



COMMONS REGISTRATION ACT 1965

Reference Nos 215/D/232  
215/D/233

In the Matter of (1) Combe Moor and  
(2) Byton Moor, both in Byton, Leominster  
District, Hereford and Worcester

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DECISION

These disputes relate to the registrations at Entry No 5 in the Rights Section of Register No CL. 153 and at Entry No 4 in the Rights Section of Register Unit No CL. 154 in the Register of Common Land maintained by the Hereford and Worcester County Council and are occasioned by Objection No 397 and No 396 made by Mrs J G Hiam and noted in the Register on 15 October 1971.

I held a hearing for the purpose of inquiring into the dispute at Hereford on 8 and 9 February 1978. At the hearing Mrs Judith Glendonig Hiam (the Objector) was represented by Mr D O Moseley solicitor of Moseley Chapman & Skemp, Solicitors of Sutton Coldfield; and (2) Mr David Arthur Edwards (the disputed registrations were made on his application as tenant) and (3) Mr David Lyndon Arkwright (the Ownership Section Entries were made on his application) were represented by Mr W D Turton, solicitor of Lloyd & Son, Solicitors of Leominster; and (4) the said Mr Turton also attended for himself personally (the Land Section Entries were made on his application).

The lands ("Coombe Moor" OS No 39 and "Byton Moor" OS Nos 48 and 132) in these two Register Units extend (according to the Register) to about 7.12 acres and about 22.25 acres. They (together "the Unit Lands") are adjoining flat areas only a few feet above the River Lugg (a short distance northnorthwest), and are therefore liable to flooding. Near their south side runs the road (B 4362) from Mortimers Cross on the east to Presteigne on the west. Between the Unit Lands and this road are a number of closes of land being dwelling houses with gardens and other lands, or small agriculture or other holdings which, with other similar closes as far as the road leading northwards to Byton, make up an area ("the Small Holding Area") also known as Coombe Moor. The Unit Lands are separated by a stream ("the Dividing Stream") which starts from a spring just north of the B 4362 road, and which from the Unit Lands follows an irregular course to join the River Lugg almost due north. Court House Farm comprises the greater part of an area of about 1 square mile northeast, east, southeast, south and southwest of Byton; according to the below mentioned 1911 tenancy agreement it contains 359.880 acres. Byton Moor for about  $\frac{1}{4}$  of a mile along its northeast side ("the Moor-Farm Boundary") adjoins Court House Farm. An area which adjoins the Moor-Farm Boundary and which comprises the greater part (a precise definition of this area is not needed) of OS Nos 128, 129, 130A, 133 and 134A, I shall for the purposes of exposition call (it was not so called by anyone at the hearing) "the Farm Wet Area".

The disputed registrations (in all relevant respects the same for both the Unit Lands) are of a right attached to Court House Farm to graze 30 cattle. The grounds of the Objections are: "The Right does not exist at all".



In both Rights Sections, there are 7 other (Coombe Moor) and 9 other (Byton Moor) registrations of rights of grazing of which 6 are identical (one includes firewood and bracken); leaving 1 (Coombe Moor) and 3 (Byton Moor) which do not correspond. One of these 3 is of a right attached to the Hollow to graze 6 horses, 2 donkeys, 2 cows and of estovers, turbary, piscary and pannage. Except as above mentioned, all the rights are of grazing only. All these registrations being undisputed have become final, as also have the Ownership Section registrations of Mr Arkwright.

Against the disputed registrations oral evidence was given by (1) Mrs Hiam (the Objector and application for CL. 154 RS/E No 9), (2) Mr C W Weaver (he and his father were applicants for CL. 153 RS/E No 6 and CL. 154 RS/E Nos 5 and 6), (3) Mr R J H Beaumont (applicant for CL. 153 and CL. 154 RS/Es No 7), and (4) Mr J H H Addis (applicant for CL. 153 RS/E No 4 and CL. 154 RS/E No 3). In the course of their evidence they produced the following documents as being evidence by their signatories: (5) petition to Kington District Rural Council signed by 12 persons "The Commoners", (6) an objection signed by Mr W A Weaver (father of Mr C W Weaver), (7) an open holograph letter dated 11 November 1969 to the chairman of Kington Rural District Council signed by Mr Arthur Boden and a typewritten declaration signed on 3 December 1969 by him in the presence of Mr C W Weaver, (8) a statement signed (in 1969) by Miss Elizabeth Thomas, (9) a statement dated 22/11/69 signed by Mrs Bengren and (10) a open letter signed (in about 1969) by Mr George Beaumont (he died in 1971; he was the father of Mr R J H Beaumont).

In support of the disputed registrations oral evidence was given (A) by Mr D A Edwards (his father came to Court House Farm in 1901, he was born in 1907, his father died in 1919, the farm was then taken over by his mother helped for some years by his elder brother, in 1932 he took his elder brother's place, in 1937 he took over complete management, his mother dying in 1941), (B) by Mr G C J Payne who now works and has for the past 22 years worked for the Kinsham Estate. In the course of his evidence Mr Edwards produced (1) a statement signed by Mr J A Addis (uncle of the said Mr J H H Addis), (2) a copy (apparently of some age and perhaps contemporary) of a tenancy agreement dated 31 January 1911 by which Mr W B Heygate and Mr W A Evelyn let to Mr Richard John Edwards Court House Farm described in the Schedule, (3) an OS map (1/2500) of 1886 (Herefordshire Sheet xi.2) and (4) a map of the Kinsham Court Estate based on the OS map (6" = 1 mile) 1904 edition (?1941 print).

On the day after the hearing I viewed Combe Moor from just within its south side and walked over the southwest part of Byton Moor. I could not do more, because recently there had been snow and much of the Unit Lands where I went were covered with a foot of water over which there was a layer of breakable ice.

The evidence for the Objector was to the effect (a) that there had never been any relevant grazing from the Unit Land from Court House Farm, and (b) that as a result of something said or done by Mr F L Evelyn of Kinsham Court between 1905 and 1910 and of something said or done by Sir John Arkwright through his agent Mr A Boden in 1922 and 1923, it had somehow become established that for Court House Farm there were no grazing rights over the Unit Lands, the other commoners having somehow then given up any right that they had over the Farm Wet Area.



As to (a), the issues have been simplified because Mr Edwards himself said that there had been no grazing on the Unit Lands from Court House Farm from about 1940 to about 1969; he maintained throughout this period that he had the right, and has said that he did not graze after 1941 because after his mother died (there was a farm sale) he could not afford to stock the farm with cattle, and when he started to have cattle (after the war) the Unit Lands became waterlogged: a bog.

As to (b):- Mr Boden in his holograph 1969 letter said:- "...I was agent for Sir John Arkwright in 1923 who was Lord of the Manor, and Landlord of Byton Court Farm tenanted by Mrs Edwards, and later by her son David Edwards and he, Sir John Arkwright, instructed his tenant to keep their cattle on the Byton side of the fence. When ditch was cleaned out in 1967, the wire fencing was not put back; Mr David Arkwright (?) is willing to this and instructed his Agent to re-erect the fence but has neglected to so far a least six months. Yours faithfully A Boden (aged over 90 and stone deaf)". Mr Boden's 1969 declaration (typewritten at his direction by Mr Weaver) includes paragraphs: "It is within my knowledge from the records available to me that between the years 1905 and 1910 the commoners of Byton made representations to the Lord of the Manor (F A E Evelyn Esquire) to the effect that the tenant of Court House Farm was abusing his common rights over the said common land by grazing excessive numbers of cattle thereon. The Lord of the Manor therefore directed that the problem should be resolved by erecting a fence between the points marked "x" and "y" on the said plan (that is along the Moor Farm Boundary). It was further directed by the Lord of the Manor that the Tenant of Court House Farm should thereafter have exclusive use and possession of parcels of land numbered...(the Farm Wet Area)...and in return should release abandon and relinquish all rights over the parcels of land numbered...(the Unit Lands)... which said land was reserved for the use of the remaining commoners. The said fence was duly erected and a ditch dug and the rights were thereafter exercised according to the direction of the Lord of the Manor..."

It was not disputed that Mr Boden was the Agent of the Kinsham Court Estate from 1919 to 1959 (his successor is Mr Harrison). Neither he nor any of the others who made statements could have had personal knowledge of the 1905-10 direction; however the inclusion of the Farm Wet Area in the 1911 tenancy is consistent with it.

Of the 1905-10 and 1923 directions, Mr Edwards said that he had never heard of them from his mother or elder brother, or had Mr Boden ever complained about their grazing before 1940 of the Unit Lands except that Mr Boden in 1921 asked for the removal of a colt which had grown entire and in 1921 (the drought year) he had complained about their being many cattle on the Unit Lands.

These disputes may be explained (at least in part) by the 1967-69 drainage works done on or around the Unit Lands and the Farm Wet Area. Of these Mr Edwards said (in effect):- His land above the Moor started to get waterlogged because the land drains had emptied into the ditches; they became blocked. So he decided to drain some of the fields; they were away from the Moor, but the land drains from them emptied down there. They were far too wet to graze. The (Agricultural) Committee would not help, so he went to Mr Harrison. An arrangement was made, he (Mr Edwards) paid something towards the cost. The work was done by Mr Tracy Reed, who employed a man with a long drag line. They had to start at the River (you could not get across the bog, machinery would have got stuck). In those days there were swans and wild geese ( wild



fowl sanctuary!), For about 12 months there was a drag, with which he and his men helped when the tractor got stuck. In the result from about 1969 the Unit Lands (and I suppose also the Farm Wet Area) became dry (the old fences were all dilapidated); from then on he grazed the Unit Lands (intentionally). (The ditch along the Moor Farm Boundary?) There is a tremendous stream at the top end (the south side) of the Unit Lands and this runs between Combe Moor and Byton Moor; it is when this ditch from the stream gets silted up that water runs along the Moor Farm Boundary. Mr Edwards later in his evidence elaborated his statements as above summarised. Mr Payne described the difficulties of the drainage works having regard to the boggy nature of the ground at the time.

The legal position is unusual, in that it appeared to be generally accepted (no documents of title were produced) that Court House Farm (except for OS No 131 containing 2.988 acres of no significance in this case) and the Unit Lands are now (and have been for many years) in the ownership of Mr Arkwright (or his predecessors) as part of his (or their) Kinsham Estate, and that of Court House Farm Mr Edwards and before him his mother, and before her his father, were tenants. A person cannot have "a right of common" within the ordinary legal meaning of these words over his own land, a tenant cannot merely by grazing land of his landlord (not included in his tenancy) for however long acquire any such right over his landlord's land.

Mr Turton pointed out (rightly I think) that there are many common lands which are grazed from a number of different farms some but not all of which are in the same ownership as the common, in that it is convenient (and he said not unusual in Herefordshire) for this grazing to be on the basis that the grazing from the farm of the owner of the common shall be regulated and measured similarly to that from farms of others.

~~That there may for some purposes~~ a quasi right of common is by law recognised, see *Musgrave v Inclusion* (1874) LR. 9 QB. 162 at page 165. Accordingly whatever the legal position, I have considered whether any such quasi right of common has been established: applying as far as seems appropriate the same sort of rules as would be applicable if Mr Arkwright and his predecessors had always owned Court House Farm and never owned the Unit Lands.

From the maps produced, the history of the Unit Lands as described at the hearing, and their appearance when I viewed them, I conclude that the Unit Lands and the Farm Wet Area are now and have from time immemorial been one geographical area of flat land always liable to flooding, and always much damper than the surrounding lands (the Small Holding Area on the south and southwest and Court House Farm on the other side).

It was not disputed that <sup>at</sup> this geographical area, the Farm Wet Area had as far back as living memory went been grazed as part of Court House Farm. As to actual grazing as of right from this farm over the Unit Lands, I need not consider the after 1969 period, because after 1971 when the Objections were noted in the Register, any such grazing was in question, see section 16 of the 1965 Act. Because the two year period 1969-71 is too short to establish any right unless the grazing during such period can somehow be linked with some before 1941 grazing. Mr Edwards and Mr Payne during the 1967-1969 drainage works discovered the remains of the fence along the Moor-Farm Boundary; I infer that such fence must before the land became boggy, have been substantial. Mr Edwards not suggesting the contrary, I conclude that this fence was there as far back as he can remember (about 1925). Of this before 1941 grazing the only non-hearsay



oral evidence I have of it is from Mr Edwards. That the Farm Wet Area was sometimes grazed with cattle and that cattle from the farm were sometimes on the Unit Lands, I accept; having regard to the nature of the ground, it is likely that the fence was never good enough to stop some cattle from straying from the Farm Wet Area onto the Unit Lands, and it may be that it was obvious that cattle from the Farm Wet Area, or even from other parts of Court House Farm, could and would so stray. But I am not persuaded by anything Mr Edwards said that cattle were before 1941 ever put onto the Unit Land for the purpose of grazing there as of right; his evidence of what was done was too vague. This conclusion is no reflection on him, because the nature of the land is such that it is unlikely, save in exceptional conditions, that grazing from the Farm on the Unit Lands could ever have been of much importance, and he was for most of the relevant time only a boy.

As regards the hearsay evidence, the question is whether before 1941 there was reputed to be attached to Court House Farm the grazing rights now claimed. There being conflicting evidence to this (what Mr Edwards said his mother and brother had told him on the one hand and the above mentioned statements in support of the Objections on the other) I can and should I think have regard to the history of the above-mentioned geographical area, as I infer it to be from the evidence put before me and its present appearance.

When I viewed the geographical area its probably history seemed to me clear enough:- In the remote past (in this case meaning some time before the alleged 1905-10 direction) the geographical area would have been grazed without distinction from Court House Farm and the Small Holding Area; the grazing from the Farm being mostly on the part on the Byton side of the Moor-Farm Boundary and the grazing from the Small Holding Area being mostly on the southern part, these parts being respectively more easily accessible, and the part in between being generally too wet to graze except in favourable weather. During this time, there would I suppose have been no fence dividing up the geographical area (perhaps such a fence would not then have been worthwhile), so all the users would be reputed to have rights over all the geographical area. I assume therefore (for the benefit of Mr Edwards) that such rights did in law at sometime in the remote past exist. But during such time, a division of the geographical area between Court House Farm and the Small Holding Area would (they being so different) always have seemed to be mutually advantageous if economically possible.

As to the contention that directions such as Mr Boden said were given by Mr Evelyn and Sir John Arkwright, could not in law be enough to change old or create new interests in land, I agree that a mere direction could not be enough. But too much should not I think be made of Mr Boden's choice of words, even in his holograph letter. Basically what he said accords with the legal principles which are I think well established: if a person having a grazing right on the common somehow becomes owner of part of the common, he as a result of such acquisition will lose his right over the other part, see *Tyrringham* (1584) 4 Co.Rep.36B and the explanation of the principle in *White v Taylor* 1969 1 Ch 150 at page 158; in accordance with these principles, it follows that if the Farm Wet Area somehow became part of Court House Farm, then the owners and occupiers of such farm would lose their rights over the Unit Lands, and it would not matter whether the Farm Wet Area was so incorporated, because it was fenced off or for some other reason; all I need say about the directions said by Mr Boden to have been given by Mr Evelyn and Sir John Arkwright is that any such directions if given were a correct statement of the consequence of a fence along the Moor-Farm Boundary, such as I have concluded existed at least as far back as 1925.



So in my view, the burden lies on Mr Edwards to establish the reputed existence of the rights he claims. Such rights if they ever existed presuppose that at some time the geographical area became divided between Court House Farm and the Small Holding Area upon the basis that the Farm Wet Area became for all purposes part of Court House Farm and on the basis that the grazing of the Unit Lands continued for the benefit of the Farm as so enlarged. In my opinion the present appearance of the Unit Lands is against the geographical area ever having such a history. Although the form of the various hearsay statements produced by the Objectors is open to some criticism and although some of these statements may do no more than repeat information they must somehow have acquired from Mr Boden, they are all against the reputed rights now claimed. Balancing as best I can these statements against what Mr Edwards said he had been told by his mother and elder brother, the scale in my opinion tips against Mr Edwards.

My decision is therefore that the rights described in the disputed registrations do not exist, and accordingly the Objections succeed.

Having based so much of my decision on the present appearance of the Unit Lands, I think I should record for the benefit of Mr Edwards and Mr Arkwright, that the 1967-69 drainage works which were (as I understood their evidence) paid for wholly by them must (so it seems to me) incidentally much improve the Unit Lands. It may be that the law ought to make better provision for persons who incur expenses in doing works which incidentally benefit others; however this may, I cannot I think merely because Mr Edwards and Mr Arkwright have paid for these works conclude that they have some quasi right of common qualifying the rights of common described in the registrations which have now under the 1965 Act become final. I have no jurisdiction to determine how far if at all Mr Edwards or any other person claiming by virtue of Mr Arkwright's ownership of the Unit Lands can use the Unit Lands subject to these finally registered rights.

For the above reasons I refuse to confirm the registrations.

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 26<sup>th</sup> day of June 1978

*A. A. Baden Fuller*

Commons Commissioner