



COMMONS REGISTRATION ACT 1965

Reference Nos. 13/D/2
13/D/3
13/D/4

In the Matter of Tump Common,
Cliffords Mesne, Newent R.D.,
Gloucestershire

DECISION

These disputes relate to the registration at Entry No. 1 in the Land section of Register Unit No. CL53 in the Register of Common Land maintained by the Gloucestershire County Council and are occasioned by Objection No.12 made by Mr. Stanley Walter Brickell and noted in the Register on 26 June 1969, Objection No.14 made by Mr. Eric Joseph James and noted in the Register on 26 June 1969 and Objection No.138 made by Mr Albert Kenneth Huggins and noted in the Register on 11 March 1971.

I held a hearing for the purpose of enquiring into these disputes at Gloucester on 23 and 24 November 1972. The hearing was attended by the Objectors Mr. Brickell, Mr. James and Mr. A.K. Huggins who were all represented by Mr. V.R. Chapman of counsel who was instructed by Messrs. Burt Evans and Shawcross solicitors of Ross on Wye and Messrs. Leslie J. Slade & Co. solicitors of Newent and by Mr. William James Henry Hale and Mr. Owen Leslie Warren who were represented by Mr. B.D. Bodinham. It was agreed that these references should be heard together.

The registration was pursuant to an application made on 18 August 1967 by Mr. Hale. The land comprised in this Unit ("the Unit Land") is in two pieces; that ("the Larger Piece") on the west side of the metalled highway ("the Main Road") leading south from Newent through Cliffords Mesne to Glasshouse is very much larger than the piece ("the Brown Land") on the east side. Pursuant to applications dated January 1968 and made by Mr. James, Mr. A.K. Huggins and Mr. Brickell they were provisionally registered as owners of the Larger Piece; Mr. James being shown as the owner of the part ("the Green Land", about one seventh of the whole) being the southern part of the Larger Piece; Mr. A.K. Huggins being shown as the owner of the part ("the Red Land", about five sevenths of the whole) being the northern part of the Larger Piece and Mr. Brickell being shown as the owner of the part ("the Blue Land") being the remaining and central part of the Larger Piece. Three separate applications to register the land as common land made by Mr. Warren, Mr. E.J. Huggins and Newent Parish Council are noted in the Register, such applications having been made in April 1968, April 1968 and March 1969 respectively. The grounds of objection stated in the notices of objection were as follows:- (by Mr. Brickell; dated 15 May 1969) "Ownership with Titled Deeds", (by Mr. James; dated 16 June 1969) "Ownership to area marked green with Titled Deeds position of bungalow marked red" (on the notice of objection was drawn a sketch plan showing the Green Land edged green and Mr. James's bungalow marked red), and (by Mr. A.K. Huggins; dated 28 September 1970) "Proof of ownership before registration of common land. Land as shown coloured red on the attached plan was not common land at the date of registration" (the attached plan showed the Red Land edged red). The above mentioned provisional registrations of ownership, being undisputed, became final 1 October 1970.



The Brown Land is coloured brown on the supplemental map ("the Supplemental Map") referred to the Ownership section of the Register; it is a triangular piece of waste land bounded on the east by the Main Road and on its other sides by roads or tracks leading to and behind the adjoining pieces of land. Mr. Chapman said that his clients did not object to the Brown Land being registered as common land. In view of this statement and there being no other objection, I can I think properly confirm the registration of the Unit Land at least as regards the Brown Land.

Evidence was given on behalf of the Objectors; (i) by Mr. A.K. Huggins who bought the Red Land in 1963 from his uncle Mr. W.H. Huggins; he produced his documents of title and the papers relating to an application he made to the Minister of Transport in 1965 for an order under section 153 of the Town and Country Planning Act 1962 for the closing of a public footpath across the Red Land; (ii) by W.H. Huggins who is 68 years of age (Mr. James is his nephew and Mr. Brickell is husband of his niece) and who first knew the land when he was five years old; (iii) by Mrs. A.E. Potts who is 72 years of age and spent her childhood at Springfield Grange (nearby on the west of the Unit Land) and was at the time when the Newent Parish Council applied for registration their chairman but is not now a member although she is a member of the Rural District Council (she had lived in the Village until she was 19 years of age when she married and came back to the Village about 20 years ago to live there again permanently); (iv) by Mr. W.M. Sherard who is 87 years of age; (v) by Mr. Brickell who bought the Blue Land in 1958; and (vi) by Mr. P.A. Eward who produced a list of the commons in Gloucestershire which accompanied a letter dated 6 November 1942 from the Gloucester County Council to Mr. Gordon E. Payne; a similar list from a book entitled "A Physical Social and Economic Survey and Plan" by Mr. Gordon E. Payne (Tump Common was not mentioned in either list); and a copy of the Poor Rate Book for the Parish of Newent in respect of the rate made on 21 October 1920 and the Ordnance Survey Map for 1884. Evidence was given on behalf of Mr. Hale and Mr. Warren, (i) by Mr. Hale who is coming 68 years of age and lived in the village as a boy, and (ii) by Mrs. S.E. Ballinger who is 86 years of age and lived from 1913 to 1954 at Tump Cottage.

Just before the hearing I received a letter dated 21 November 1972 sent by Newent Parish Council to the County solicitor enclosing a letter to myself as follows:- "After indicating the intention to be represented at an Inquiry Newent Parish Council decided to withdraw the registration of that part of Tump Common on which dwellings had been erected. Though the Parish Council had originally registered the area in good faith, it was felt that great personal hardship might be suffered by persons who had purchased plots ~~and land~~ on Tump Common and had built and occupied dwellings there. My Council therefore made application to the Office of the Commons Commissioners asking to be allowed to withdraw the registration of that part of Tump Common on which dwelling houses had been erected but was advised that it was not possible at this stage to withdraw registration ... therefore.....Newent Parish Council will not be represented at the Inquiry.....". The "applicationasking to be allowed to withdraw" refers to a letter dated 14 November 1972 sent to the Office of the Commons Commissioners.

In a letter dated 25 October 1972 and sent to the same Office, Mr. E.J. Huggins said he no longer lived in Hay Farm (his address when he applied for registration) and "I have no more right to (common) as I am not the owner of any land".

I was asked to inspect the land, and it was agreed that I might do so unattended; accordingly I inspected it before the hearing on the second day.

For the purposes of exposition I find it convenient to divide the Larger Piece into three:- (i) a narrow strip ("the Boundary Strip") extending along the whole of the south east boundary which where it crosses the Blue Land and the Green Land is bounded by a bank sloping down to the east and where it crosses the Red Land by



a line being approximately a continuation of the east side of the track on the north leading to The Oaks; (ii) a piece ("the High Level Triangle") part of the Red Land, approximately triangular in shape, bounded on the southwest by the Boundary Strip, on the north east by the metalled road ("the Back Road") leading from Cliffords Mesne to and terminating at Tump Cottage and Belgrave Cottage; and (iii) the remainder (the Low Level Area") bounded on the south east by the Main Road (the carriage way of which is for the most part a little below the abutting part of the Area), on the north east by enclosed land (for the most part above the Area) and on the north by enclosed land and the High Level Triangle (high above the Area, the line of separation being a steep cliff: the face of the former quarry, of which more below), and on the south east by the High Level Triangle (mostly high above the Area, the line of separation being the continuation of the cliff or quarry face) and by the Boundary Strip (on the north much above but sloping downwards until at the southern end of the Larger Piece it is approximately at the same level).

The documents of title produced by Mr. A.K. Huggins included:- (i) An abstract of a conveyance dated 21 May, 1912 by Mr T.D. Grimke-Drayton to Mr. F.F. Grafton of first Clifford Manor House and 63 acres of land and secondly two plots of ground one of which was numbered 1736 on the Ordnance Survey Map 1903 and described as "Quarry: 3A OR 24P". From a consideration of the plan on the 1912 conveyance "by way of identification only and not of limitation or extension", I conclude that the plot of land conveyed by it comprised only the Low Level Area and did not include either the High Level Triangle or the Boundary Strip. (ii) An abstract of a conveyance dated 2 August 1930 by Mr. F.F. Grafton to Mr. J.R. Glasson of the same (by a similar description) land and other land. (iii) An abstract of a conveyance dated 27 November 1936 by Mr. J.R. Glasson to Coutts & Company (as trustees of a settlement in which Mrs. V. Younghusband was interested) of lands described in the schedule and delineated on the annexed plan; in the schedule the said plot was described as "pt 1736; Rough Pasture (disused brickfield); 3.-.6." and on the annexed plan shown as including the High Level Triangle but not the Boundary Strip. (v) An abstract of a conveyance dated 7 October 1947 by Coutts & Company to Mr. A.G. Meek of the lands described in the 1936 conveyance. (vi) A conveyance dated 29 November 1949 by Mr. A.G. Meek to Mr. W.H. Huggins in consideration of £50 of the Low Level Area and the High Level Triangle but not (as clearly appears from the annexed plan) the Boundary Strip. (vii) A conveyance dated 8 May 1963 by Mr. W.H. Huggins to Mr. A.K. Huggins of the Red Land exclusive of the Boundary Strip.

How Mr. J.R. Glasson obtained a right to include the High Level Triangle in the said plot conveyed by the 1936 conveyance and why such inclusion did not increase the area of the plot above 3 acres 6 perches did not appear from any document produced or other evidence given to me. At the hearing no comment was made by anyone on the documents of title produced showing no title whatever in any of the Objectors to the Boundary Strip or on the defects in their title to the High Level Triangle.

From about 1900 until 1949 when Mr. W.H. Huggins purchased the Larger Piece (or most of it) the Low Level Area was a disused quarry, claypit and brickworks: open and derelict waste land. There was a length of iron railing between brickworks and the Main Road which was removed in 1914 but such railing did not prevent access to the Low Level Area from the Main Road.

Before 1900 the brickworks and quarry were worked by Mr. Ballinger; Mr. Sherard remembered as a boy going there with his father with a horse and wagon to fetch bricks. In the 1884 Ordnance Survey Map the Low Level Area is shown as "old quarry".



On the map annexed to the Tithe Apportionment Award, the Larger Piece is shown uncoloured without distinguishing it in any way from the roads in the Parish; the original Award, which is very lengthy, was produced from the County Record office, but no argument based on it was put to me.

Sometime after 1949 brick bungalows were built on the Green Land, on the Blue Land and on the south side of the Red Land. Around the bungalow (and garage) on the Green Land is now a well cultivated garden; the Boundary Strip is here only a narrow bank on the west side, a little higher than the level of the garden. Around the bungalow on the Blue Land is also a garden but the Boundary Strip is here a substantial and relatively higher bank, rendering this part (the west side) of the Blue Land uncultivable. In the vicinity of the bungalow and garage on the Red Land there is a garden; but a great part of the Low Level Area on the Red Land is a grass paddock (formerly the bed of the quarry); the Boundary Strip rises steadily higher to the north leading up to the High Level Triangle which is much higher than the paddock.

Viewed from the Main Road, the Larger Area now appears to be three recently built bungalows with their gardens, enclosed, as dwelling houses and gardens might be in any village, save that they are bounded at the back on the west by a bank getting steadily steeper to the north until it becomes what is obviously the face of an old quarry, and save that the land north of the bungalow on the Red Land includes the above mentioned paddock. Viewed from the Back Road, the Larger Piece appears to be a small piece of flat rough ground (the High Level Triangle) which abruptly ends at the top edge of the quarry face with a difficult way down on the north east. The delineation on the Supplemental Map of the road junction near Tump Cottage may be misleading: the Back Road, metalled and being the main access, joins from the east; two tracks apparently old roads but now not much used join from the north and west; the Boundary Strip which joins from the south has not now the appearance of ever having been a road; the proximity of the County boundary may perhaps be the explanation of the unusual features shown on the Map.

In substance, these disputes arise as follows:- From 1900 to 1948, the Larger Piece has been Village Land in the sense that it has been open for anyone in the Village to use it for casual purposes as they pleased; in particular children have played there, attracted I suppose by the disused industrial works and the extraordinary features of the ground consequent on its former use as a claypit and quarry. In and after 1949, Mr. W.H. Huggins developed it, so that it ceased to be a derelict and unsightly waste of no advantage or of no great advantage to anyone and converted it into three plots of land providing good dwelling house accommodation in attractive surroundings, apparently well cared for and harmonising with similar local developments. As a consequence, Village Land has been lost to the detriment of those who live there, and Mr. W.H. Huggins or his successors in title have pieces of land which are (if not subject to any rights of common, of any public rights) of considerable value (Mr A.K. Huggins estimated £12,000 as the value of each of the three pieces).

It was accepted at the hearing that I am concerned, not with the merits of the development, but with the question whether the Larger Piece is "common land" within the meaning of the definition in section 22 of the 1965 Act. Mr. Bodenham contended that the evidence showed that it was land subject to "common rights" within paragraph (a) of the definition. He relied particularly on the use made of the land between 1900 and 1949: Mr. W.H. Huggins kept chickens on it (regularly putting his arks on the land until about 1937 when Commander Younghusband challenged his right); the tethering of a donkey there by Mrs. Phillips, and Mr. W. Bodenham, Mr. Apperly and Mr. Webley, the tethering of goats by Miss Woodroffe, the use of the land by Mr. G. Higgin for horses (possibly straying from a nearby common); and the cutting of sticks for the making of besoms for household use.



There was some conflict in the evidence as to the extent and nature of this use; but having regard to the probability that anyone living in the village near to the land would have used it in the ways suggested, I feel little hesitation in finding that it was so used.

Mrs Potts whose evidence I entirely accept said that the High Level Triangle all her life had been known as "Tump Common"; in this description she would I think have included at least the northern end of the Boundary Strip. At least until Mr. Huggins' purchase (and subsequently so she thought) Tump Common has been open to the Back Road. Referring to "Cliffords Manor" mentioned in the documents of title produced by Mr. A.K. Huggins, she said that although there was a dwelling house so called, there was in the legal sense no such manor; the village was in the manor of Huntley; about 120 years ago the then lord of the manor, Lord Somers built Cliffords Manor House. The wife of Mr. T.E. Grimke-Drayton (mentioned in the 1912 conveyance produced by Mr. A.K. Huggins) was a descendant of Lord Somers. As chairman of the Parish Council when they applied to register the Unit Land in 1969 she supported the registration of the High Level Triangle being what she considered to be "Tump Common".

In cross examination Mr. Chapman sought to establish that the use made of the common for grazing and taking sticks was done in exercise of a supposed right as an inhabitant of the village, but I do not think the witnesses who spoke of this use had any so precise understanding of the legal position; the land was open to anybody, and obviously a person who wished to graze his donkey, goat or horse, would not wish to do so unless he happened to live nearby. In fact Mr. Webley, Mr. Bodenham and Miss Woodroffe all lived in nearby cottages.

Merely from looking at the land, I deduce that before it was quarried it was all part of hillock, on top of which Tump Cottage and Belgrave Cottage were built; so if the land described by Mrs Potts as "Tump Common" was waste of a manor, Mr. Ballinger and his predecessors when working the quarry and brickworks, were quarrying into and digging clay out of manorial waste. As a matter of history it would I think be reasonable to guess that all brick burning and quarrying was done under the authority of the lord of the manor by virtue of his ownership of the manorial waste with all such consents as might be requisite under the customs of the manor. But against this guess, I have evidence that the Low Level Area was before 1900 industrial land from which the public were substantially excluded by an iron railing, (I infer that at that time no rights common would be exercised by reason of industrial activity), that in 1912 the Low Level Area was conveyed as a "quarry" and that from 1949 onwards it has been occupied in a manner which is wholly inconsistent with anybody having any rights of common over it. In respect of the new use made of the Larger Piece by Mr. A.K. Huggins after 1949, there may have been some discontent in the Village, but no person after 1949 attempted to do anything on the Larger Piece in respect of a supposed right of common. To make a finding that the use made before 1949 of the Low Level Area for grazing and taking sticks as above described was in exercise of rights of common, I must have evidence upon which I can specify at least in a general way, whether the rights were annexed to any lands or buildings or held in gross, what kind of animals could be grazed in exercise of the rights, how the number of animals at any time grazing was determinable, whether such rights were under a premises grant or the custom of a manor or otherwise, and so forth. I had no such evidence. My conclusion is that the use made of the Low Level Area for grazing or taking sticks as above described was not in the exercise of any rights of common but amounted to no more than the sort of use which any owner of unmarketable former industrial land might tolerate pending the discovery of some profitable use for it.



Mr. Bodenham directed his observations to the rights of common which might exist over the Low Level Area. Having regard to the evidence of Mr. Hale, he could not I think on his behalf properly suggest that if the whole of the Larger Piece was not properly registerable as common land, part of it might be; even although the evidence of Mrs. Potts suggested the High Level Triangle (always known as "Tump Common") might be dealt with separately, and Mrs Ballinger said it was common land until Mr. A.K. Huggins purchased it.

It is not clear from the letter of 21 November 1972 exactly what part of the Unit Land the Parish Council regarded as that "on which dwellings had been erected", and it may be that they intended to support the registration of the High Level Triangle (and perhaps of the paddock too). However as no argument was submitted to me in relation to the High Level Triangle particularly, I must I think in justice to the Objectors conclude that they have established that no part of the Larger Piece is common land within the definition in section 22.

I should perhaps record that nobody argued that any part of the Larger Piece was within paragraph (b) of the definition.

For the above reasons I confirm the registration with the following modifications: of the two pieces into which the land comprised in the Land Section of this Register Unit is divided by the metalled highway leading south from Newent through Clifford Mesne to Glasshouse, the larger piece being that situated on the west side of the said road is to be removed from the Register.

Mr. Chapman submitted that I should order Mr. Hale, Mr. Warren, Mr. E.J. Huggins and Newent Parish Council jointly and severally to pay the Objectors the costs incurred by them in respect of these proceedings on County Court scale 4, contending:- By their applications for registration they have put these proceedings in motion. Mr. E.J. Huggins cannot escape liability by not appearing. The reasons given by Mr. Hale in his evidence for applying for the registration were quite inadequate. Mr. Warren although present and represented at the hearing gave no evidence explaining why he had applied for registration. The Parish Council gave no notice of withdrawal to the Objectors so they had no opportunity of saving costs. It should have been obvious to all these applicants at the time when they made their applications, that the land was inclosed and built on land, and had been such for some time; the land had been fenced by Mr. W.H. Huggins at least by or sometime in or before 1950 (he fixed the date by a letter of complaint from the County Council which was dated 18 July 1950 but not followed by action); the bungalows on the Green and Blue Land were built in 1958 and that on the Red Land in 1965. It was obvious then that the Larger Piece could not properly be registerable as common land. The status of the land was made known as a result of the public inquiry held on 1 June 1965 before the closing of the footpath.

Mr. Bodenham submitted that I should not order Mr. Hale or Mr. Warren to pay any costs. If the Parish Council instead of withdrawing, had investigated the history of the land and put in evidence about it, its status as common land would have been established. Following the 1965 Act the Government published notices inviting persons to register land under the Act: Mr. Hale and Mr. Warren should not be penalised by doing that the Government had asked them to do.

In my view a person who applies for registration of land as common land under the Act does not thereby put himself at risk as to cost merely by making the application. His position is I think different from that of a plaintiff in ordinary legal proceedings, who as a general rule conducts the proceedings on his own behalf and can at any stage discontinue them subject to becoming liable to paying the costs of the defendant to date; in any such proceedings the court in exercising its discretion as to costs normally consider that costs should follow the event. Under sections



5 and 6 of the 1965 Act, a Commons Commissioner is, following an objection, "to inquire into the matter"; words essentially different from those commonly used to describe proceedings to determine a private dispute. The regulations under the Act show that an applicant and an objector are not the only persons concerned, so that by making an application the applicant may in some way be acting on behalf of the public, not merely on his own behalf.

In exercising the discretion as to costs conferred on me by section 17 of the 1965 Act, I must I think consider in relation to each applicant (i) the circumstances as they were when the application was made and (ii) the subsequent circumstances. As regards to Parish Council:- Although they were not represented at the hearing, the Objectors called as a witness Mrs. Potts who was their chairman at the time of their application. As above stated she thought the High Level Triangle should be registered as common land, and having heard her evidence I conclude she held this opinion on reasonable grounds and in good faith. The Act contemplates the registration of land as common land can become final if no objection is made to it; it seems to me that the purpose of the Act would be defeated if every applicant, in order to escape liability for costs had to consider in detail exactly how he could if called upon prove that the definition of common land in the 1965 Act was fulfilled. In this case the High Level Triangle had always been called by a name which included the word "common"; it was not built on and Mrs. Potts believed it to be not enclosed opposite Tump Cottage (although Mrs. Ballinger and Mr. W.H. Huggins spoke of it as being enclosed, the fencing there did not I think provide any substantial reason for not claiming it to be common land). It's status as such was not in issue at the inquiry on 1 June 1965 and the Inspector's report contained no finding about it.

I do not know why the Parish Council included in their application for registration the rest of the Larger Piece. But regarding the matter objectively, it was not I think unreasonable for them in March 1969 to include the whole; (i) because in January 1968 the Objectors, without objecting to the registration of any of the land as common land as applied for by Mr. Hale, applied to be registered as owners, apparently then accepting that the land was properly registerable as common land and (ii) because if the hillock from which the stone had been got was common land, it would follow that when stone was no longer got, the quarry bed would revert to or continue to be common land.

The reasons given by Mr. Hale for making his application are all I think illogical. Having with the assistance of the County Record Office found the Unit Land on the map annexed to the Tithe Award, he concluded, without considering the terms of the Award at all, that the map established that the Unit Land was all common land properly registerable under the 1965 Act. He told me that his only object in applying for registration was to enable the children of the Village to continue to play on the Larger Piece as he had done as a boy on the Low Level Area and that he did not think that by so applying he was doing anything, to which Mr. W.H. Huggins, his old friend, could take objection. But Mr. Hale cannot become liable for costs merely because in a complicated legal situation he is unable in the witness box to state good grounds for the application he made, if in fact there were good grounds (such as I have outlined above in relation to the Parish Council) for his application.

For similar reasons in my view Mr. E.J. Huggins and Mr. Warren did not by making their applications put themselves at risk as to costs.

The grounds of objections put forward by the Objectors in their notices of objection (quoted above) were their "titled deeds" and "ownership". These grounds reflect the view expressed by Mr. W.H. Huggins in the course of his evidence, that having obtained the 1949 conveyance which was in a form similar to the conveyance of any ordinary building plot he necessarily acquired a title to the land free from any rights of common or any other rights. But from the history of the land as known