COMMONS REGISTRATION ACT 1965

Reference No. 59/D/17

In the Matter of Milespit Hill Waste,
Barnet, Greater London.

DECISION

This dispute relates to the registration at Entry No. 1 in the Land section of Register Unit No. CL/102 in the Register of Common Land maintained by the Greater London Council and is occasioned by Objection No. 17 made by the London Borough of Barnet and noted in the Register on 6 July 1970.

I held a hearing for the purpose of inquiring into the dispute at Watergate House, WC2N 6LB on 11 and 12 May 1976. The hearing was attended by Mr L Craymer, solicitor, on behalf of the Mill Hill Preservation Society, the applicant for the registration, and by Mr P Langdon-Davies, of Counsel, on behalf of the Objector.

The land comprised in the Register Unit consists of strips of grassland of varying widths on either side of the road known as Milespit Hill, a similar strip on the north side of Wise Lane and two islands at the junction of Wise Lane and Milespit Hill. These strips are divided by fences or hedges from the enclosed land on either side.

There are no entries in the Rights section of the Register Unit, so that the registration is only supportable by a contention that the land in question is waste land of a manor not subject to rights of common. Mr Langdon-Davies contended that even if the land is waste land of a manor, it forms parts of the highways known as Wise Lane and Milespit Hill and is therefore excluded from the definition of "Common Land" in section 22(1) of the Commons Registration Act 1965.

Milespit Hill and Wise Lane lie within the manor of Hendon. Milespit Hill and Wise Lane are ancient highways, being shown on maps prepared before the passing of the Highways Act 1835. The manor is traversed by a number of ancient highways having strips of land on one or both sides similar to the land comprised in this Register Unit. Some of these strips are the subjects of other disputes which have been referred to me, and I have come to the conclusion that my proper course is to have regard to the evidence relating to the roads in the manor as a whole rather than to attempt to don blinkers when considering each separate road.

I have been furnished with extracts from the court books of the manor of the late eighteenth and early nineteenth centuries which show that a number of the roads were lined by manorial waste. This waste land was not then regarded as part of the highways, for the lords of the manor granted licences for the enclosure of various parts of it. Several of these licences were subject to the condition that no fence should be erected within 15 feet of the centre of the road, in some cases described as "the King's highway", so it would appear that the view then held was that the highway land was 30 feet wide and that the rest was the property of the lord of the manor, untrammelled by any public right of way over it.

Such a view would be contrary to the general presumption that the public right of passage prima facie extends to the whole space between the fences. That presumption is, however, rebuttable by evidence. Indeed, it does not arise at all unless the

fence is in some way referable to the existence of the highway, so that it can be assumed from the nature and position of the fence that it was put up as the boundary of the highway : see Offin v. Rochford R.D.C., [1906] 1 Ch.342.

In the absence of direct evidence as to when and why the fence was put up, the question whether the presumption can be rebutted in a particular case must depend upon inferences drawn from the ascertainable facts. It so happens that one of the leading cases on this topic related to land beside a road in the manor of Hendon. This was Neeld v. Hendon U.D.C. (1899), 81 L.T. 405. It appears from the facts set out in the report that the road there in question (Butcher's Lane) was very similar to the roads in the cases which I have to consider, the land the subject of the proceedings being part of the waste of the manor of Hendon. Channell J. stated that whether such an unmetalled margin was part of the highway would depend, to a great extent, on circumstances such as the nature of the district through which the road passed, the width of the margins, the regularity of the line of the hedges, and the levels of the land adjoining the road. In the Court of Appeal Williams L.J. said:-

> "I entirely agree that if any presumption could be made from any of the facts "as to this piece of land forming parts of the highway, it is amply rebutted "by the evidence before the Court. But I wish to add one word with regard to the "applicability of the presumption to a case where a road goes across the "un-inclosed waste of a manor. The presumption is that prima facie, if there "is nothing to the contrary, the public right of way extends over the whole "space of ground between the fences on either side of the road; that is to say "that the fences may prima facie be taken to have been originally put up for the "purpose of separating land dedicated as a highway from land not so dedicated. "But in the case of the waste of a manor there is another obvious reason for "which fences may be put up, namely to separate the adjoining closes from the "waste. I therefore doubt if any presumptions can be said to arise in the "case of a road going across the un-inclosed waste of a manor".

In Neeld's Case it was held that the fact that the land there in question had been inclosed in accordance with the custom of the manor under a licence from the lord of the manor in 1872 and had remained so inclosed for many years without any protest from any one entitled to use the highway showed that it was not part of the highway when inclosed. I am considering land which has remained un-inclosed, but having regard to the inclosures of various parts of the waste land of the manor disclosed in Neeld's Case and in the court books of the manor referred to in this case and having assisted my understanding of the evidence by inspecting the land the subject of the proceedings, I have come to the conclusion that these highways were originally laid out across the un-inclosed waste of the manor and that the fences were erected when parts of the waste were inclosed in order to separate the inclosed land from the remaining un-inclosed waste. The waste land of the manor must originally have been very extensive, for it is recorded in Domesday Book that there was sufficient woodland for the feeding of a thousand pigs.

Mr Langdon-Davies ~~agreed~~ argued in the alternative that even if the land in question does not form part of the highway, it does not fall within the definition of "common land" in section 22(1) of the Act of 1965 because it is no longer waste land of the manor. He based this limb of his argument on the definition of "wastes" in the judgment of Watson B. in Att.-Gen. v. Hanmer (1858), 27 L.J. Ch. 837 as "the open, uncultivated and unoccupied lands parcel of the manor". Mr Langdon-Davies said that while the land in question might satisfy the other requirements of the definition, it could not be properly described as "uncultivated", since the Council, as highway authority, has cut the grass and generally kept the land tidy. In support of this contention he

cited my decision in In the Matter of Chiselhurst and St Paul's Cray Commons, Bromley, Greater London (1974), Ref. Nos 59/D/9-10, where I said :-

> "In my view, uncultivated land is land which is left in its natural state, "subject only to such restrictions on the growth of vegetation as necessarily "follows from grazing and the exercise of other rights of removing the natural "produce of the land. If there is no such restriction, the features and aspect "of the land must inevitably change".

In that case I had to consider work which was done by conservators under a scheme for the establishment of local management confirmed by a local Act of Parliament. The work done by the Conservators was substantial, being directed to maintaining the land in such a condition as to be capable of enjoyment by members of the public. The land still retained what could be described as a natural aspect, but I held that it was really an artificial aspect, the measure of the Conservators' success being the extent to which the artificiality had been concealed. This work, I held, took the land out of the category of uncultivated land.

The work done by the Council in this case falls into an entirely different category. It is no more than the removal of the natural produce of the land, which might have been done by grazing. The fact that the Council may not have been exercising some right to remove the grass is, in my view, irrelevant when considering the nature of what has been done. Merely cutting grass in order to prevent land becoming untidy is not, in my view, cultivation and does not of itself take land out of the category of manorial waste..

I have therefore come to the conclusion that the roadside strips of grass are the remains of the un-inclosed waste land of the amnor and have never been dedicated as parts of the highways known as Milespit Hill and Wise Lane. The two islands at the junction of the roads also appear to me to be parts of the manorial waste which have not been dedicated as parts of the highways.

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 21st day of June 1976

Chief Commons Commissioner