recited in the Act that the land to be inclosed was subject to such rights of agistment and commonage, or other rights, as the owners and occupiers of any messuages, lands, tenements, and hereditaments in the several townships, hamlets, or places adjoining or lying near to Delamere Forest might prove themselves to be entitled. It does not follow from this recital that the whole of the open and uninclosed land in the Forest was subject to rights of common, though the description in the award of the land in question as a turbary and the reference in section 50 of the Act of 1812 to holding and enjoyment as of right before the passing of the Act, if considered in isolation, could



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indicate that this land was subject to rights of turbary and continued to be so after the award. On the other hand, the provision in section 52 of the Act that the allotments to be made by the Commissioners were to be in full compensation, satisfaction, and discharge of all rights of common in the Forest, and that all rights of common were to be extinguished seems to indicate that the rights which were preserved by section 50 were not rights of common. However, it does not seem to be necessary to form a concluded opinion upon this point, since the absence of any evidence of the exercise of a right of turbary over this land by anyone during a period of over a century and a half drives me, in the absence of any other explanation, to the conclusion that any rights there may have been have long since been abandoned by those entitled to them.

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 June 1973


Chief Commons Commissioner