COMMONS REGISTRATION ACT 1965

Reference Nos: 209/D/340-342 (inclusive)

In the Matter of Chagford Common, Meldon Common, Nattadon Common, Padley Common, Weekbrook Down, Week Down, Steniel Down, and Jurston Green all in Chagford, West Devon District, Devon.

SECOND DECISION

This second decision is supplemental to my decision dated 21 January 1985 made after a hearing in February 1984 relating to Register Unit No. CL173 in the Register of Common Land maintained by Devon County Council.

My January decision should be treated as corrected by inserting at the top of page 19 "Beetor" as a heading. For the reasons stated under such heading, I then gave no decision about the Rights Section registration at Entry No. 102, made on the application of Mr Rowden Sawdye Windeat (being of rights attached to Beetor Farm in North Bovey), so far as it could affect the part of the Unit Land therein called "the CL173 Green Coombe Part".

About this No. 102 registration, I continued my February 1984 hearing at Exeter on 17 July 1985. At this hearing, Mr R S Windeat and Mr T G Pollard were represented by Mr Sampson, and the Chagford Commoners Association were represented by Mr E J Andrews their chairman. Present also were Mr F Hutchings, vice-chairman of the Association, and Mr C Sturmer, representing the Attorney-General for the Duchy of Cornwall, he being concerned with the case next listed before me about a similar registration made on the application of Mr R S Windeat of rights over the Forest of Dartmoor (CL164).

At the beginning of the hearing, all present were agreed that the name "the CL173 Green Coombe Part" given in my January decision was inapt, because the coombe in which this part is situated is not locally known as Green Coombe; so in this decision I call the part of the Unit Land so defined "the January Decision Part".

The stream which is the east boundary of the January Decision Part (also the parish boundary and the boundary of the Unit Land) runs down from "East Bovey Head" marked on the OS map 1/50,000, revision 1981; so it is I suppose sometimes called the East Bovey River and must be distinguished from the River Bovey marked on the Register map as flowing a short distance to the west down from Lakeland. In this decision I call the said stream "the East Bovey".

All present were agreed that the part of the Unit Land which adjoins the northwest side of the East Bovey and which is a ridge extending southeastwards down to the East Bovey so as to include the January Decision Part and extending also northwestwards down to the enclosed lands between Jurston and Lakeland, is locally known as Jurston Down. In this decision I so call the ridge so extending.

Mr Sampson said that his clients claimed that the No. 102 registration should extend not only over the January Decision Part but also over such other parts of Jurston Down as could be defined from the evidence which would be given.

At the end, and possibly before the end of the hearing it appeared that all present either were agreed or did not dispute:-- Adjoining the East Bovey boundary of the Unit Land and southeast of it is a tract of land ("the CL148 Land") which contains about 1,617 acres called Coombe Down, Hookney Down and Headland Warren in the parish of North Bovey, being Register Unit No. CL148, and which adjoins the Unit Land by the January Decision Part, along the line of the East Bovey. If the 1969 application made by Mr Windeat leading to the Unit Land registration at Entry No. 102 had included also the CL148 land, it is practically certain that the resulting CL148 provisional registration would not have been included in any Objection, and would therefore long ago have become final. But because "CL148" was not included in such application there is not now and never has been any CL148 Rights Section registration of any rights attached to Beetor Farm. The non-inclusion of "CL148" in Mr Windeat's application was due to an oversight of his advisers and/or a misunderstanding between him and them; he only discovered that the rights he believed to be attached to Beetor Farm over the CL148 Land had not been registered as a result of a notice from the Clerk of the Commons Commissioners sent to him of the then intended Unit Land February 1984 hearing. After getting this notice he told Mr Pollard about the non-inclusion, so that he at my February 1984 hearing knew that there was no CL148 registration of rights attached to Beetor Farm. Mr Andrews at the February 1984 hearing believed there were attached to Beetor Farm rights over the CL148 Land and knew nothing of them being possibly not lawfully exercisable by reason of their non-registration.

At my July 1985 hearing in support of the registration oral evidence was given by Mr T G Pollard in the course of which he referred to a map (TGP/10) showing (6" = 1 mile) the Unit Land and the CL148 Land; he is now and has been since 1964 (when he was 16 years of age) the tenant of Beetor Farm; he succeeded Mr Mark Mortimore. Also oral evidence in support of the registration was given by Mr R S Windeat who is now and has been since 1927 the owner of Beetor Farm as successor of his father and before him his grandfather. Against the registration oral evidence was given by Mr E J Andrews who is chairman of the Chagford Commoners Association; they thought that there were over Chagford Common (including Jurston Down) no rights attached to Beetor Farm (in North Bovey); the mistake leading to the non-registration of rights attached to Beetor Farm over the CL148 Land was, he insisted, wholly that of Mr Windeat (the Association was in no way responsible). Also against the registration oral evidence was given by Mr Fred Hutchings of Yardworthy Farm.

Mr Andrews again emphasised that the Unit Land was grazed on a parochial basis and that in respect of Beetor Farm no rent was paid (see page 7 of my January 1985 decision). Mr Windeat agreed that no such rent had (as far as he knew) ever been paid to a Lord of the Manor of Chagford. Mr Hutchings whose knowledge of Chagford goes back to 1930 said (in effect): Jurston Down has always been part of Chagford Common and grazed like the other common land in the Parish of Chagford. This evidence, the absence of any mention in any document produced of Beetor Farm being assumed to have rights over Chagford Common, the situation of Beetor Farm outside the Parish of Chagford, and grazing from it on Jurston Down being no more and possibly less

convenient than grazing on the nearer parts of the CL148 land, I conclude that the rights of grazing over the Unit Land attached to Beetor Farm, if they now exist at all, cannot have existed from time immemorial. Therefore the possible applicability of prescription at common law has been negatived.

Accordingly, as explained at page 19 of my January Decision, I must now consider whether the rights claimed have by usage been established under the Prescription Act 1832 or under a grant presumable in accordance with the legal principles set out in Tehidy v Norman 1971 2QB 528.

So far as he personally has been concerned, Mr Pollard at my February 1984 hearing and inspection relied on his grazing on the area TUVWXY on my copy of the Register map, an area extending over the January Decision Part of the Unit Land, that is as far up the ridge as the Challacombe Cross to Jurston road; and at my July 1985 hearing Mr Pollard identified his grazing area by the PQRSTUV on the map then referred to (TGP/10) extending over the Unit Land up to the ridge skyline as viewed from the East Bovey (that is rather more of the Unit Land than the January Decision Part). His grazing area, whatever it may have been in relation to the Unit Land, certainly included a much larger part of the CL148 land; the grazing he described was as I understood him, combined grazing on both sides of the East Bovey. So a question arises as to the legal effect of sub-section (2) of section 1 of the Commons Registration Act 1965 under which from the day to be thereunder fixed (in 1970) any right of common not registered as therein mentioned ceased to be exercisable. The rights now claimed by Mr Windeat and Mr Pollard over the Unit Land are, because they are not lawfully exercisable over the CL148 land, more burdensome on the Unit Land and therefore different from the usage relied on. So a question of law arises as to the possible applicability of the principles of law established in Tyrringham's Case (1584) 4 Co. Rep. 6 and White v Taylor 1969 1Ch 150. Because this question was not discussed at the hearing, because it is novel and unusual and perhaps unrealistic, and because Mr Pollard's grazing has, as I understood him, continued over the CL148 land up to the present day without any person suggesting what he was doing was or could be illegal, I shall in this decision assume (although I feel some doubt about this) that I am only concerned with the usage over the Unit Land and may disregard any effect the 1965 Act may have on what Mr Pollard has been doing or claims to be able to do over the CL148 land.

For the purposes of the Prescription Act 1832 the 30 year period in it mentioned ends with the date of the relevant Objection, see section 16 of the 1965 Act. Chagford Commoners' Objection No. 712 (the claim for grazing rights should be amended to stray only on this register unit) is dated 7 September 1970; there are other Objections which indirectly put the registration in question; for the purposes of this decision September 1970 is precise enough. In my opinion the same date is applicable to the period of 20 years specified in Tehidy v Norman supra for a grant to be presumed, either by analogy with the said section 16 or because any grazing from Beetor Farm over the Unit Land cannot after the Objection be as of right at least as against any Objector.

So I am concerned with grazing by Mr Pollard from 1964 to 1970 and with grazing by Mr M Mortimore from 1940 (or 1950) to 1964.

As to Mr Mortimore's grazing, the evidence was both lacking in precision and conflicting. Mr Pollard in answer to the question "what were you told of the common rights?" said "I always took it that the common rights were extensive and that they ran both sides of the B3212 (relevantly the B3212 crosses the CL148 land a short distance from the East Bovey with the east side of the coombe in between); when asked whether the rights extended over the border into Chagford Common CL173 he answered "correct" and as to before he took over, he said he had talked to Mr Mortimore who "said he grazed both sides of the B3212". Mr Windeat when asked "was your understanding that Beetor Farm enjoyed rights over the common of North Bovey? were such rights over North Bovey Common? were such rights exercised over the period of your knowledge of the property?" said "yes" to all three questions adding "during my whole life time, not since I have owned the property"; when asked about the extent of the lear across the boundary of the CL173 land (the Unit Land), and which area of Jurston Down did he graze, he said that he remembered going with his father on Jurston Down in the year 1927 to see the cattle (meaning as I then understood him to see cattle from Beetor Farm); when asked whether any objection had ever been made to grazing on the Jurston Down area he said "Never any objection to stock grazing on Dartmoor". Contra, Mr E J Andrews said that the sheep of Mr Mark Mortimore were leared over Shapley Tor at the (north) end of the range of Hamel Down (that is on the east part of the CL148 land), and insisted (as he had at my February 1984 hearing) that stock from the parish of North Bovey although they may have strayed from the CL184 land onto the Unit Land, were leared on the CL148 land and not on the Unit Land; he concluded his evidence by saying that when in 1963 Mr Mortimore sold (offered for sale) his Scotch sheep he (the witness) inquired where they were leared (he wishing to know whether they would be a suitable addition to his stock), and was told by Mr Mortimore that they ran up over Shapley Down towards Hamel Down. Contra too, Mr F Hutchings said: he went back to the 1930's; he was concerned not only for Chagford but also with the East Quarter of the Forest of Dartmoor (CL164) of which he is the Agister; Mr Mark Mortimore had nothing to do with Chagford.

After Mr F Hutchings had given his oral evidence and Mr Sturmer had said something about grazing on the Forest of Dartmoor (CL164) from Beetor Farm (relevant to a later hearing about CL164), Mr Sampson submitted that the registration should be confirmed on the area defined by Mr Pollard on the map (TGP/10) and, that about the conflicting evidence of user I should prefer the evidence of Mr Pollard who had more than 20 years knowledge as tenant and Mr Windeat who had knowledge of the previous tenant going back for more than 50 years to the general evidence given by Mr Andrews and to Mr Hutchings; he emphasised that there had been no objection to the grazing from Beetor Farm notwithstanding the heavy grazing of Jurston Down by the Commoners of the parish of Chagford mentioned in the evidence of Mr Andrews and Mr Hutchings. After Mr Sampson had finished his submissions, there was a discussion, in the course of which Mr Windeat amplified his earlier evidence by saying (in effect):-

Mr Mark Mortimore went in as tenant in about 1945, the previous tenant having been his cousin another Mr Mortimore; the Mortimore family as tenants started in 1899. His (Mr Windeat's) family lived at Moretonhampstead. In his time (he was born in 1912); and before that they have lived at North Bovey. As to the 1927 incident the rent of Beetor Farm up to the 1930's was always 2 or 3 years in arrear because at that time cash was not plentiful and there were farming difficulties and he and his father went up from Jurston Down to see the cattle.

The evidence being so conflicting I must express my opinion as to the reliability of the evidence given by each of the said four witnesses.

Questioned by Mr Andrews about straying, Mr Windeat's answers showed him to consider the relevant grazing area to be undefinable because animals could go anywhere (there being no fences), and because there were, before under the 1965 Act the moorland was divided into distinct Register Units, no lines on any map showing any grazing area. Questioned by me as to what, when he answered the above quoted questions, he assumed the questioner meant by "North Bovey Common", Mr Windeat said: "I do not know where North Bovey Common is ... There is no line on the map ... The are certain areas of it (meaning the relevant grazing area) in North Bovey Parish ... There is no common of North Bovey to my knowledge". The 1927 incident on Jurston Down was as I understood Mr Windeat the only occasion on which he actually saw on any part of the Unit Land any stock which he believed came from Beetor Farm; I suppose it is likely that a tenant much in arrear with his rent in or before the 1930's would expect his landlord to come and look and see whether there was anything on which he could distrain, and also likely that such a tenant would guess when the landlord was likely to come and keep his stock out of the way; however this may have been this one 1927 incident during the tenancy of the predecessor of Mr Mark Mortimore is I think no basis for any inference about his grazing between 1945 and 1964. It was tacitly assumed by all at the hearing that Mr Mark Mortimore certainly grazed the CL148 land, and I accept that Mr Windeat knew that from Beetor Farm moorland grazing on the adjoining moor (the CL148 land) was for the Farm an essential activity. Mr Windeat did not mention any grazing on the Unit Land (other than the 1927 incident) either as within his knowledge or as having been told him by Mr Mortimore or anyone else; at the conclusion of the hearing I asked Mr Windeat if he could add anything to what he had said about the grazing of Mr Mortimore and his answer was "I don't really think so in any way". On these considerations and his manner of answering questions put to him during the hearing, I conclude that of actual grazing by Mr Mark Mortimore on the Unit Land, Mr Windeat has no significant personal or hearsay knowledge. I accept that as a lifetime resident and landowner in the area, he knew the January Decision Part and Jurston Down well enough to make the common sense inference that it is likely (there being no fence) that stock of Mr Mortimore lawfully on the CL148 Land sometimes went (strayed) onto Jurston Down; Mr Windeat, as I understood him, wished me to accept his inference based on his general knowledge of the locality that Mr Mark Mortimore from Beetor Farm grazed on Jurston Down with as much right as he was grazing on the moorland (the CL148 Land) adjoining Beetor Farm. Mr Windeat (a retired engineer) did not claim to be expert as a farmer or otherwise on grazing matters, so I cannot treat his inference as primary evidence unless I accept the basis on which he made it. As I understood him, he relied on the absence of fences and the absence of any indication on any map made before the 1965 Act which could indicate a grazing area. Against this basis, I have: maps (both before and after 1965) marking the parish boundary; the East Bovey although there is no fence along it and it is no obstruction to stock or humans, is a reasonable parish boundary; Mr Windeat in the course of his evidence indicated that he knew and recognised it as such; grazing on common land frequently (although not invariably) is on a parochial basis; and the evidence at my February 1984 hearing was that the Unit Land was grazed on a manorial or parochial (no now relevant difference) basis. For these reasons I consider Mr Windeat's inference from his general local knowledge about the grazing of Mr Mark Mortimore to be unreliable;

the mere probability that some of his stock sometimes was on the Unit Land in my opinion, falls short of being evidence that they were there grazing "as of right" within the legal meaning of these words.

Mr Pollard when he took over Beetor Farm in 1964 started a new flock, Mr Mortimore having before he left sold all his stock; so from the learing of the new flock, I can deduce nothing about the learing of Mr Mortimore's stock. Mr Pollard's description of his understanding in 1964 of grazing generally on the moorland the Farm was too vaguely expressed to be a basis for any deduction about what Mr Mortimore had been doing; so I need only consider Mr Pollard's evidence about what Mr Mortimore said to him. I accept that when Mr Pollard took over there was a conversation between him and Mr Mortimore about the grazing on the moor adjoining Beetor Farm, and it may well be that Mr Mortimore during it stated that the grazing on both sides of the B3212 road would be in order; such a statement would not by itself take the grazing outside the CL148 land or to any moorland outside North Bovey. That Mr Mortimore ever made any statement express or implied that he grazed on the other side of the East Bovey or that it would be in order for Mr Pollard as tenant of Beetor Farm so to graze, was never distinctly or clearly said by Mr Pollard. If during his tenancy Mr Mortimore had so grazed he would I think have known that such grazing would locally be considered extraordinary, and so knowing when describing it to Mr Pollard would I think have used easily memorable language. Of Mr Mortimore speaking in any such way, Mr Pollard said nothing; on the contrary his description of the conversation was vague. If Mr Pollard intended for me to believe that Mr Mortimore ever made any such statement (of this I feel some doubt) I think he had somehow persuaded himself during the course of these proceedings that Mr Mortimore must have so stated and was not describing the conversation as it actually happened. So as to Mr Mortimore ever having grazed stock on the Unit Land, I consider the evidence of Mr Pollard to be unreliable.

I accept the evidence of Mr Andrews about the grazing on the Unit Land being generally on a parochial or manorial basis as given by him at my February 1984 hearing and briefly referred to by him at my July 1985 hearing; as to this see my July 1985 decision. I also accept his evidence given at my July 1985 hearing that he was told by Mr Mark Mortimore that his stock was leared on Shapley Down.

I also accept the evidence of Mr Hutchings which except by way of confirmation of what Mr Andrews said and perhaps carrying it back to a slightly earlier date, did not on the question with which I am now concerned significantly add to it.

From my opinion of the evidence of the four witnesses as above stated, it follows that I have no reliable evidence of any grazing by Mr Mortimore on the Unit Land, meaning by grazing "as of right" within the legal meaning of these words. The burden of proof of establishing usage by Mr Mortimore enough to comply with the 1832 Act or to presume a grant is on Mr Windeat and Mr Pollard as supporters of the registration; considering the evidence offered in support to be unreliable, it follows that this burden has not been discharged. I feel some doubt whether evidence of what Mr Mortimore said either to Mr Pollard or to Mr Andrews is legally admissible about his usage before 1964; but because it may be that on an inquiry such as I have held I may properly regard hearsay which would not be admissible in legal proceeding, I find that on the balance of probabilities Mr Mortimore's stock from Beetor Farm grazing on the moor was always leared on the

CL148 Land and was never grazed in such a way as could form a basis for a claim that it was ever on the Unit Land grazing as of right. My conclusion so far is enough to dispose of the whole matter because grazing by Mr Pollard from 1964 to 1970 is for too short a period to establish a right.

Nevertheless I think I should record my view of his evidence about any such grazing. In 1964 Mr Pollard started grazing near the East Bovey, and it may be that his sheep (there being good grass on both sides) went from the CL148 land side to the Unit Land side. As explained by Mr Andrews strays would be tolerated. For the grazing of Mr Pollard to be "as of right" within the legal meaning of these words, the grazing must not have been "secret" within the meaning of the word as used in connection with the expression "as of right". The absence of conscious deception is not enough; the enjoyment must have been open, of such a character that an ordinary owner of the land diligent in the protection of his interests would have or must be taken to have had a reasonable opportunity of becoming aware of that enjoyment, see Union v London 1902 2Ch 557 at page 571. There was no evidence that Mr Pollard ever said or did anything or that there were ever any circumstances which would lead the owner of or the graziers on Jurston Down to be aware that he was so grazing; accordingly I conclude that such grazing if any there may have been by Mr Pollard before 1970 on the Unit Land was not as of right .

For the above reasons my decision is that this registration at Entry No. 102 was not properly made, not only as regards all the Unit Land other than the January Decision Part but also as regards the January Decision Part itself; accordingly I refuse to confirm it.

As my decision is based on my conclusion that some of the evidence given by Mr Windeat and Mr Pollard was unreliable, I record for their benefit first that at the beginning of the hearing they were, so it seemed to me, worried by the mistake made in Mr Windeat's application but for which the matters in dispute might have been less important, and indeed might never have arisen; and secondly I have been helped by what was said towards the end of the hearing when Mr Windeat seemed to be speaking without reserve and realising by so speaking that he might (as indeed he did) prejudice his chance of success. I also record that Mr Sturmer said he knew of others who had failed to apply for an undisputable registration and of discussions as to how such persons could lawfully be relieved of the consequences.

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 20th day of November 1985.

C. A. Baden Fuller

Commons Commissioner