



COMMONS REGISTRATION ACT 1965

Reference No.15/D/15

In the Matter of Shiel Meadow,
Richards Castle, Leominster &
Wigmore R.D., Herefordshire

DECISION

This dispute relates to the registration at Entry No.4 in the Rights Section of Register Unit No.CL.121 in the Register of Common Land maintained by the Herefordshire County Council and is occasioned by Objection No.388 made by Mrs. E. M. Turner and noted in the Register on 28 January 1971.

I held a hearing for the purpose of inquiring into the dispute at Hereford on 12 December 1973. The hearing was listed on the same day as hearings of disputes (reference Nos.15/D/12, 15/D/13 and 15/D/14) relating to Entries No.1, No.2 and No.3 in the same Section of the same Register Unit and occasioned by the same Objection. At all four hearings Bilbury Farm Limited was represented by Mr. G. H. Rickards solicitor of Phillips & Co., Solicitors of Ludlow and Mr. L. G. Bayliss appeared in person.

The land ("the Unit Land") comprised in this Register Unit is known as Shiel Meadow and contains (according to the Register) $21\frac{1}{2}$ acres (the acreage may be a little less by reason of an amendment made in 1971). Entries Nos.1, 2, 3 and 4 in the Rights Section were made on the application of (1) Mrs. C. M. Price, (2) Mr. M. A. Sparey, (3) Mr. G. Thomas and (4) Mr. Bayliss, in respect of rights attached to various lands specified in the fifth column of the Rights Section ~~and~~ to graze over the whole of the Unit Land (1) 20 sheep (2) 10 head of cattle, (3) 30 sheep and (4) 10 head of cattle respectively. All the said registrations are provisional by reason of the said Objection, the grounds of which are therein stated as follows:- "I do not admit the title of the applicant to any rights of common and I put each of them to proof of his title. In the alternative the rights claimed by the applicant are not in accordance with the right to which the Commoners are entitled. A statement setting out the rights which commoners are entitled is attached". The attached Statement was as follows:- "Commoners entitled to common rights over this common are entitled to the following rights - Commoners can graze animals that have been wintered on their property, or on such parts of their property as are in the Parish of Richards Castle. Animals that have been wintered elsewhere, or have been bought since the winter may not be grazed. The rights can be exercised during the whole of the year except between the 2nd February in each year and the day on which any hay crop on the common has been harvested by the owner. In any year where no hay crop is taken, the date on which commoners are first entitled to exercise their rights is 21 June. No tups, stallions or bulls are entitled to be grazed at any time. No common of estovers has been exercised by any person for twenty years and upwards, and I consider that any such rights of common as may have been appurtenant to the property of any applicant in the past have been extinguished by abandonment". There is no Entry in the Ownership Section of the Register.

Mr. Rickards asked that all four hearings be adjourned on the following grounds:- These four disputes relate to rights registered over land ("the Unit Land") comprised



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in this Register Unit (CL.121) and are tied up with other disputes relating to rights registered on the application of Mrs. Price, Mr. Sparey, Mr. Thomas and Mr. Bayliss over two nearby lands comprised in Register Unit Nos. CL.119 and CL.120. All these three lands are included in Bury Farm (containing 212.743 acres) which by a conveyance dated 5 August 1971 was conveyed to Bilbury Farm Limited ("the Owner"). It might be that the rights claimed by Mrs. Price, Mr. Sparey, Mr. Thomas and Mr. Bayliss were exercisable one year in every three over these three lands, so that in any one year the rights could only be exercised over one of the lands. The Owner wants all the disputes relating to all three lands settled so that the cultivation of Bury Farm could be properly planned. During any adjournment the Owner would not attempt to interfere with the exercise of the rights as they have been exercised for a number of years ("as they have been exercised" must not be understood as meaning the same as "as they have been registered"). The Owner's case is that from 2 February to harvesting of hay crop no common rights can be exercised, when no hay crop is taken the owner has exclusive rights from 2 February to 21 June.

Mr. Bayliss opposed the adjournment stating the he wished to have the position determined as soon as possible.

Mr. G. H. Holman who was representing the County Council as registration authority said (in effect):- Register Unit CL.119 comprises Little Tenement, Big Tenement, and Barn Meadow (according to the Register map containing $6.540 + 13.729 + 21.104 = 41.373$ acres; now part of Bury Farm). Register Unit CL.120 comprises of Bury Part Grounds (according to the Register map, 3 fields containing $18.674 + 23.353 + 12.209 = 54.718$ acres; also part of Bury Farm). The Rights Section of both these Register Units (CL.119 and CL.120) contain a number of entries; in respect of the Entry in both the Land Sections and of some of the Entries in the Rights Sections an objection by Mrs. E. M. Turner and an objection by one other person has been registered; some of the objections relating to CL.119 are "second period" and could not therefore be referred to a Commons Commissioner at the same time as the four references (all dated 26 January 1973) leading to these (CL.121) proceedings.

The Rights Section of this Register Unit (CL.121) in addition to the four Entries above mentioned, contained 22 other Entries Nos. 5 to 26, in respect of rights attached to various other lands specified in the fifth column of the Section to graze sheep (numbering altogether 670) and to graze cattle (numbering altogether 75); Entry No.7 is registered not only as attached to land but also as "held in gross" and as including (unique in this respect) the right to estovers. Entry No.9 is limited (unique in this respect) from 24 June to 25 December annually. Entry No.19 includes (unique in this respect) the right to graze 4 horses. All the 22 entries being undisputed became final on 1 August 1972. If the number of animals stated in these 22 Entries is added to the number of animals stated in the said 4 Entries number 1, 2, 3 and 4 the totals are: 720 sheep, 95 cattle, and 4 horses.

Mrs. Price, Mr. Sparey and Mr. Thomas from the letters sent to them on behalf of the Owner giving them notice of the proposed application for an adjournment, may I think have assumed that an adjournment would be granted and that their attendance at the hearing was therefore unnecessary; my decision as regards the right claimed by Mr. Bayliss whether it is for or against the Owner, will not in any proceedings which may hereafter be heard by a Commons Commissioner in relation to the rights claimed by Mrs. Price, Mr. Sparey and Mr. Thomas, as to facts be binding as between Mrs. Price, Mr. Sparey and Mr. Thomas and the Owner and their right of appeal as to any point of law will not be affected. The circumstance that my decision may leave outstanding the questions between Mr. Bayliss and the Owner as to the other land



(CL.119 and CL.120) is not I think sufficient reason for my declining to give effect to Mr. Bayliss's request to deal with the registration at Entry No.4 relating to the Unit Land. Upon the above considerations, before hearing the evidence summarised below, I decided (i) not to make any order under regulation 12 of the Commons Commissioners Regulations 1971 that these 4 matters arising out of these 4 disputes should be consolidated; (ii) to adjourn the proceedings arising out of the objection to Entries Nos.1 2 and 3 to such date and place may be affixed by a Commons Commissioner and (iii) to proceed the hearing of the dispute arising out of the objection to Entry No.4.

Mr. Bayliss giving evidence said (in effect):- The land to which the right registered at Entry No.4 is attached contains about 15½ acres (including a dwelling house), known as Mapp's Place. He was born there 53 years ago; he purchased the freehold in 1951; before then he (and also his father before him) was tenant. He and his father for as long as he could remember had grazed cattle on the Unit Land. Bury Farm was at one time owned by Mr. Turner; shortly after his death in January 1956, his widow Mrs. Turner (the Objector above mentioned) arranged a meeting of all the Commoners. The meeting was held in May 1956; she was represented by the two Mr. Whittles (? her brothers); about 20 Commoners were present; "legally" their rights were from 24 June to 2 February; a "Gentlemen's agreement" was reached at the meeting; Mrs. Turner would be allowed to cultivate lands, other than the Unit Land, over which the Commoners claimed rights and the Commoners would be able to graze the Unit Land all the year through.

Mr. Bayliss said his right and the right of the other Commoners had been granted in the reign of King Edward I and he produced a copy of the grant (?translation of the grant), which so far as relevant is as follows:- "Know all men present and to come that I Hugh the son of Lord Mortimer of Richards Castle have given, granted and by this my present writing confirmed to all my Burgesses of Richards Castle and to all my tenants of the Township of ... for their good services done to me in the time of the Welsh war and for Twenty Pounds of Sterling to me in hand paid common of Pasture for all manner of their Cattle and Beasts in my fields at Bury Hynton at all times after the grain is carried thence, and in my meadow called Shulle Meadow after the Feast of St. John the Baptist and also Common of Pasture for all their Beasts in all my woods within my said Lordship of Richards Castle ... at all times in the year ... to have and to hold all the aforesaid common of Meadow, Pasture ... to my said Burgesses and tenants of the aforesaid Villages of Richards Castle ... of me and my heirs in fee forever yielding and paying therefore yearly to me and my (sic) the sum of Twelve shillings at the Feast of St. Michael the Archangel viz. the Burgesses of Richards Castle four shillings ... for all manner of services exaction and demand and if it shall happen that this my grant shall be gainsaid withheld or retained by me my Heirs or by any person claiming under us at any time for the future then I will and grant that all my said Burgesses having thereby their own proper wills should take and hold the aforesaid Common in all the said meadows, pastures and ... afore granted and in all places strength and virtue of the said deed ..."; there followed a warranty by "the aforesaid Hugh" and a testimonium showing the grant to have been executed on "the Thursday after the Feast of the Nativity of St. John the Baptist in the Nine and Twentieth Year of the Reign of King Edward the son of King Henry". Mr. Bayliss thought that "Shulle Meadow" mentioned above was the same as (?includes) what is now known as Shiel Meadow (the Unit Land).



Mr. Bayliss was questioned by Mr. Rickards and myself as to the exact terms of the agreement reached at the 1956 meeting and as to what he and others had done under it. He said (in effect):- Mrs. Turner could cultivate Barn Meadow and Big Tenement (not he thought Little Tenement); and also Bury grounds, subject to the complication that the twelve acre field O.S. 303 could be grazed by the commoners after the grain had been harvested; the majority of the commoners were at the meeting; "We trusted the Turner family; either party could say let us go back to the old arrangements". He (Mr. Bayliss) had adhered to the 1956 agreement as he understood it, grazing on the Unit Land all the year round and not elsewhere on Bury Farm; he had not himself grazed the 12 acre field O.S. 303, although he could not speak for the other commoners; practically Mrs. Turner or her successors could not cultivate under the 1956 Agreement, unless all the commoners observed it; he thought that Mrs. Turner had done better out of the 1956 arrangement than the commoners had.

On behalf of the Owner evidence was given by Mr. V. E. Tudge:- He was born in 1912 and has lived in the neighbourhood ever since. The Owner (Bilbury Farms Limited) is his Company and he arranged for it to buy Bury Farm in 1951; at that time the Company owned and still owns Bilbury Farm (about 153 acres adjoining Bury Farm). During the hearing both these farms were referred to as Mr. Tudge's, the legal distinction between his ownership and the ownership of his Company being disregarded; in the rest of this decision, for the convenience of exposition I shall do likewise, so that any reference to him should where appropriate be treated as a reference to the Owner. Mr. Tudge before purchasing Bury Farm, understood from Mrs. Turner that common rights were exercised over the Unit Land and Little Tenement but the commoners had no rights on any other part of the farm and that Little Tenement was to be available for the owner for lambing purposes from the middle of March until May (for the last 2½ years he had not used it for lambing). He thought Mrs. Turner's above quoted statement raised problems in that: (a) cattle were put on the Unit Land to winter (they did not winter on Mapp's place), (b) if the weather was wrong, the hay crop was sometimes in August. (c) to get hay, the cattle should be away from February (d) practically it would be an awkward job now to take a hay crop off the Unit Land, because nobody has done anything to maintain it and it is just a matter of snatch whoever snatch can. In the 1971 conveyance Bury Farm is expressed to be conveyed "unto the Purchaser in fee simple but subject to certain rights of common enjoyed by the Burgesses of Richards Castle aforesaid over numbers 305, 312, 314, 320, 378, 381 and Part 388 on the said Ordnance Survey map (meaning Second Edition 1903)"; these numbers comprise the Unit Land and the whole of CL.119 and CL.120.

After the conclusion of the evidence Mr. Rickards submitted that the so called "Gentlemen's Agreement" made at the 1956 meeting was not legally binding and that I should therefore modify the registration at Entry No.4 by limiting the right to "from after 24 June to 2 February"; he said on reconsideration Mr. Tudge did not wish to press the ~~objection~~ to the number of cattle stated in the Register or contend that the rest of the Entry should not be confirmed.

Mr. Bayliss contended that the Entry should be confirmed without any modification, pointing out that if the 1956 Agreement had no effect, it would follow that he could (much to the inconvenience of Mr. Tudge) graze cattle on the other common lands (meaning CL.119 and CL.120).



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It was agreed that I should make no order as to costs whatever my decision might be. On the day after the hearing I inspected the Unit Land and the other common land forming part of Bury Farm and above mentioned and also much of Mapp's Place in the presence of Mr. Tudge and Mr. Bayliss and some others. Of the lands comprising CL.119, Barn Meadow O.S.381 (21.104 acres) was ploughed, Big Tenement O.S.378 (13.729 acres) was cultivated (wheat) and Little Tenement O.S.320 (6.540 acres) was grass. Of the lands comprising CL.120, the piece O.S.312 (18.674 acres) was ploughed, the piece O.S.314 (23.853) "should have roots but they did not grow" and was being grazed by sheep and the 12 acre piece O.S. 303 (12.209 acres) was ploughed.

For Mr. Tudge, the substance of the matter is that he wishes to continue (as he and Mrs. Turner before him have done since the 1956 meeting) to cultivate the CL.119 and the CL.120 lands without any disturbance or risk of any disturbance from those who have registered rights of common over those lands; if he could be certain that he could always do this, he would not be concerned or much concerned as to who grazed the Unit Land. For Mr. Bayliss, the substance of the matter is that he has grazed the Unit Land throughout the whole year and would like to continue to do so; he is of course at risk that other persons might in exercise of the grazing rights registered under the 1965 Act, graze the Unit Land (I understand that few if any of them have done so, at any rate recently), but he realises that Mr. Tudge can not do anything to mitigate this risk. And for both Mr. Tudge and Mr. Bayliss there is the possibility that persons who have registered grazing rights over the lands CL.119 and CL.120, may exercise these rights and prevent Mr. Tudge cultivating the lands so that he then might consider insisting that the Unit Land should not be grazed until after 24 June or before 2 February.

Clearly on this reference, I cannot dispose of the substance of the matter as outlined above, because my decision will not bind the persons (other than Mr. Bayliss) who could exercise grazing rights over the Unit Land and the CL.119 and CL.120 lands. But even if all the references which could be made under the 1965 Act in relation to Bury Farm had all come before me at the same time, I still could not dispose of the substance of the matter, as outlined above, because the Act does not confer on me jurisdiction either to determine every question which may arise in relation to the rights of common or (as at one time seem to be suggested at the hearing) to frame rules for the regulation and improvement of common land.

My jurisdiction under the Act is I think limited (on this reference) to determining whether the entry in the Rights Section of the Register made pursuant to the application of Mr. Bayliss, should be cancelled altogether, or should stand as it is or should be modified.

It was I think rightly conceded that some sort of grazing right attached to Mapp's Place over the Unit Land could and should be entered in the Register. The argument in favour of a modification was I think, if not expressly at any rate impliedly, based on the proposition that after the 1965 Act the terms and conditions on which a right of grazing can be exercised must be determined by reference to the Entry in the Register, in the sense that all the terms and conditions must either be set out in or be capable of being deduced from the Entry in the Register. This argument is I think mistaken because the Act (as its title suggests) is a Registration Act and it is I think enough (except as particularly required by section 15) that any registration of a right of common under it certainly identifies the right; any other view would I think be productive of much inconvenience, for in many



cases it would be practically impossible, particularly where numerous persons have rights of common over the same land, to set out in the Register precisely how such rights are exercisable in every conceivable circumstance.

Although the 1965 Act expressly requires the number of animals to be stated in any application for the registration for the right of common, see section 15, there is no such requirement in the Act relating to the time during which the right is exercisable. Nor is there any such requirement in the Commons Registration (General Regulations 1966) except that in the form 9 set out in schedule 1 headed "Application for the registration of a right of common", there is against Part 5 "Description of the right of common" a marginal note "If any right is exercisable only during limited periods full particulars of these periods must be given". In my view it would be giving this note an effect far beyond anything which could have been intended if I read it as requiring that in all cases in which a right of common could not at the will of the owner be exercised on every day of the year (whatever any other person interested in the land might want to do), it was essential that the application for registration should set out precisely how the times of exercise would be determined, and also essential that the entry in the Register should set this out too.

By reason of section 20 of the Act, in some cases, the Entry in the Register may be the only evidence of the terms of the grant actual or presumed under which the right is exercisable. But in cases where the right can from the Entry be identified, the conditions (apart from the number stated in accordance with section 15) may in my opinion, be determined by evidence of the terms of the grant (if there be one) or from the terms of the grant which is by law presumed from the evidence as to how the right has been exercised in the past.

Whether an Entry certainly identified a right of common, must I think be determined having regard to any relevant evidence from persons living in the locality; is not I think an objection to an entry that a stranger could not merely from reading the entry and looking at the land deduce exactly what the rights are. Although the Entry is by section 10 conclusive evidence that there is a right as described in the Register, it is not conclusive evidence that the grant actual or presumed, under which the right can be exercised is free from all terms and conditions not mentioned in the Register.

Having regard to what Mr. Bayliss said about the 1301 grant and the terms of the 22 undisputed entries, I would conclude (apart from the 1956 agreement) that the rights recorded by all the entries in this Register Unit are the rights conferred by Lord Mortimer on the Burgesses. And it is I think unnecessary for purposes of identifying these rights to include in the Register, a statement that under the grant the rights are not exercisable before the feast of St. John Baptist, and also unnecessary to record that by usage or implication of law they ceased to be exercisable at Candlemas. Further some term must by law be implied, which would prevent all the 22 farmers at the same time attempting to graze (as the Register apparently contemplates) 720 sheep, 95 cattle and 4 horses on this 21½ acres; so many animals would (as it was said at the hearing) scarcely have enough room to stand up! Quite apart from the 1956 agreement, in the particular circumstances of this case, I feel no inclination to direct a modification of Entry No. 4 by inserting a time limit, because only one of the 22 other entries contained such a limit and because the entry relating to grazing rights attached to Bilbury Farm, which was made pursuant to an application made by Mr. Tudge, contains no such limit.



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Accordingly for the above reasons, on the assumption that the 1956 Agreement has no legal effect, I decline to direct any modification of Entry No.4.

But as my reasons may be wrong, I now consider whether what was said at the 1956 Meeting had any legal effect.

That it had some effect was obvious by what was said at the hearing and what was apparent on my inspection: lands CL.119 and 120 have been and are being cultivated and it is inconceivable that Mr. Tudge and Mrs. Turner would have done this, if there had been any real possibility of the persons entitled to rights of common turning out at a moments notice animals on the growing crops; further the ploughing apart from what was said at the Meeting, would have been an infringement of the rights of the commoners.

I attach no importance to Mr. Bayliss's expression "Gentlemen's Agreement", or to the vagueness of some of his answers to questions as to how the agreement could be ended or as to how it took effect. It may be impossible to deduce from what was said at the 1956 Meeting that some agreement was reached which varied the rights of the Owner of Bury Farm and the rights of each and all the commoners and which could be enforced in legal proceedings ~~by a decree of specific performance~~ by a decree of specific performance; any such result would I think be far from what anybody at the Meeting then intended. The essential part of Mr. Bayliss's evidence on this point was not disputed and I accept it; the majority of the commoners who attended the meeting assuming they had power to regulate the use by the commoners of the Unit Land and of the lands CL.119 and CL.120, proceeded to say how it should be used and what they said (although perhaps expressed with some lack of precision) has been substantially acted on ever since. In my view what they did had some legal effect; the proper inference is I think that there was some usage consistent with the 1301 grant which empowered the majority of the commoners to regulate the use of the common of pasture thereby granted, and a legal origin of this usage can properly be in law ascribed to a presumed supplemental grant. I need not I think determine exactly what was the legal effect of the 1956 Meeting; it is enough ~~that~~ that I conclude that it had some legal effect, that this effect was consistent with and not contrary to the 1301 grant, and that on 28 June 1962 (when Entry No.4 was made) Mr. Bayliss was entitled (for how long and under what conditions I need not say) to graze cattle all the year round. This conclusion provides an additional reason for there being no entry in the Register such as might be made as a result of the marginal note on Form 9 above mentioned, and for the Entry not being altered so as to contain a limitation from 24 June to 1 February.

For the reasons outlined above I confirm the registration at Entry No.4 in the Rights Section without any modification.

I realise that my reasons may disappoint Mr. Tudge and Mr. Bayliss, in that I leave unresolved many of the difficult questions they raised before me. I think some of these questions have arisen because they have ascribed to the 1965 Act a larger effect than it has. But for the Act, any difference as to the way in which these rights of common should be exercised or as to the power of the majority of the Commoners at a meeting to regulate their use, would be determined by the Courts.



in ordinary (i.e. not under the 1965 Act) legal proceedings; before the Act was passed no such legal proceedings were contemplated and the position in all relevant respects is now as it then was.

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 1974.

A. A. Baden Fuller

Commons Commissioner