



COMMONS REGISTRATION ACT 1965

Reference Nos. 210/D/51 - 52

In the Matter of Turnworth Down, Turnworth  
Dorset.

DECISION

These disputes relate to the registration at Entry No.232 in the Land section of Register Unit No.CL.232 in the Register of Common Land maintained by the Dorset County Council and are occasioned by Objection No. 1266 made by the former Dorset County Council and Objection No. 142 made by Mr R J Tory and both noted in the Register on 1st February 1973.

I held a hearing for the purpose of inquiring into the dispute at Dorchester on 8th January 1976. The hearing was attended by Mrs R Colyer, the applicant for the registration, Mr D J Harper, Solicitor, on behalf of the County Council, and Mr T C M Winwood, Solicitor, on behalf of Mr. Tory. Mr Harper informed me that the County Council did not wish to pursue Objection No. 1266.

Mrs Colyer based her case on the inclosure award made under the Turnwood, otherwise Turnworth, Inclosure Act of 1801 (41 Geo. III, c. 39 (private) ). The original award, which was directed by the Act to be deposited with and remain in the custody of the Lord of the Manor of Turnwood, otherwise Turnworth, cannot now be found, and Mrs Colyer sought to rely on what purported to be a copy of the award produced from the records of the former Clerk of the Peace in the Dorset County Record Office. Mr. Winwood objected to the admissibility of this document on the ground that there was nothing to show that it was indeed a true copy of the award. I must, therefore deal with this objection before considering the merits of the case.

The document in the Record Office is written on parchment in what appears to be a contemporary hand and has attached to it a plan of the parish of Turnworth bearing the name of Thomas Davis, the younger, who was the Surveyor named in the Act of 1801. The names of two of the Commissioners named in the Act appear at the end, but they are both in the same writing and where the seals should be there are merely the letters "L.S". There is no indorsement stating that the document is a copy of the award.

The Act provided that the award should, within twelve months after its execution, be enrolled either among the records of the Court of Quarter Sessions for the County of Dorset or in the High Court of Chancery, and that the award and enrolment and the plans annexed to them could be inspected and perused at all reasonable times on payment of a small fee.

I was greatly assisted by evidence given by Miss Margaret Holmes, the County Archivist, who has had the disputed document in her care since 1955. When she took up her post the document was among the records of the Clerk of the Peace, and there is no record that it came from any outside source. There is, however, no entry of the enrolment of the award in the Quarter Sessions Court Book covering the years 1798 to 1806, which contains enrolments of other inclosure awards during this period. On the other hand, it appears that the book cannot be relied upon as being a comprehensive record, since Miss Holmes has found examples of awards which



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should have been recorded in the book and were not. It appears that the Turnworth award was in fact enrolled, for it is included in a list of inclosure awards in the custody of the Clerk of the Peace compiled about 1830, where the date of enrolment is stated to have been 25th March 1805. The records of the Clerk of the Peace contain other lists of enrolled inclosure awards compiled about 1860, on 25th June 1870 and in 1938. The Turnworth award appears in each of these lists. The records of the Clerk of the Peace also include a certificate dated 23rd April 1805 by the Surveyor appointed by the Commissioners in accordance with the Act of 1801 that the awarded roads had been put in good and sufficient repair.

There is no document among the records of the Clerk of the Peace which could be the enrolment mentioned in the lists other than the document produced by Miss Holmes. While Mr Winwood was fully justified in questioning its authenticity when he had seen no more than the document itself, Miss Holmes's evidence of the context in which it is preserved leads me to find as a fact that the document is the enrolment which was required to be made in accordance with the provisions of the Act of 1801.

I therefore turn to a consideration of the terms of the award. The land comprised in the Register Unit forms part of an allotment in the Sheep Down to the Lord of the Manor subject to the right of cutting furze for fuel thereafter awarded. This right was in the following terms:-

"And the said Commissioners do Order Direct and Award that the said George Fry Thomas Mullett John Bowdon George Pope John Kingsbury and the Occupiers of the Houses and Tenements now in their Possession for the Time being and also the Occupiers for the Time being of the Rectorial House of Turnwood otherwise Turnworth, aforesaid shall be at Liberty to cut Twenty-four Waggon Loads of Furze in every Year to be used for Fuel in their respective Dwelling houses and not elsewhere in the Proportion of Four Waggon Loads in every Year for each of the said Occupiers and that in Case of the future Increase or Decrease of the Quantity of Furze grown on the said Down the said Quantity of Twenty-four Loads to be cut in each Year shall be increased or Decreased and Divided Proportionably as shall be agreed on by the Steward and Homage of the Court Baron of the Lord of the said Manor of Turnwood otherwise Turnworth for the time being such Furze to be cut in that part of the Down called Bondsley Peak Containing about Sixteen Acres and not elsewhere the Same being Part of the Allotment on the Sheep Down allotted to Mark Davis Esquire on the North Side of a Line drawn East and West from the Sheep Pond by the Public Highway No.2 to a place called Bondsley Pit by the Highway No. 3 as Delineated on the said Map".

The area so delineated on the map referred to in the award is clearly identifiable on the modern Ordnance Survey Map and forms the northern half of the land comprised in the Register Unit. Mrs Colyer stated, in my view very properly, that she did not wish to support the registration in so far as it related to the southern part, i.e. the land to the south of a line drawn from the Sheep Pond to Bondsley Pit. No right of cutting furze for fuel is registered in the Rights Section of the Register Unit. Mr. Winwood therefore submitted that all such rights had ceased to be exercisable by the operation of section 1 (2) (b) of the Commons Registration Act 1965 and that I ought to follow the decision of Goff J (as he then was) in Central Electricity Generating Board v Clwyd County Council (1975), 235 Estates Gazette 299 and refuse to confirm the registration in the Land Section of the Register Unit.



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This is at first sight an attractive argument, but after careful consideration I have come to the conclusion that I ought not to accede to it. An inclosure award made under an Act of Parliament is a form of delegated legislation, its provisions having the same effect as if they had been enacted in the Act itself. Indeed, the Act of 1801 expressly declares that all orders, directions, regulations, and determinations of the Commissioners made or expressed by or in the award to be final, binding, and conclusive. Such provisions can only cease to have effect if repealed by a subsequent Act. Mr Winwood sought to rely upon section 1 (2) (b) of the Act of 1965 as repealing the provision of the award giving rights of estovers to the occupiers of certain houses. In my view the Act of 1965 did not so operate. The rule to be applied in such cases was laid down by Lord Selborne, L.C. in Seward v "Vera Cruz" (1884), 10 App.Cas.59, at p.68 in the following terms:-

"Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention so to do".

This rule was applied in the case of an inclosure Act in Wiltshire County Valuation Committee v Boyce, (1948) 2 K.B.125, see per Scott, L.J. at pp 131, 132. The provision in question in that case was in the Act itself, but it was not to come into effect until after the execution of the award, and I can see no ground for drawing any distinction between such a provision and one contained in the award made under the authority of the Act.

The Act of 1965 contains no indication of a particular intention to repeal the rights created by the Act of 1801, and the words of section 1 (2) (b) of the Act of 1965 are capable of a reasonable and sensible application to rights of common not created by local legislation without extending them to rights so created.

Mr Tory gave evidence that he is the owner of Bondsley Peak and of all the other property, including the houses, in the manor of Turnworth. Mr Winwood submitted that the rights over Bondsley Peak had been extinguished by the unity of the ownership of the land and of the houses in favour of which the rights were created. I am unable to accept this submission, because the rights were awarded to the occupiers and not to the owners of the houses in question. In my view, the rights could not be extinguished unless Mr Tory were the occupier as well as the owner of the houses, the basis of such extinguishment being that the owner of the right and of the land which is the subject of the right is the same person. It may be however, that such unity of occupation would only operate to suspend the right, but it is not necessary for me to express a view on this point, since in this case there is no unity of occupation.

Mr Tory also gave evidence that he has known Bondsley Peak for the last 45 years, and that he has never heard of anyone collecting furze there. On this evidence I was invited to infer that the rights to do so had been abandoned. In considering this point it is necessary to have clearly in mind what is meant by the abandonment of a right of common. Mere non-user of the right does not of itself extinguish the right, but non-user for a long period in unexplained circumstances can be evidence upon which it can be presumed that the person entitled to the right has released it: see per Littledale J in Moore v Rawson (1824), 3.B. & C 332, at p.339. In my view, there is no scope for such a presumption in this case. A release can only be made by a grantee or his successor in title to the grantor or his successor in title. Here there was no grant by Mr Tory's predecessor in title. The rights were created by statute. Statutory rights can only be taken away by statute and, as I have already observed, there has so far been no



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statute which has taken away the rights of collecting furze created by the Act of 1801 and the award made under it.

I have therefore come to the conclusion that Bondsley Peak is still subject to the rights created by the Act and award, and therefore falls within the first limb of the definition of "common land" in section 22 (1) of the Act of 1965.

For these reasons I confirm the registration with the following modification:- namely, the exclusion of the land to the south of a line between the Sheep Pond and Bondsley Pit.

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

9<sup>th</sup>

day of

February

1976

Chief Commons Commissioner