



## COMMONS REGISTRATION ACT 1965

Reference Nos 209/D/337  
209/D/338

In the Matter of the pond and the  
waste ground immediately north of  
it, in Throwleigh, West Devon  
District, Devon.

DECISION

These disputes relate to the registrations at Entry No. 1 in the Land Section and at Entry Nos. 1, 2 and 3 in the Rights Section of Register Unit No. CL 132 in the Register of Common Land maintained by the Devon County Council and are occasioned by Objection No. 137 made by Gilbert John Caseley Molland and Carole Naomi Molland and noted in the Register on 15 October 1970 and by Objections Nos. 693 and 694 made by Sidney John Powlesland and Dora Mary Cole and noted in the Register on 10 February 1971.

I held a hearing for the purpose of inquiring into the disputes at Exeter on 10 November 1983. At the hearing (1) Mr G J C and Mrs C N Molland, the said Objectors, were represented by Mr C E R Dowell solicitor with Veitch & Co, Solicitors of Exeter and (2) Throwleigh Parish Council were represented by Mr F J Woodward solicitor of Burd Pearse Prickman & Brown, Solicitors of Okehampton.

The land ("the Unit Land") in this Register Unit is approximately a triangle, its eastnortheast side (about 20 yards) open to the road (the wide Village Cross road junction and the road leading southwards from it to Wonson), its south side (about 17 yards) being next to the garage and garden and other grounds held with the dwelling house and shop known as The Forge, and its northwest side (about 30 yards) being a wall retaining ground at a higher level on the west and north. The north part ("the Pond Part") of the Unit Land is a pond, a pleasing amenity for those living nearby and for visitors and others coming to the Village. The south part ("the Molland Objection Part") is open to the road apparently thereby providing convenient access to the said garage and also although not so apparently providing access for persons going to the garden and other back land held with The Forge and/or going for a walk round the south side of the pond.

There are three registrations in the Rights Section: at Entry No. 1 (Rosemary Hooley; for Shaugh Garden Cottage, Belstone), and at Entry No. 3 (Henry Littlejohns; for land in South Tawton, land in Belstone and Bude Farm in Sticklepath), both being of "to stray"; and at Entry No. 2 (Eileen Gore; for Waye Farm, Withecombe, Chagford) being estovers, sand and gravel, and grazing. The grounds of Objection No. 137 (expressed to be applicable to the Land Section) are (in effect) that the Molland Objection Part "forms part of the property known as the Forge Stores which we (Messrs Molland) own" and at the date of registration was not common land and no rights of common existed thereover; by subsection (7) of section 5 of the Commons Registration Act 1965, this Objection must be treated as an objection to all the Rights Section registrations.



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The grounds of Objections Nos. 693 and 694 (expressed to be applicable respectively to the Land Section and to the Rights Section) are (in effect) that the Pond Part "belongs to us (Messrs Powlesland and Cole)" and was not common land at the date of registration and common rights do not exist over it. I have papers (yellow forms) dated 3/11/70 and 25/3/71 signed by E Gore in effect agreeing all the Objections as regards Right Section Entry No. 2. In the Ownership Section, no person is registered as owner.

Mr Dowell on behalf of Messrs Molland opened the proceedings by producing the documents (GTCM/1) specified in Part I of the Schedule hereto. From them it appears that the Molland Objection Part had at least since the 1954 conveyance been dealt with as being neither subject to rights of common nor waste land of a manor, and consistently with it being so negatively regarded since the 1936 assent and possibly since the death in 1880 of Mr James Dunning.

Next Mr Woodward on behalf of the Parish Council outlined the evidence which would be given in support of his submission that I should altogether avoid the Rights Section registrations; he referred to re Ilkley and Burley Moors, Current Law Feb 1983 page 416H and re Sutton Common 1982 1WLR 647.

In support of the Land Section registration oral evidence was given by Mr Frederick John Kingsland who was born in 1929, has lived more or less in or around the Parish all his life, and been a member of the Parish Council since 1960/61 and their vice-chairman since May 1983. He produced the documents specified in Part II of the Schedule hereto, which showed the doubts felt in 1956 (PC/12), 1972 (PC/13) and 1975 (PC/10) about the legal position. He said (in effect):- As he first remembered the Molland Objection Part, it was gravel with very little grass: there was (and still is) a well there at its southwest corner above which was a pump with a stone trough. The pump provided water for the domestic use of the nearby houses and the Molland Objection Part was crossed regularly by persons getting water. It was also regarded as public, for example when a steam roller came to the Village it was parked there overnight. As he first remembered the building now called The Forge (a dwelling house and shop) was (in part) a blacksmith shop where horses were shod; (he had himself taken horses there); there was a cooling stone on the Molland Objection Part for making iron rings (iron tyres for wheels) cooled by water from the pond. No animals went to the trough to drink, the pump being used by people to get water for themselves; although he thought the animals could have drunk from a bucket filled from the pump; but they could more conveniently drink from the pond (first stop by the road!). The pond was (and still is) supplied with water from the overflow from the well and if there were no well there would he thought be no pond. The horses waiting to be shod did not stand on the Molland Objection Part but were in the shop; this was not where Mr Molland now has a garage but was in the part of the main building (to the south); save for cooling iron rings, the Part was he thought little used in connection with the Blacksmith Shop. In the 1950s Mr Moore (owner of The Forge from 1954 to 1961) built the wall on the Molland Objection Part (meaning the wall on the south bank of the pond). In about 1963 or 1964, the Devon Water Board brought piped water to the Village, and shortly afterwards they took away the pump; nobody objected. He knew of Mr James Dunning who in 1916 was chairman of the Parish Meeting (not mentioned in PJMC/1 abstract); he lived at Wonson Manor but he (the witness) could not say whether the Manor (? any manor) went with the house.



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Mr Thomas Endacott who is 58 years of age, was born in Throwleigh, and has been for 21 years a member of the Parish Council and their chairman for about 15 years before May 1983, in the course of his oral evidence said (in effect):- For a long time there have been arguments in the Village about the Unit Land. No doubt Village people have used it as a village pond. He had taken horses to the blacksmith's shop and they would normally drink from the pond, although the pond was not always clear enough. There used to be a lot of ducks on the pond. He had actually had horses waiting to be shod which drank from the trough. He had seen horses ridden (not to or from The Forge) drinking at the trough. At one time the postmaster who lived in his own property on the opposite side of the road made baskets and used the pond for soaking the willow cane. He could not say from where nearby houses got their water before the pump came into existence; he thought that must have been a very long time ago; he knew that in about 1928 an hydraulic ram had been installed in the village, that was in a different part and the water from it did not go into the pond. It was Mr Moore (owner 1924-1961) who converted the building formerly used as a blacksmith's forge into shop (such as the present stores). Mr Gelder (owner 1961-1966) was as far as he knew the first to dispute that there was a public way going from the road to the well.

Mr Woodward put in statements and photograph (PC/16 to 19) as evidence by those who signed. The photograph gives a good idea of the pump in 1933. Mrs Holman and Mr and Mrs Aggett, about the pump and the pond said much the same as what Mr Kingsland said in more detail; although about the trough they were nearer to Mr Endacott. Mrs Harvey who was for 38 years headmistress of Throwleigh School, said her father carried on a trade of village blacksmith in 1926 when she was 17, he took the tenancy of what is now known as The Forge Stores (he was born in 1888); in those times water was drawn from the village well in the Molland Objection land; she remembered when her father during the first 10 years of his tenancy asked the Parish Chairman Mr Lowe whether he could pipe water to the house and The Forge from the well; this request was granted upon his paying a yearly nominal sum (1/-); she believed her father remembered the well being sunk when he was young.

Mr G J C Molland in support of his Objection gave oral evidence saying (in effect):- He had lived in Throwleigh for 16 years since he bought The Forge. The main house is old going back at least he thought to the 14th century (but with later additions). Behind the building, the land (held with it) slopes up very steeply so as to be above roof level. Recently he and his wife had on the Molland Objection land planted a Rhododendron and Laburnum. He had looked at the 1840 Tithe Award and identified The Forge building and land with No. 383 in the Schedule described as (so he thought) "Village smithy with garden and orchards about 1 acre of land; the 1840 Award plan showed that the building now on the opposite side of the road must be a recent development.

Because Mr Molland seemed somewhat uncertain about his reading of the 1840 Award, I adjourned the proceedings to the Devon County Record Office where the original 1840 Award and Tithe map were produced. A photo copy of the relevant part of the Schedule is GJCM/2; the original map is too fragile to photograph and my rough tracing is GJCM/3.



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After leaving the Record Office, Mr Woodward questioned Mr Molland pointing out that in the Tithe Award Schedule No. 383 is "Houses and Gardens:--: 26½." indicating an area of 26½ poles.

Two days after hearing I inspected the Unit land in the presence of Mr Molland and Mr Kingsland.

It is apparent that since the 1840 Tithe map near the Unit Land have been erected many new buildings and additions to buildings. In my view No. 383 in the 1840 Award Schedule cannot be identified with any part of the land which Mr Molland at the hearing claimed made up The Forge main building, his garage and the land at the back; nor can I infer from the Award and the map that the Unit Land can be equated in any now relevant way with now existing buildings and now existing boundaries. The most I can infer from it is that the then blacksmith's shop stood in an open area of land that then included the Village Cross; so the 1840 map might be regarded as some (although not I think weighty) evidence of the Molland Objection Part being then considered either as highway land or as waste land of a manor.

The map attached to the Objections are as indicating the south bank of the pond somewhat confusing in that although the pond is approximately triangular, its southwest apex is obtuse and its south boundary is not as long but is at an angle to the eastwest line. In this decision I assume that the Objection maps together show the whole of the Unit Land without any overlap or gap, and the boundary between the Pond Part and the Molland Objection Part is clear enough for any purpose with which I am concerned. The sketch map GJCM/2 is angularly inaccurate, and I reject it.

As to any part of the Unit Land the subject to rights of common, I have no evidence in support of any Rights Section registration other than the statutory declaration made in support of the application. Against them I have as regards Entry No. 2 the above mentioned withdrawals (yellow forms); as regards Entry Nos. 1 and 3, a registration of "to stray" in the absence of any special reason (I had no evidence of any) is irregular for the reasons stated under the heading "Straying" in my decision dated 30 June 1983 re The Forest of Dartmoor (CL164). Further the appearance of the Unit Land is much against there ever having been any rights. My decision is therefore that none of the Rights Section registrations was properly made.

A right to take water from lands of another may be claimed as an easement but it is not a profit a prendre properly describable as a right or common, see *Race v Ward* (1955) 4E&B 702; so the existence of the pump and its use by inhabitants before 1963 is no evidence that the Molland Objection Part was ever within paragraph (a) of the definition of common land in Section 22 of the Commons Registration Act 1965: "Land subject to rights of common ...".

So if the registration of the Molland Objection Part is to stand, it must be within paragraph (b) of the definition: "Waste land of a manor ...". The existence of a pump up to 1963 and the use of the strip leading to it as access, is perhaps some evidence that in 1967 when the registration was made the Part was waste land of a manor. But contra, I find that since 1963 there has not been any significant use of the Molland Objection Part for any public purpose and that since 1954 it has been conveyed as part of the land held with The Forge in a



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manner inconsistent with the public or in any way connected with a manor. Balancing these conflicting considerations as best I can, my decision is that the Molland Objection Part has not at any now relevant time been waste land of a manor, and should therefore be removed from the Register.

The Pond Part is more or less in the same position as the pond marked on the 1940 Tithe map, and its appearance is consistent with it being waste land of a manor. It is I think the sort of land intended by Parliament to come within the Commons Registration Act 1965. In the absence of any evidence or argument against the registration by Messrs Powlesland and Cole or by their successors in title, or by anyone else my decision is that the Land Section Registration of the Pond Part was properly made.

My decision is however subject to the liberty to apply hereinafter granted, because at the hearing I was told that Mr Wadlam died on 8 November 1983 (3 days before my hearing), was thought to be a successor in title of Messrs Powlesland and Cole, and had before he died expressed his disagreement ~~with~~ the registration. Because I was also told that G D Cann and Hallett, Solicitors of Okehampton who are named in Objection No. 693 as solicitors for Messrs Powlesland and Cole also acted as solicitor for Mr Wadlam and might therefore be the solicitors of or know about his personal representatives, a copy of this decision will be sent to them. It might be advantageous for those concerned to know as soon as possible whether this decision is or is not final, and I suggest therefore for the consideration of the Parish Council that they should if they know who are the personal representatives of Mr Wadlam or other the the successors in title of Messrs Powlesland and Cole, arrange for them to have a copy of this decision. To give time for consideration to those concerned, the notice which I am required by section 6 of the 1965 Act to give to the County Council as to the effect of this decision will not be sent out until 3 months from the day on which this decision is sent out in accordance with the Regulations.

In summary my decisions as above set out are as follows:- I confirm the registration at Entry No. 1 in the Land Section with the modification that there be removed from the Register the land coloured pink on the plan attached to Objection No. 137 made by Messrs G J C and C N Molland, and I refuse to confirm the registrations at Entry Nos. 1, 2 and 3 in the Rights Section. I give liberty to Messrs S J Powlesland and D M Cole who made Objection No. 693 and to persons claiming under them to apply to re-open the hearing and vary this decision so far as by it I have confirmed the Land Section registration as regards the Pond Part and I direct that such liberty shall be exercised within THREE MONTHS of the day on which notice of this decision is sent to the persons entitled to receive it (or within such extended time as a Commons Commissioner may allow) and that such application shall be in writing (it may be by letter) sent to the Clerk of the Commons Commissioners and shall summarise the evidence which will be given in support of the Objection and list the documents which will be relied on and that a copy of the application should be sent by the applicant to Throwleigh Parish Council or to their solicitors herein named and for their information to the Devon County Council as Registration Authority.



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.

SCHEDULE  
(documents produced)

Part I: on behalf of Mr and Mrs Molland

GJCM/1

(1) Abstract of the title of B R Dunning to The Forge commencing with will dated 31 March 1880 of James Dunning (he died 17 August 1880) by which he devised all his estate called Throwleigh Barton to his son Richard Dunning and including an assent dated 1 February 1936 by which Bertram Richard Dunning (nephew of the said R Dunning) as his personal representative (he died 13 December 1935) assented to the vesting in himself of (inter alia) the dwelling house and blacksmith's shop garden and outbuilding all adjoining ... then in the occupation of Richard Hill as tenant.

(2) Conveyance dated 30 December 1954 by Bertram Richard Dunning to Cyril Harry Moore of "dwelling house and the blacksmith's shop garden and outbuildings situated in the Village and Parish of Throwleigh ... which said premises are for the purpose of identification only ... delineated on the plan ... pink" (and secondly shed on the other side of the road ... green).

(3) Conveyance dated 12 June 1961 by C H Moore to Charles William James Gelder of dwelling house shop as premises (formerly a dwelling house and blacksmith's shop) described by reference to the said 1924 conveyance and the plan thereon "now known as The Forge Stores" (and secondly as above).

(4) Conveyance dated 15 August 1966 by C W J Gelder to Edward Joseph Fowler and Barbara Anne Fowler of the said premises.

(5) Conveyance dated 8 January 1968 by A J and B A Fowler to G J C and C N Molland of the said premises.

GJCM/2

Sketch map prepared by Mr G J C Molland.

Part II: on behalf of Throwleigh Parish Council

PC/10

Letter dated 16 April 1975 to Parish Council from Dunn and Baker Solicitor on behalf of Mr G J C Molland claiming that as he had



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acquired the land he had also acquired the stone trough on it, with letters dated 14.10.70 from the County Council notifying the Parish Council of notes on Common Land Register.

- PC/11 Minute book of Throwleigh Parish Meeting from 4 December 1894 to 19 October 1956.
- PC/12 Extract from said book, about Parish Meeting held on 19 October 1956 in which it was suggested that the cleaning out of the pond is likely to be the responsibility of the Lord or the Manor, no action was taken, no resolution having been put after some uncertainty as to ownership has been expressed.
- PC/13 Letter dated 19 December 1972 from County Council to Parish Council as to objections, a copy dated 22 January 1973 of reply.
- PC/14 Copy plan attached to Objection No. 137.
- PC/15 Statement dated 5.11.83 by Mrs J Holman of 4 Clampits, Throwleigh.
- PC/16 Photograph taken in 1933 showing pump and trough referred to in said statement.
- PC/17 Statements dated 5.11.83 by Mr W Agget and Mrs G M Agget of Ivy  
PC/18 Cottage, Throwleigh.
- PC/19 Statement dated 3.11.83 by Mrs E Harvey of Scathe, Throwleigh.

Part III: inspected at County Record Office, Exeter

Tithe Apportionment Award for the Parish of Throwleigh with 1840 maps therein referred to.

- GJCM/3 Tracing of relevant part of said map.
- GJCM/4 Copy of relevant part of Award Schedule.

Dated this 2<sup>nd</sup> day of July - 1984

*a. a. Bades Fuller*

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Commons Commissioner