



COMMONS REGISTRATION ACT 1965

Reference Nos 215/D/272 to 275 inclusive
and
215/D/277 to 279 inclusive

In the Matter of (1) Shucknall Hill Common (about 13 acres) and (2) another part of Shucknall Hill (about 3 acres, north of the Common), Weston Beggard and Yarkhill parishes, South Herefordshire and Malvern Hills Districts, Hereford and Worcester

DECISION

These seven disputes relate to the registrations at Entry Nos 2, 3, 4, 5, 6, 7 and 8 in the Rights Section of Register Unit No. CL137 in the Register of Common Land maintained by the Hereford and Worcester County Council and at Entry Nos 1, 2 and 3 in the Rights Section of Register Unit No. CL169 in the said Register, and are occasioned by Objection Nos 442, 443 and 445 (CL137) and Nos 447, 448, 449 (CL169) and made by Mr Andrew Thomas Foley and noted in the CL137 Register on 14 January 1972 and in the CL169 Register on 17 January 1972.

I held a hearing for the purpose of inquiring into the disputes at Hereford on 9 February 1978. At the hearing (1) Mr Foley (the Objector), who is in the CL137 Ownership Section (Entry No. 1) registered as the owner of the greater part (all of it south of the large quarry OS No. 16a containing 2.744 acres) of the CL137 land and is also in the CL169 Ownership Section (Entry No. 1) registered as owner of all the CL169 land (both these Entries being undisputed have become final), was represented by Mr J W King solicitor of Bannister & King, Solicitors of Stourbridge; (2) Mrs Joan Margaret Fraser whose application for the registration of the CL137 land is noted in the Land Section, who is in the Ownership Section (Entry No. 3) registered as owner of the remaining part (the said quarry OS No. 16a) of the CL137 land and on whose application the CL137 and CL169 Rights Section Entries Nos 8 and 3 respectively were made, was represented by Mr A N T Rose solicitor of Few and Kester Solicitors of Cambridge, (3) Mr Stanley Howard Dolphin and Mrs Lilian Dolphin on whose application the CL137 and the CL169 Rights Section Entry Nos 7 and 2 respectively were made, were represented by Mr P C Davies solicitor of Foster and Finlay, Solicitors of Malvern, (5) Mr and Mrs Bryan Smith as successors in title of part of the land to which the rights registered on the application of Mrs J M Fraser are attached, was also represented by Mr Davies, (6) Mrs Doreen Elizabeth Scott on whose application the CL169 Rights Section Entry No. 1 was made, was represented by Mr H D M Owen, legal executive with David Allen & Carver, Solicitors of Hereford; and (7) Mr R Ebdon as a resident of Shucknall Hill and as a successor in title of Mrs J M Fraser of another part of the land to which the rights registered on her application are attached, attended in person.

The land ("the CL137 Land") in Register Unit No. CL137 is from southwest to northeast a little under 800 yards long, and for the most part about 100 yards or a little more wide; its southeast side is approximately parallel to the Hereford-Worcester road (A4103), and from it there is access to its southwest and east corners. From its southeast side (along which there is a track usable by motor vehicles), the land



slopes upwards to the northwest side (Shucknall Hill), in places steeply, except the area of the quarry above mentioned where the land is comparatively flat quarry floor bounded on the northwest and north by an almost vertical quarry face. Apart from the quarry, some roads or tracks providing vehicular access to the nearby dwellinghouses and numerous not very large grass areas, the greater part of the land is scrub, apparently the growth of about the last 15 years or less. The land ("the CL169 Land") in Register Unit No. CL169 is from northwest to southeast a little under 500 yds long; in places it is about 60 yards wide, but much of it is much narrower; along its length is a track or footpath which at its highest part (the west end) joins the north corner of the CL137 Land and at its lowest (southeast end) joins (some distance from the CL137 Land) the track which leads from the CL137 Land to the A4103 road; most of the CL169 Land is scrub and trees.

The Rights Section Entries and the grounds of Objection are summarised in the First and Second Schedules hereto.

The CL137 Ownership Section (or at least my copy of it) is ambiguous in that at Entry No. 2 it is said that Entry No. 1 relating to all the land is replaced by Entry No. 3 relating to part only; Mr King and Mr Rose said that they were agreed that Mrs Fraser owned the quarry and Mr Foley owns the rest. Mr Ebdon said that Mr C C Payne (applicant the CL137 Rights Section Entry No. 2) is deceased. Mr King said that it was impossible for his client (Mr Foley) as Lord of the Manor to know who are now the successors of those who were tenants of the Manor or to know who are the successors of the customary freeholders entitled to common appendant, and contended that the claimants should therefore satisfy me that they are entitled to rights; he also contended that (as regards numbers) the rules of levancy and couchancy were applicable, that the number claims were by such rules all excessive (Mr Foley would accept 2 sheep for every acre of dominant land); he referred me to *Morse v Webb* (1610) 2 Brownlow 397 and 13 Co 65. Mr Davies, for Mr and Mrs Dolphin, explained that the CL137 and CL169 Rights Section Entry Nos 7 and 2 (respectively) were intended to be culmulative, but that their claim to turbary at Entry No. 7 is abandoned.

(was given)

After this introduction, oral evidence in support of the disputed registrations (hereinafter I shall refer to them by reference to their Rights Section Entry Nos thus: "137 E/6", or "169 E/2", or as may be): (1) by Mrs D E Smith of Woodside Cottage (137 E/8 part 2), (2) by Mr N R Morgan of Hill Top (137 E/6 and E/8 part 1), (3) by Mr S H Dolphin of Long View (137 E/7 and 169 E/2), (4) by Mr A F Hounslow now aged 77 years, and for 48 years employed as a game keeper by Mrs Fraser, (5) by Mrs D E Scott of Quarry Cottage (169 E/1 and E/8 part D), and (6) by Mr D J Price of Stoke View (no right attached to his property has been registered). In the course of his evidence Mr Hounslow produced statements (as evidence by the signatories) signed by Mrs A Green, Mr E W Preece and Mrs Charlie Jones (all since deceased).

Mr Ebdon said that as it was accepted that animals had been grazing on the Common, he would not call any witness.

Mr Foley of Stoke Edith House who has most of his land in hand and has been farming it himself for 15 years, gave oral evidence as to how many animals could throughout the winter be fed on the produce of the holdings to which the disputed registrations are attached, expressing the opinion that the proper rate for sheep (Welsh cross, small hardy type), was about $1\frac{1}{2}$ to 2 sheep per acre, or for ponies not more than one pony



per acre. In answer to questions by Mr Davies and Mr Owen, he explained in some detail the considerations on which he had based this opinion, saying (among other things): "If you have a limited amount of by land, you have got to try and keep the sheep off there for as long as possible, so that they can be fed hay and lambed in the spring. They come off wherever they are grazing in the autumn and return in the spring. If you leave them out (all the winter) they must have some food... (as to bales of hay off a field in Shuckmall) ... Some of the soil is very thin; about 10 cwt (say about 20 bales, 50 lbs = 1 bale) to the acre, if you use fertiliser and chemicals and it is good land ... (as to how many bales 5 sheep could eat in a week) ... Assuming that they did not get any supplementary feed from the aftermath of the hay crop, I would say a bale a week ...".

Mr Owen in the course of his evidence said that he and his father before him had farmed for nearly 30 years the land on the other side of the Shuckmall valley; he thought that Mr Foley's estimate of the yield of winter fodder per acre extremely low; without artificial manure he would expect at least 60 bales of hay per acre, and with artificial manure 100 bales per acre.

On the day after the hearing I walked over much of the CL137 Land and of the CL169 Land.

The greater part of the hearing was concerned with the rights to graze and the next 12 paragraphs of this decision should be read as relating only to such rights.

None of the grounds of Objection put in question that a right of some kind could properly be registered, and I decline to treat any of the Objections as putting any of the applicants at risk of my refusing to confirm the registration of any right. So I am concerned only to consider the propriety of the registrations as regards the number and genus of the animals (and birds) specified.

Mr King contended as to number that the rules of levancy and couchancy are applicable because (as I understood him) grazing rights to which such rules are inapplicable could not (unless over a stinted or gated pasture or under an express grant) exist. Although there are observations in *Morse v Webb* (1610) *supra* which suggest that a plaintiff cannot claim a right of grazing unless he expressly pleads it is for animals levant and couchant on his land, these observations must be considered in the light of *Hoskins v Robins* (1671) 2 Wms Saund. 319; in that case a plaintiff successfully claimed a right of grazing without alleging it was for animals levant and couchant. As to this case generally see the discussion in *Williams 1877 Lectures on Commons* (1880) at pages 25 et seq. Although commonly quoted as showing that a right of sole or several herbage may lawfully exist (such a right is mentioned particularly in section 22 of the 1965 Act), it is I think an authority binding on me against there being any rule of law that a right of grazing (if not over a gated or stinted pasture or under an express grant) must be limited by levancy and couchancy.

I must therefore determine whether the evidence shows that the rules of levancy and couchancy are in fact applicable to the rights now in dispute.

I was not provided with any complete statement as to the acreage of the lands to which the disputed rights are attached. From my examination of the plans attached to the application forms (CR 7), it seems that only one (169 E/3 part C) could be



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more than 1 acre, that four or five of the others could be between 1/2 and 1 an acre (137 E/3, E/5, E/8 part 1 and E/8 part 4, and 169 E/3 part A and E/3 part B); but I may be mistaken about these areas, because Mrs D E Smith said her holding is 1 1/2 acres and although the plans attached to Mrs Fraser's application show Woodside Cottage as much less, it may be that some backland has been mistakenly excluded. However without any finding about the acreage of any of the dominant tenements, it is clear (as was I think accepted at the hearing) that if Mr Foley's formula of 2 sheep to the acre is applied, most of the registrations would qualify for 1 sheep or less and the remainder qualify for some number between 1 and 2. If one horse or pony or donkey is treated (as is usual) as equivalent to some number of sheep between 4 and 10, then none of the registrations would qualify for any such animal.

As to the evidence of grazing by animals:- Mrs D E Smith said Mr Jack Williams of the Blacksmith's shop had 2 horses, Mr Ted Bayliss and Mrs Emma Bayliss of Stoke View had a horse between them, Mr Victor Lewis of Rosegarth had a horse and pony, and Mr Harris (next door to her) had a donkey which he replaced by a pony. Mr N R Morgan said that Mrs Ince of Woodend Cottage (tenant of Mrs Fraser) had a pony. Mr Dolphin of Long View thought his predecessor Mr Stanton kept sheep. Mr Hounslow said that during his 48 years with Mrs Fraser he had seen animals, mainly sheep and ponies with the odd goat or two put on by those who signed the statements he produced and who lived at Mrs Fraser's cottages. In these statements Mr Green spoke of Mr Williams keeping 2 ponies and a donkey, Mr Preece spoke of Mr Williams keeping 2 ponies and Mr Bayliss a pony and a donkey and Mr Stanton keeping sheep. Mrs Jones spoke of Mr Williams keeping 2 ponies and a donkey and Mr Bayliss a pony and a donkey and Mr Ted Smith a donkey and also goats.

There was no evidence about the CL137 and 169 Lands ~~never~~ having been grazed by or on behalf of Mr Foley or any of his predecessors in title; I understood that he personally had made no attempt to do anything on these lands because of his uncertainty as to the legal position.

Nobody disputed Mr King's statement that Mr Foley is Lord of the Manor, although I have no note or recollection of the Manor being named. Mr King mentioned that the Court Rolls were available, but because he did not produce them, I assume that they give no indication as to how the CL137 and 169 Lands were granted.

The evidence of grazing by animals was criticised as to some extent relating to grazing from lands in respect of which no rights had been registered under the 1965 Act. But because the proceedings were conducted on the basis that the origin of the rights was manorial (the CL137 and CL169 Lands look as if they are or were waste lands of a manor), and because the existence of such rights was not questioned, grazing from these lands is I think relevant. The dwellinghouses near and around the CL137 and 169 Lands all appear to be (apart from modern additions and improvements) old or in the place of older buildings, and it would be extraordinary having regard to the general situation and appearance of these buildings in relation to the CL137 and CL169 Lands if animals had not from time immemorial been put out from them as described by the witnesses. That there is no record of any custom limiting the numbers is I think explained by the improbability of the persons entitled to rights ever having (until recent years) enough capital to purchase animals to a number that would make it necessary to consider any limitation. If the numbers which any person having a right, could lawfully graze, had been limited by the rules of levancy and couchancy grazing would have been impossible in any convenient or sensible way.



At present the areas of grass are so small that there would, however the rights be quantified, not be enough grass left for any owner to graze his animals. Apart from any rules of levancy and couchancy the numbers now registered are sensible and not excessive. Having regard to the evidence summarised and to the appearance of the lands to which the disputed rights are attached, my conclusion is that the rules of levancy and couchancy are not in fact applicable.

The alternative put forward in *Hoskins v Robinson* supra was that the commoners themselves owned all the herbage to the exclusion of the Lord of the Manor. In case it is necessary for me to express an opinion as to the applicability of this alternative to this case; if there is no middle course between applying the limitations applicable under the rules of levancy and couchancy and treating the rights as subject to no limitation (except as between themselves, as is the case where the herbage is owned by the commoners to the exclusion of the Lord of the Manor), on the evidence summarised above and the appearance of the CL137 and CL169 Lands and their surroundings, I conclude that in this case a several herbage has been proved. In my view it matters not that the registered rights are described in the Register as "of grazing" rather than "of herbage"; such a degree of precision is not I think necessary in a registration; but if need be, to give the registrations validity, I would modify them accordingly.

My decision therefore is that subject to the points particularly below mentioned all the disputed registrations were properly made. I see no reason for making any distinction in principle between the registrations which were at the hearing supported by the applicants or their successors in title and those which received no such support. As to the inclusion of goats in 137 E/4 and E/6 and 169 E/2, Mr Hounslow mentioned goats as did Mrs Jones; I see no reason why a right to graze these animals should necessarily be contrary to the general law or to the custom of a manor; but from the appearance of the land, I conclude that the goats should be tethered. Mr Davies on behalf of Mr and Mrs Dolphin conceded that at 137 E/6 and 169 E/2, the goats should be alternative to sheep and this I accept. The registrations made on the application of Mrs Fraser are as regards animals (horses or cows) expressed to be alternative; my decision as regards 137 E/2 and E/3 (nobody appeared to support these registrations) but they should be alternative likewise. I see no reason for treating the registration of 2 donkeys at 137 E/1 as irregular but they should be alternative to the 2 ponies. I record that I have seen a letter dated 6 February 1978 from Mr N K Hinchman of Fairview (137 E/5) forwarded to me by the County Council; as they received it after the hearing, I have disregarded it.

As regards birds:- Mrs D E Scott said she had poultry and during her evidence Mr King conceded that her registration was properly made. I see no reason for treating differently the registrations of geese.

Having regard to the situation at Long View in relation to the CL 169 Land, I consider that Mr and Mrs Dolphin could only have a right to graze it on the basis that such land and the CL137 Land are one common; I shall therefore modify 137 E/7 and 169 E/2 so as to prevent these rights being cumulative.

As regards estovers:- While Mrs D E Smith was giving evidence about the cutting of bracken, it was agreed that after the word "estovers" should be added "(for kindling and litter only)". Mr Green and Mr Preece and Mrs Jones all mentioned pea and bean sticks and these should I think be included. Mr Foley said that as owner he thought he could with advantage plant trees on the CL137 and CL169 Lands (for timber as I understood him); accordingly for his benefit I record that my conclusion that

*Therefore*

the herbage belongs or may belong to the commoners does not apply to everything growing on these lands (a right to everything growing is a vesture), and ~~accordingly~~ ~~considering~~ his Objections) that estovers should be limited or defined; my decision is the limitation should be as above.

The registrations at 137 E/6 and E/8 part 3 overlap as also do those at 169 E/1 and E/3 part D; they cannot both stand and I consider I ought to give effect to those made on the application of Mr Morgan and Mrs D E Scott both of whom gave evidence before me.

For the reasons set out above, I confirm the CL137 Rights Section Entry No. 6 without any modification and Entries Nos 2, 3, 4, 5, 7 and 8 with the following modifications (all save where otherwise stated to column 4 of the Register):-

At Entry No. 2, for "(a) 2 ponies. (b) 2 donkeys. (c) 8 sheep," substitute "2 ponies or 2 donkeys or 8 sheep".

At Entry No. 3, for "Right of estovers Right of turbary" substitute:- "Right to cut and take sticks and bracken for kindling and litter and for pea and bean sticks only".

At Entry No. 4, for "(a) 12 chickens. (b) 2 goats. (c) 1 pony," substitute "12 chickens and 1 pony or 2 tethered goats".

At Entry No. 5, for "Right of estovers. Right of Turbary", substitute "Right to cut and take sticks and bracken for kindling and litter and for pea and bean sticks only".

At Entry No. 7, for the whole of column 4 substitute "Right to graze 2 sheep or 2 tethered goats and (in addition to the sheep or goats) 2 geese over the whole of the land comprised in this register unit but so that for the purpose of these numerical limitations the said land (the land comprised in register unit No. CL169 shall be regarded as one common, and the right to cut and take sticks and bracken for kindling and litter and for pea and bean sticks only".

At Entry No. 8, for "Right to graze 6 sheep, 6 geese and 6 chickens in respect of cottages No. 3 on the plan right of estovers in respect of each cottage edged blue on the plan", substitute "right to take sticks and cut bracken for kindling and litter as for pea and bean sticks only in respect of each cottage edged blue on the plan other than that numbered 3" and in column 5 of the said Entry for "Seven" substitute "Six" and delete the figure "3".

and I confirm the CL169 Rights Section Entries Nos 1 to 3 inclusive with the following modifications (all such save where otherwise stated being to column 4 of the Register:-

At Entry No. 1, for "Right of pannage. Right of estovers", substitute "Right to cut and take sticks or bracken for kindling and litter and for pea and bean sticks only".

At Entry No. 2, for the whole of column 4, substitute "Right to graze 2 sheep, or 2 tethered goats and (in addition to the sheep or goats) 2 geese over the whole of the land comprised in this register unit but so that for the purpose of the numerical limitation the said land and the land comprised in register unit No. CL137 shall be treated as one common and the right to cut and take sticks and bracken for kindling and litter for pea and bean sticks only.

At Entry No. 3, for "C and D. One horse or one cow and 4 geese. Right of estovers" substitute "and C. One horse or one cow and 4 geese. Right to take sticks and bracken for kindling and litter and for pea and bean sticks only" and in column 5 delete "D.".

It was agreed at the hearing that I should make no order as to costs.



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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.

FIRST SCHEDULE
(Rights Section Entries)

Entry No.	Applicant (as owner except where stated)	Rights Registered: H = Horse P = Pony C = Cow D = Donkey S = Sheep G = Goat	Land to which right is attached	Situation of such land	Relevant Objection
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Part I. The CL. 137 Land

2	Mr C C Payne	Graze 2P, 2D, 8S	Quarry Gardens (west of Zion Chapel, on the other side of the track (south part of OS 19))	No. 442
3	Mr C H Jones	Graze 12S, 12 Geese Estovers Turbary	Chestnut House (west and southwest of Quarry Gardens supra being the west part of OS 29)	No. 442
4	Mrs N S Reynolds	Graze 12 chickens 2G, 1P	131 Shucknall Hill (west of OS No. 30 west of west corner of the Unit Land)	No. 442
5	Mr N K Hinkman	Graze 1 Animal Estovers Turbary	Fairview (east of Zion Chapel)	No. 443
6	Mr W R Morgan (tenant)	Graze 3S, 6 Geese, 12 chickens	Hill Top (OS No. 17 west part)	No. 442

TURN OVER



7	Mr S H & Mrs Dolphin	Graze 2G, 2S, 2 Geese	The Cottage (Long View, OS No. 17 middle part)	No. 444
		Turbary		
		Estovers		
8	Mrs J M Fraser	(1) Graze 1H or C, and 4 Geese	Cottage (1) (Woodgate Cottage, near west corner)	No. 445
		Estovers		
		(2) Ditto	Cottage (2) (Woodside Cottage occupied by Mrs D E Smith, north of west corner)	Ditto
		(3) Graze 6S, 6 Geese and 6 Chickens	Cottage (3) (Hill Top occupied by Mr N R Morgan northwest corner)	Ditto
		Estovers		
		(4) Graze 1H, or C, and 4 Geese	Cottage (4) (Elm Tree now occupied by Mr Ebdon OS No. 8 containing 0.560 acres surrounded by the CL137 Land)	Ditto
		Estovers		
		(5) Ditto	Cottage (5) (OS Nos 13 & 19 containing 0.378 and 0.461 acres near east corner)	Ditto
		(6) Ditto	Cottage (6) (near southwest side)	Ditto
		(7) Ditto	Cottage (7) (near southwest side)	Ditto

TURN OVER

Part II. The CL. 169 Land

1	Mrs D E Scott	Graze 24 Poultry Pannage Estovers	Quarry Cottage (adjoining quarry being the northeast part of the CL137 Land)	No. 447
2	Mr S H & Mrs L Dolphin	Graze 2G, 2S, 2 Geese	The Cottage (Long View OS No. 17 supra)	No. 448
3	Mrs J M Fraser	(A) Graze 1H or C and 4 Geese Estovers (B) Ditto (C) Ditto (D) Ditto	(A) Cottage (on south- west side of CL169 Land) (B) Cottage (on south- west side of CL169 Land) (C) Cottage (on south- west side of CL169 Land) (D) Cottage (plan shows same as Quarry Cottage)	No. 449 Ditto Ditto Ditto

SECOND SCHEDULE
(Grounds of Objection)

File No.	Objection No. and Entry No.	Grounds of Objection
D/272	CL137 Objection No. 442 Entry Nos 2, 3, 4 and 6	(1) Chickens geese goats and donkeys are objected to as not commonable animals (2) The number of animals...is excessive in that several pieces of land in respect of which the rights of common are claimed are not each capable of maintaining the number of beasts claimed by their produce through the winter
D/273	CL137 Objection No. 443 Entry No. 5	(1) The number of animals is excessive...(as above)... (2) ...estovers...objected to...not specified what type...(eg housebote)... (3) ...turbarry objected to...no combustible turf or peat on the common

TURN OVER



- D/274 CL137
Objection No. 444
Entry No. 7
- (1) ...goats and geese objected to...not commonable animals
(2) The number of animals...is excessive...(as above)...
(3) ...turbary objected to...(as above)...
(4) ...estovers objected to...(as above)...
- D/275 CL137
Objection No. 445
Entry No. 8
- (1) ...geese objected to as...not commonable animal
(2) The number of animals...is excessive...(as above).
(3) ...estovers...objected to...(as above)
- D/277 CL169
Objection No. 447
Entry No. 1
- (1) ...poultry objected to...not commonable animal
(2) As to pannage this common is not woodland and therefore this right cannot exist at all
(3) ...estovers...objected to...(as above)
- D/278 CL169
Objection No. 448
Entry No. 2
- (1) ...goats and gees...are not commonable animals
(2) The number of animals...is excessive...(as above)
- D/278 CL169
Objection No. 449
Entry No. 3
- (1) ...geese objected to...not commonable animals
(2) The number of animals claimed...is excessive...
(as above)
(3) ...estovers...(as above)

Dated this 23rd day of August 1978

a. a. Borden Fulle

Commons Commissioner.