



In the Matter of Bearwood Common, Cradley,
Hereford and Worcester.

DECISION

This dispute relates to the registrations at Entry Nos 1 - 8 (inclusive) in the Rights section of Register Unit No CL 101 in the Register of Common Land maintained by the Hereford and Worcester County Council and is occasioned by Objection No 412 made by Mrs M A Higgins and noted in the Register on 12 January 1971.

I held a hearing for the purpose of inquiring into the dispute at Worcester on 1 and 2 December 1977. The hearing was attended by Mr P C Davis, solicitor, on behalf of Mr G E Evans, the applicant for the registration at Entry No 5, Mrs A L Smallwood, the applicant for the registration at Entry No 1, Mr T L Davies, the applicant for the registrations at Entry Nos 2 and 3, and Mr D L Judge, solicitor, on behalf of the Objector. There was no appearance by or on behalf of Mr F E Wagstaff, Mrs M G Todd, Mrs G E H Tustin, and Mr A E Brookes, the applicants for the registrations at Entry Nos 4, 6, 7, and 8 respectively.

The land comprised in the Register Unit is almost entirely covered with bracken, but there is a small amount of grass. It is described as "common" in the tithe apportionment of 1841. Although this indicates that the land was then subject to some right or rights of common, it is not evidence of the existence of any of the rights claimed by the applicants. Such rights must be proved by specific evidence.

Mr Evans is the owner of a cottage and garden with an area of 0.251 acres, the northern boundary of which adjoins the land comprised in the Register Unit. This was conveyed to Mr Evans by a conveyance made 16 November 1955 between (1) John David Lambourn (2) George Edward Evans and Wolstan Derek Evans. The parcels of this conveyance include (only so far as the Vendor had the power to grant the same) all rights of common and commonable rights whatsoever to the property conveyed belonging or appertaining upon or over (*inter alia*) the land comprised in this Register Unit. Mr Evans's property was formerly part of a larger property having an area of 1a. 1r. 1p., which was conveyed with the same words regarding rights of common and commonable rights by an indenture dated 22 May 1940. The title goes back to an indenture dated 22 May 1920, in which there is no mention of rights of common and commonable rights.

Mr Evans said that when he purchased his property he saw a document about 2½ couple of sheep, which led him to quantify his right to graze in that way. Mr Evans has never kept any sheep and, so far as he knows, his predecessor, a Mr Lambourn, had no stock. It appears that a Mr Pooten, who lived in Mr Evans's cottage, kept one or two cows and put them on the land in question (referred to hereafter, for convenience only, as "the common"). Mr Pooten left about 1940. He did not take any bracken. Since he purchased his property Mr Evans has taken bracken and fallen wood from the common without asking permission from anyone. However, Mr B A Higgins, the husband of the Objector, who has lived in the neighbourhood since 1954, and Mr A J Goodwin, the Objector's farm bailiff since 1959, both of whom have frequently seen the common, have never seen Mr Evans doing this and there was no evidence that his predecessors in title had ever done so.



Mr P C Davis contended that on the evidence Mr Evans was entitled to the rights which he claimed by prescription at common law. In the alternative, Mr Davis relied on a lost modern grant. Mr Judge contended that if any of Mr Evans's predecessors in title ever had a right to graze sheep, the non-exercise of that right for the last 30 years was evidence that it had been abandoned. So far as the taking of bracken and fallen wood was concerned, Mr Judge relied on the facts that there was no evidence of this ever having been done by any of Mr Evans's predecessors in title and that Mr Higgins and Mr Goodwin had never seen Mr Evans doing it.

On the evidence before me I am not satisfied that there was any right of grazing attached to Mr Evans's property when he bought it, and I am not satisfied that the taking of wood and bracken by Mr Evans has been of a sufficiently continuous nature to indicate to the Objector that a right to do so was being asserted.

Mrs Smallwood's property has an area of 0.087ac. It consists of a cottage without any stabling. Mrs Smallwood and her husband use it as a week-end cottage and so have never kept any animals, but they have collected fire-wood from the common. Their predecessor in title was Mr R Hickman. He let the cottage to Mr R J Clinton, who gave evidence. Mr Clinton also did not keep any animals, but he cut bracken on the common. Mrs Smallwood did not, however, apply for the registration of a right to take wood or bracken. Both Mrs Smallwood and Mr Clinton based their belief in the existence of rights of grazing upon what they had been told by Mr Hickman. This, in my view, is insufficient to support the right to graze one pony, which is the only subject of Mrs Smallwood's registration.

Each of the farms in respect of which Mr T L Davies registered rights has fields adjoining the common with gates opening onto it. Mr Davies purchased Mosewick Farm in 1959 and he became the tenant of Barrow Mill Farm at the same time, buying the latter three or four years later. There is no mention of rights of common in his documents of title, which go back to 1919. He said that in consequence of having been told about common rights by his predecessors as owners and tenant he had grazed up to 12 cattle and 70 or 80 sheep on the common and collected bracken and firewood, and that no one had ever said that he had no right to do so. Mr Davies's immediate predecessors had acquired bracken from somewhere, for there was bracken in the cattle byres when he took over. Mr Clinton remembered that Mr R Hickman, who sold Barrow Mill Farm to Mr Davies, used to keep sheep and cattle on the common in the 1950's. Mr Hickman had about 20 ewes, a dairy cow, and one or two store cattle. He also cut bracken on the common.

Mr Higgins agreed that he had sometimes seen Mr Davies's cattle on the common, but said that they had strayed from Mosewick Farm. On these occasions Mr Higgins told Mr Davies about it by telephone. Mr Higgins said that Mr Davies thanked him and said that he would send his boys to drive the animals out of the common. Mr Davies agreed that he thanked Mr Higgins for letting him know, but said that this only happened once and that he did not remove the cattle immediately, but left them until the evening, adding that he would have removed them immediately had they been trespassing. Neither witness said that on any of these occasions did Mr Davies say that he considered that he was entitled to put his animals on the common. Mr Davies's son said that his father had put sheep and cattle on the common from 1959 onwards, usually during three or four weeks in August.



In so far as there was any divergence between the evidence of Mr Higgins and Mr Davies and his son, I prefer that of Mr Higgins who seemed to me to be a more reliable witness.

Mr Davies seemed to me to be a man who would not have failed to tell Mr Higgins to mind his own business if he had claimed to be entitled to turn his cattle onto the common as of right. In my view, Mr Davies's cattle were on the common either because they had escaped from his fields or because he turned them out regardless of whether he had any right to do so. There was no evidence of a claim of right acquired in by or on behalf of the Objector or any of her predecessors in title.

Mr Davies's son, presumably on the advice of his solicitor, said that he relied on 30 years enjoyment under the Prescription Act 1832. In order to fall within the ambit of that Act enjoyment must be nec vi, nec clam, nec precario. The essence of prescription under the Act of 1832 is that there should have been enjoyment with the acquiescence of the owner of the servient tenement for the necessary period down to the time when the dispute arose. I am satisfied on the evidence that there has been no such acquiescence by the Objector. Mr Higgins, who acted as her agent, asked for the removal of Mr Davies's cattle when he saw them on the common, and any taking of wood or bracken by or on behalf of Mr Davies was without Mr Higgins's knowledge.

For these reasons I refuse to confirm the registrations at Entry Nos 1, 2, 3, and 5. There being no evidence in support of the registrations at Entry Nos 4, 6, 7, and 8, I also refuse to confirm those 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

23rd

day of

January

1978

Chief Commons Commissioner