



COMMONS REGISTRATION ACT 1965

Reference Nos: 213/D/175-184

In the Matter of Lower Cow Pasture, Shuthonger
Common and Cowham, Twynning, Gloucestershire (No. 2)

DECISION

These disputes relate to the registration at Entry Nos 1 to 11 (inclusive) in the Rights Section of Register Unit No. CL 46 in the Register of Common Land maintained by the Gloucestershire County Council and are occasioned by Objection No. OB 22 made by Miss R D Wigan and noted in the Register on 14 May 1970, Objection Nos OB 133, OB 134, and OB 135 made by Mr B C Ball, Objection Nos 145 and 146 made by Mr A E Jones and M/S G E Jones and Objection No. OB 156 made by Mr G S Niblett and all noted in the Register on 22 December 1970, and Objection OB 577 made by Mr B C Ball and Objection Nos OB 703 and OB 704 made by Mr V H Halling and Mr J S Warner and all noted in the Register on 8 January 1973.

I held a hearing for the purpose of inquiring into the dispute at Cheltenham on 28 and 29 March 1979 and at Watergate House, WC2 on 9 and 10 April 1979. The hearing was attended by Miss Sheila Cameron, of Counsel on behalf of the personal representatives of the late Miss R D Wigan, the applicant for the registration at Entry No. 1, Mr C E Passey and Mr C W Passey, the applicants for the registration at Entry No. 2, Mr V R Halling, the applicant for the registrations at Entry Nos. 4 and 6, Mr M C Pitcher, the applicant for the registration at Entry No. 5, Mr G S Niblett, the applicant for the registration at Entry No. 7, and Mr T S Halling, the applicant for the registration at Entry No. 8, Mr Martin Roth, of Counsel, on behalf of Mr B C Ball, the Objector and the applicant for the registrations at Entry Nos. 9 and 10, and Mr F M H Russell, Solicitor, on behalf of Mr S R R Williams and M/S C Williams, the applicants for the registration at Entry No. 11.

I was informed that the parties were agreed that the registrations at Entry Nos. 6 and 8 should not be confirmed and Mr Roth informed me that he was instructed not to pursue the registration at Entry No. 9.

The land comprised in the Register Unit consists of three areas. The first is known as Lower Cow Pasture and the second as Shuthonger Common. The third consists of a number of separately named, but contiguous, areas which can conveniently be referred to collectively as Cowham, the name of the largest of them. The whole of the land is subject to 123 rights, known as cow pastures, originally appurtenant to or usually held with certain lands in Cowham. These rights are now owned in varying numbers by several persons, and it is not now possible to ascertain to which part of Cowham each right was formerly attached. Two cow pastures carry with them the right to graze 8 sheep or 4 yearlings, heifers, or steers or 2 yearling fillies or colts or one horse.

The position with regard to the cow pastures during the middle of the nineteenth century was described by one Thomas Tolley in a statutory declaration dated 26 June 1883. Mr Tolley said that Shuthonger Common was commonable all the year round except from 2 February to 1 May, Lower Cow Pasture from 14 May to 2 February, and Cowham from 12 August to 2 February. However, all the 123 pastures



had long been in the hands of a very few persons as tenants and the tenants were accustomed to arrange from time to time among themselves as to the time and mode of stocking the Commons according as their mutual convenience and the character of the season might render desirable. Mr Tolley went on to say that in the year 1844, a verbal (presumably oral) arrangement was made amongst the tenants and had ever since been acted upon, under which in lieu of turning into the Lower Cow Pasture on 14 May, the tenants mowed and carried away the first math thereof, the Lower Cow Pasture being divided and apportioned among them according to the number of pastures held by them respectively.

A little further light on the "verbal" arrangement of 1844 is thrown by the particulars of sale of property in Twynning prepared for a sale by auction held by Messrs Moore and Sons on 24 August 1904. Lot 19 consisted of 26 cow pastures and it is stated in a note that under the arrangement the land was apportioned at 2r.18p for each pasture, which was equal to 15a.3r.28p of first math, being part of O.S. No. 97, in addition to rights of depasturage. It further appears from these particulars that by 1904 some of the rights of first math in Lower Cow Pasture had been separated from the pastures in which they originated, for Lots 18 and 20 consisted of the first maths of various pieces of meadow land in Lower Cow Pasture.

The names of the occupiers of the 123 cow pastures are given in the Tewkesbury Union valuation list for the Parish of Twynning dated 20 September 1859. The particulars there given are the same as those stated in Mr Tolley's statutory declaration, save only that the date for the opening of Lower Cow Pasture is stated to be 1 May instead of 14 May. 14 May is also the date given in the 1904 particulars of sale. Faced with this discrepancy, I have come to the conclusion that 14 May is more likely to be the correct date.

It appears from the evidence that the owners of the 123 cow pastures are entitled to the exclusive right of pasture over the areas of land comprised in the Register Unit, so that the cow pastures are rights of common only by virtue of the definition of "rights of common" in Section 22(1) of the Commons Registration Act 1965.

In some of the registrations the rights are stated to be exercisable over areas less than the whole of the land comprised in the Register Unit. In such a case the right has ceased to be exercisable over the remainder of the land by virtue of Section 1(2) (b) of the Commons Registration Act 1965.

The registration at Entry No. 1 is in two parts, the first being of 2 cow pastures and the second of one, presumably because they are so divided in the parcels of a conveyance made 7 February 1946 between (1) Edward James Redwood (2) Jane Shipley Dimmock. The rights are stated in this conveyance to be exercisable at "all seasonable times" and at "all customary times". In my view, it would be desirable to state these times precisely in accordance with Mr Tolley's statutory declaration. At the time of the registration Miss Wigan was the owner of Shuthonger Lodge and she applied for her rights to be registered as attached to that property. However, by a conveyance made 8 April 1970 between (1) Ruth Damaris Wigan (2) Jean Elizabeth Mews Shuthonger Lodge was conveyed with the exception of the rights of common appurtenant to it. The rights should therefore now be stated in the Register to be held in gross.

The registration at Entry No. 4 does not state the periods of the year during which



the rights are exercisable and therefore requires modification by the inclusion of a reference to these periods in accordance with Mr Tolley's statutory declaration.

The registration at Entry No. 5 is of the right to take the first math from the two commonable meadows known as Leech Meadow and Palmers or Palmy Hatchet. Mr Pitcher claims this right under a conveyance made 8 December 1952 between (1) Grace Mary Pain (2) George James Pitcher. The schedule to this conveyance includes the land in question, but with an entry in a column headed "Remarks" of the words: "First Math' only subject to existing commonable rights of pasturage being 'After' 'Latter Math' between 12 August and 12 February in every year".

It is therefore not surprising that Mr Pitcher should have registered this right. The earlier documents of title, however, throw a different light on the matter. The two areas of land in question are included with other land in the parcels of an indenture made 3 September 1896 between (1) Edward Charles Riddell (2) Edith Mary Catherine Gerard (3) Hon. Robert Joseph Gerard-Dicconson, Richard Trappes-Lomax, Bruno Butler Bowden and George Pfaehler without the remark relating to "first math". The two areas appear again in the parcels of a vesting deed made - March 1926 between (1) R Trappes-Lomax, B B Bowden and George Thomas Gerard (2) E M C Riddell (née Gerard), but with the following entry in a column headed "Remarks": "First Math only i.e. Subject to the existing commonable rights of pasturage between the 12 August and 12 February in every year". The same areas appear in the parcels of a vesting assent made 2 March 1950 by Cuthbert Edward Alfonso Riddell and Charles Leigh Pemberton with the form of the "Remark" varied to: "First Math only. Subject to existing commonable rights of pasturage between 12 August and 12 February in every year".

It is apparent that the parcels of this series of documents were intended to have an identical content. There was nothing to indicate that the indenture of 1896 did not relate to the freehold interests shown in the Tithe Award. Indeed, it is there recited that both parts of the land in question were in 1864 the property of Charles Porter, who appears in the Tithe Award as the owner of Palmer's Hatchet Meadow. The "Remark" in the vesting deed of 1926 that the land was subject to the existing commonable rights could with equal accuracy have been included in the indenture of 1896, and in my view the words "First Math only i.e." show that by "First Math only" the draftsman meant only that the land was subject to the existing rights. Since the land was subject to those rights, the only effective agricultural use that the owner of the land could make of it was to take the hay crop and it would appear that local custom limited him to taking the first crop only. That did not, however, mean that he had only a right of first vesture. He was entitled to the hay as the owner of the land, even though in practice he might not have any further use of the land. It is unfortunate that "i.e." was omitted from the vesting deed of 1950, but I do not consider that this had the effect of converting what had been a freehold interest into a mere right of first vesture. The introduction of the "Remark" was unfortunate in that it could be taken as an indication that only the first math passed, but when examined in its context it is perfectly accurate and was no doubt intended to be helpful. In my view, the parcels in each case consisted of freehold land.

I have therefore come to the conclusion that my proper course is to refuse to confirm this registration and to leave Mr Pitcher to claim to be registered as the owner of the land in the reference which will have to be made later under section 8 of the Commons Registration Act 1965 with regard to the parts of the land comprised in the Register Unit of which no person is registered as the owner.



The registration at Entry No. 7 is in two parts, the first being of 4 cow pastures and the second of 10 cow pastures. The reason for this division is that although the whole 14 cow pastures were included in a conveyance made 20 January 1956 between (1) Nellie Fletcher and Archie Mew (2) George Stanley Niblett, the conveyance of the 10 cow pastures was subject to the reservation to Mr A E Passey of the first math of 15a.3r.28p. of meadow land in Lower Cow Pasture. This reservation was a division of the 26 cow pastures which formed Lot 19 in the Sale particulars of 1904. Effect has been given to this reservation in the registration by the limitation of the period for the exercise of the 10 pastures so as to commence on 12 August instead of 14 May. Having regard to the arrangement made in 1844, this limitation must also apply to the period for the exercise of the 4 pastures.

The 4 cow pastures are stated to be exercisable at "the usual and accustomed times of the year." It seems to me that it would be desirable to state these times precisely in accordance with Mr Tolley's statutory declaration. In the part of the registration relating to the 10 cow pastures it is stated that the right of pasture over Shuthonger Common can be exercised perennially, the exception of the period from 2 February to 1 May having been omitted.

The registration at Entry No. 11 is of the right of pasturage for 18 cows or other cattle usually depastured at all usual or reasonable times of the year. It seems desirable to define this right precisely in accordance with Mr Tolley's statutory declaration.

The only real difficulty with regard to the registrations the subject of these disputes arises with regard to those at Entry Nos 2 and 10. The registration at Entry No 2, for which Mr E W Passey and Mr C E Passey applied, is of 76 cow pastures exercisable over Lower Cow Pasture and most of Cowham and 36 cow pastures exercisable over another part of Cowham known as Midsummer Meadow, while the registration at Entry No. 10, for which Mr Ball applied, is to graze 76 cattle, or 304 sheep, or 152 yearling heifers or steers, or 76 yearling fillies or colts or 36 horses exercisable over Shuthonger Common. Until a few months before the registration at Entry No. 2 was made the applicants were the owners of 76 cow pastures exercisable over Lower Cow Pasture, Shuthonger Common, and Cowham. Mr Ball then agreed to buy these cow pastures in so far as they were exercisable over Shuthonger Common. The parties executed a conveyance made 12 July 1967 between (1) Edwin Wilson Passey and Colin Ernest Passey (2) Bryan Christopher Ball, which stated that there were conveyed to Mr Ball 76 rights of pasture over Shuthonger Common.

The question for consideration is what (if anything) Mr Ball acquired by this conveyance and what (if anything) remained with Mr E W Passey and Mr C E Passey. The difficulty is caused by the doctrine summarised in 6 Halsbury's Laws of England (4th Edn), paragraph 671, that a right of common may be extinguished by a release of the right to the lord and that by a release of any part of the right the right over the whole of the land is extinguished. Mr Roth, on the other hand, argued that the conveyance of 1967 was not a release to the lord of the manor, but a transfer of the right over Shuthonger Common to Mr Ball as a purchaser. Miss Cameron argued that since the owners of the 127 cow pastures had an exclusive right of pasture over the land in question, these were not rights of common and so were not extinguished by the conveyance: see Johnson v Baines (1877), L.R.3 Q.B.527.



Although the conveyance of 1967 is worded as a transfer to Mr Ball of the right to graze 76 cattle over Shuthonger Common, I have come to the conclusion that its effect in law was to extinguish the right by merger. It is well established that a man cannot have a right to take a profit out of his own land as a separate right apart from the ordinary incidents of ownership: See 14 Halsbury's Laws of England (4th Edn), Paragraph 266.

The decision in Johnson v Barnes, supra would clearly be applicable to this case if the owners of the whole of the 123 cow pastures had agreed to release their rights over Shuthonger Common. In that case they would have continued to be entitled to exercise their rights over Lower Cow Pasture and Cowham and they would be deemed to have consented to any insufficiency of the grass on Lower Cow Pasture and Cowham for 123 cows. Here the result of the loss of the right to graze 76 cows on Shuthonger Common will be that those cows will impose a greater burden on Lower Cow Pasture and Cowham, leaving less grass for the 47 cows belonging to the other owners. On the other hand, Shuthonger Common will be relieved of the burden of grazing by 76 cows, thus leaving more grass for the other 47. There will therefore be just as much grass for 123 cows as there was before, but in order to secure it the owners of 47 cows will have to graze their animals on Shuthonger Common for longer than they would otherwise have done. Since none of the persons entitled to the 47 cow pastures has objected to the registration at Entry No. 2 on this ground, it would appear that the removal of the 76 cows from Shuthonger Common has not materially adversely affected the rights of those persons. I can, therefore, see no valid reason for distinguishing this case from Johnson v Barnes, supra.

There is, however, a further difficulty arising out of the drafting of the registration at Entry No. 2. As stated above, the registration is of 76 cow pastures exercisable over parts of the land comprised in the Register Unit and of 36 cow pastures over another part known as Midsummer Meadow. This cannot be correct, for it would enable 112 cows to be grazed at one time, provided that they were correctly distributed. It is apparent from the documents of title that the registration came to be drafted in this form because the 76 cow pastures are held under three separate titles comprising 24, 36 and 16 cow pastures respectively, and only the deeds relating to the 36 cow pastures refer specifically to Midsummer Meadow. While it seems highly likely that the 24 and 16 cow pastures were also exercisable over Midsummer Meadow, I must take the registration as I find it, and I cannot extend the 24 and 16 cow pastures to Midsummer Meadow. Accepting, as I must, that a distinction is to be drawn between the 36 cow pastures on the one hand and the 24 and 16 cow pastures on the other, in my view the correct way to give effect to it in the registration is to specify 36 cow pastures over the whole area and 40 cow pastures over that area with the exception of Midsummer Meadow.

Another point with regard to the registration at Entry No. 2 is that the rights are stated to be attached to Woodend Farm, but it was agreed at the hearing that this is incorrect, the rights being held in gross.

For these reasons I confirm the registration at Entry No. 1 with the following modifications, namely, the substitution of the words: "to graze 2 cows or beasts or 8 sheep and to graze 1 cow or beast from 12 August to 2 February over the land numbered 1 on the Register Map, all the year round except from 2 February to 1 May over the land numbered 2 on the Register Map, and from 12 August to 2 February over the land edged blue and lettered B on the overlay number 1 to the Register Map for this Register Unit" for the words in column 4, and the substitution of the words "In Gross" for the words in column 5; I confirm the registration at Entry No. 2



with the following modifications, namely, the substitution of the figures "40", "160", "80", "40" and "20" for the figures "76", "304", "152", "76" and "38" respectively and the substitution of the words "red, blue, green and violet and lettered A, B, C and D" for the words "green and lettered C" and the substitution of the words "In Gross" for the words in column 5; I confirm the registration at Entry No. 4 with the following modification, namely, the substitution of the words: "from 12 August to 2 February over the land numbered 1 on the Register Map, all the year round except from 2 February to 1 May over the land numbered 2 on the Register Map, and from 12 August to 2 February over the land numbered 3 on the Register Map" for the words: "over the whole of the land comprised in this Register Unit but excluding the small strip of land to the north of the red line A-B and to the east of the red line B-C and also excluding the small area of land lettered D". (The words of exclusion are no longer necessary, since these areas are no longer comprised in the Register Unit); I refuse to confirm the registrations at Entry Nos. 5, 6, 8, 9 and 10; I confirm the registration at Entry No. 7 with the following modifications, namely, the deletion of the words: "but excluding the small strip of land to the north of the red line A-B and to the east of the red line B-C" (those words being now surplusage since the strip in question is no longer comprised in the Register Unit), the substitution of the words: "from 12 August to 2 February, except Shuthonger Common (Area No. 2) where the right of pasture can be exercised all the year round except from 2 February to 1 May" for the words "at the usual and accustomed times of the year", and the substitution of the words "all the year round except from 2 February to 1 May" for the word: "perennially"; I confirm the registration at Entry No. 11 with the following modifications, namely, the substitution of the words: "36 yearling heifers or steers or 18 yearling fillies or colts or 72 sheep or 9 horses" for the words "other cattle usually depastured," the deletion of the words "at all usual or seasonable times", the insertion of the words: "all the year round except from 2 February to 1 May" after the words "(Area No. 2 on the provisional register map)" and the insertion of the words "from 12 August to 2 February" after the words: "(Area No. 3 on the provisional register map and lying wholly within the red lines and as lettered "G")."

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

1972

day of

June

1979

Chief Commons Commissioner