



COMMONS REGISTRATION ACT 1965

Reference Nos. 24/D/6
24/D/7

In the Matter of East Butterwick Hale and
Common, East Butterwick, Lincolnshire
(Parts of Lindsey)(No.2)

DECISION

These disputes relate to the registration at Entries Nos.1, 2, 3, 4 and 5 in the Rights Section of Register Unit No.C.L.85 in the Register of Common Land maintained by the Lincoln, Parts of Lindsey County Council and are occasioned by Objection No.OB/51 made by Mrs. M.K. Oliver and Mrs. L. Drakes and by Objection No.OB/52 made by Mr. A.G. Sutton and both noted in the Register on 14th August 1972. OB/51 relates to all five entries and OB/52 relates only to Entry No.4.

I held a hearing for the purpose of inquiring into the disputes at Lincoln on 12th March 1974. The hearing was attended by Mr. Frank Trafford, trading as Joseph B. Trafford and Son, the applicant for Entry No.1; Mr. K.T. Stubbs, solicitor, on behalf of Mr. W.E.D. Lee, the applicant for Entry No.2; Mr. P.A.S.J. Axe, solicitor, on behalf of Mr. Ralph Clark, one of the applicants for Entry No.3 (the other applicant having died), and on behalf of Messrs. E.S., J.R. and R.G. Preston, the applicants for Entry No.5; Messrs. E.J.B. and E.L. Fowler, the applicants for Entry No.4; Mr. N. Lumley, solicitor, on behalf of Mrs. Oliver and Mrs. Drakes; and by Mr. Sutton.

The land the subject of this reference consists of two portions, described on the modern Ordnance Survey map as "Butterwick Hale" and "Butterwick Common", but the two portions were formerly known collectively as "Butterwick Hale and Moors".

It appears from the minutes of a meeting of "the owners and occupiers of common-rights in the common land called Butterwick Hale and Moors", held on 23rd April 1878, that there were then in Burringham 51 common-rights of which the owners were known and one unknown, in Butterwick 28, and in Gunstone 6, all belonging to ancient toftsteads. The minutes contain lists of the toftsteads and their occupiers and of the common-rights owners. It was stated that the owner or occupier of each common-right could turn on the common one horse or beast, a mare and foal, or a cow and calf, sucking, to count as one. The time for turning on the common was from 1st May to 31st October inclusive.

Nine of the 51 rights in Burringham were purchased in 1921 by the father of Mrs. Oliver and Mrs. Drakes. It was not contended on their behalf that the other rights did not still exist, but they put the applicants to the proof of their claims.

Between them the applicants claim rights of pasture in respect of 241 beasts, 31 horses, and 100 sheep, which differ considerably from the



-2-

rights recorded as existing in 1878.

Mr. Trafford purchased his farm from a daughter of Mr. Richard Moody, who appears in the 1878 list as the owner of four common-rights in Butterwick. In his application Mr. Trafford described his right as: "Rights held by owners of farms in East Butterwick". He went on to say: "As far as we know the grazing rights are not limited by number, we have always grazed 100 to 150 cattle". In fact, as appears from the 1878 list, there were only 28 common-rights in the whole of Butterwick, it not being stated whether they were all in East Butterwick.

At the hearing Mr. Trafford gave evidence that he had grazed between 100 and 150 cattle on the land for over 40 years without interference by anybody. Before 1948 other people also grazed cattle there, but since then he has been the only one to do so.

On this evidence it would be possible to find that Mr. Trafford had acquired a right to graze up to 150 cattle by prescription. But it is not enough to say that it is possible. Prescription must be reasonable: see per Byles J. in Bailey v. Stephens (1862), 12 C.B.N.S.91, at p.110, cited with approval by Cozens-Hardy, M.R. in Lord Chesterfield v. Harris, [1908] 2 Ch.397,412. Here there were in 1878 rights to pasture no more than 86 animals on this land. If this, as it seems to me it must be, is taken as the capacity of the land, Mr. Trafford's claim not only exhausts the capacity of the land, but leaves nothing for the owners of the other common-rights. In my view, Mr. Trafford has claimed too much, which is unreasonable. Furthermore, the claim to graze up to 150 cattle is inconsistent with the opening words of the description of the right in the application, namely "rights held by owners of farms in East Butterwick", which the 1878 list shows did not exceed 28. I am not satisfied that Mr. Trafford is the owner of more than the four common-rights owned in 1878 by Mr. Mocdy. It may well be that everyone concerned will be content to allow Mr. Trafford to go on having the exclusive use of this land as he has been doing, but I find myself unable to confirm the extensive right which he has registered. I shall confirm the registration, but with a modification restricting the number of animals to four.

Mr. Lee gave evidence that between 1926 and 1939 his father had grazed about 10 head of cattle on Butterwick Hale between April and October in each year without making any payment. The sale particulars of Mr. Lee's farm dated 2nd November 1878 state that it was to be sold with nine gates in Butterwick Hale. On this evidence I shall confirm Mr. Lee's right to graze nine animals.

The conveyances under which Mr. Clark holds School Farm, East Butterwick, refer to rights of common of pasture on Butterwick Common and Butterwick Hale, but do not quantify those rights. Mr. Clark remembers that his father grazed three or four cattle and about six horses on the land. He himself has not put any animals on the land for some years, but he stated that he had not intended to abandon his rights.



-3-

Mr. Preston's position is similar to Mr. Clark's. Both of them derive their titles from conveyances made 4th November 1920 by Frederick Ridsdale Smith. I find on the balance of probabilities that the unquantified rights which Mr. F.R. Smith conveyed were the eleven common-rights shown in the 1878 list as belonging to Mr. G. Smith. In the absence of any evidence as to how Mr. F.R. Smith intended to apportion his eleven common-rights, I shall confirm the registration with modifications allotting $5\frac{1}{2}$ common-rights to Mr. Clark and $5\frac{1}{2}$ to Mr. Preston. Obviously half a common-right could not be exercised, but it could be let to the owner of the other half.

Mr. E.I.B. Fowler has not grazed animals on the land in question. His father, Mr. E.L. Fowler, last had horses there in the mid-1930's. They would wish to use the land again if the water supply could be improved. The wording of the description of the right of common in their application shows that they were claiming 15 of the rights referred to in the 1878 list. They produced deeds from which I was able to identify with reasonable certainty as their predecessors in title six of the persons named as common-right owners in the list of 1878. I shall confirm their registration with the appropriate modification.

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 29th day of March 1974.

Chief Commons Commissioner