



COMMONS REGISTRATION ACT 1965

Reference Nos 226/D/18
226/D/19

In the Matter of The First
Allotment, Nassington, East
Northamptonshire District,
Northamptonshire

DECISION

These disputes relate to the registration at Entry No 1 in the Land Section of Register Unit No CL. 36 in the Register of Common Land maintained by the Northamptonshire County Council and are occasioned by Objection No 48 made by Dr Dennis Gordon Teall and noted in the Register on 22 December 1970 and by Objection No 118 made by Mr John Thomas Pike and noted in the Register on 8 August 1972.


I held a hearing for the purpose of inquiring into the dispute at Northampton on 5 July 1977. At the hearing (1) Nassington Parish Council on whose application the registration was made, were represented by Mr J Evans solicitor of Greenwoods Solicitors of Peterborough; (2) Mr Pike was represented by Mr M Hewnes solicitor of Sherard & Coombs Solicitors of Oundle; and (3) Dr Teall attended in person and as representing his successors in title Goodyear Investments Limited c/o West Wake Price & Co Chartered Accountants of 6 Broad Street, London EC2.

Oral evidence was given by Mr A Parrish, who is the vice chairman of Nassington Parish Council (he has been a member since 1961) and has lived in the Parish all his life (49 years), by Mr Pike and by Dr Teall. Two days after the hearing I inspected the land.

Mr Parrish produced the Nassington Inclosure Award dated 6 June 1778 by which the Commissioners made an allotment in these words:- "...allot and award several plots of land...which do not exceed in the whole eight acres as and for public stone and gravel pits with convenient roads to and from the same to be used in common by the proprietors of the lands and estates in Nassington Yarwell Apethorpe and Woodnewton aforesaid and their tenants as well for their own necessary uses as for the repair of the public and private roads in Nassington Yarwell Apethorpe and Woodnewton aforesaid, that is to say one piece or parcel of land or ground containing one acre two roods twelve perches and being in Nassington aforesaid in a field there called the Northfield and bounded on the East and part of the North by an allotment herein awarded to William Ireson on further part of the North and the main part of the East by the 15th Allotment herein awarded to the said John Earl of Westmoreland on the South side by the public road or highway herein described called the Drove Road and on the West and remaining part of the North by the said 15th Allotment herein awarded to the said John Earl of Westmoreland the hedges ditches mounds and fences of which said allotment on the South against the said road be made and forever hereafter be maintained and kept in repair by and at the expenses of the said John Earl of Westmoreland and the owners of the said 15th Allotment for the time being who upon making and maintaining such fence and also of making and maintaining a proper gate for the inhabitants of



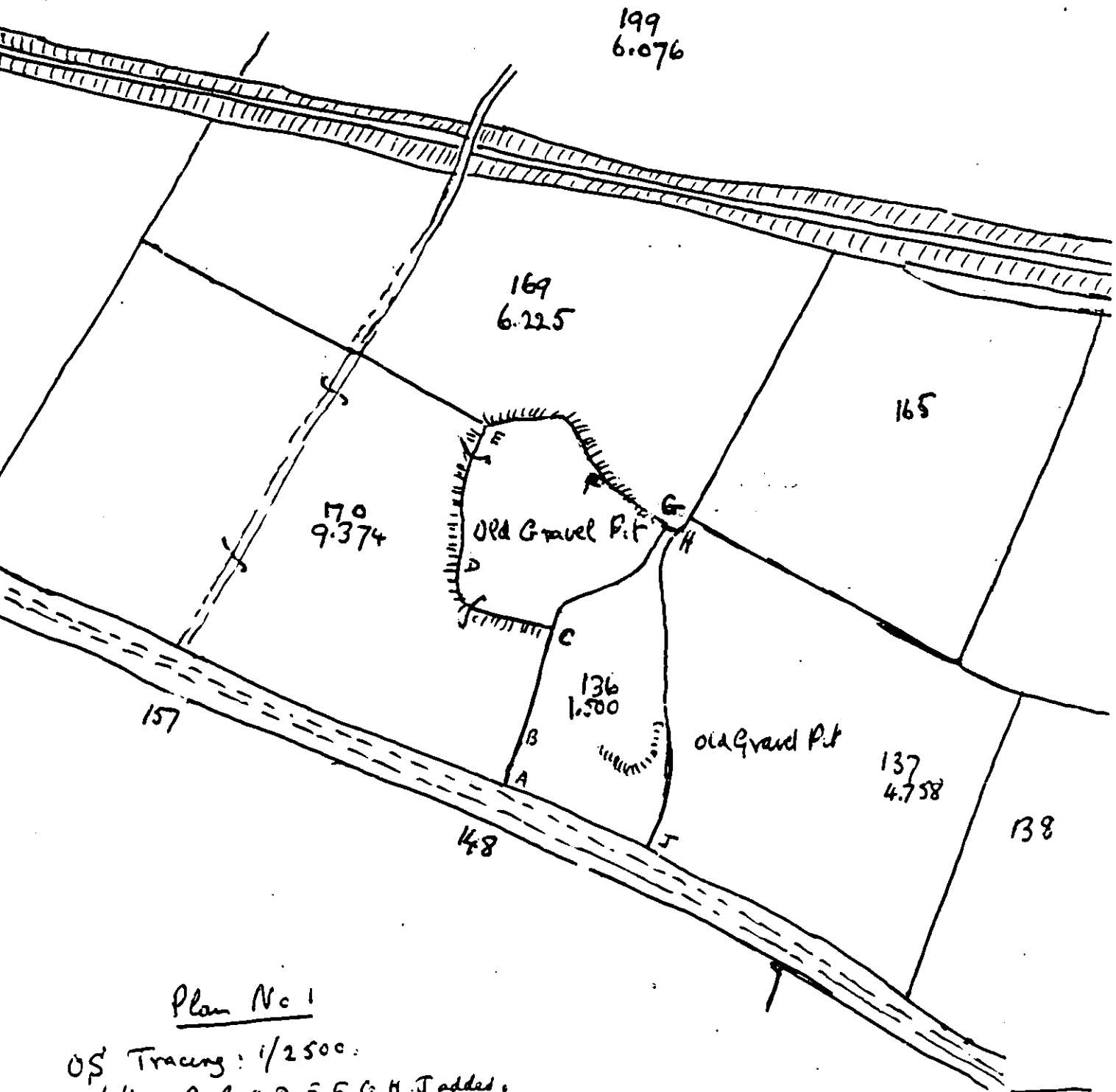
Nassington Yarwell Apethorpe and Woodnewton aforesaid at all or any time or times to enter and come into and upon the said Allotment for digging and carrying away any stone from the same Allotment shall and may take and enjoy the herbage growing or to grow in or upon such Allotment to and for his and their own proper use and benefit..."

Mr Parrish also produced the Award map. The Award and map so produced by him are held by the Parish Council and appear to have been made at the time of the Award. The map is rather worn particularly in the area of the allotment above quoted, so that the Ireson allotment is not visible. Mr D Nightingale who is the Rights of Way Officer of the Northamptonshire County Council and who was representing his Council as registration authority, produced from the County Archives a copy of the Award and map certified on 25 March 1914 as a true copy; on this map the Ireson allotment is plainly delineated, as a comparatively very small rectangular area at the north east of the pit allotment  of 1a 2r 12p; all the land which is north of the public road and surrounding the pit allotment and the Ireson allotment, is on the map coloured blue as being allotment nos 1 and 15 containing 169a 1r 22p and made to the Earl of Westmoreland.

Mr Pike produced:- (1) a conveyance dated 11 October 1954 by which Mrs M A Hollowell conveyed to him land containing about 14.011 acres, (2) a much coloured (but nevertheless very legible) OS map (2nd edition 1901, 6" = 1 mile); (3) a conveyance dated 11 October 1918 by which Mr W Boynton conveyed to Mr J Hudson land containing 17.099 acres (the 1954 conveyance contains acknowledgements for the production of assents dated 1 October 1943 and 24 February 1944 being I suppose the intermediate title); (4) an abstract dated 1918 of the title of Mr W Boynton commencing with a conveyance dated 21 April 1904 by which in exercise of a power conferred by a settlement dated 27 June 1899 the Earl of Westmoreland with the concurrence of mortgagees conveyed to Mr H L C Brassey various Manors including Apethorpe and Nassington, and the Apethorpe Estate therein described as containing 7,276 acres, and including a conveyance dated 6 December 1917 by which Mr Brassey conveyed to Mr Boynton land containing about 1533.142 acres; and (5) eleven photographs (7" x 4 $\frac{1}{2}$ ") recently taken by or under his supervision showing the lands in question from various points of view.

Dr Teall produced: (1) a copy of the part of the Minutes of the meeting of the Parish Council held on 16 June 1966 headed "Closure of Rubbish Tip - Apethorpe Road"; (2) a copy of HM Land Registry map apparently showing the extent of Title No HM 3456; and (3) a plan ("the DGT4 Plan") intended to show how the 1778 Award map would appear if proportionately enlarged and then overlaid on the most recent OS map of 1/2500.

The lands in question in these proceedings are part of plot nos 136 and 170 on the most recent OS map 1/2500, a tracing of which (apart from the letters A to J which I have added for the purpose of this decision) is Plan No 1 on page 3 of this decision. Plot No 136 now has on it some pigsties and associated buildings which are not now used; they and the plot appear to be somewhat derelict and neglected; the plot is fenced against the road by a substantial hedge but there is a gate near the point J on Plan No 1 through which vehicles may gain access from the



199
6.076

169
6.225

165

170
9.374

Old Gravel Pit

136
1.500

Old Gravel Pit

137
4.758

138

157

148

Plan No 1

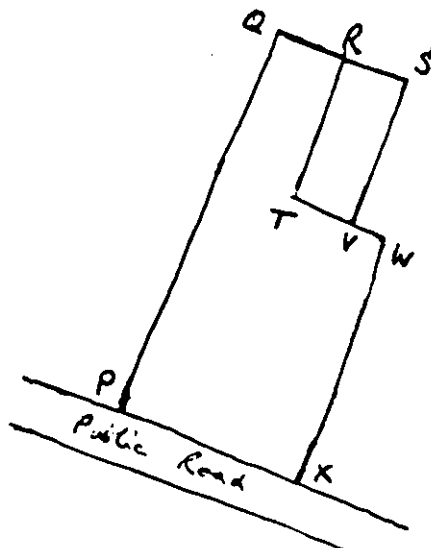
OS Tracing: 1/2500.

Letters A, B, C, D, E, F, G, H, J added.

Plan No 2

Enlargement on same scale
of 1778 Award map.

Letters P, Q, R, S, T, V, W, X added.





adjoining public motor road (from Nassington about 1 mile away on the east to Apethorpe on the west). Plot No 170 except for the area CDEFG on Plan No 1, has been ploughed and cultivated (now wheat and near point C a large heap of pig manure, brought there from Plot No 136); there is a gate a little to the west of the point A which provides access from the road. The area CDEFG is about six feet (in places more) lower than the rest of Plot No 170, is apparently a disused quarry, and is in part (particularly near the point C) much overgrown with nettles; however a very large part of it (by the Points DEF) is rough grass providing (when I saw it) some grazing for two ponies. The line CG on Plan No 1 has no reality so that ponies can cross at will, and indeed apart from some slight wire fences at the inner part of the area (apparently erected to control them), they can go anywhere over Plot No 136 and the area CDEFG. Along the line ABCDEFG there is now a substantial hedge which has apparently been there for some time; there is a gap (with a barrier) at the point B (apparently used for the depositing of pig manure); in some places there are small gaps in this hedge, but these are protected by post and bar/wire fencing so that in the result the line ABCDEFG is a substantial boundary apparently of very considerable age. There is no access (or at least no easy access) from the road for vehicles to the area CDEFG except through the said gate near and west of the point J and across Plot No 136. The most obvious access on foot from the road to the area CDEFG is through this gate, although access on foot is possible through the other gate near the point A and then through the said gap in the hedge at the point B or by climbing down the bank somewhere between the points C and D.

The 1778 Award map is on a scale of about 10" = 1 mile (1/6336). The land shown on it as allotted as a stone and gravel pit if enlarged to a scale of 1/2500, would appear as PORTWX as shown on Plan No 2 on page 3 of this decision, and the Ireson allotment would appear as RSTV.

Mr Parrish explained that the map attached to the Parish Council's application for registration is on a scale of 6" = 1 mile and was prepared by him from the 1778 Award map by taking the area PORSWX by reference to some certainly corresponding point on the modern map (eg the nearby crossroads identifiable on both maps as still being the same) and then, having made calculations necessary because of the difference in scale, transcribing the area onto the modern map. Because in all now relevant respects the 6" = 1 mile map is only a smaller version of the 1/2500 map, for the purposes of exposition I shall in this decision refer only to Plan No 1. The result of Mr Parrish's transcription was to put the line PX on Plan No 2 along the line AJ on Plan No 1 so that about $\frac{2}{3}$ of it is west of and $\frac{1}{3}$ of it east of point A and so that the line QS is wholly within the area CDEFG.

In the Land Section of the Register the land registered is described as: "The piece of land known as The First Allotment in the Parish of Nassington as marked with a green verge line inside the boundary on sheet no 27..." Sheet No 27 is essentially a copy of the plan attached to the Parish Council application. For the purposes of exposition I divide this description into two parts: (Part I) "known as The First Allotment" and (Part II) "as marked with a green verge line". If the description in Part II stood alone, no piece of land would be described, because nothing can be identified on the ground as corresponding with the lines PORSWX.

The grounds stated in Dr Teall's Objection are:- "(i) The plan accompanying the application by Nassington Parish Council does not correspond exactly with that attached to the Nassington Parish Award in which the First Allotment is defined. (ii) The rights granted in the Parish Award with reference to the First Allotment refer to the extraction of stone only. These rights have not been exercised within living memory and are therefore void."



The grounds stated in Mr Pike's Objection are:- "Two plots of land coloured red on the attached plan were not common land at the date of registration". The attached plan is based on the plan attached to the 1954 conveyance and shows two areas coloured red; one part of plot no 170 being an area south of CD and west of ABC on Plan No 1; and the other area a very small part of plot no 169 near the point F. In the course of the hearing it was agreed that no part of plot no 169 could be regarded as having been registered, so in this decision I disregard altogether the marking on the Objection plan of part of plot no 169.

Mr Parrish in the course of his evidence said (in effect):- The majority of people in the Parish know of their right to extract stone (contrary to what might be inferred from the OS map, there is no gravel); the Church records go back to 1842. As a child he remembered his father extracting stone to fill up some cart ruts; he used a pick and shovel, and took it away in the horse and cart; he believed that at that time it was quite a common practice. With the advent of tarmacadam the use of stone has gone down. For a roadway to a playing field and to some allotments, the Parish Council might need the Pit for some cheap stone.

Mr Pike in the course of his evidence said (in effect):- He came to Woodnewton in 1916 when he was 8. From 1946 he rented plot 170 and other lands nearby (plot 170 was included in his 1954 purchase). He had never known anyone take any stone from the Pit. It must have been worked years ago when there were no machines as there are today; stone got with pick and shovel and taken away by barrows and horses and carts. The banks between the Pit (the area CDEFG) and plot no 170 are so steep that the only access must have been through the Piggery Land (Plot No 136). There was no stone but only soil in the belt near the road; the stone belt ran across the fields from west to east, and that is why the Pit was worked on the position shown on the OS map; he had had his field tested and can vouch that the stone was in the line he said, and this can also be seen from the way the wheat is growing. The present Pit area (CDEFG Plan No 1) is given on his 1954 conveyance as 1.587 acres, almost exactly the same as the 1a 2r 12p given in the 1778 Award.

Mr Teall in the course of his evidence said (in effect):- He originally owned Plot No 136 and the area CDEFG on Plan No 1; when he sold he promised the purchasers that he would give evidence in any proceedings such as these. The DGT4 Plan (above mentioned) was professionally prepared; it shows the point X on Plan No 2 as being the same as point A on Plan No 1, the line WX as the same as the line ABC, and the point W on Plan No 2 as a little to the north of point C on Plan No 1, so that in the result no part of plot no 136 is within the 1778 allotment and only a small part of the area CDEFG is within it. The DGT4 plan also excludes the Ireson allotment, being the area RSVT on Plan No 2. He wished to make two points: (i) no part of the Pit allotment ~~is~~ is east of the boundary hedge (being the line ABC on Plan No 1) and (ii) nothing corresponding to the Ireson allotment should be included in the registration.

The 1778 Award was made under the Waddington Farwell Apethorpe and Woodnewton Inclosure Act 1777 (17 Geo 3 cap 61). The above quoted 1778 allotment closely follows the wording of the Act. Of allotments made under Inclosure Acts Lindley LJ said: "Now, although it is competent for the Legislature to create trusts unlike any previously known, we do not think a trust of that kind ought to be held to have been created if it is equally consistent with the object and the words of the statute to hold the trust to be one with which lawyers are familiar and which there is no difficulty in executing"; see re Christchurch (1888) 38 ChD 520 at page 530. From this statement of the law, I conclude that the boundaries of the land allotted



by the above quoted 1778 allotment have no greater permanence than the boundaries of any farm or other lands which might have been granted by a deed made in 1778, that is to say, such boundaries may between 1778 and 1965 have been changed by some express grant or agreement, by the operation of the Limitation Acts consequent on adverse possession, or by gradual encroachments or other events upon which a grant between neighbours will by law be presumed to have been made for the purpose of regularising a state of affairs for a long period generally accepted and acted on.

The area CDEFG now appears quite obviously to be an old stone pit; notwithstanding that the line CG now has no reality, the line CDEFG appears quite obviously to be and for a very long time to have been the boundary of this pit. Being approximately in the position shown on the 1778 Award map as that of "the First Allotment", I conclude that the area CDEFG has been quarried in the past because the above quoted allotment was made.

From the evidence of Mr Parrish and Mr Pike and the present appearance of the land, I conclude that the area CDEFG has not been quarried at all since 1946 and has been quarried very little within living memory, so that the present boundaries and state of the area is due to events which happened before living memory and have therefore been accepted and tolerated by all concerned for many years. Neither the adjoining parts of plots 170 and 136 appear to be or ever have been quarried land.

The considerations set out in the previous paragraph indicate that the Earl of Westmoreland, Mr Ireson and all persons entitled under the 1778 Pit allotment and their successors in title have accepted the area CDEFG in substitution for that delineated as a pit on the 1778 map. The only contrary indication I have is Dr Teall's statement that 4 years ago he saw a marker stone, then covered with brambles, which was about 18" out of the ground and which was he thought where the point C on plan no 2 would have been if it had been transferred as shown on the DGT⁴ plan and that he saw at some earlier time another stone (no longer there) in the hedge by the road corresponding to the point P on Plan No 2 similarly transferred. On my inspection I did not notice the C stone, but maybe I overlooked it. If these stones were intended to preserve the boundaries as delineated on the 178 Award map, I must suppose that the quarrying which I infer took place before living memory was on the basis that so much of the area PORTWX as is within the area CDEFG was quarried for the benefit of the allottees under the above quoted 1778 Pit allotment, that so much of the area RSVT as was within the area CDEFG was quarried for the benefit of Mr Ireson and his successors in title and the remainder quarried for the benefit of the Earl of Westmoreland and his successors in title. Dr Teall appeared to me somewhat uncertain about the stones he described. Even assuming they existed, I must balance as best I can their significance against the significance of the manifest extent of the former quarry working and the manifest boundary CDEFG. So balanced, I regard the stones as comparatively insignificant, and certainly not decisive. I conclude therefore (that) from the appearance of the land and its known history the substitution has been generally accepted and tolerated as long as living memory goes back.

As to the grant which may be presumed to regularise this state of affairs long tolerated and accepted, the circumstance that the Pit allotment creates an unusual legal situation which renders it unlikely that any such deed was actually made, is immaterial, because it is legally possible that it was made, see *Tehidy v Norman* 1971 2 QB 528 at page 552. If land is added by encroachment to common land, the




land so added becomes common land subject to the same incidents as that to which it was added, see *Mercer v Denne* 1905 2 Ch 574. In accordance with the above considerations, my general conclusion on this aspect of the proceedings is that subject to any question there may be as to the result of any abandonment of rights or of any exhaustion of the product, at the commencement of the 1965 Act the area CDEFG on Plan No 1 was the land which was then subject to all the provisions (so far as capable of being applicable) of the above quoted 1778 Pit allotment, in complete substitution for the land on the 1778 map thereon marked by lines such as PQRTWX on Plan No 2.

Because there was some discussion at the hearing as to the right of way if any to and from the area CDEFG common to the road, I record that I am satisfied that the substitution which I have concluded was tolerated and accepted, must have been on the basis that access to this area was across the plot 136. Although it may be that the gate now situated to the west of point A is in the same position as that perhaps provided by the Earl of Westmoreland in accordance with the 1778 Pit allotment, access by such gate with vehicles to the area CDEFG would not be sensible; I reject the suggestion made at the hearing that carts have been taken through this gate to some place near where the manure heap now is and stone lifted up from the pit in buckets. Of necessity there must be a right of way of some kind, and I am not in these proceedings concerned to determine its exact situation.

From the general conclusion above set out, I deduce that the part of plot no 170 coloured red on the plan attached to Objection No 118 made by Mr Pike was not in 1968 commonland within the meaning of the 1965 Act, and accordingly this Objection succeeds. I should record that even if I had come to a different conclusion about the land subject to the provisions of the 1778 allotment at the commencement of the 1965 Act, I would for the benefit of Mr Pike have concluded that the boundary hedge ABCDEF was of such a substantial character and the inconvenience of proceeding from the road through the gate on Plot No 170 and thence down the bank into the area CDEFG, and the expense of cultivating the part of Plot No 170 next to the line ABC was so substantial, and so obviously not in exercise of a right of herbage that those entitled to the benefit of the 1778 allotment should be regarded as having abandoned their rights to the extent that they might be exercisable over Plot no 170. (unbanked)

Properly to deal with Objection No 48 made by Dr Teall, I must I think determine the extent of the land registered under the 1965 Act as described in the Land Section of the Register.

As above stated, the description is in two parts. Part I, a piece of land "known as the First Allotment" must I think be given the meaning which those words had in 1968 when the registration was made, that is they refer to the land which was in 1968 subject to the provisions of the above quoted 1778 Pit allotment. Part II of the description is "a piece of land..." as marked with a green verge line...", being a line shaped as PQREWX on Plan no 2. For the reasons set out above, I consider that the Part I description describes unambiguously the area CDEFG, a piece of land which has  boundaries (except the line CG which causes no practical difficulty) which are visible and identifiable without difficulty. The Part II description identifies nothing at all. In accordance with the principles of law which are conveniently summed up in the legal maxim *falsa demonstratio non nocet*, I reject the Part II description as meaningless and adopt the Part I description as meaningful, and conclude that the land comprised in this Register Unit is the area CDEFG.



As regards paragraph (i) of Dr Teall's Objection No 48 it is for the reasons above stated irrelevant that the Parish Council application does not correspond exactly with the 1778 Award. Further I decline to exclude from the CDEFG area any part which might correspond with the Ireson allotment. If the Ireson allotment was for agricultural purposes, it would have been very inconveniently situated and impossible to work agriculturally with a surrounding gravel pit. I cannot suppose that Mr Ireson or his successors in title came to some arrangement under which he or they took the stone from his 1778 allotment and others took the stone under the 1778 Pit allotment. My conclusion is that the grant which I have presumed to have been made ~~and that~~ was joined in by Ireson or his successors in title.

As to paragraph (ii) of Dr Teall's Objection, I find that the rights have been exercised within living memory, because as stated above Mr Parrish remembers his father exercising them. But even if they had not been so exercised they would not in my opinion for that reason become void. The area CDEFG is obviously a stone pit, and I can see reason why it should not be ~~created~~ ^{created} as such; I have not overlooked that there is some authority for the proposition that a right of common is extinguished if the product is exhausted; it may be that now the stone in the area CDEFG cannot be either conveniently or profitably worked, but I had no evidence from which I could conclude that there is there no stone which could ever be worked if it ever became convenient or profitable for anybody to work it.

The proceedings were conducted on the basis that the provisions of the 1778 Pit allotment were such that any land to which they were applicable was certainly within the definition of common land in the 1965 Act. I record that in my opinion this basis was correct; the recitals in the 1778 Act showed the land to be then waste land of the Manor; it is now waste land; historically it did not lose its ^{manorial} character ~~when~~ in 1778 because the Pit allotment dealt only with the taking of stone and the herbage.

For the above reasons my decision is that Objection No 48 made by Dr Teall wholly fails.

Having regard to my view as to the extent and area of the land registered under the 1965 Act, strictly to give effect to my decision it would be enough for me to merely confirm the registration without modification. But one of the incidental consequences of these proceedings is that it has come to my attention that owing to a series of circumstances for which neither the registration authority nor anyone else can be blamed the meaning and effect of the registration as it now stands can by reason of the inconsistency between the two parts of the description be only certainly ascertained after a detailed enquiry into the history of the land and a careful consideration of the legal position, so the registration, as it now stands, is likely to cause confusion. By section 6(1) of the 1965 Act a Commons Commissioner to whom a dispute is referred shall "either confirm the registration with or without modification or refuse to confirm it". It seems to me because this possible confusion has come to my attention I ought in the public interest to make such modifications as will make the meaning and effect of the registration apparent without any such enquiry or consideration.

For the above reasons I confirm the registration with the modification that "green verge line inside the boundary on sheet no 27" referred to in the column of the Land Section headed "Description of the Land..." be altered by drawing such line so that it corresponds with the boundary line of the part of OS 60170



delineated as a quarry area on the OS map scale 1/2500, being the part for the purposes of identification marked CDEFG on Plan no 1 referred to in this decision.

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 *12th* day of *August* — 1977

a. a. Baden Fuller

Commons Commissioner