COMMONS REGISTRATION ACT 1965

Reference No.232/D/9

In the Matter of Withycombe Scruffets, Withycombe, Somerset (No.1).

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No.CL.191 in the Register of Common Land maintained by the Somerset County Council and is occasioned by Objection No.0/96 made by the Crown Estate Commissioners and noted in the Register on 5th November 1970.

I held a hearing for the purpose of inquiring into the dispute at Taunton on 9th October 1974. The hearing was attended by Mr Robert Wakefield, of counsel, on behalf of Mr A.T. Case, the applicant for the registration, and by Mr S.J. Sher, of counsel, on behalf of the Objectors.

Mr Wakefield sought to support the registration on the ground that the land in question falls within the definition of "common land" in section 22(1)(a) of the Commons Registration Act 1965 by being subject to the right of estovers registered at Entry No.1 in the Rights Section of the Register Unit. This right was registered on the application of Mr Case, who made the application in his capacity as Chairman of the Withycombe Parish Council, the right being stated to be personal to the parishioners of Withycombe.

The present civil parish of Withycombe has for the last 15 years or thereabouts comprised the areas of the ecclesiastical parishes of Withycombe and Rodhuish. The land the subject of the reference lies within the ecclesiastical parish of Withycombe, and it is not suggested that the parishioners of Rodhuish have any rights over it.

Having regard to the decision in Gateward's Case (1607),6 Co.Rep.59b, it would at first sight appear to be impossible in law for the right claimed to exist. Mr Wakefield, however, argued that the registration could be supported on the ground that it should be presumed that there had before the time of legal memory been a grant by the Crown of the right in question to the parishioners of Withycombe, which grant would have had the effect of making the inhabitants a body corporate to the extent of enabling them to hold the right so granted. In the alternative, Mr Wakefield argued, it should be presumed that there had been a grant of the right to a body corporate in trust for the parishioners, and he suggested that the grantee could have been the Rector of Withycombe who, as a corporation sole, would have been qualified to have received such a grant.

The land the subject of the reference is in the ownership of the Crown Estate Commissioners, who also own, with some insignificant exceptions, the whole of the rest of the property in the ecclesiastical parish of Withycombe. Until 1950 the owners had been successive members of the Luttrell family, one of whose ancestors had acquired the estate by marriage with the heiress of

the Hadley family in the reign of Philip and Mary.

Mr Wakefield called as witnesses several local residents, from whose evidence it clearly appears that during the whole period of living memory any persons living in the ecclesiastical parish of Withycombe who wished to do so have taken wood from the land in question for fuel and for other purposes, mostly for mending fences. Furthermore, it is stated in Savage's History of the Hundred of Carhampton (Bristol, 1830) p.274, which was put in by Mr Wakefield without any objection from Mr Sher, that the inhabitants had a right to take coppice wood for fuel from the land in question and also from adjoining land called Black Hill, in respect of which no right has been registered. The land in question was included in Black Hill in the Tithe Apportionment in 1840, where it was described as "Dwarf Oak, Coppice, Furze and Heath" and as being owned by Mr G.F. Luttrell and occupied by one William Pearce. During the period of living memory it has been untenanted and could be described as waste land, using the word "waste" in its colloquial and not in its technical sense. When Mr G.F. Luttrell sold the Withycombe estate in 1950 the state of cultivation of the land in question was described in the schedule to the conveyance as "Common".

In order to decide this case it is necessary to find an explanation of the state of affairs disclosed by the evidence. Mr Sher argued that the true explanation is that the inhabitants of Withycombe took wood from the land in question with the good-natured tolerance of the owner, who was also their landlord. As already stated, Mr Wakefield argued that a Crown grant to the parishioners ought to be presumed. It appears from Savage's History that the Crown had no estate in Withycombe from the time of the Domesday survey onwards, but Mr Wakefield said that there could have been a Crown grant at some time between the Norman Conquest and Domesday. In support of his alternative argument that there could have been a grant to the Rector in trust for the parishioners, Mr Wakefield relied on evidence that before the estate was sold in 1950 Mr Luttrell used to pay to the Rector an annual sum of £2, which the Rector paid into the Christmas Clothing Club and which was thought to be in respect of the shooting over the land in question, though why Mr Luttrell should make such a payment in respect of land of which he was [redacted] the owner remains unexplained.

In my view, no presumption of a Crown grant ought to be made in this case. The facts of the present case do not differ in any material respect from those of Lord Rivers v. Adams (1878), 3 Ex.D. 361. There the Court refused to make such a presumption, not because it was improbable, but because it was inconsistent with the past and existing state of things. To adopt the words of Buckley L.J. in Lord Chesterfield v. Harris [1908] 2 Ch. 397, at p.423, there is no trace anywhere of any such corporation having ever existed; on the contrary, so far from there being any meetings of such corporators, or of there being any corporate acts, we find the persons who claim the prescriptive right acting in every way as would have been expected if their claim were as individuals.

There appears to be no reported case in which it was presumed that such a Crown grant had been made, but if such a presumption were to be made it could only be on the basis that it was the only possible way of explaining what had

in fact been done by the interested parties. In this case there is another possible explanation, namely that propounded by Mr Sher. In my view this is not only a possible explanation, but one which the evidence leads me to find to be in fact the true one. A presumed lost grant could be but a legal fiction devised as a means of explaining what would otherwise be inexplicable. To my mind there is in this case no room for such a fiction. That a landowner would good-naturedly tolerate the taking of wood from a piece of untenanted waste land by people living on his estate affords no cause for wonderment or surprise, and where such a state of affairs is found there is no warrant for seeking to presume a lost grant, of the existence of which there is no evidence.

So far as Mr Wakefield's alternative is concerned, the evidence regarding the payments by Mr Luttrell to the Rector was somewhat vague, but even if such payments were made, there is nothing in the evidence to indicate that it had anything to do with the taking of wood by the parishioners.

For these reasons I refuse to confirm the registration.

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 28th day of October 1974

Chief Commons Commissioner