



COMMONS REGISTRATION ACT 1965

Reference Nos. 8/D/1
8/D/2
8/D/3
8/D/4
8/D/5
8/D/6

In the Matter of land northeast of
Screetham Lane (shown on The Ashover
Inclosure Award map as No.299),
Ashover, Chesterfield R.D., Derbyshire.

DECISION

These disputes relate to the registration at Entry No.1 in the Land Section, at Entry No.1 in the Rights Section, and at Entry No.1 in the Ownership Section of Register Unit CL.23 in the Register of Common Land maintained by the Derbyshire County Council and are occasioned by Objection No.16 made by Mr. David Michael Helliwell and noted in the Register on 5 October 1970 (8/D/1, 8/D/3 and 8/D/5 respectively) and by Objection No.15 made by Mr. Stanley Brough Buxton and noted in the Register on 5 October 1970 (8/D/2, 8/D/5 and 8/D/6 respectively).

I held a hearing for the purpose of inquiring into these disputes at Chesterfield on 17 October 1973, and made the inspection below mentioned on the following day. Ashover Parish Council were represented at the hearing and the inspection by Mr. B. S. Shemwell solicitor of Jones Middleton Solicitors of Chesterfield and Mr. Helliwell and Mr. Buxton were represented at the hearing by Mr. A. J. G. Glossop solicitor and at the inspection by Mr. A. W. C. Glossop solicitor both of W. & A. Glossop Solicitors of Chesterfield.

The land provisionally registered is in the Register described as "The piece of land situated to the northeast of Screetham Lane ... (shown on the Ashover Inclosure Map as No.299) and marked with a green verge line inside the boundary on ... the register map ..."; on the Register map the piece of land so marked is partly in O.S. plot No.322 and partly in O.S. plot No.1781. The land is apparently (as I scale the map) about 20 yards wide where it fronts on Screetham Lane, extends back from the Lane about 40 yards and ultimately becomes about 100 yards wide on its northeast side; it is shaped roughly like a flat T. The Register map shows the land as apparently divided in two by the boundary between plot no.322 and plot No.1781. The Right provisionally registered is in the Register (column 4) described as "The right to take stone from the land comprised in this register unit"; no land is in the Register (column 5) specified as that to which the right is attached, but the applicant is in the Register (column 3) said to have applied "on behalf of the Parishioners of Ashover". The owner provisionally registered is "Ashover Parish Council". All these registrations were made pursuant to applications dated 15 August 1967 and made by Mr. A. W. H. Bowler, Clerk of the Ashover Parish Council.



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The grounds of objection stated in the Objection dated 30 September 1970 of Mr. Helliwell are:- "I object to the registration of parcel number 1781 on the register map, this is in my ownership, and was not common land at the time of registration". The grounds of objection stated in the Objection also dated 30 September 1970 of Mr. Buxton are:- "I object to the registration of parcel of land 322 on the register map this is in my ownership and was not common land at the time of registration".

Mr. Shemwell said that the registrations were based on the Ashover Inclosure Award dated 22 January 1783 made under the Ashover Inclosure Act 1779 (19 Geo. 3 cap. lxi). By the Act, the Commissioners were empowered to "allot and set out such Parcel or Parcels of Land, upon the said Commons directed to be divided (not exceeding Twenty Acres in the Whole) as they ... shall think proper in order that the same may be used by all the Proprietors, Owners and Occupiers of Lands and Tenements within the said Manor of Ashover, for the purpose of getting Stone, Gravel, and Sand, or other Materials for the building or repairing of Fences, or Houses, Barns, Stables, and other Buildings within the said Manor, but not elsewhere, and for building making, repairing and amending all such Bridges, Highways, and private Ways, which now or hereafter shall be within the said Manor". By the Award, the Commissioners exercised the said power (following the words above quoted) by allotting (among other plots) "One other piece plot or parcel of land lying on the said Commons marked in the said Map or Plan with the number 299 containing 3 roods and 3 perches statute measure or thereabouts, an allotment hereinafter made to the said Elizabeth Bower number 298 lying on all sides thereof ... AND we do order direct and appoint that the said several stone quarries shall be fenced on all sides thereof with a good and sufficient fence by the respective overseers of the Highways for the time being for the several and respective liberties district and divisions in which such stone Quarries do lie, and that the same shall at all times hereafter be respectively maintained and kept in repair by the said respective overseers of the said Highways for the time being".

Mr. Shemwell also said that the Register Map is not correct in that the land registered, although its shape is as shown on the map, is thereon marked too far south. He submitted that the Register map should be modified so far as might be necessary. He did not contend that the Parish Council were now owners, because in his view after the allotment above quoted the fee simple ownership of the land remained in the Lord of the Manor.

Giving evidence on behalf of the Parish Council, Mr. U. E. Bond (their present chairman; he has been a member of the Parish Council on and off since 1948 and a member of the Rural District Council on and off for about 15 years) said:- About 20 years ago, he (being then chairman of the Parish Council) with another member (Mr. Miles) visited C.S. plot 322 in the course of visiting other parish properties; they had with them a copy of the Award map; they were able to find the piece of land numbered 299 identifying it (or the greater part of it) by the remains of the stone walls and the foundations of the stone walls which they then saw. The plot they so identified was covered (as was also the near by surrounding land) with bracken and heather. There was no sign of any quarrying. It looked then much as it does now.



Mr. Buxton in the course of his evidence produced a conveyance dated 15 April 1959 by which two parcels of land, one comprising 45 acres and including O.S. plot 322 (therein described as "Moorland" acreage 21.051) was conveyed to him in fee simple. He also produced a conveyance dated 15 April 1921 by which the same parcel was conveyed to one of his predecessors in title. Neither conveyance contained any indication that any part of O.S. plot 322 was a quarry or was common land or appeared to be or was held any way different from the remainder of the plots. Mr. Buxton who is 62 years of age said (in effect):- There has never been any gap in the wall ("the Lane Wall": between O.S. plots 322 and 1781 and Screetham Lane) for the full length of his memory. You cannot pick out a quarry from other ground; you can only guess; there is no quarry face. You cannot see anywhere where there has been a quarry. As a boy his parents from 1920 to 1929 lived at Hodge Lane Farm (a near by farm): they and he had ever since been in some way concerned with O.S. plot 322 either as tenants or owners of the said 45 acres. He remembered Mr. Bond and Mr. Miles visiting the land twenty years ago; he warned them off as trespassers. Before their visit, he had never heard it (a quarry on the land) mentioned. In days gone by (more than 50 years ago) heather and clay had been taken; but the land had never been quarried in his time. Bracken had been mowed for packing pipes and heather cut for besom making; on the land there is a lot of loose stones which were used for packing up the heather and bracken. The land ever since he could remember it was as it is now covered with heather and bracken. He had never had occasion to check whether there was a quarry there or not, because the question had never arisen until the day of the hearing; he had signed the Objection because one of his neighbour came and showed him a copy of the Register map.

At the conclusion of Mr. Buxton's evidence I felt uncertain whether he was saying that the remains of walls and of foundations of walls, such as had been described by Mr. Bond, either had never existed or did not now exist. In answer to my question Mr. Buxton said that he could show me a number of places on the moor where you could find pieces of wall such as was described by Mr. Bond, they being windbreaks and that if I as a Commissioner went along to repeat what Mr. Bond had said he had done 20 years ago and looked for walls and the foundations of walls as he (Mr. Bond) had described them I would find nothing like it; he (Mr. Buxton) had looked 3 weeks ago and found nothing like it.

At the conclusion of the oral evidence the original Ashover Inclosure Award was produced.

On the day following the hearing, I inspected the southwestern part of O.S. plot 322 in the presence of Mr. Bond, Mr. Shemwell, Mr. Buxton, Mr. Glossop and some others.

O.S. plot 322 and O.S. plot 1781 are separated by Screetham Lane by a stone wall ("the Lane Wall") and from each other by a stone wall ("the Boundary Wall"). The Lane Wall is well constructed, and its appearance is consistent with it having been erected about 40 years ago consequent on the widening of the highway along Screetham Lane to enable it to carry modern traffic (this highway is now a through motor road). It is not possible to enter the southwestern part (and possibly any part) of O.S. plot 322 without climbing over the Lane Wall. Screetham Lane here runs along the brow of a hill, so that the land on the east side of the Lane Wall slopes down.



Near the Lane Wall are the remains of an old inclosure ("the Small Square") of which the north and south walls (all that remains of them, about 10 yards apart) are plainly visible. Starting somewhere near the east side of the Small Square and after passing through it, there will be found the remains of a cart track (now much overgrown with heather and bracken; so as not to be very easily distinguishable from the remainder of the southwest part of plot O.S. plot 322 which is similarly overgrown); this track soon turns to the north apparently leading straight across O.S. plot 322 and beyond; the cart track can be traced with difficulty for at least 300 yards (as far as I walked); for about 50 yards or more from where it leaves the Small Square, the cart track is supported on its east side by a retaining wall (by reason of the slope, the land on the east side of the retaining wall is at a lower level than the cart track). A few yards east near to or little beyond the north end of the retaining wall will be seen the remains of a wall ("the East Wall"), extending southwards for at least 100 yards; in places the remains of this wall are about 4 feet high constructed with through stones on the west side (as would be customary if the wall was built by the owner or occupier of the west side); in places the remains are lower; but for, most of their length the remains are no more than foundations; nevertheless the line on the East Wall (except possibly for a few yards at its north end) is plainly visible. At the south end of the remains of the East Wall and adjoining them at an acute angle, there are the remains of a wall (the South-west Wall) running for at least 30 yards approximately northwest; the remains of the Southwest Wall do not apparently join up with the south wall of the Small Square. The Boundary Wall is a short distance south of the point where the Southwest Wall joins the East Wall.

I reject the submission made by Mr. Glossop that because the Register map is wrong and may need modification that I should treat the registration as void either because I have no power to modify the Register map or for any other reason. As to this submission I must first determine whether any and if so what land is, on the true construction of the description in the Land Section of the register, thereby identified. If every word in the description is given its ordinary meaning, the description as it stands is impossible; the piece shown on the Inclosure map is not the same as that marked on the Register map (the comparison of the maps shows the former to be a few yards north of the latter); there is no piece of land (in the sense of anything which appears separate and distinct from its surroundings) as marked on the Register map. But if the reference in the description to the Register map is either disregarded or alternatively read as if the green verge line were on such map moved a few yards further north, the description in the Register describes a piece of land which is for the most part distinct and separate from its surroundings. I have no difficulty whatever in identifying the piece of land so described at least to the extent that it includes the land within the East Wall and the Southwest Wall (as above defined). The other boundaries are not so clear; but considering what I saw and paced out during my inspection and considering also the Award map, I conclude that the land ("the Unit Land") comprised in this Register unit as described in the Land Section of the Register, is a piece of land having the same shape (a little more or less) as that delineated on the Award map and on the Register map, bounded by the Lane Wall, by the East Wall (treated as continued so far as necessary up to the north end as hereinafter defined of the Unit Land) by the Southwest Wall, by the north wall of the Small Square, by the north and west side of the said cart track from the point where such cart track leaves the Small Square up to the north end (as hereinafter defined) of the Unit Land. The foregoing description leaves



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undefined the exact position of the north end of the Unit Land and the exact position of the boundary where it leaves the Lane Wall and joins up with the remains of the Southwest Wall; in my opinion these positions can be fixed with precision from the Award map if it is properly scaled up and applied as near as may be to the other boundaries as I have determined them. I conclude that the Unit Land is as above described: I reject the part of the Register map which is inconsistent with the above description, under the rules of law which are commonly referred to by reference to the legal maxim; *falsa demonstratio non nocet*, and which are applicable to the construction of written documents.

It follows from this conclusion that the Unit Land was properly registered as Common Land if the rights conferred by the above quoted allotment still subsist. Mr. Glossop submitted that the evidence showed that these rights had been abandoned; and he referred me to Halsbury's Laws of England (3rd edition) volume 15, page 367. On this aspect of the case, Mr. Buxton's statement at the hearing that I would on any inspection find nothing like what Mr. Bond described as being there 20 years ago, was quite contrary to what I saw on my inspection. Mr. Buxton at the inspection was unable to point out a single stone on which heather and bracken had been stacked as he described at the hearing. On the Unit Land there is a hole which is apparently man made and is in a place where stone might be expected to be found; although such hole may have remained open as a result of having been used as shelter by animals, it nevertheless is a sign of some quarrying or exploratory quarrying at some time. In my view Mr. Buxton was at the hearing quite mistaken as to the extent of his knowledge of the relevant part of O.S. plot 322, and I consider the evidence he then gave unreliable. I decline to substitute for such evidence, the various statements he made to me at the inspection about the walls and remains of walls, the existence of which he had on the previous day altogether forgotten.

Accordingly on the issue of abandonment, in the absence of any reliable evidence from Mr. Buxton, I have no more than what I myself saw at the inspection. The Unit Land is now and probably for at least the past 40 years has been separated from Screetham Lane by the Lane Wall. I think it probable that in 1783 after the Award was made a convenient way of quarrying the Unit Land would be to enter from Screetham Lane with, a cart, and then to cross the Small Square and go north along the cart track, and then make a U-turn along the East Wall so as to quarry into the high ground immediately adjoining Screetham Lane roughly in the position of the hole I found. But I cannot merely by observation neglect the possibility that the Unit Land might as conveniently be entered by taking a cart from the north along the cart track which as above described crosses O.S. plot 322. On this issue, I attach importance to the fact that the owners and occupiers of O.S. plot 322 have apparently never done anything by way of cultivation or otherwise to the Unit Land, which would be inconsistent with its use as a quarry; it and the surrounding part of O.S. plot 322 are apparently waste land almost completely covered with heather or bracken, not cared for in any way. There are some farm houses near by, the occupiers of which might be inclined to quarry.

The Court of Appeal recently stated the test applicable in this way:- "Abandonment of ... a profit a prendre can only, we think, be treated as having taken place where the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to anyone else," see Tehidy v Norman (1971) 1 Q.B. 528 at page 553.



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Upon the considerations set out above, I conclude that there is no evidence upon which I can find that all the proprietors, owners and occupiers mentioned in the above quoted allotment have ever demonstrated any such fixed intention. Accordingly I reject the abandonment submission.

Although I am against Mr. Buxton on this main issue, I record that I think his ignorance at the hearing of the relevant part of O.S. plot 322, although unfortunate, is understandable. The part is remote and uninteresting. The Unit Land is quite unlike anything usually or ordinarily thought of as common land. Compared with other amenity land and other quarries in Ashover, its value to the inhabitants either as an amenity or a quarry must be very small. Mr. Shemwell said that it had been registered by the Parish Council along with 13 other pieces of land similarly allotted by the 1783 Award without (so I understood) much consideration as to the advantages likely to result from the registration of the Unit Land, particularly. So although the inhabitants may have got advantages from the 14 registrations considered collectively Mr. Buxton may have been unlucky to have become involved in these very technical disputes. However this may be, for the reasons set out above I am satisfied that the registration in the Land Section was correctly made and accordingly I confirm it with the modification that the Register map should be altered by deleting the green verge line (distinguished by the number of this Register Unit) which is now on it, and substituting a new green verge line which is (a little more or less) the same shape as the deleted green verge line, which is situated further north and which shows the boundary of the Unit Land as defined in this decision.

The entry in the Rights Section should I think be altered to correspond more closely with the terms of the allotment quoted above; but if so altered, it being in accordance with the 1783 Award is in my opinion rightly registered. For this reason I confirm the registration in the Rights Section with the modifications (1) that for the words "The right to take stone from the land comprised in this register unit" in column 4 of the Register there shall be substituted "The right for all the proprietors, owners and occupiers of lands, tenements and hereditaments within the Manor of Ashover (as it was in 1783 the date of the Ashover Inclosure Award) to get stone, gravel and sand and other materials for the building or repairing of fences or houses, barns, stables and other buildings within the said Manor but not elsewhere and for building, making, repairing and amending all such bridges, highways and private ways which now are or hereafter shall be within the said Manor", and (2) that in column 5 there shall be inserted "As specified in column 4".

In view of Mr. Shemwell's statement that he did not contend for Parish Council owners I refuse to confirm the entry in the Ownership Register. Even if I were satisfied as to the ownership of Mr. Buxton I cannot on these references substitute his name in the Register for that of the Ashover Parish Council; he should have applied to be registered as owner himself, see Example (2) set out in paragraph 6 of the Notes presented on the Objection Form CR.26; I cannot I think when hearing a dispute under section 4 of the 1965 Act take a course which would prevent the operation of the unclaimed land procedure set out in section 8.

Mr. Glossop submitted that I should order either the Parish Council or the County Council or both to pay the costs of these proceedings incurred by Mr. Helliwell because they were responsible for the above mentioned error in the Register map.

The map annexed to the application by the Parish Council is scaled 6 inches to the mile, does not show the O.S. plots, and marks the Unit Land on it as "Award Map No.299". The Register map is scaled 25 inches to the mile. If on the application the Unit Land is measured against the road crossing Screetham Lane some distance away



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the Unit Land is on the Register map marked a little too far south. If the application map is treated as for identification purposes only, it is accurate enough, particularly as the Award map (referred to in it), if measured up similarly, correctly shows that the Unit Land is wholly north of what subsequently became O.S. plot 1781. The above information comes from the Commons Commissioners file; no evidence about the error was given at the hearing.

I infer that the person responsible for the Register map delineated the Unit Land simply by enlarging the Application map, and that he did not (there being no reason why he should) either check the application map against the Award or inspect the land.

It would I think be contrary to the scheme of the 1965 Act and the regulations made under it to hold either the Parish Council or the County Council responsible for the costs incurred by any person who may have been misled by an error occasioned as outlined above. The Act and regulations contemplate that errors in the registration may be made in that they provide that there shall be a discussion period (which in this case ended on 17 December 1971) during which the persons concerned may meet with a view to avoiding a hearing before a Commons Commissioner, see section 5(6) of the Act and regulation 6 of the Commons Commissioners Regulations 1971. I must therefore consider what the parties did or did not do after the registration.

Although it would I think have been open to Mr. Helliwell under his objection to contend (if it had not been conceded) that the Register map should be altered by moving the green line north of O.S. plot 1781, the Parish Council cannot I think be blamed for not reading the Objection as meaning that he would agree to the confirmation of the registration if it were modified in this way.

Although the Parish Council never (as far as I know) made any approach to Mr. Helliwell during the discussion period, neither did Mr. Helliwell approach them to explain that he would be satisfied with any such modification. As owner of O.S. plot 1781, he could have easily inspected the land (as I did), and discovered the error. I decline to assume that if he had done this and told the Parish Council what he saw they would not have satisfied him in the same way as Mr. Shemwell did at the opening of the hearing. Although the Parish Council might have made a similar inspection, Mr. Helliwell has by his inactivity to some extent contributed to his own misunderstanding.

Read literally the grounds set out in Mr. Helliwell's Objection are on the facts as I have found them, wholly irrelevant; the circumstance that O.S. plot 1781 may be (Mr. Shemwell conceded that for the purposes of these proceedings that it is) in his ownership, and was not common land at the date of registration, has not affected the result of these proceedings in any way. Mr. Helliwell in substance objected to a registration which I have confirmed; he is therefore not a victor in these proceedings; he is a loser who has in the course of the proceedings and in somewhat unusual circumstances, discovered that being the loser is of no practical consequence to him.

Upon the above considerations I decline, for the benefit of Mr. Helliwell, to make any order as to costs.



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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 18th day of December 1973.

A. A. Baden Fuller

Commons Commissioner