



In the Matter of The Hudnalls, St Briavels,
Gloucestershire (No. 1).

DECISION

This dispute relates to the registration at Entry No. 1 in the Land section of Register Unit No. CL 333 in the Register of Common Land maintained by the former Gloucestershire County Council and is occasioned by Objection No. Ob 526 made by Lt Col J C O R Hopkinson and noted in the Register on 22 November 1972.

I held a hearing for the purpose of inquiring into the dispute at Gloucester on 10 and 11 February and at Watergate House, London WC2, on 16 February 1976. The hearing was attended by Mr T Etherton, of Counsel, on behalf of the St Briavels Parish Council, the applicant for the registration, and on behalf of the Parishioners of the Parish of St Briavels (a Corporation) and the St Briavels Parochial Church Council, whose applications were noted in respect of the registration under section 4(4) of the Commons Registration Act 1965, and Mr J Bradburn, of Counsel, on behalf of the Objector.

The land comprised in the Register Unit is and, so far as historical records go, always has been an area of woodland, though not so densely wooded as not to afford pasturage in some parts. It is claimed to be common land as defined in S.22(1) of the Act of 1965 by being subject to the rights of estovers, herbage and pannage registered in the Rights section of the Register Unit, to which the Objector has also objected.

The land in question was for many centuries part of the Forest of Dean, but it has long since been disafforested. The only relevance to this case of the former afforestation is that the land is referred to in some of the Forest records.

At all material times St Briavels has been a royal manor. The form of a letter close dated 13 August 1232 (misdated 1231 in the list of documents) directed to the Sheriff of Gloucestershire stating that the King wished that a weekly market should be held at St Briavels indicates that St Briavels was a royal manor by that time.

The earliest mention of the land in question adduced in evidence is in a regard of the Forest of Dean begun on Ash Wednesday 1282. It is there stated that the wood of "Hodenhales" was a demesne wood of the King and was cut by the men of St Briavels, who claimed the liberty of taking from there at will and that they had always taken from there in this way. This regard was prepared in obedience to a writ dated 25 November 1281 directed to the Sheriff of Gloucestershire and was to be produced before the justices in eyre for the pleas of the forest. There is no reference to this regard in the roll of the eyre, but it is evidence that the men of St Briavels had in fact been cutting wood in the Hudnalls and that they claimed to have done so always as of right.

After the regard there is a gap of some three and a half centuries in the documentary evidence. The next document is a survey of the Forest of Dean taken in 14 Charles I (1638-9), in which it was presented that a parcel of rough woody ground called "Hudnolds" near to St Briavels wherein the King's tenants in and about St Briavels claimed common of herbage and wood was worth 3s. 4d. an acre. In another survey made 15 July 1641 it was found and presented that a parcel of wood called "Hudnells" had been always time out of mind enjoyed by the "Country" as common.



In a presentment to the Royal Commissioners for the Forest of Dean returned into the Exchequer in Michaelmas term 1660 the "town and parish" of St Briavels stated that they had usually had and enjoyed within the waste of the King called "Hudnalls" liberty to take and cut wood there at all times at their pleasure without the order or attachment of any officer whatsoever of the Forest.

In an undated petition to Parliament of about the same period the inhabitants of the parish of St Briavels stated that they had enjoyed time out of mind for 300 years together common of pasture and estovers in "Hudnalls". They went on to state that Hudnalls, though within the old bounds of the Forest of Dean, had been disafforested for 300 years and that offences done within the common were presentable and punishable only in the court leet of St Briavels and not in any court belonging to the Forest.

Section 11 of the Dean Forest Act 1667 contained a saving to the inhabitants of and in the parish of St Briavels for the time being their lawful rights and privileges for the taking, cutting, and enjoying the wood growing in Hudnalls.

The St Briavels churchwardens' accounts for the year 1696 record the payment of £2 to Arthur Ricketts for one year's salary as Keeper of "Hudnalls".

On 3 May 1827 land called the Hudnalls was conveyed to George Rooke, an ancestor of the Objector, by the Commissioners of Woods, Forests, and Land Revenues. The land there described as the Hudnalls included, with other land, the land comprised in the Register Unit.

It appears that after this purchase Mr Rooke or his successors planted larch trees in the Hudnalls. This led to disputes as to whether the parishioners' rights extended to the cutting of the larch trees. These disputes came to a head in 1901 when Mr G D W Rooke sued Mr John Stevens in the Chepstow County Court for wrongfully cutting down a larch tree. The attention of the Judge was called to section 11 of the Act of 1667. In his judgment he pointed out that the section did not grant any rights to the inhabitants of St Briavels, but only protected such rights as they had, and he said that the defendant had to show in some other way that he had the right which he claimed to be entitled to exercise as an inhabitant of the parish. The Judge then referred to the line of authorities which decided that a right of this kind could not be claimed by custom or prescription or otherwise than by a grant from the Crown or by Act of Parliament and came to the conclusion that the defendant had not made out his case. He also held that, even if there were any such right, it would not extend to larch trees.

These proceedings were then followed by negotiations between Mr G D W Rooke and the Parish Council, which culminated in an agreement dated 18 June 1904 whereby Mr Rooke was allowed up to 25 March 1905 to cut any or all of the larch in the Hudnalls and after that date he should not plant or sell any more wood, but the parishioners should have with him the same rights to cut and take any kind of wood growing in the Hudnalls for their own use, but not for merchandise.

Such is the authentic history of this matter as revealed by the documents produced in evidence. My attention was, however, also directed to a passage in Rudder's History of Gloucestershire, published in 1778, where it is stated in the account of St Briavels parish at p.307:-

"..... they (i.e. the inhabitants) have also common of wood and of pasture in "Hudnolls, confirmed to them by an act of parliament 20.C.2.

"They have a custom of distributing yearly upon Whitsunday, after divine "service, pieces of bread and cheese to the congregation at church, to defray



"the expense of which, every householder in the parish pays a penny to the churchwardens; and this is said to be for the liberty of cutting and taking the wood in Hudnolls. The tradition is that the privilege was obtained of some earl of Hereford, then lord of the forest of Dean, at the instance of his lady, upon the same hard terms that Lady Godiva obtained the privileges for the citizens of Coventry".

This is the earliest mention of the bread and cheese ceremony and of the grant by an earl of Hereford which has been found. It was repeated by Bigland in his History of Gloucestershire, published in 1787, and in Fosbrooke's History of Gloucestershire, published in 1807. The distribution of bread and cheese on Whitsunday is still carried out, but there is nothing, apart from the story in the county histories, to connect it with the Hudnalls, nor is there any evidence of any grant made by an earl of Hereford. It seems to me that my proper course is to decide this case upon the authentic documents.

Mr Etherton squarely faced the difficulties placed in his path by the decision in Gateward's Case (1607), 6 Co. Rep. 59b that a fluctuating body, like the inhabitants of a parish, cannot have a right to a profit à prendre in alieno solo. He sought to overcome this difficulty by arguing that this was a case in which a lost Crown grant of rights of estovers and common of pasture to the inhabitants or the parishioners of St Briavels, thereby incorporating them, could be presumed. In the alternative, he argued that the agreement between Mr G D W Rooke and the Parish Council made in 1904 operated as an equitable grant of estovers to the Parish Council.

I have come to the conclusion that this is not a case which calls for what may be called, I hope without offence, such legal contortions. The persons alleged to be entitled to rights of common in the Hudnalls have been described in a variety of ways. In the regard of 1282 they were the men of St Briavels; in the survey of 1638-9 they were the King's tenants in and about St Briavels; in the presentment of 1660 they were the town and parish of St Briavels; and in the petition to Parliament and the Act of 1667 they were the inhabitants of the parish. In my view, the clue to the resolution of these inconsistencies is to be found in a document to which I have not yet had occasion to refer because it does not contain any reference to the Hudnalls. This is presentment made about 1660 to the Royal Commissioners for the Forest of Dean by the freeholders and inhabitants of a number of parishes, towns, villages, and places, including St Briavels, in which they set out their claim to common of pasture, pannage, and estovers in the waste soil of the Forest and 18,000 acres recently disafforested as appurtenant to their several ancient messuages, lands, tenements, and buildings. This shows that the word "inhabitants" was there used in a special sense as meaning all those (other than freeholders) who were entitled to enjoy the rights of common appurtenant to ancient messuages, lands, tenements, and buildings, and not the fluctuating body of persons resident in a parish, town, village, or place. If the word "inhabitants" in the nearly contemporary parliamentary petition and the Act of 1667 is construed in this sense, it brings those documents into line with the survey of 1638-9, in which the King's tenants are referred to, and also explains the statement in the petition that offences done within the common were presentable and punishable in the court leet of St Briavels. Although it seems to me that the primary importance of this document is that it shows that the word "inhabitants" was used in St Briavels in a special and restricted sense, it also shows that the rights of the "inhabitants" over the land to which the document related were appurtenant to their several ancient messuages, etc. Although the land in question may not have included the Hudnalls, it is highly improbable that the "inhabitants" rights in respect of the Hudnalls had a different legal basis from that of their rights over land in the manor.



I have therefore come to the conclusion that the rights of common referred to in the series of old documents were not rights in gross belonging to the inhabitants as such, but were rights enjoyed by the freehold and copyhold tenants of the manor as appurtenant to their respective holdings. Although copyholds and other manorial incidents have been abolished, there is nothing in the legislation by which that was effected to destroy the old rights of common, to which the land in question still remains subject.

For these reasons I confirm the registration.

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

16th

day of

May

1977

A handwritten signature in cursive script, appearing to read 'S. J. G. Smith'.

Chief Commons Commissioner