



COMMONS REGISTRATION ACT 1965

Reference No.29/D/25

In the Matter of Russell's Water Common,
Pishill-with-Stonor, Oxfordshire (No.1).

DECISION

This dispute relates to the registration at Entry No.5 in the Rights Section of Register Unit No.C.L.69 in the Register of Common Land maintained by the Oxfordshire County Council and is occasioned by Objection No.28 made by Lord Camoys and noted in the Register on 18th September 1970.

I held a hearing for the purpose of inquiring into the dispute at Oxford on 30th January 1974. The hearing was attended by Mr D.G. Lang, solicitor, for Mr P.D. Hancock and Mrs M.W. Hancock, the applicants for the registration, and by Mr J. Jopling, of counsel, for the Objectors.

The applicants are provisionally registered as the owners of (a) a right of estovers, and (b) a right of common in the soil, attached to Kiln Barn, Russell's Water. The particular right of estovers claimed is to take wood for domestic fuel (firebote) and peasticks and also some bracken, and the right of common in the soil claimed is to dig for clay for the making of bricks in the kiln from which Kiln Barn takes its name. The kiln is no longer in existence and has not been in operation during the whole period of living memory.

Shortly after applying for the registration Mr and Mrs Hancock sold Kiln Barn to Dr H.K. Baker, the present owner. None of Dr Baker's title deeds contains any reference to rights of common. Since he has been the owner of Kiln Barn, Dr Baker has taken wood from the Common, mostly for firewood, but some for peasticks, together with some bracken. He believed that he had a right so to do and no one has ever sought to stop him.

Although Dr Baker could only speak about the last few years, there was evidence, which I accept, from several persons who have lived in the immediate vicinity that from the beginning of the present century and, by inference, very much earlier that wood and bracken had been taken from the common by persons living in the nearby villages of Russell's Water and Maidensgrove. This taking of wood and bracken was very extensive, being indulged in by all the inhabitants of the two villages.

On this evidence Mr Jopling argued that the right of estovers claimed cannot exist in law, since it was held in Gateward's Case (1607), 6 Co.Rep.59b that there cannot be any right to a profit à prendre in a fluctuating body like the inhabitants of a particular place. If this evidence had stood alone, I should have felt bound by this decision to hold that the existence of no right of common had been proved and that the taking of wood, etc. which has been proved could be explained by toleration on the part of the owner of the land. But the oral evidence summarized above does not stand alone. In the Rights Section of the Register Unit there are four registrations of rights



of estovers over the land in question which have become final. By virtue of section 10 of the Commons Registration Act 1965 these registrations are conclusive evidence, as at the dates of the registrations, that there were rights of common over the land in question attached to the four areas of land set out in column 5 of the Register Unit. The witnesses, however, drew no distinction between the persons exercising these rights and the other persons who took wood, etc. from this land: they lumped them all together as inhabitants. Inhabitants they were, but some at least of them were taking wood, etc. not as inhabitants, but as persons entitled to rights of common. Since it is therefore not possible to dismiss the evidence as being nothing more than evidence of the taking of wood, etc. by inhabitants by toleration on the part of the landowner, it becomes necessary to consider whether in this particular case what has in fact happened is capable of that or some other explanation. There is no evidence that the owner of the land ever granted permission to an owner of Kiln Barn to take wood, etc. from this land. Dr Baker has been doing it as of right, and there is no reason to believe that his predecessors in title did not also do it as of right. The evidence covers a period of more than sixty years. I find that a right of estovers attached to Kiln Barn has either existed from time immemorial or has been acquired under the Prescription Act 1832.

So far as the right of common in the soil is concerned, the non-exercise of the right during the period of living memory, coupled with the removal of the brick kiln, leads me to draw the inference that this right has been abandoned.

For these reasons I confirm the registration with the following modification:- namely the deletion of the words "(b) A right of Common in the soil".

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 7th day of March 1974

Chief Commons Commissioner