



In the Matter of Smithmoor Common, Earl's Croome,
Hereford and Worcester (No. 1)

DECISION

This dispute relates to the registration at Entry No. 2 in the Land section of Register Unit No. CL 32 in the Register of Common Land maintained by the former Worcestershire County Council and is occasioned by Objection No. 5 made by Mrs D E Kember and noted in the Register on 1 August 1969.

I held a hearing for the purpose of inquiring into the dispute at Worcester on 29 November 1977. The hearing was attended by Mr P C Davis, solicitor, on behalf of the Earl's Croome Parish Council, the applicant for the registration, and by Mrs M J Paton, solicitor, on behalf of the Objector.

The land comprised in the Register Unit is described in the application as "(1) Lane leading to Smithmoor Common" and "(2) Smithmoor Common". The lane leads from the northern end of the common to the main road and it alone is the subject of the Objection. The Objector owns and occupies a cottage on the eastern side of the southern end of the lane. At the southern end, where it adjoins the Objector's cottage, the lane widens into a triangular piece of land. It is really this triangular area to which the Objection is directed. The lane is merely the means of access from the main road to the common and there was no evidence that there is a public right of way over it, which would have excluded it from the definition of "common land" in section 22(1) of the Commons Registration Act 1965.

The northern part of the lane is in the parish of Hill Croome and the southern end where it adjoins the curtilage of the Objector's cottage is in the parish of Earl's Croome, as is the Objector's cottage.

The evidence as to the history of the lane begins with the Inclosure Award made 20 December 1771 under the Hill Croome Inclosure Act of 1770 (11 Geo. III, c.17 (private)). The Award is not easy to interpret because the map which would have clarified it cannot now be found. It appears from the wording of the Award that Smithmoor Common formerly extended into the parish of Hill Croome and that the part in that parish (i.e. the eastern part) was enclosed under the Award. It further appears that the eastern part of Smithmoor Common extended further north than the western part and that this northern part of Smithmoor Common was bounded on the west by Hill Croome Common. The evidence for this interpretation of the topography is contained in the parts of the Award by which various parts of the eastern portion of Smithmoor Common were allotted. The western boundary of one of these allotments was a part of Smithmoor Common left open as a passage to the other parts and the western boundaries of the other allotments were parts of Hill Croome Common left open for a passage into Smithmoor Common. I interpret this as meaning that what is now the northern part of the lane was the part of Hill Croome Common which was left open and that what is now the southern end of the land was the part of Smithmoor Common which was left open, this part being in Earl's Croome parish.

The subsequent history of the lane is somewhat meagre. It is shown on the Tithe Apportionment map, where the whole of it, including the triangular area at the southern end, is coloured beige, like other roads shown on the map. Coming to



the time of living memory, Mr W J Tustin, who is now aged 80 and has known the lane for about 75 years, stated that in his early days the lane was a green lane apart from about 20 yards at the northern end. The southern end of the land was fenced from the common, with a gate at the western end of the fence. Later the gate was moved to the centre of the fence and then back to its western end, then back to the centre and finally to its present position at the eastern end. There was no gate at the northern end of the triangular area. Mr Tustin never saw the triangular area used for grazing as such, but sheep and cattle were penned there for shearing and marking and grazed on such grass as there was, though there was not a lot of it.

Later the making up of the lane was extended southwards for its whole length by the Commons Committee of the former Earl's Croome Parish Meeting. The making up did not cover the whole triangular area, of which only a strip the width of the lane to the north had stone put on it. This strip adjoins the Objector's cottage.

The cottage was conveyed to the Objector's late husband on 27 January 1959, the property being described as being bounded on the west by a lane leading to Smithmoor Common. The Objector and her husband seem to have regarded the part of the triangular area which had no stones on it as their property, an impression which was no doubt reinforced by the fact that it had chicken coops on it at the time of the sale. The Objector and her husband moved into the cottage in 1960. They called the triangular area "the paddock". They used it continually, keeping chickens, grazing a horse, and putting vehicles and building materials on it, but never on the part which had stones on it. No one else has used the triangular area since 1960.

On this evidence I have come to the conclusion that until 1771 the northern part of the lane formed part of Hill Croome Common and the southern triangular part in Earl's Croome parish formed part of Smithmoor Common. When the Award is read with the Act it is clear that all rights of common over land in the parish of Hill Croome were extinguished and that the northern part of the lane was one of the ways which the Commissioners were authorised by the Act to lay out. There is no evidence that any rights of common over this part of the lane have been subsequently created. Although there is no evidence that any rights of common have been exercised over the southern part of the lane for many years, there is no evidence from which I can draw the inference that those entitled to the rights have abandoned them.

Mrs Paton adopted as part of her argument a passage in 4 Halsbury's Laws of England (4th edn), para. 850, where it is stated that where land is bounded by a private right of way, the boundary is, as a general rule, a line drawn along the middle of the way, for the owners of land adjoining the way are presumed, in the absence of any evidence to the contrary, to own the soil as far as the middle of the road and all above the soil subject only to the right of passage over the surface. While this is a perfectly accurate statement of the law as far as it goes, it needs for completion the addition of some such words as "and any other right over the surface". If the issue in this case had been the ownership of the lane where it passes the Objector's property, the proper construction of the conveyance of 1959 might have been very material, but in my view there is nothing in that conveyance which is inconsistent with the continued existence of the rights of common to which the southern part of the lane was subject in 1771.



For these reasons I confirm the registration with the following modification, namely the exclusion of the part of the land comprised in the Register Unit situate in the parish of Hill Croome.

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 *20th* day of *December* 1977

Chief Commons Commissioner