



COMMONS REGISTRATION ACT 1965

Reference No.3/D/16

In the Matter of Land adjacent to
Fanshawgate Lane described in
Holmesfield Inclosure Award as
Lidgate Well in Allotment No.158,
Holmesfield, Chesterfield R.D.,
Derbyshire

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No. CL15 in the Register of Common Land maintained by the Derbyshire County Council and is occasioned by Objection No.10 made by Miss Jennie Allerton and noted in the Register on 2 October 1970.

I held a hearing for the purpose of inquiring into the dispute at Chesterfield on 16 October 1973. The hearing was attended by Mrs. B. Bunker on whose application the registration was made. Miss Allerton did not attend and was not represented; the grounds of objection stated in her Objection are:- "The land was not common land at the date of registration. In addition I am the owner of the land, and there is no visible sign of this well - any rights there may have been attached to a well have obviously not been exercised for a considerable time, and would have lapsed in any event".

Mrs. Bunker relied on the Holmesfield Inclosure Award dated 10 November 1820 which contained an allotment as follows:- "PUBLIC WATERING PLACES. We do allot and award one parcel on Holmesfield Common No.22 containing ... ONE other parcel on Hall Green No.36 containing ... which said parcels so set off by us as public watering places we do hereby declare to be for ever hereafter used exercised and enjoyed as such by all persons whomsoever ... AND Lidgate well in the allotment No.158 made to Anthea Fanshaw which said well called Lidgate well we do hereby direct to be maintained and kept in repair by the owner and occupiers of the said allotment and for ever hereafter exercised and enjoyed by all persons whatsoever for the purpose of fetching and carrying away the water therefrom and to which a public footpath is hereinbefore set out." The Award map shows the well to be about 30/40 yards from the west side of Fanshawgate Road, to be situated in Lidgate Bank and to be approachable from the Road by a public footway from the south-east diagonally to the well on the north-west.

Mrs. Bunker said she had not been down to the well for years and years, but she knew it to be in a little group of trees; she remembered that when she was a girl (in or before the 1914-18 war), she was able to lie down by the well and scoop up the water with her hands; there was no cover then; the well was always full of water.

Mr. J. C. Thompson who had lived nearby at Lidgate Farm since 1947 also gave evidence. He described how he had sometime ago helped the previous owner of the land to pipe the water to his dairy (lower down the Bank) in place of a previous existing pipe which was partly under and partly above ground; he did not then know that the spring was something special, and just thought it was a spring belonging to the owner of the land. He thought there had been a pipe there to the dairy for about 40 years.



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He had never seen any other use of the well; water had been piped to the Village before he came there.

Mrs. Bunker contended that the well under the Award was common land, that its non use was no reason for it not being registerable under the 1965 Act, and that it was properly registered as part of our heritage, and as belonging to our history (as the Church and roads are part of Village history).

After the hearing I inspected the land. Allotment No. 158 slopes steeply down from Fanshawgate Road to the west; I found two small groups of trees as described by Mrs. Bunker; although within each of these groups there were patches of moist ground, I found no visible spring of water.

In my opinion a piece of land being or containing a well or spring of water is not under the general law subject to a right of common merely because some persons other than the owner of the land have a right to fetch and carry away the water; such a right is an easement not a profit a prendre; see Race v Ward (1855) 4 E. & B. 702, particularly the judgment of Campbell C. J. Such a right, notwithstanding that it is not a right of common, is recognized by law and may be enforceable; e.g. the inhabitants of a district may have a valid customary right (protected by law) to fetch and carry away water, see S.C.

Whether the existence of such a right is an indication that the land is subject to a right of common, or is waste land of a manor (so as to be within the definition of "common land" in section 22 of the 1965 Act) depends on the circumstances. The Award quoted above makes a distinction between parcels 22 and 36 and Lidgate well in that the parcels are "public watering places" and are "on Holmesfield Common" and "on Hall Green" and are not otherwise allotted, (they could therefore after the Award continue to be manorial waste); while Lidgate well is surrounded by an allotment made to A. Fanshaw and could not therefore after the Award (apart from the small area containing the well itself) continue to be manorial waste. This distinction clearly appears on inspection; parcels 22 and 36 are now open and I infer have been ever since 1820 open to the public highway; allotment 158 is now separated from the road by a wall and Lidgate well could not after 1820 have been approached as of right otherwise than by the public footway expressly awarded. My conclusion from what I saw and from the evidence at the hearing is that Lidgate well is not within the definition in section 22 and is therefore not properly registerable.

Mrs. Bunker contended that if I reach such a conclusion, I should be disregarding the will of Parliament. I think not. The Holmesfield Inclosure Act 1816 (56 Geo. 3 cap. xix) under which the Award was made, does not deal particularly with wells. Parliament has legislated about wells particularly, see section 64 of the Public Health Act 1875 replaced by section 124 of the Public Health Act 1936; Lidgate well is in relation to these sections essentially similar to that considered in Smith v Archibald (1880) 5 A.C. 489; the House of Lords held that section 89 of the Public Health (Scotland) Act 1867 (in all relevant respects the same as the sections above quoted) is applicable to such a well. The object of the 1965 Act is not I think to record local rights or rights which are of local historic interest but to record rights which are within the definitions of section 22 of the Act so that the land affected can be better



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used and better protected in the future. The land comprised in this Register Unit is "marked with a green verge line inside the boundary" on the Register map; a dot with a small circle round it. The spring or well referred to in the Award, as I understood the description of Mr. Thompson and Mrs. Bunker could never have been more than 3 square yards; such a piece of land is outside the scope of the 1958 report of the Royal Commission on Common Land on which the 1965 Act was based.

For the reasons set out above 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

9/12

day of

November

1973.

a. a. Baden Fuller.

Commons Commissioner