



COMMONS REGISTRATION ACT 1965

Reference Nos. 42/D/59-83
(inclusive)

In the Matter of Marsh Common
Earls Croome and Defford,
Malvern Hills D.

DECISION

These disputes relate to the land registered at Entry Nos. 1 and 2 in the Land Section of Register Unit No. CL.38 in the Register of Common Land maintained by the former Worcestershire County Council.

I held a hearing for the purpose of inquiring into these disputes at Worcester on 29 & 30 January 1975.

Mr. Davis of Messrs Foster and Finley, solicitors, appeared for Earls Croome Parish Council, Mr. Tustin, Miss Orme, Mr. Harcombe and Miss Wilton; Mr. Penson of Messrs Russell & Co. solicitors, appeared for Miss Wadley; Mr. Parker appeared in person; Miss S. Cameron, counsel, appeared for the Croome Estate Trustees.

The background to these disputes is complex and confused and for the sake of clarity I will endeavour to state the geographical and historical facts before dealing with the issues which were argued at the hearing and the respective References.

The land registered at Entry No.1 aforesaid was coloured pink in the plan annexed to this decision (and is hereafter referred to as the Pink Land). Its status as Common Land is undisputed and has become final and ownership of this land is claimed by Earls Croome Parish Council at Entry No.3 in the Ownership Section of the Register. The land registered at Entry No.2 in the Land Section of the Register was coloured green on the said plan (and is hereafter referred to as the green land). The Croome Estate Trustees are registered at H.K. Land Registry as the owners of the green land.

The Pink Land lies in the Parish of Earls Croome and the green land lies in the Parish of Defford. The Pink Land comprises approximately 18 acres and the green land comprises approximately 12 acres; they adjoin each other and until 1955 there was no physical boundary between them and they were together known, at any rate in the Parish of Earls Croome, as Marsh Common.

However the green land was together with other lands in the Parish of Defford owned by the pasture owners of Defford. Until 1926 when all those lands on the coming into force of the Law of Property Act 1925 vested in the Public Trustee and subsequently by a Deed of Appointment and conveyance and subsidiary Vesting Deed dated 31 December 1959 all the lands formerly owned by the Defford Pasture owners were vested in the Croome Estate Trustees. Included in these lands was an Enclosed common, popularly known as Defford Common, which was stocked annually, subsequent to an annual auction of pastures. This enclosed common was strictly controlled and the animals grazed thereon did not graze on any of the other lands formerly owned by the Defford Pasture owners. Two parcels of these other lands were sold by the Croome Estate Trustees in 1960 and 1962 as appears from endorsements on the said Deed dated 31 December 1959.



The green land though popularly regarded as part of Marsh Common was in fact part of the lands owned by the Pasture owners of Defford before it was acquired by the Croome Estate Trustees though the land popularly known as Defford Common comprised only the enclosed common referred to above.

In 1955 the Pasture Owners of Defford leased part of the green land to Mr. Gerrard who farmed at Mill Pond Farm, and the land so leased was fenced off from the remainder of the green land and in 1959 the Croome Estate Trustees leased the remainder of the green land to Mr. Gerrard and shortly thereafter a fence was erected along what was believed to be the Parish boundary but it was found to have been wrongly sited and was later moved back off the Pink Land on to what was then agreed to be the Parish Boundary.

By Entry Nos. 1 to 10 inclusive in the Rights Section of the Register ten individuals claim grazing rights over the whole of Register Unit No. CL.38 and the Croome Estate Trustees by their objection contend that these rights do not extend over the green land. By Entry Nos. 11 to 19 in the same section of the Register the Croome Estate Trustees claim grazing rights over the Pink Land and the Earls Croome Parish Council objects to these rights.

The issues argued before me at the hearing were therefore:

1. Had Mr. Davis' clients or any of them grazing rights over the green land?
and
2. Had the Croome Estate Trustees any grazing rights over the Pink Land?

In order to consider the claims to Rights over the green land it is necessary to consider the nature of these claims. In the first place it is relevant to point out that the Earls Croome Parish Council had not registered any claim to rights and indeed it did not register the green land as common land - which was registered by the Registration Authority consequent on the registration of a claim to rights over both the Pink Land and the green land.

The claims to rights are therefore claims by individuals. The only person who claimed that his Deeds conferred upon him any title to rights of pasture was Mr. Tustin and those rights were restricted to rights over the commons in the Parish of Earls Croome. It follows that the rights claimed must have been acquired either by "vicinage" or prescription.

Mr. Tustin gave evidence and he has held office as a member and chairman and the Earls Croome Commons Committee which was originally appointed by the commoners at a Parish meeting and later by the Parish Council as a sub committee of the Council. This committee allotted pastures over Dunstall Common, Smithmoor Common and Marsh Common, collectively so that the number of animals which a pasture comprised could be grazed on any one or more of those three commons but so that no more than that number of animals should be grazed at any one time. Mr. Tustin stated that these allotments by the Committee were in the nature of a "gentleman's agreement" that he had at one time objected to the committee making an allotment to him and claimed his strict rights and that the Committee sustained his objection. Then again it was established



that animals could and did stray from anyone of the three above mentioned commons on to any other of them. Part of the green land was ploughed by the War Agricultural Committee during the 1939/45 war. I was not told who if anyone received any compensation from the War Agricultural Committee.

In addition to Mr. Tustin, Mr. Wilfred Smith, Mr. Simmonds, Mr. Webb, Mr. Harcombe, Mrs. Orme, Mr. R.A. Smith and Mr. Redmond gave evidence on behalf of those who claimed grazing rights over the green land. Mr. & Mrs. Gerrard and Mr. Eastment gave evidence on behalf of the Croome Estate Trustees. I have no doubt at all that all the witnesses gave their evidence to the best of their recollection and it is not surprising that on some material matters there was a conflict of evidence bearing in mind the confused background.

In my view the onus of establishing rights over the land of another lies upon those who claim these rights. In my opinion those who have claimed rights over the green land have failed to discharge that onus.

First and foremost when the first fence was erected there was little evidence of any assertion of rights over the green land. A copy letter dated 28 March 1956 addressed to the Pershore Rural District Council which I assume was written on behalf of Earls Croome Parish Council was produced and is in the following terms:-

"One of our Councillors complains that part of Marsh Common, Earls Croome (part of which is in your area) has been enclosed, and I should be glad if you would let me know whether you are taking any action in this matter."

I was not told what, if any, answer was received to that letter and it is relevant to note that the letter does not state the basis of the complaint which may have been made under the misapprehension that the title to the green land was the same as that to the Pink Land. Only one witness spoke of any interference with the first fence, namely Mr. R.A. Smith who said several people took the posts out because there was no water. It is a fact that the only water on Marsh Common is a pond on the green land which was enclosed, in 1955, though Mr. Smith put the date at 1952. Mrs. Gerrard said that there was no objection to the first fence and that no posts from that fence were pulled up.

No effective action was taken to enforce any grazing rights over the part of the green land fenced off in 1955 and I infer that Mr & Mrs. Gerrard had quiet enjoyment of that land by reason of their willingness to take a tenancy of the remainder of that land in 1959.

The remainder of the green land was fenced in 1960 and quite apart from grazing rights there were two objections to this fence, first that it obstructed a bridle path and secondly, that it was wrongly situated. A letter dated 24 July 1963 was written to the County Surveyor, the Worcester^{shire} County Council presumably by the Earls Croome Parish Council in the following terms:

"There appears to be some local feeling regarding the fencing and obstruction of rights of way on Marsh Common and I should be glad if you could assist me in trying to sort things out. It appears there are three problems:-

- (1) the right to use the road across Defford Common
- (2) fencing part of Marsh Common
- (3) the obstruction of a right of way....."

It is to be observed that there is no reference to grazing rights. It was not until



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27 October 1967 that the clerk to the Earls Croome Parish Council wrote to the Croome Estate Agent inter alia in the following terms:-

"At a recent Earls Croome Parish Meeting which was called to discuss Registration of Common Land it was unanimously decided that Earls Croome Pasture Holders have the right to graze the whole of Marsh Common. It was also decided therefore that the fence on the Marsh Common should not have been erected and should therefore be removed. I am instructed to ask you to remove it otherwise the commoners will take it down."

This is the first specific claim to the rights over the green land now in dispute, twelve years after the erection of the first fence and seven years after the erection of the second fence.

While it would be quite wrong to construe the Parish Council's letter dated 27 October 1967 as if it were a legal document drafted by a lawyer it does in terms state:

- (1) That the decision that the pasture holders had the right to graze the whole of Marsh Common was taken at the meeting therein mentioned.
- (2) That the decision was arrived at when the registration of Common Land was under consideration; and
- (3) That the rights were claimed by the Earls Croome Pasture Holders.

The inference is inescapable that the Earls Croome Pasture Holders were seeking to avail themselves of the Commons Registration Act 1965 for the purpose of asserting claims which even if they believed they had such claims they had not in terms asserted or prosecuted since 1955 when the first fence was erected.

On any view claims on behalf of the pasture holders based on prescription cannot be upheld since the pasture holders have at all material times been a fluctuating body of individuals and it is well settled that a fluctuating body of individuals cannot prescribe. It is to be observed that the Earls Croome Parish Council which claims ownership of the Pink Landhas made no claim to rights as appurtenant to that land. Mr. Tustin alone might by reason of the reference to pastures in his deeds have been entitled to claim rights by prescription but there is no evidence that he made any such claim until the hearing. There is the further fact that in his evidence Mr. Tustin stated that Marsh Common is not currently used because of (1) traffic, (2) the absence of water and (3) the grazing is poor. However in my view the interruption in the exercise of the rights claimed in the one case from 1955 and in the other case from 1960 is fatal to all the claims for rights over the green land.

As regards Mr. Tustin insofar as it is sought to distinguish his claim from those of other claimants I take the view that his failure to put forward his individual claim prior to the hearing is a bar to his reliance on his individual rights at the hearing. His attitude throughout has been that the commoners of Earls Croome are entitled to the rights now claimed. The commoners of Defford and later the Croome Estate were never apprised of any individual claim by Mr. Tustin and were probably under the impression that his grazing was no different from that of others and that they had therefore no reason to fear any prescriptive rights being acquired over the green land. This element of secrecy in my view precludes Mr. Tustin from raising a claim that he individually has grazed on the green land as of right.



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Finally in this part of the case, I must deal with "common of pasture by reason of vicinage". There is a short answer to any claim to rights over the green land based on vicinage, namely that the owner of either one of two commons over which there are rights of vicinage may at any time enclose his common where upon the rights cease: see para.568 Vol 6 of Halsburys Laws of England 4th edition; Authority for this proposition is to be found in Tyrringhams Case Cokes Reports 2 Part IV at page 36 approved in Jones -v- Robin 10 Queens Bench Reports 581. It is no doubt this right of an owner to fence his common land notwithstanding a prescriptive right of pasture by reason of vicinage which is the foundation of the statements to be found in the authorities that such a right is only an excuse for trespassers. The possibility that there was possibly a right of pasture by reason of vicinage in my view precludes any claim that other rights have been acquired by prescription since vicinage would exclude the acquisition of other grazing rights.

For these reasons I refuse to confirm any rights of grazing over the green land.

I turn now to the other side of the coin, namely, the claims to grazing rights over the Pink Land by persons other than the Earls Croome commoners. At the hearing these claims were confined to claims on behalf of Mill Pond Farm, now farmed by the Gerrards and Red Deer Farm which was farmed by Mr. Chugg prior to his death in 1973.

The evidence of Mrs. Gerrard was to the effect that twenty two years ago she and her husband acquired a T.T. dairy herd of Fresians and had to cease turning out on the common. In cross-examination she stated that her animals were kept in and that after the second fence was erected about twenty cows were turned out but not regularly and there was some evidence that on occasions these animals were enclosed by an electric fence. Mr. Gerrard further stated that Marsh Common is now not worth grazing unless something is done about it.

Mrs. Gerrard also gave evidence as to grazing by the late Mr. Chugg who kept a lot more cattle than she and her husband which grazed on Dunstall, Smithmoor and Marsh Commons and which wandered all over.

On this evidence I am not satisfied that the grazing by Mr. & Mrs. Gerrard during the last 22 years had been uninterrupted; indeed the picture I have is that such grazing was occasional when in special circumstances they found it convenient to avail themselves of the adjacent Marsh Common. There is the further point that until the erection of the fences the grazing from Mill Pond Farm on the Pink Land may have been attributable to vicinage as regards Red Deer Farm, since the rights over Dunstall, Smithmoor and Marsh Commons are one set of rights and since Mr. Chugg grazed on all three commons it may be that if Red Deer Farm has rights over Dunstall and Smithmoor it also has rights over Marsh Common but the evidence as to Mr. Chugg's grazing does not satisfy me that Red Deer Farm has acquired any prescriptive rights over the Pink Land independently of any right it may have over the other two commons.

I turn now to the individual References and entries in the Register.

Reference No. 42/D/59 occasioned by Objection No. 47 by the Croome Estate noted in the Register on 20 November 1970 being an objection to the Entry No.2 in the Land Section of the Register of Common Land. For the reasons given above namely, that there are no rights of grazing over the green land I refuse to confirm this Entry No.2.



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Reference No. 42/D/60 is also occasioned by Objection No. 47 and for the reasons given above I refuse to confirm Entry Nos. 1 to 20 inclusive insofar as they affect the land comprised in Entry No. 2 in the Land Section of the Register.

Reference No. 42/D/61 occasioned by Objection No. 48 by the Croome Estate being an objection to the Entry Nos. 1 to 8 inclusive in the Rights Section of the Register so far as they affect the land comprised in Entry No. 1 in the Land Section of the Register. For the reason which I will give below I adjourn this reference for further consideration when disputes in relation to Smithmoor Common are referred to a Commissioner.

Reference No. 42/D/62 Is occasioned by Objection No. 54 by the Earls Croome Parish Council to the Entry No. 1 in the Rights Section of the Register. It is within my recollection that I confirmed Mr. Parkers right to graze one Pony on Dunstall Common. Since I was told at the hearing that the rights on Dunstall, Smithmoor and Marsh Commons are interchangeable I confirm Entry No. 1 aforesaid modified so as to confer the right to graze one pony when no pony is being grazed on either Dunstall or Smithmoor Commons.

Reference Nos. 42/D/63 to 71 inclusive are occasioned by Objection Nos. 75 to 83 by the Earls Croome Parish Council to the Entry Nos. 11 to 19 inclusive in the Rights Section of the Register. For the reasons given above I refuse to confirm Entry Nos. 11 and 13 to 19 inclusive and I adjourn Reference No. 42/D/64 occasioned by Objection No. 82 for further consideration when the disputes in relation to Smithmoor Common are referred to a commissioner.

Reference No. 42/D/72 is occasioned by Objection No. 93 to Entry No. 20 in the Rights Section of the Register. The Amphlett Trustees and Miss L.B. Amphlett having withdrawn their claim to the rights entered I refuse to confirm Entry No. 20.

Reference Nos. 42/D/74 to 79 inclusive all relate to Entries in the Ownership Section of the Register conflicting with Entry No. 4 made by the Amphlett Trustees and Miss L.B. Amphlett whose claim to ownership has been withdrawn and for this reason I refuse to confirm Entry No. 4 in the Ownership Section of the Register.

Reference Nos 42/D/73 and 80 to 83 inclusive No evidence was led and no argument was addressed to me on these disputes and I adjourn them. They could conveniently be dealt with in the same occasion as the other outstanding matters.

The effect of this decision may be summarised briefly as follows:-

1. The exclusion of the green land from Marsh Common
2. Save possibly as regard; Red Deer Farm to refuse to confirm rights claimed by the Croome Estate over the land comprised in Entry No. 1 in the Land Section.
3. To refuse to confirm the Amphlett claim both as regards rights and ownership.
4. To leave outstanding for further consideration the Entry Nos. 2-7 inclusive in the Rights Section of the Register.
5. To leave outstanding Reference Nos. 42/D/73 and 80 to 83 relating to ownership.

My decision as regards Dunstall Common has become final and the state of the Rights Section of that Register is not consistent with interchangeable rights on Dunstall



and Marsh Commons whatever my ultimate decision as regards the Entries in the Rights Section of the Register relating to Marsh Common - may be.

As regards those of the above mentioned references which do not require further consideration 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

14th

day of

March 1975

Y A Lettle

Commons Commissioner