



In the Matter of Gold Gothern Common, St Keverne  
Cornwall

DECISION

These disputes relate to the registration at Entry No. 1 in the Land Section and Entry No. 1 in the Rights section of Register Unit No. CL 376 in the Register of Common Land maintained by the Cornwall County Council and are occasioned by Objection Nos. X1250 and X1251 made by Mr P A Tylor and noted in the Register on 15 November 1972.

I held a hearing for the purpose of inquiring into the dispute at Truro on 13 June 1979. The hearing was attended by Mr Gill of the Registration Authority, Mr B C Peters, Solicitor, on behalf of the applicants for registration of the Entry in the Rights Section, Mr P A Tylor, and Mr F Gilbert of Counsel on behalf of the Nature Conservancy Council, successors to Mr Tylor, who no longer has any interest.

The registration as common land was made in consequence of the application to register rights of common, which was made by Mr Peters's clients, E N Jennings, W J Jennings and E J T Jennings. The rights are claimed to be attached to property called Marchant Downs and are "to graze 36 head of cattle or 24 pigs, to cut and take turf or peat and to take tree loppings or gorse, or furze, bushes or underwood" over the whole of the land in question ("the Unit Land"). Objection No. X1251 is on the grounds that the rights do not exist at all, and Objection No. 1250, on the grounds that the land was not common land at the date of registration.

2. Marchant Downs comprise lands of some 62 acres, the southern boundary of which adjoins the northern boundary of the Unit Land. E N Jennings held these lands under an 80 years lease granted in 1911 and the freehold was purchased by him and his two sons W J and E J T Jennings in 1966. The Vendor was a Mrs E Kempthorne and the Conveyance dated 28 October 1966 was of the lands "together with a right of common overcroft land adjoining called Gold Gothern Common".

In evidence Mr W J Jennings said that in 1920 when he was about 4 years old he went to Marchant Downs where the family lived in a bungalow until 1935, when they moved to Penanporth. Their landlord was Mr Kempthorne. As long as the witness can remember they grazed and cut furze on the Unit Land - grazing was of cattle and sometimes pigs: this was perhaps once a month, though less often since the move to Penanporth, and since the war, only occasionally, if and when they were at Marchants Downs. In cross-examination he said that the Unit Land belonged to Mr Kempthorne and they grazed their cattle over the fields rented from him and over the Unit land. They were exercising their rights over what was Mr Kempthorne's land - he did not know of other owners of the Unit land and had never heard it called Little Treloan. When they first went to Marchants Downs it was like the Unit land - heath and croft land. The rights were exercised openly, without hindrance and without making any payment.

3. Mr Tylor in evidence said that part of the Unit land had been in his ownership - the remainder he bought two years ago: in the last 15 years he had seen no grazing on the Unit land which he went on regularly in summer - once or twice a week - though rarely in winter.

Mr Gilbert produced a Conveyance dated 10 November 1925 whereby Sir Cadrttenay Vyvyan conveyed on sale to a Mr M P Williams, various parcels of land in the area including the Vendor's undivided ~~share~~ in the piece or parcel of land called Little Treloan Common. On the plan attached to the Conveyance Little Treloan Common is plainly ~~the~~



the Unit Land.

4. Mr W J Jennings's evidence as to grazing and cutting furze on the Unit land was not seriously challenged by Mr Gilbert and I accept what the witness said. Mr Gilbert's submission was that the Jennings were exercising rights over land thought to belong to their landlord Mr Kempthorne, which in fact it did not - that is, they were exercising the rights by mistake thinking they derived them from Mr Kempthorne.

Mr Peters put his claim on the basis of acquisition of the rights by prescription, or alternatively by virtue of the express grant in the Conveyance of 1966. As to the latter, as far as the wording "together with a right of common ....." is concerned it is not clear whether this purported to be a grant by the Vendor Mrs Kempthorne over land - the Unit land - which she owned, or an assignment by her of an existing right over the Unit land. Either way it could in itself hardly provide satisfactory proof of the rights claimed since the nature of the right of common is left unspecified and uncertain and the title to grant or assign it is not established. The claim by prescription is in my opinion adequately made out.

As regards Mr Gilbert's submission, I find it was the case that the Jennings mistakenly thought they were exercising their rights over other land belonging to their landlord Mr Kempthorne. If this had been the case then a right of common could not have been acquired by prescription, since a claim by prescription must be a claim in favour of the owner of the freehold of the dominant tenement (Marchant Downs); and it is not possible for that owner (Mr Kempthorne) to have the right over land which he also owns. But if - and on the evidence of the Conveyance of 19 November 1925 this appears to be the case - the Unit land was not Mr Kempthorne's but that of some other person, I do not see why the mistake of the Jennings as to the ownership vitiates an otherwise valid claim to rights by prescription. The basis of prescription is acquiescence by the true owner, and the corresponding requirements that the user should not have been by force or secret or by permission do not involve a further requirement that the person exercising the rights be under no mistake as to who owns the servient tenement (*cf. Earl de la Warr v Miles* (1881) 17 Q.B. 535).

I should add that Mr Gilbert did not seek to modify the rights as registered, and in the result I confirm the registration at Entry No. 1 in both the Land Section and the Right Section.

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

2<sup>nd</sup> October

1979

*L. J. Morris Smith*

Commons Commissioner