



COMMONS REGISTRATION ACT 1965

Reference No 215/D/231

In the Matter of Byton Common,
Byton, Leominster District,
Hereford and Worcester

DECISION

This dispute relates to the registration at Entry No 4 in the Rights Section of Register Unit No ^{CL} 145 in the Register of Common Land maintained by the Hereford and Worcester County Council and is occasioned by Objection No 373 made by Mr H Beaumont and noted in the Register on 26 October 1971.

I held a hearing for the purpose of inquiring into the dispute at Hereford on 8 February 1978. At the hearing (1) Mr Ralph Julian Howard Beaumont (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 registration was made on his application as tenant) and (3) Mr David Lyndon Arkwright of Kinsham Court (according to a note on the Register he claims to be the owner in fee simple of the Unit Land) were both represented by Mr W D Turton solicitor of Lloyd & Son, Solicitors of Leominster.

The land ("the Unit Land") in this Register Unit extends (according to the Register) to about 24 acres, is from southwest to northeast about half a mile long and has an irregular width averaging about 100 yards or a little more; it slopes upwards, in places rather steeply, from its west side which is a short distance from houses and buildings around the Church (St Mary's). The registration in dispute is or a right attached to Court House Farm to graze 100 sheep and their lambs. Additionally in the Rights Section there are 5 other registrations (Entry Nos 1, 2, 3, 5 and 6), all of which have become final; these are of rights to graze (No 1) 5 cattle, (No 2) 10 sheep, (No 3) 20 sheep and 4 cattle, (No 5) 30 sheep and (No 6) 30 sheep; and also (No 1 only) of estovers and to cut and remove fern and bracken. The grounds of Objection (dated 28 September 1970) are (in effect) that Mr Edwards and his family before him from Court House Farm had "never exercised any rights on the Hill (meaning the Unit Land)."

In support of the Objection oral evidence was given by Mr Beaumont (Rights Section Entry Nos 5 and 6 were made on his application) in the course of which he produced as written evidence a statement dated 7.2.78 and signed by Mr G Hill of Stoneycroft (Rights Section Entry No 2 was made on his application).

In support of the registration oral evidence was given (1) by Mr Edwards who was born at Court House Farm in 1917 and has been there ever since, in the course of which he produced a 1930 OS map (6" = .1 mile) on which was delineated the Kinsham Estate, and (2) by his son Mr Herbert Edwards who was born in 1933 and has since he was 18, farmed with his father.

Two days after the hearing I walked over some of the track which from the gate at the end of the road southeast out of the Village, continues near to and within the southwest side of the Unit Land. At the time there had been much snow, and I found too slippery to go up any steeply sloping land; however although my inspection was somewhat limited, I could see a great part of the southern half of the Unit Land, and there being no evidence at the hearing



that the nature of the Unit Land ~~was~~ changed^d anywhere, I infer that what I did not see of it looked much the same.

Mr Beaumont who has lived at The Orchard since 1959 said that there had never been stock of any kind from Court House Farm on the Unit Land and Mr Hill who had lived at Stoneycroft since 1952 said that "during this time David Edwards has not had animals on Byton Hill". This evidence conflicted with that of Mr D A and Mr H Edwards. The former (the father) said:- "I have turned out sheep. Not regularly to leave them there. For the last 17 years or so, we have left them there for a few hours and then taken them off because there was no pasture. When we take sheep through, we just leave them there for a while; they would not stay there, there is not enough grass. They just stay around the gate, waiting to be let on land which they know is the best pasture. (Never more than a few hours?) There has been no grass there, not for the last 17 years since it (the Hill) has been grazed excessively. You put sheep there and they wait about the gate for you to open it, except for the few who stray; they stray until we find them in a few day's time to take them back and stop them growing too thin. (Your sheep have been merely taken across?) They have not been left for 24 hours; they just stay against the gate for a few hours and then we let them through. You like to move sheep around because you like to freshen the pasture. (More than 3 hours?) Sometimes, it depends, 2 or 3 hours, sometimes 4 or 5 hours; they have not been driven directly through; they have been left there for awhile. Before Mr Beaumont came, we left the sheep there for days, and it was then only grazed by the Morgans (Rights Section Entry No 3) and myself; as soon as he (Mr Beaumont) arrived he put a lot of sheep on so my sheep would not stay there...". The latter (the son) said:- "(Having heard the foregoing evidence) I agree with my father. The sheep are some days put on very often...I put 2 sheep there just to exercise the right...".

The legal position is unusual in that Mr Edwards gave his evidence on the basis that the Unit Land and Court House Farm (except a small area of no significance in this case) are and for many years have been in the ownership of Mr Arkwright (or his predecessors) as part of his (or their) Kinsham Estate, and that of Court House Farm, he (Mr Edwards) and his mother before him, and his father before her were tenants. A person cannot have a "right of common" within the ordinary legal meaning of these words over his own land, and a tenant cannot merely by grazing the land of his landlord not included in the tenancy, for however long, ever acquire any such right over his landlord's land.

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

That there may for some purposes be such a quasi right of common is by law recognised, see *Musgrave v Inclosure* (1874) LR. 9QB 162 at page 165. Whatever may be the correct legal position, I consider whether the evidence outlined above shows the existence of any such quasi right on the basis of the rules by law applicable to establishing an ordinary right of common by prescription or presumed lost grant; although in doing this, I must to some extent apply these rules as if Mr Edwards was the freeholder of all Court House Farm, I decline to apply them without any regard at all to Mr Arkwright being the owner both of the Farm and of the Unit Land, so that to the extent that anything done from Court House Farm can properly be ascribed to the ownership of Mr Edward's landlord rather than to Mr Edwards being the owner (or assumed owner) of Court House Farm must be disregarded.



Court House Farm as shown on Mr Edwards application (dated 28 June 1968) extends over the greater part of a square mile, northeast, southeast, south and southwest of the Village: all, except the Unit Land, some woodlands at its south end, and some comparatively small holdings near the Village. The Kinsham Estate extends for several square miles north and northwest of the Village. Although I had no evidence as to the lands of Mr Beaumont and of the other persons on whose application the registrations at Rights Section Entry Nos 1, 2, 3, 5 and 6 were made, it was assumed at the hearing and not disputed that they were small holdings quite different from Court House Farm; I cannot disregard the circumstance that these registrations were never objected to by Mr Edwards or anyone else, and have therefore become final.

I accept the evidence of Mr D A Edwards that for the 17 years before 1960 the use of the Unit Land by his sheep was as he described; there are at least two places from which sheep could be taken across the Unit Land from one part of Court House Farm to another; although I have no note or recollection of Mr Edwards specifying that to which he was referring, I infer that it was not significantly different from that one over which I walked. In my opinion the use he made with his sheep of the Unit Land cannot properly be regarded as done in respect of a right to graze "100 sheep and their lambs over the whole of the Unit Land"; although I infer that the sheep which he described as being taken over the Unit Land frequently numbered about 100, he never contemplated that this number should in any now relevant sense graze there.

Although Mr H Edwards said the he agreed with his father, there was in some respects a conflict (unintentional perhaps) between them, in that Mr H Edwards (unlike his father) spoke of his having put two wethers on the Unit Land "just to exercise the right". The relevant use of the Unit Land is before 28 September 1970 (the date of the Objection) and I am not persuaded by anything said by Mr H Edwards that the Unit Land was before then used for his father's sheep in any now significantly more extensive way than as described by his father (whose evidence I prefer); but even if I gave full effect to Mr H Edwards' evidence about the grazing of two wethers, it would not be enough to justify the right claimed to graze "100 sheep and their lambs". Mr D A Edwards said that generally before Mr Beaumont came there was grazing from Court House Farm more extensive than he described in detail (as summarised above); but after he came to graze there "he had to make a living". Even assuming that after Mr Beaumont's arrival the Hill was over-grazed, Mr Edwards cannot I think rely on any use he made of the Hill more than 17 years ago, having discontinued such use more than 9 years before the relevant time (September 1970).

Having regard to the above considerations, I am not persuaded by anything said by Mr Edwards that he would have had a right of common such as he claims, even assuming that he and his predecessors were always the owners of Court House Farm and were never the owners of the Unit Land, and accordingly I conclude that the quasi right claimed was not established and the Objection therefore succeeds. But I record for the benefit of Mr Edwards that the question whether Mr Arkwright as owner of the Unit Land can to any and if so to what extent authorise Mr Edwards to allow his sheep to go upon and remain on the Unit Land when the Rights Section of this Register Unit contains no registration of any right attached to Court House Farm, is a question which is not now before me.

For the above reasons I refuse to 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 26th day of June — 1978

A. A. Baden Fuller

Commons Commissioner