COMMONS REGISTRATION ACT 1965

Reference No.9/D/11

In the Matter of Colaton Raleigh Common,
Colaton Raleigh, Devon.

DECISION

This dispute relates to the registration at Entry No.1 in the Rights Section of Register Unit No.CL.169 in the Register of Common Land maintained by the former Devon County Council and is occasioned by Objection No.950 made by the Trustees of Lord Clinton's Marriage Settlement, and noted in the Register on 5th January 1972.

I held a hearing for the purpose of inquiring into the dispute at Exeter on 15th May 1974. The hearing was attended by Mr.D.G.Williams, solicitor, on behalf of Mr.A.S.Hills and Mrs.B.A.Hills, the applicants for the registration, and by Miss Sheila Cameron, of counsel, on behalf of the objectors.

The particulars of the rights of common entered in the Register are as follows:-

"Estovers:
"Turbary;
"To take sand and gravel;
"To cut unenclosed timber of less than two inches in diameter;
"To graze 20 cows and 2 horses or equivalent M.F.U.scale over the whole "of the land comprised in this register unit, CL.35, CL.39, CL.49, "CL.54, CL.55, CL.82 and CL.136".

When opening the case Mr.Williams stated that the applicants desired to limit the grazing claimed to 2 cows, 12 sheep and 2 horses. Mr.Williams also stated that the claim was based on prescription by virtue of the Prescription Act 1832.

The rights in question were registered as attached to the applicants' property known as Furze Close. Until 1916 this property formed part of a larger property known as Stallcombe House. In addition to the residence, the Stallcombe House property comprised farm buildings and about 59 ac. of agricultural land. What is now the applicants' property consisted of two fields without buildings, having a total area of about 4 ac. It will be convenient to refer to these two fields hereafter by their present collective name of "Furze Close", noting that a field in the vicinity (which has nothing to do with the present proceedings) was formerly known as Furze Close.

The whole Stallcombe House property was offered for sale by auction in 1902 with "valuable rights over Woodbury Common", the nature of the rights not being specified in the particulars of sale. The western boundary of Colaton Raleigh Common is co-terminous with part of the eastern boundary of Woodbury Common. The common boundary is marked by stones, but there is no

fencing between the two commons, so that animals on one common would be free to stray onto the other. It was suggested that the term "Woodbury Common" was used in the locality to embrace both commons. That this was so is indicated by the map annexed to particulars of sale dated 1889 relating to property in the parish of Colaton Raleigh to the north-east of Stallcombe, offered with rights of common on "Woodbury Common", where the words "Woodbury Common" extend across both commons. The manorial documents to which I shall later have occasion to mention seem to indicate that "Colaton Raleigh Common" was not the ancient name of the land the subject of this dispute. However, irrespective of the nomenclature, the topographical facts indicate that any right of common over what is now called Woodbury Common which may have existed in 1902 would include a right of common pur cause de vicinage over what is now called Colaton Raleigh Common and vice versa.

On 19th April 1904 the whole of the Stallcombe House property was conveyed to the late Mr.Reginald Montgomery Hill, who took up residence there.

On 1st September 1916 the Stallcombe House property, with the exception of Furze Close, was offered for sale by auction with "valuable common rights". It was stated in the Special Conditions of Sale:-

> "Certain valuable common rights are mentioned in the particulars as being included in the sale; no reference to such rights is contained in any of the title deeds, and the Vendor shall not be required to deduce any title to such rights other than a statutory declaration to be made by himself that ever since he purchased the property on the 19th day of April 1904, he has been in actual possession thereof, and has enjoyed the following rights over Woodbury Common without the same being challenged in any way, viz:- (1) Cutting heather for bedding. (2) Cutting turf for fuel. (3) Drawing sand and gravel. (4) Grazing beasts on the Common, subject to supervision. (5) Cutting uninclosed timber of less than two inches in diameter; such declaration to be prepared by the Vendor at his expense but to be approved on behalf of the Purchaser and stamped at his expense."

It appears from an indorsement on the conveyance of 19th April 1904, now in the possession of the applicants, that the sale of the major part of the Stallcombe House property was completed on 1st December 1916. Also among the applicants' deeds is a statutory declaration by Mr.R.M.Hill of the same date, which is stamped as a duplicate. It therefore appears that the statutory declaration is that which was required by the Special Conditions of Sale, the original having been properly stamped and handed over to the purchaser. The terms of the statutory declaration are exactly those provided for by the Special Conditions of Sale. In the light of the other evidence, I take the words "Woodbury Common" in the statutory declaration to include what is now called Colaton Raleigh Common.

After the sale in 1916 Mr.Hill began to build a house on Furze Close. He built the house by direct labour, and it was not finished until 1922. Mr.Hill then lived in this house until his death in 1942. Later his son, Mr.J.L.Hill, lived there until about a year before he sold the property to the applicants in 1968.

It appears from a manorial survey of 1785, now in the possession of the objectors, that what is now called Colaton Raleigh Common was then named Colaton Hill and was one of two commons belonging to the manor of Colaton Abbot alias Duke's Colaton, which was one of the two manors in the parish of Colaton Raleigh. The survey states: "The herbage belongs to the tenants of the manor as appurtenant to their leases, but the right of cutting turf remains with the lord, who makes a considerable advantage by sale of turf". The court rolls of the manor contain notes of receipts from the sale of turf. It appears that there were also rights of cutting furze, for in 1772, there were presentments for cutting furze and selling it in "foreign" parishes.

Miss Cameron stated that the objectors accepted that both Woodbury Common and what is now called Colaton Raleigh Common were wastes of their respective manors and that there were rights of common annexed to Stallcombe House. Miss Cameron, however, argued that in 1916 Mr.Hill transferred those rights without any reservation in favour of Furze Close, which he retained, so that any rights to which the applicants may now be entitled could only have been acquired since the new house was finished in 1922.

I shall return to the 1916 conveyance, but it will be convenient first to outline the later events. Evidence, which I accept as being correct, was given by Mrs.E.M.Case, a daughter of Mr.R.M.Hill, who was born at Stallcombe House in 1904 and lived there and at Furze Close until 1939 and also from 1947 to 1949. When the house at Furze Close was being built Mr.Hill took gorse and heather from the Common for binding the cob walls and for thatching. He also used sand and gravel from the Common for making cement and paths. After he went to live at Furze Close he used heather for bedding for his animals. He also burnt turf in piles to make fertiliser for potatoes. After he moved to Furze Close Mr.Hill did not keep cattle, but Mrs.Case sometimes grazed her pony on the Common. Mr.Hill occasionally took a little fir tree, which Mrs.Case thought was used for fencing.

Since the applicants purchased Furze Close in 1968 Mr.Hills has cut heather, furze and gorse and has taken sand and gravel for repairing the house and the drive. He has also occasionally cut turf, which he has used for fuel in the house, not because it burns very well, but in order to show that he has not abandoned any rights he may have. He has also taken wood from time to time.

Mr.Hills has not kept any animals at Furze Close, but 2 ac. of Furze Close is pasture on which he thinks that he could winter 2 horses and 2 cows or 2 horses and 12 sheep.

Miss Cameron submitted that these acts by the successive owners of Furze Close since 1916 could not establish a right by prescription because they were unlawful during most of the period by virtue of an order made on 14th November 1930 by the Minister of Agriculture and Fisheries under section 193 of the Law of Property Act 1925. This section was applied to both Woodbury Common and Colaton Raleigh Common by a deed poll made 11th March 1930 by the Clinton Devon Estates Company, the then owner of the two

commons. The rights of access of members of the public to the commons were made subject to the limitations and conditions set forth in the schedule to the order. These limitations and conditions prohibited all the acts done on the commons by the successive owners of Furze Close, unless they were done by lawful authority from the owner of the soil, or in the exercise of a right of common. These limitations and conditions were published as required by the order, at first on painted notice boards and more recently by printed notices.

In his reply Mr.Williams accepted that he could not rely on acts of user after 1930, but he said that he relied on such acts during the necessary period before 1930. In the alternative, Mr.Williams argued that Mr.Hill was entitled to apportion the rights to which he was entitled in 1916 between the part of his property which he sold and the part which he retained.

I have come to the conclusion that there is no room for prescription in this case. In 1916 Furze Close was part of a property which the objectors admit had rights of common attached to it. There was insufficient time between 1916 and 1930 for fresh rights to be acquired in respect of Furze Close. The only question is whether the pre-existing rights continued to enure for the benefit of Furze Close after 1916. Whether those rights originated by prescription or in some other way does not seem to be material. The fact that Mr.Hill made a duplicate statutory declaration which he kept with his title deeds indicated that he intended to apportion his rights on the sale, and his subsequent acts show that he thought that he had done so. What has to be considered is whether he was correct in that belief.

There is no single answer applicable to all the rights referred to in Mr.Hill's statutory declaration. In the first place, a right of common of pasture is clearly apportionable. I have not seen the conveyance of 1st December 1916, but since there is no mention of rights of common in the conveyance to the applicants, it seems likely that there was no express apportionment of the rights of common in 1916. That, however, would not prevent the retention by Mr.Hill of some rights of grazing, for in the absence of any peculiar circumstances such rights should be apportioned rateably to the area of the alienated part and the retained part: see per Buckley J. in White v Taylor (No.2), [1969] 1 Ch.150, at p.190. In the present case the apportionment is not a mere matter of arithmetic, for the right is described in the statutory declaration as "grazing beasts". In the absence of a limitation by number, a right of pasture is limited to the animals levant and couchant on the dominant tenement. How many animals were levant and couchant on the whole property before 1916 we do not know, but the number which could be levant and couchant on Furze Close is capable of estimation. As already mentioned, Mr.Hills put it at 2 horses and 2 cows or 2 horses and 12 sheep. Although Mr.Hills did not claim to be an expert in such matters, there was no other evidence on this point, and his evidence does not strike me as being inherently improbable. Mr.Hill's statutory declaration speaks of grazing "beasts". "Beasts" is a word of wide significance, though it is sometimes used of bovine cattle, as distinct from other animals. However, in the absence of any evidence as to such a specialized use in this locality, I take it not to be confined to bovine cattle.

I shall therefore confirm the registration of the right of grazing in the limited form in which it is now claimed, namely for 2 horses and 2 cows or 2 horses and 12 sheep and confining it to the land comprised in this Register Unit and CL.136, CL.136 being Woodbury Common over which the applicants have a right of common per cause de vicinage, which , of course, means that the total numbers of animals on the two Commons at any one time cannot exceed 2 horses and 2 cows or 2 horses and 12 sheep. There was no evidence of any rights over the other Register Units mentioned in the application for this registration.

The right of cutting turf for fuel mentioned in Mr.Hill's statutory declaration was, in my view, incapable of apportionment. It was a right to cut turf to burn in the existing Smallcombe House (and not a right to burn turf to make fertiliser, which is not a right of turbary) and Mr.Hill could not increase the burden on the Common by burning turf in the new house which he built. Likewise the drawing of sand and gravel appears to have been related to building operations and repairs and could not be extended to relate to new work on the severed portion.

On the other hand, the apportionment of the right of cutting heather for bedding would not increase the burden on the Common, since it would be limited by the number of cattle levant and couchant on the two parts of the severed property. Similarly the cutting of timber for the repair of fences on Furze Close would not increase the total consumption, though the use of the timber for repairing the new house would result in such an increase.

For these reasons I confirm the registration with the following modifications: namely,

(1) The substitution of the words "Cutting heather for bedding" for the word "Estovers";

(2) The deletion of the word "Turbary";

(3) The deletion of the words "To draw sand and gravel";

(4) The addition after the word "diameter" of the words "for the repair of fences";

(5) The substitution of the words "2 horses and 2 cows or 2 horses and 12 sheep" for the words "20 cows and 2 horses or equivalent M.F.U. Scale"; and

(6) The deletion of the letters and figures "CL.35, CL.39, CL.49, CL.54, CL.55, CL.82".

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 28th day of June 1974

Chief Commons Commissioner