



COMMONS REGISTRATION ACT 1965

Reference No.9/D/20

In the Matter of Aylesbeare Common,  
Aylesbeare, Devon.

DECISION

This dispute relates to the registrations at Entries Nos.1,2 and 3 in the Rights Section of Register Unit No.CL.35 in the Register of Common Land maintained by the former Devon County Council and is occasioned by Objections Nos.1025-1027 (inclusive) made by the Trustees of Lord Clinton's Marriage Settlement and noted in the Register on 11th September 1972.

I held a hearing for the purpose of inquiring into the dispute at Exeter on 16th May 1974 and at Watergate House, WC2N 6LB on 23rd May 1974. The hearing was attended by Mr.M.White, solicitor, on behalf of Mr.W.H.A.Reece, the applicant for Entry No.1, Mr.G.W.Rice, solicitor, on behalf of Mr.H.G.Parsons, the applicant for Entry No.3, and Miss Sheila Cameron, of counsel, on behalf of the objectors. Mr.T.G.Salter, the applicant for Entry No.2, did not appear and was not represented.

Mr.White withdrew after informing me that Mr.Reece did not wish to pursue his claim.

The rights comprised in Entry No.3 are:-

"To cut gorse and trees;

"Turbary;

"To graze 50 cattle"

and the land to which the rights are claimed to be attached is shown on a supplemental map.

When opening Mr.Parson's case Mr.Rice stated that he desired to amend the right claimed by reducing the number of cattle to 30 and to reduce the area of the land to which the rights are claimed to be attached. Mr.Rice also stated that the claimed right of turbary would not be pursued, because it was of little value.

Aylesbeare Common has at present an area of about 482 ac. At all material times it has been in the ownership of the objectors and their predecessors in title. Originally the Common was considerably larger, but was reduced to its present size by a conveyance of about 200 ac. of it to the Minister of Agriculture, Fisheries and Food on 22nd February 1960.

Aylesbeare Common was believed to be still subject to rights of common during the nineteenth century. A notice dated 16th June 1876 stated that freeholders of the manor of Aylesbeare were entitled to the use of so much



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of the turf of the Common as was required by them for consumption on their own premises and offered a reward for information leading to the conviction of others taking turf. In 1896 and 1913 the St. Thomas Rural District Council put up notices under the provisions of the Local Government Act 1894 concerning their power to take legal proceedings against persons infringing rights of common at (among other places) Aylesbeare.

The evidence concerning the connection of Mr. Parsons's family with the locality begins with an agreement dated 25th March 1885, whereby the Trustees under the Will of the late Lord Rolle let to Thomas Parsons, Mr. Parsons's grandfather, the house (now known as "The Common") and land containing 11 ac. Or. 2p. on a tenancy from year to year. This property was bounded on all sides but one by Aylesbeare Common. By clause IV of this agreement all common rights and waste grounds were reserved exclusively to the landlords. Mr. T. Parsons died in 1909, and by a lease dated 24th March 1909 the then Lord Clinton let the house and land, together with other land, to Mr. Robert John Parsons, the present Mr. Parsons's father, also on a tenancy from year to year, reserving to the landlord all common rights and waste grounds.

By a conveyance made 10th September 1930 between (1) The Clinton Devon Estates Company (2) Charles John Robert, Lord Clinton (3) Arthur Francis Forster and Francis Franklin (4) Robert John Parsons the property the subject of the 1885 agreement was conveyed to Mr. R. J. Parsons. The conveyance contains no mention of any rights of common, either by way of inclusion or exclusion. Mr. R. J. Parsons died on 9th November 1948 and the property was vested in the present Mr. Parsons by an assent dated 22nd May 1960.

Meanwhile by virtue of section 85 of the Agriculture Act 1947 and the Aylesbeare Compulsory Purchase Order 1951 the Minister of Agriculture, Fisheries and Food had become entitled to purchase part of Aylesbeare Common compulsorily. Mr. Parsons made a claim for compensation for the loss of his rights of common on this part. In his claim Mr. Parsons said:-

"As may be expected the reclaimed land [i.e. the part being purchased by the Minister] was the most fertile part of the common and it was here that the cattle found such grazing as existed. There is no grazing of any value elsewhere on the common except for the purposes of exercise for short daily periods in the winter. Even then they have to be supervised as the 200 acres acquired by the Ministry is unfenced and fencing on the common is not permitted".

The claim set out the value of the rights which Mr. Parsons asserted before the purchase and the value after the purchase. It was claimed that before the purchase the grazing was capable of supporting 30 head of cattle and was worth £100 p.a. After the purchase the grazing was put at "Nominal value for exercise purposes" £30 p.a. The total claim was £2000.

Ultimately the claim was settled for £550, and on 24th June 1960 Mr. Parsons conveyed and released to the Minister all rights of common and commonable and other rights whatsoever to which Mr. Parsons was entitled in or



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over the Minister's land.

The fact that Mr. Parsons was able to persuade the Minister that he had rights of common worth £550 over the part of the common which the Minister purchased is not evidence against the objectors that Mr. Parsons was at that time entitled to any rights over the portion of the Common which the Minister did not purchase. It is therefore necessary to consider whether Mr. Parsons had the rights in respect of which he claimed and, if so, what was the effect on those rights of his conveyance to the Minister of his rights over the part of the Common purchased by the Minister.

Mr. Rice founded his argument in support of the existence of Mr. Parsons's rights on two alternative grounds, either by prescription or by the implied inclusion of rights of common in the 1930 conveyance by virtue of section 62 of the Law of Property Act 1925.

The claim by prescription must be considered in the light of the fact that on 11th March 1930 section 193 of the Law of Property Act 1925 was applied to Aylesbeare Common by a deed poll made by the Clinton Devon Estates Company, the then owner of the Common. This was followed by an order made on 14th November 1930 by the Minister of Agriculture and Fisheries, the schedule to which set out the limitations and conditions to which the rights of access of members of the public were made subject. These limitations and conditions prohibited (*inter alia*) injuring or removing trees or gorse, removing turf, and permitting cattle to graze unless by lawful authority from the owner of the soil or in the exercise of a right of common. These limitations and conditions were published at first on painted notice boards and more recently by printed notices, as required by the order.

It therefore follows that any acts of grazing or cutting gorse or trees done by Mr. Parsons after 14th November 1930 would have been unlawful unless done by lawful authority from the owner of the soil or in the exercise of a right of common. Mr. Rice argued that if the owners of the Common acquiesced in the acts done by Mr. Parsons there would be an implied lawful authority. This may well be, but acts done under such circumstances could not support a claim by prescription, for prescription depends upon user as of right and enjoyment of an alleged right which has taken place with the licence of the owner of the alleged servient tenement is not enjoyment as of right. Therefore, in my view, nothing done by Mr. Parsons since 14th November 1930 could assist him to acquire a right of common by prescription.

Until 10th September 1930 Mr. Parsons's father and grandfather had been tenants of the house and land known as "The Common", but Mr. Parsons's father owned other land in the parish of Aylesbeare and in the near neighbourhood of Aylesbeare Common. Some of this other land he acquired in 1920, some in 1935. He also owned two fields in the adjoining parish of Venn Ottery, which he acquired in 1902 and 1921. The only property acquired from the objectors' predecessors in title was "The Common", the rest having previously belonged to several different owners. It does not appear that any rights of common were acquired with these other properties, and when Mr. Parsons made his claim for



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compensation in connection with the purchase by the Minister he alleged that his rights were used in conjunction with his farm, known as Common Farm. However, in a statutory declaration dated 5th April 1960 made in connection with the settlement of his claim Mr. Parsons stated that his father had exercised rights of common by virtue of his ownership of one or more of the fields and land comprised in the various conveyances of 1902, 1920, 1921 and 1935. Mr. Parsons also stated that his father had exercised such rights for upwards of 40 years before 1939. On this somewhat conflicting evidence I find that any rights to which Mr. Parsons may have been entitled were appurtenant to the property known as "The Common" and not to the other land which he purchased between 1902 and 1935.

The next question to be considered is therefore whether any rights of common passed to Mr. Parsons's father under the 1930 conveyance by virtue of section 62 of the Act of 1925. I accept Mr. Parsons's evidence that his father when tenant of "The Common" did the various acts, including the pasturing of up to 30 cattle, on Aylesbeare Common, which, if done as of right, would be rights of common. There was produced by the objectors a copy of a letter dated 14th June 1930, addressed to Mr. Parsons's father, in which it was stated that the sale did not include any common rights. There was no evidence that this letter was ever received by Mr. Parsons senior, still less that he agreed to this statement. In these circumstances I do not propose to allow this copy letter to affect my decision. The matter therefore resolves itself into a question of law, namely whether such acts when done by a tenant on land belonging to his landlord can result in a deemed conveyance of rights of common upon a subsequent purchase of the reversion by the tenant. The authority on this point is the judgment of Buckley J. (as he then was) in White v. Taylor (No.2), [1969] 1 Ch.160, at p.185. The learned judge there held that a right of common of pasture would pass in such circumstances, provided that it could be shown that at the date of the relevant conveyance the occupier of the land conveyed was in fact grazing the number of animals claimed or a greater number on the alleged servient tenement and was doing so in respect of the land conveyed. On the evidence I am satisfied that at the time of the 1930 conveyance Mr. Parsons's father was in fact grazing 30 cattle and also cutting gorse and wood on Aylesbeare Common in respect of the property conveyed.

I now turn to what is, in my view, the fatal flaw in Mr. Parsons's claim. By the conveyance of 24th June 1960 Mr. Parsons released his rights over the part of Aylesbeare Common which the Minister had purchased. There is authority going back to Rotherham v. Green (1597), Cro.Eliz.593 that a release of a right of common in part of the common operates to extinguish the whole right, the right of common being entire throughout the whole of the common. Lord Kenyon expressed some doubt as to the correctness of this doctrine in so far as it related to a release by all the commoners in Benson v. Chester (1790), 8 T.R.396, at p.401, though he said that he had not examined the cases thoroughly and went so far as to say that a release by one commoner of his right over part of the common might possibly operate as a release of his right over the whole. However, Rotherham v. Green was accepted as good authority by Willes J. in Johnson v. Barnes (1872), L.R.7 C.P.592,600, and although it was not cited on appeal to the Exchequer Chamber (1873) L.R.7 C.P.527, the decision of Willes J. was upheld. On this state of the authorities I feel



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bound to hold that Mr.Parsons's release of 1960 operated to extinguish the right of common which his father acquired under the conveyance of 1930.

For these reasons I refuse to confirm the registration at Entry No.3. I refuse to confirm the registrations at Entries Nos.1 and 2 because there was no evidence to support them.

Both Mr.Rice and Miss Cameron applied for costs in the event of their respective clients being successful. I shall therefore order Mr.Parsons to pay the objectors' costs on County Court Scale 4.

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 1st day of July 1974

A handwritten signature in black ink, appearing to read 'G. J. Smith', written over a horizontal line.

Chief Commons Commissioner