COMMONS REGISTRATION ACT 1965

Reference Nos. 209/D/314
209/D/315
209/D/316

In the Matter of Whitchurch Down,
in Tavistock, Tavistock Hamlets
and Whitchurch, West Devon
District, Devon

SECOND DECISION

This decision is supplemental to my decision dated 11 July 1983 about the disputed Land Section and Rights Section registrations of Register Unit No. CL86 in the Register of Common Land maintained by the Devon County Council. By my said decision at page 5, (a) I adjourned the consideration of the Rights Section registrations at Entry Nos 84 and 85 made on the application of Mr Ivor Phillips; and (b) I gave Whitchurch Commoners Association liberty to apply to have my said decision set aside as regards the registrations which include in column 4 the word "stray", other than the registrations confirmation of which was in my said decision refused, that is to say Nos 7, 20, 21, 59 (mistakenly in my said decision at page 5 typed as 52), 60, 63, 64, 65, 66, 68, 72, 87, 89, 107, 108, and 109. Since my said decision, Whitchurch Commoners Association have made such an application (their Solicitors' letter of 11 November 1983) and Horsham Travel Agency Ltd as owners of Higher Longford Farm, Whitchurch applied for the word "stray" at Entry No. 7 to be modified by substituting the word "graze" (their Managing Director's letter of 6 December 1983).

I held a hearing for the purpose of inquiring into the said registrations at Entry Nos 84 and 85 and into the said applications of Whitchurch Commoners Association and Horsham Travel Agency Ltd at Plymouth on 17 and 18 January 1984. At the hearing: (1) Mr Ivor Phillips attended in person; and (2) Whitchurch Commoners Association were represented by Mr D M Crocker solicitor of Bellingham & Crocker, Solicitors of Plympton.

Of the above mentioned registrations of rights "to stray", Mr Harry Batholomew as chairman of Sampford Spiney Commoners Association said that most of them (he excepted Nos 7, 52 and 109 and did not mention No. 59) were made by members of his Association, and that his Association did not now wish to support such registrations.

As to the application of Horsham Travel Agency Ltd, Mr Crocker said that on the morning of the hearing he had had a short telephone conversation with Wolferstans, Solicitors of Tavistock who said they represented the applicant and would not be coming to the hearing. Whether or not this conversation amounted to a withdrawal, in the absence of any evidence of argument in support, I dimiss the application. So in this decision I treat the registration at Entry No. 7 like the other registrations which include "to stray".

For the reasons given under the hearing "Straying" in my decision dated 30 June 1983 re Forest of Dartmoor (CL164), I consider that a registration of a right

"to stray" should in the absence of any evidence justifying it with or without some modification, be avoided. The evidence of Mr Batholomew provides as regards some of the registrations an additional reason for avoiding them. So notwithstanding such evidence did not deal with all the stray registrations, I REFUSE to CONFIRM the registrations at Entry Nos 7, 20, 21, 59, 60, 63, 64, 66, 68, 72, 87, 89, 107, 108 and 109, and accordingly these registrations are hereby excluded from the paragraph of the Schedule (Decision Table) to my said decision which begins: "I confirm all the other registrations in the Rights Section ...".

In support of the registrations at Entry Nos 84 and 85, Mr Phillips gave oral evidence in the course of which he produced: (a) the documents which he produced to me in January 1983 at a hearing relating to Penn Moor and Stall Moor (Register Unit No. CL112) and which are listed in Part IV of the Third Schedule to my decision dated 2 March 1984, and made by me about such Moors; (b) a conveyance (IP/101) dated 17 May 1960 by which Mr John Rogers Davies conveyed to him (Mr I Phillips) some fields formerly part of Ash Farm containing about 31 acres (with some buildings); and (c) a statement dated 18 January 1984 by Mr Mercy Bradwell Peacock Matthews of 5 Kimberley Villas, Western Road, Ivybridge that from the early 1960's until the mid-1970's he assisted Mr Ivor Phillips to drive cattle from Whitchurch Down to Ash Mill, Grenofen. Much of the evidence and arguments of Mr Phillips at this CL84 hearing (January 1984) were the same as those put before me at my said January 1983 hearing relating to Penn Moor and Stall Moor (CL112), and about which Mr Phillips then knew nothing of my said March 1984 Decision. ⟶ So far as his evidence and arguments related to "Man of Devon", to "Venville" to rights in gross and to the decisions favourable to him (by agreement or concession) made by the Chief Commons Commissioner in re Hentor Warren, CL190 and by myself re Forest of Dartmoor CL164, I reject them for the reasons which I have set out under the heading "Man of Devon" in my said 1984 CL112 Penn Moor and Stall Moor decision, which reasons should be treated as repeated herein.

But as explained under such heading I am concerned to determine whether the rights claimed, particularly those at Entry No. 84, can be supported as ordinary rights of commons appurtenant by use from any of the lands mentioned in column 5, being (i) Ash Mill and Part Ash Lands, Grenofen, Whitchurch, (ii) 8 Beechfield Avenue, Yelverton, Buckland Monachorum, (iii) The Corner, Yelverton, Buckland Monachorum, and (iv) 1 and 1A Weston Park Road, Plymouth, by the exercise of the rights described in column 4 as of right over the requisite period, in this case 20 years before 31 January 1972 (the date of the Commoners Association Objection No. 959).

As to this, Mr Phillips, while conceding the North Devon Water Board Objections Nos 507 and 526, seemed only concerned with a possible right attached to (i) being his lands at Grenofen; he said (in effect):- He understood that the Unit Land was vested in Tavistock Rural District Council as Lord of the manor: their Objection No. 688 put in question merely the number of animals, not the existence of rights (except turbary) as claimed. As to himself exercising rights on the Unit Land, he had tried several times, but it was so overstocked, that it is starvation to put cattle there; he had had his land at Grenofen for the last 24 years (since 1960); he was only interested in cattle (not sheep); he and others so interested had been driven off the Unit Land by the overstocking of sheep.

Against Mr Phillips , oral evidence was given Mr Ernest John Reed Doidge who has farmed in Whitchurch since 1944 and who is and has been for between 25 and

30 years a member of the committee of the Whitchurch Commoners Association and a member of Whitchurch Parish Council. He had since he was a boy known Mr Phillips' land at Grenofen; it was formerly part of Ash Farm. As to there being rights attached to it over the Unit Land, it was not among the farms in Whitchurch which had such rights; exceptionally Ash Farm and Budghill Farm (a short distance south of Middlemoor) had no such rights. Which of the Whitchurch Farms had rights was sometimes a matter of local discussion; the said two farms were the only two he knew of which had not.

Also against Mr Phillips was Captain Edward Madgwick, R (Canada) N, who is and has been for about 11 years chairman of Whitchurch Commoners Association and who in the course of his oral evidence produced: → copy conveyance (EM/1) by which Mr and Mrs Edward and Marjorie Camp and another conveyed to Mrs Elizabeth Ruth England and Captain William Alexander Dallmeyer RN → part of Ash Farm containing 38.66 acres (situated south of and adjoining Mr Phillips' land comprised in his said 1960 conveyance) and which mentioned a conveyance dated 31 January 1960 by John Rogers Davies of the premises and three mesne conveyances dated 3 September 1954, 27 October 1959 and 25 March 1960; a letter (EM/2) dated 13 January 1984 requesting him to produce the original; and (EM/3) particulars of sale by auction on 18 August 1944 of Ash Farm containing 105a.Or.29p (no mention of any attached right of common). He said (in effect):- Budghill Farm and Ash Farm were not generally regarded as having common rights; if Ash Farm had such rights they would have been important enough for mention in the 1960 conveyance and the 1944 Particulars.

On the day after the hearing, I viewed from the road Mr Phillips' land at Grenofen, and motored along the road which he said his cattle would have been driven when going onto the Unit Land (that is a right turn at the crossroads and then steadily upwards by St Andrews Church so as to enter the Unit Land by the road for through motor trafic) about ¼ of a mile west of its southeast corner near Middlemoor.

Even assuming that Mr Phillips' cattle during the 12 years he owned land at Grenofen before January 1972 (the relevant Objection date) from time to time have "tried" (as he said) to graze the Unit Lane (notwithstanding its overstocking of sheep) I find that these cattle never graze as of right in the sense that his activities were open enough to be recognised by those concerned as being done in exercise of a right; neither he nor Mr Matthews said anything from which I can deduce activities as of right. During my inspection Ash Farm seemed to me not situated conveniently for grazing from it on the Unit Lane; indeed it appeared less conveniently situated than might be suppose merely by looking at the Register map, for notwithstanding it being in the direct line not far from the nearest point on the Unit Land, the comparatively complicated route through a built-up area (the route used by Mr Phillips) appeared the only possible. So my inspection gave me no reason to doubt the general statement of Mr Doidge and Captain Madgwick about Ash Farm having always been relevantly different from other Whitchurch Farms and I accept their evidence. There was no evidence at all that from the 31 acres Mr Phillips acquired in 1960 or from the other smaller adjoining fields he acquired later, there had been any grazing on the Unit Land before 1960; and their situation in relation to the Unit Land is against it ever having been a convenient way of farming Ash Farm. So even if contrary to my view Mr Phillips grazed as of right after 1960 I cannot infer that there was from his lands any such grazing before; and a 12 year period is too short to

presume a grant such as was presumed in Tehidy v Norman 1971 2QB 528. There was no evidence apart from that above summarised which would support prescription at common law or under the Prescription Act 1832. By reason of the Commoners Association Objection No. 959, after it, grazing by Mr Phillips (even if there was any) cannot be as of right. So I conclude that by use no right of grazing from Mr Phillips' land at Grenofen has been established.

There was no evidence at all to support any right of common for any of the other lands of Mr Phillips mentioned in column 5 or of any other rights of common mentioned in column 2. Accordingly my decision is that the registrations at Entry Nos 84 and 85 were not properly made, and I therefore refuse to confirm them.

Of even date with this my second decision is the notice of the finality or the avoidance (as the case may be) of all the disputed registrations mentioned in my said 1983 decision (except the registrations mentioned in this my second decision), which I am by section 6 of the Commons Registration Act 1965 required to send to Devon County Council as registration authority and a copy of which I am by regulation 32 of the Commons Commissioners Regulation 1971 required to send to the persons therein specified. To save expense, the said notice and this my second decision will be sent out together. If no appeal is brought against this my second decision, or when any such appeal has been disposed of, copies of the said section 6 notice relating to the registrations mentioned herein will be sent out to (1) Devon County Council as registration authority, (2) persons on whose application the registrations mentioned in this my second decision were made or their successors in title or their representatives so far as known in the office of the Commons Commissioners; (3) Whitchurch Commoners Association or their representatives so far as so known; and (4) such persons as may write to the office of the Commons Commissioners asking for a copy of the said notice to be sent to them.

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 8th day of March 1984

A. A. Baden Fuller.

Commons Commissioner

CORRECTED by adding at the end of the second paragraph on page 4 "and I therefore refuse to confirm them."

A A Baden Fuller
21 September 1984.