



COMMONS REGISTRATION ACT 1965

Reference Nos.35/D/12 & 13

In the Matter of Hurst Fen, part of the
land called the Hurst, Holywell Row,
Mildenhall, West Suffolk.

DECISION

These disputes relate firstly (35/D/12) to the registration at Entry No.1 in the Land Section of Register Unit No. C.L.68 in the Register of Common Land maintained by the West Suffolk County Council and secondly (35/D/13) to the registration at Entry No.1 in the Rights Section of the same register unit. Both disputes are occasioned by the Objection No.0/11 made by Mildenhall Parish Charity and noted in the Register (both sections) on 8th May 1969.

I held a hearing for the purpose of inquiring into these two disputes at Bury St.Edmunds on 27th April 1972. The hearing was attended by Mr. Eric Butcher Mr. George Peachey and Mrs. G.M. Tyrell ("the Claimants") represented by Mr. E.J. Wells (formerly chief engineer of the Mildenhall Fen Drainage Board) and by the Trustees of the Mildenhall Parish Charities ("the Charity") who were represented by Mr. C.G. Wright solicitor of Messrs. Greens and Greens.

Both registrations were made in consequence of an application dated 26th June 1968 and made by Mr. Archibald Morley, Mr. John Stebbeds, Mr. Eric Butcher, Mr. George Peachey and Mr. Eustace Tyrell as "owners in common with all other residents of Holywell Row" of the following "right of common":-

- "A. A Right to the Herbage (a right to cut and take litter: a right to graze 16 animals)
- B. A Right of Estovers
- C. A Right of Common of Turbary
- D. A Right to shoot and take game".

The objection dated 25th April 1969 of the Charity was "that the land was not common land at the date of the registration".

The names of Mr. A. Morley and Mr. J. Stebbeds had been removed from the registration pursuant to requests made by them in 1969 and 1970. I was told that Mr. E.C. Tyrell had died and that before his death Mrs. G.M. Tyrell (who was represented before me) had become entitled under conveyance dated 30th March 1966 (which was produced) to his bungalow 55 Holywell Row which was the only land he had in the village.

At the commencement of the hearing, Mr. Wells said that the Claimants did not now claim a right to shoot and take game.

On behalf of the Claimants, 7 persons gave oral evidence and statements signed by 6 other persons who were, I was told, too old or for some other reason unable to attend, were with the consent of the Charity read to me as written



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evidence by such persons. On behalf of the Charity 3 persons gave oral evidence and put in the various documents mentioned below, and a letter signed by Mr. F.A. Laws who was unable to attend by reason of absence abroad, was with consent of the Claimants, read to me as written evidence by him.

There was little if any difference between the parties as to the facts but great difference as to how I should view the facts and as to the order I should make.

The land, the subject of this reference is known as "Hurst Fen", has an area (as was agreed) of 11.437 acres or thereabouts, is Ordnance Survey Nos. 2269 and 2271, and is part of an area known as the Hurst; it must not be confused with another piece of land also part of the Hurst which is also the subject of a dispute under the Act and is Register Unit No. C.L.67.

Hurst Fen adjoins a strip of land through which runs a lode which is part of the drainage system of the area; in about 1961 a new channel for this was constructed. Hurst Fen has within living memory always been rough land, and is now almost entirely overgrown by trees and scrub; such vegetation as there is on it is coarse; and it is often waterlogged. Since the New Channel was constructed it has been drier and is now of some value for shooting. It is a pleasant place through which to ramble, take a dog for a walk and so forth; to botanists and ornithologists it is full of interest. As appears below it was let in 1829, but has not within living memory been let before 1961.

In the report dated July 1829 and made by the Commissioners appointed pursuant to the Charities Inquiries Acts 1813, 1819 and 1824 (County of Suffolk) the following entry No.4 appears under the heading "Parish of Mildenhall. Pools Lands. Doles." as being lands and tenements "under the order or management of the churchwardens for the time being":-

"4. A piece of ground called the Hurst, in Holywell Fen, containing 11 A. 2 R. 16 P., is let yearly, subject to the right exercised by the poor of Holywell of cutting turf thereon, by auction; the rent this year being 1 l. It is unknown how this land became appropriated to the use of the poor".

I identify the land referred to in this entry as the same as Hurst Fen the subject of this reference.

Mr. F.A. Oldman who was schoolmaster in Beck Row (a nearby village) from 1933 to 1960 and who took an active interest in local history including the village of Holywell Row produced a well-bound but slightly damaged book entitled "... (? Charters) and documents relating to charities of Mildenhall" and containing a number of manuscript and printed documents apparently dated between 1836 and 1895 relating to the locality. Mr. Oldman purchased the book because he was interested in the subject matter. In the circumstances, I am with some regret of the opinion that I cannot treat the documents contained in the book as legally admissible evidence in these disputes. The possibility of any one of the documents in the book being admitted by reason of some special circumstance relating to it was not pursued, rightly I think, because the entry in one of the documents, about 1895 about the use of Holywell Fen



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by the poor of Holywell for digging turf fuels and cutting litter was substantially dealt with by the evidence given to me, and the other documents could not, I think, affect my decision in this case.

Mr. Oldman also produced White's History of Suffolk 1844; whether or not it was admissible in evidence, it added little to the 1829 Report mentioned above.

Mr. Oldman was, from about 1950 until the scheme mentioned below a member of a body of trustees known as the Mildenhall Hall Charity Trustees and such Trustees considered Hurst Fen as included in the several pieces of land then owned by the Charity and known as "Poor's Lands".

By an order dated 16th January 1961 the Charity Commissioners approved a Scheme for the regulation of a number of Charities including the charities known as "The Poor's Lands Charities" and vested the lands specified in the schedule to the Scheme (including Hurst Fen) in the Official Custodian for Charities for all the estate and interest belonging to and held in trust for these charities.

Since 1961 the Trustees appointed under the Scheme have let Hurst Fen to Mr. H. Smart under an undated letter and two agreements dated 19th February 1968 and 17th September 1970 from (altogether) 6th June 1962 to 17th October 1977. The letter and agreements which were produced to me purported to demise the whole interest of the Charity and not merely the shooting rights which it was said were the rights in which Mr. Smart was in fact most interested.

The evidence of the Claimants established that numerous inhabitants of Holywell Row had since about the year 1900 cut peasticks in Hurst Fen and taken them away for their own use and to some extent for the use of others in the village. The inhabitants had also taken firewood, litter (said by one witness to be for littering pigs, thatching pigsties and sometimes the cottages) and also garden poles. The inhabitants had walked over Hurst Fen as much as they pleased.

All these things were done without asking permission of anyone or any interference by anyone. Mr. H. Smart had however recently complained to the Charity about the entry of unauthorised persons and the Charity decided to do nothing pending this hearing.

I conclude that ever since 1829 Hurst Fen has been held (subject to any rights the inhabitants may have as discussed below) upon a charitable trust for the poor. There was no evidence that Charity had ever been dispossessed from Hurst Fen, and I conclude that whoever was lawfully managing this charitable trust has been ever since 1829 and is still legally entitled to possession of Hurst Fen and the rents of any letting of it. I reject the suggestion that the position was somehow abruptly changed in 1961 by the Scheme: such Scheme in my view did not affect the beneficial ownership of Hurst Fen which was before and afterwards held on a charitable trust.

It was suggested that the Charity Commissioners had acted irregularly in making the Scheme. The consideration of any such suggestion is quite outside



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any jurisdiction conferred on me. But I accept the submission that if before 1961 the inhabitants of Holywell Row had any rights over Hurst Fen, they were not destroyed by the Scheme.

It was urged that the inhabitants of Holywell Row have a firm conviction of moral and social right to pursue the peaceful exercise of what they had done in the past, that there is now a greater need than ever for the preservation of open spaces for public recreation and exercise and that Hurst Fen is eminently suitable for this purpose. Such considerations seem to me to be quite outside any jurisdiction conferred on me. My concern is, I think, as regards this case to determine whether the Claimants have established rights of common (with or without modifications) as now particularised in the Register and if not whether the registration of such rights and of the land as "common land" should stand. As to this, I consider myself bound by the established legal principles applicable.

The rights of common registered are in the Register expressed (except as to grazing) to be without any limit as to amount; as expressed any resident could take all the herbage and wood on Hurst Fen and dispose of it as he pleased either in or outside the village.

In my opinion the evidence which was given by the Claimants and which was almost entirely related to the rights registered as "Herbage" and "Estovers" does not support the rights so registered. For this, the use proved must be "as of right", that is, it is not enough that permission was never asked or refused; but each person must believe himself to be exercising a public right and not merely doing something which he felt confident that the owner would not stop but would tolerate because it did no harm; see the observations of the Court of Appeal in Beckett v. Lyons 1967 1 Ch. 449.

I am unable to find that what the witnesses for the Claimants described as having been done by them and others was done by them in exercise of a right which enabled them to take away all the wood and herbage which was at any time growing on Hurst Fen. Although one of the witnesses said that she did not know that Hurst Fen was held on charitable trust for the poor, another witness said that he had always known it as "poors land"; I infer from the evidence given that no inhabitant of Holywell Row would, if he did not know that the land was held on charitable trust for the poor, have had any difficulty in discovering that it was. "Poor" includes not only the very poor but the not so well off. Those who used Hurst Fen for the purposes described were, I think, mostly not so well off and could reasonably have felt confident (at any rate as long as Hurst Fen was not let or the tenant did not object) that what they did would be tolerated by whoever was responsible for managing the Charity, because it did no harm.

The use made within living memory by the inhabitants of Hurst Fen for the grazing of animals or for turbarry was, I think, negligible: quite insufficient in my view to found a claim that anyone had any right in this respect.

I am not able to think of any modification of the rights of common claimed which would make it correspond with the evidence of user. No witness suggested that what they had done was subject to any limit of any kind, and I cannot



suggest any limit other than they took from Hurst Fen what they felt the owner would tolerate because it could do him no harm.

Quite apart from my findings of fact as set out above, the Claimants are, I think, in a formidable difficulty as regards the law. As a general rule the law does not recognise a right of common for a fluctuating body of persons such as the inhabitants of a locality: see Harris and Ryan, Law relating to Commons (1967) page 55. This case does not, I think, come under any of the allowed exceptions to this general rule.

There remains the question: what effect if any should be given under the Act to "the right ... of cutting turf ..." mentioned in the 1829 report, a right which at least resembles a right of common as ordinarily understood.

For the Charity it was contended that this right had been extinguished by the permanent exhaustion of the product. The evidence of Mr. Laws (in his letter above mentioned) was: "the raising of turf ... ; the waterlogged nature of the land, the sand subsoil and coarse vegetation makes this land unsuitable for that purpose". On this point I was referred to Harris and Ryan supra page 77 and was invited to look at the cases cited. Having done so, I cannot conclude that they oblige me to treat a right to cut turf over land such as Hurst Fen as extinguished in circumstances such as here exist. Where land has ceased by the combined effect of human works (the New Channel and the drainage system generally) and the course of nature to produce turf suitable for fuel but does produce underwood etc. suitable for fuel (during the recent strike of the coal miners, many inhabitants took wood from Hurst Fen for fuel), it seems to me that a right of cutting turf for use as fuel in a house can properly be regarded as including when wood grows in the place of turf, a right of cutting underwood etc. for use as fuel in the same house.

But I accept the contention of the Charity that the right of cutting turf mentioned in the 1829 report is not registrable under the 1965 Act. The finding of the Commissioners in their report must, I think, in its application to present circumstances be construed in the light of the legal principles expounded by the Courts since the report was made; see Beckett v. Lyons 1967 1 Ch.449 and the cases there cited. So construed, the 1829 report can, I think, be read as a finding that "the piece of ground" was held on a charitable use (or trust) for the poor to cut turf and subject thereto on a charitable use (or trust) to provide doles for the poor: in effect the poor were to benefit either from the land itself by cutting turf or from the rent of the land by receiving doles. The benefit which a poor inhabitant can take from land held on a charitable trust for the poor is not, I think, a "right of common" as ordinarily understood even if the benefit is described by words usually used in relation to rights of common.

For these reasons I refuse to confirm with or without modification the registration in the Rights Section of the Register.

There is, I think, no ground for confirming the registration in the Land Section after the registration in the Rights Section has become void. For the same reasons therefore, I refuse to confirm the registration in the Land Section of the Register.



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The Charity, so it was said on their behalf, did not if they were successful want me to make any order for costs.

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.

a. a. Baden Fuller

Dated this 12th day of June 1972.

Commons Commissioner