COMMONS REGISTRATION ACT 1965

Reference Nos.52/D/3
52/D/4

In the Matter of Dee Marsh Saltings,
Flint

DECISION

These disputes relate to the registration at Entry No.1 in the Land section of Register Unit No.117 in the Register of Common Land maintained by the Flintshire County Council and are occasioned by Objection No.42 made by British Railways and noted in the Register on 6th November 1970, and by Objection No.51 made by Central Electricity Generating Board and noted in the Register on 17th August 1971.

I held a hearing for the purpose of inquiring into the disputes at Mold on 11th and 12th December 1973. The hearing was attended by Mr. Ian McCullogh of Counsel on behalf of the Applicant the Flintshire County Council; Mr. E. L. G. Tyler of Counsel on behalf of the Railways Board; and Mr. Gavin Lightman of Counsel on behalf of the Central Electricity Generating Board (C.E.G.B.).

This application relates to some 135 acres of estuarine land in the Borough of Flint known as Dee Marsh Saltings. It is bounded in part on the south-west by the railway which runs between Chester and Holyhead, and Objection No.42 relates to a strip of land running alongside the railway line shown coloured red on the plan attached to British Rail's written objection (C.R. Form 26). After Mr. Tyler had called his evidence and addressed me on behalf of British Rail, Mr. McCullogh on behalf of Flintshire County Council, very properly as I think, withdrew the application for registration so far as it related to the railway land.

That leaves the objection of the C.E.G.B., which relates to the great bulk of the land comprised in this register unit. This objection raised a number of important issues.

Mr. McCullogh argued in the alternative that the land in question was common land as being "waste land of a manor not subject to rights of common" within the meaning of the second limb of the definition of "common land" in S.22(1) of the Commons Registration Act 1965. Whilst it was common ground at the hearing that the land in question originally formed part of the Manor of Englefield (which belonged to the Crown), the land was severed from the Manor, as to a part on the seaward side by the River Dee Acts (of which the first was the Act 6 Geo II Cap.30), and as to the remainder by a Conveyance dated 25th July 1931 made between His Majesty King George the Fifth of the first part the Board of Trade of the second part and the Dee Conserva Board of the third part. The land eventually became vested in the Dee and Clwyd River Board and was conveyed by that body to C.E.G.B. in fee simple by a Conveyance dated 3rd April 1962. Thus, the land ceased to be parcel of the Manor. In A. G. v Hanmer (1858) 6 W.R. 804, at p. 805, Watson B. defined waste land of a manor as follows: "The true meaning of waste, or waste lands, or waste grounds of the manor are the open uncultivated and unoccupied lands parcel of the Manor, or open lands parcel of the Manor, other than the demesne lands of the Manor". The words which I have underlined are clearly an essential part of this definition, and operate to exclude land which has ceased to be part of the Manor. I am quite unable to accept Mr. McCullogh's

submission that the expression "waste land of a Manor" can in the context of the definition of "common land" in S.22(1) of the 1965 Act, include open and uncultivated land which has ceased to form part of a manor.

It follows, therefore, that the land in question can have the status of common land only if at the relevant date it was land subject to rights of common. The only application to register this land as common land was made by Messrs. Clement Jones & C. Solicitors, on behalf of Mr. John Winston Thomas, the owner of Pentre Farm, Chester Ro Flint, on 21st May 1970. This application was out of time, the last date for such application being 2nd January 1970: see S.4(6) of the 1965 Act, and the Commons Registration (Time Limits) Order 1966 (S.I.1966 No.1470). There was still time, howev for the registration authority itself to register the land as common land, without an application, and, in fact, it did so on 17th July 1970: see the Commons Registration (Time Limits) (Amendment) Order 1970 (S.I.1970 No.383). No rights of common were registered in respect of the land.

Mr. Lightman submitted (1) that the relevant date for the purpose of deciding whether the land is subject to rights of common is the date of the hearing of the dispute by the Commons Commissioner; (2) that, even if the relevant date be the date of provision registration, there were no rights of common over the land at that date, because none had been registered or could, after 2nd January 1970, have been registered; and (3) that the registration of this land as common land would have no legal consequences, inasmuch as any rights of common which may have existed over the land have ceased to be exercisable for want of registration, by virtue of S.1(2) (b) of the Act.

It seems to me that, for the purpose of deciding whether to confirm or to refuse to confirm the registration, I must consider whether the land in question was subject to rights of common immediately before the registration i.e. on the 17th July 1970. The fact that no rights of common had been registered at that date, or the fact that no commoner could after 2nd January 1970 apply for the registration of any right of common, appears to me to be irrelevant. The rights of common (if any) over the land had not been extinguished for want of registration on 17th July 1970. Section 1 (2) of the Act did not take effect until after 31st July 1970. I do not think that I am required to consider whether any rights of common affecting the land on 17th July 1970 ceased to be exercisable after 31st July 1970. Section 10 of the Act, as I read it, operates to establish conclusively the status of land as common land as from the moment when the registration becomes final, whether or not any rights of common have been registered in respect of the land. If that is right, then the confirmation of the registration by me cannot be said to be devoid of legal consequences.

I turn now to the factual evidence adduced to prove the existence of rights of common over the land. This was partly documentary, and partly oral. There is no doubt that the land originally formed part of the Manor of Englefield. Manorial records show that the Manor comprised a seaside waste in the County of Flint. Thus, an Order dated 7th February 1619, gave one Edward Morgan the right to dig and search for coal in the "waste grounds, parcel of his highness lordship of Englefield in the county of Flint", described later in the Order as "lying by the seaside" and extending "from Wapra Pool to Hallywell Brook". In 1696, petitions were presented to Parliament against a Dee Improvement Bill. These included a petition of "the poor commoners using and enjoying Saltrey Marsh and the commons in the county of Flint adjoining the River Dee". By the Act 6 Geo.II cap 30 certain land in the Dee Estuary known as the White Sands was vest in Nathaniel Kindersley for the purpose of improving the navigation in the Estuary. T

White Sands were described in the Act as "lying and being between the common Salt Marshes on the south side of the said River, and the hundred of Werral in the said County of Chester on the north side of the said River".

Oral evidence was given by Mr. J. W. Thomas, the owner of Pentre Farm, and Mr. Thomas Fish, an Alderman of the County of Flint.

Pentre Farm is a small farm of some 26 acres situate for the most part south of the railway and Chester Road, and opposite the land in question. There is one field, some 8 acres in extent, on the north side of the railway and adjoining a disused Rifle Range, which in turn adjoins the land in question.

Mr. Thomas told me that his father, David Thomas, became the tenant of Pentre Farm in 1929, and purchased it from his then landlord in 1951. The Conveyance to Mr. David Thomas was produced, and is dated 30th November 1951. The land in question is grass bearing, notwithstanding that it or parts of it are subject from time to time to inundations from the sea. There is no doubt that it has provided pasture for farming livestock since before living memory. Mr. Thomas testified that he and his father before him continuously used the land for the grazing of cattle and sheep. The number of animals grazed from 1929 to the present time was some 130 breeding ewes, and 10 to 20 young cattle. They graze the land throughout the year. This has always been done as of right. No permission to do so was ever sought from anyone. Mr. Thomas also testified that other farmers in the locality used to turn their animals on to this land to graze. He mentioned in this connection Mr. Williams, of Glantraeth Farm, Oakenholt; Mr. Hughes of Park Farm; Mr. Clarke of Kelsterton Farm; and Mr. Catherall of Connah's Quay.

Mr. Fish said that he had known the land in question for upwards of 60 years. No part of the land had been fenced in until a Mrs. Williams, with the permission of the C.E.G.B., fenced off a part at the south-eastern end in 1970. During the whole of his life the whole area had been grazed by cattle sheep and horses belonging to neighbouri farms, including Catherall Farm, Park Farm, Kelsterton Farm and Hollow Farm. He had known Pentre Farm since before 1929, and the owners or tenants of Pentre Farm had always grazed the land. Kelsterton Farm had to his knowledge turned animals to graze on the land since 1912, and, so far as he knew, without any licence prior to that granted to Mrs. Clarke in 1950; and the same was true of Park Farm.

Mr. Fish also testified that fishermen, in the days when they used horse traps for selling their fish, grazed their horses on this land. They also used it for drying out their nets. Members of the public have habitually used the land for recreation, and some used to shoot wild fowl over the land until it was prohibited by the British Electricity Authority in or about 1950. He said that the land had been used and known as common land throughout his life and that of his father. He could not say whether anyone other than Mr. Thomas and licensees of C.E.G.B. had grazed the land since 1950.

No oral evidence was called on behalf of the C.E.G.B., but Mr. Lightman put in evidenc in addition to the Board's documents of title, some documentary evidence to show that its predecessor in title the Dee and Clwyd River Board had granted grazing licences to four neighbouring farmers in respect of the land viz. Hilda Clarke of Kelsterton Farm; Griffith Jones of Ty Isa, Connah's Quay; Anne Eleanor Hughes of Park Farm; and G. Carr of Marsh Farm. The first licence was that granted to Mr. G. Carr. It is dated 5th July 1950, and extends over a much larger area than the land in question. All the licences were in similar terms. Those given to Mr. Griffith Jones and

Mrs. A. E. Hughes were cancelled in 1956/7 for reasons not disclosed. The others apparently remained in force until the land was sold to C.E.G.B. in 1962.

Mr. Lightman also put in evidence a Deed dated 29 December 1953, by which the Dee and Clwyd River Board granted to the Trustees of the Dee Wildfowlers Club the right of shooting sporting killing and carrying away all manner of wild fowl in or upon certain land in the Dee Estuary, including the land in question. This grant, of course, was not inconsistent with the exercise of grazing rights over the land.

I take the view that the evidence outlined above is sufficient to establish the fact that the land in question was on 17th July 1970 "land subject to rights of common" within the meaning of the statutory definition. That, however, is not the end of the matter. Mr. Lightman argued that the only right of common (if any) established by the evidence was a right of grazing appurtenant to Pentre Farm, and that this right was lost when Mr. David Thomas (the father of the present owner) purchased a piece of land, said by Mr. Lightman to be part of the common, from the British Transport Commission by a Conveyance dated 6th September 1956. This piece of land consists of some 23 acres of land, immediately to the north of the railway line in the position shown on the register map by the indentation in the southern or south-western boundary of the land in question. In this connection, Mr. Lightman relied on the rule, recently applied by Buckley J. (as he then was) in Taylor v White (1969) 1 Ch. 150, at p. 156. viz. that where the owner of a common appurtenant purchased part of his servient tenement over which his common rights were exercisable that brought his right to common to an end in respect of the wholeof the land affected. This rule, however, does not apply to a common appendant, which has always been regarded as apportionable.

This submission will not avail Mr. Lightman unless the premise on which it is based - viz. that Mr. Thomas as the owner of Pentre Farm alone had a right of common over the land - is correct. In my view, the premise is not well founded, because the evidence satisfied me that not only the owner of Pentre Farm, but the owners of other neighbouring farms, had common rights of grazing over the land. It is true that in 1950 or later the owners or occupiers of some (though not all) of the farms mentioned by Mr. J. A. Thomas and Mr. Fish accepted licences to graze the land from the River Board, but, in the absence of evidence as to the circumstances in which these licences were granted and accepted, I am not prepared to treat them as sufficient to displace the presumption of fact arising from the evidence adduced by the applicant, documentary and oral. Moreover, I am not satisfied that the right of common exercisable by the owner of Pentre Farm was a common appurtenant, as distinct from a common appendant. True, it was referred to by Mr. McCullogh as an appurtenant right, but there was no evidence before me to show whether it was in origin an appurtenant or appendant right. Presumably, no such evidence is now obtainable. But it seems to me that this somewhat technical and arbitrary rule of law ought not to be applied in the absence of clear evidence that the right of common in question was in fact an appurtenant right. Finally, it appears to me that the rule relied on by Mr. Lightman only operates where the land was part of common at the date of purchase by the commoner. In this case, as I see it, the 23 acres purchased by Mr. David Thomas in 1956 had long since ceased to be part of the common. It could have ceased to be part of the common by approvement, or under statutory authority. Presumably, it was conveyed by the Crown to one or other of the British Transport Commission's predecesso in title - e.g. the Chester and Holyhead Railway Company - although it is not clear to me whether the Conveyance dated 15th September 1856 by the Crown in favour of that Company included the 23 acres.

For these reasons I refuse to confirm the registration of the land referred to in Objection No.42 but I confirm the registration as to the remainder of the land.

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 14th day of March 1974.

H.E. Francis

Commons Commissioner