COMMONS REGISTRATION ACT 1965

Reference Nos. 239/D/28-31

In the Matter of Baddesley Common, Baddesley Ensor, Warwickshire (No.2)

DECISION

These disputes relate to the registration at Entry No. 1 in the Rights Section of Register Unit No. CL 7 in the Register of Common Land maintained by the Warwickshire County Council and are occasioned by Objection No. 19 made by Mrs M E M Henning, Objection No. 21 made by Miss M E Whiteside, Objection No. 22 made by Mr J Paul, and Objection No. 23 made by Sir William Dugdale, and all noted in the Register on 21 October 1970.

I held a hearing for the purpose of inquiring into the dispute at Nuneaton on 13 October 1983. The hearing was attended by Mr Robin Campbell, of Counsel, on behalf of the Baddesley Ensor Parish Council, the applicant for the registration, by Mr Charles George, of Counsel, on behalf of Miss Whiteside, Mr Paul, and Sir William Dugdale, and by Mr C J S Glanvill, Solicitor, on behalf of Mrs Henning.

The registration is of a right in gross to pasture 2 horses over the whole of the land comprised in the Register Unit. The claim to this right is based on an indenture made 21 November 1922 between (1) Thomas Slack (2) The Parish Council of Baddesley Ensor whereby there was conveyed to the Parish Council "All that Common Right or Right of Common of Pasture in and over the Commons of Baddesley Ensor aforesaid heretofore appendant or appurtenant to all those two messuages (formerly one messuage) with the outbuildings, gardens and appurtenances thereto belonging fronting The Gullet and Common at Baddesley Ensor aforesaid the whole containing seven hundred and thirty square yards at one time occupied by Charles Chetwynd and others". Thomas Slack acquired the right from James Tretwell by an indenture made 15 June 1917 with identical parcels. It would appear from the covenant for the production of documents in the 1917 indenture that Mr Slack deduced his title from an indenture made 15 December 1890 between (1) Henry Atkins (2) Henry Sanders. Mr Campbell also put in a Conveyance of the two messuages effected by an indenture made 7 July 1863 between (1) Charles Chetwynd (2) Michael Glover Atkins and Joseph Chetwynd, an indenture made 24 February 1832 between (1) Richard Maddocks and Elizabeth his wife (2) William West and Thomas Dee, the parcels of which consist of two messuages (formerly one messuage only), and an indenture of a fine levied on 18 January 1832 between William West and Thomas Dee, querents, and Richard Maddocks and Elizabeth his wife, deforciants, relating to two messuages, two gardens and common of pasture for all cattle in Baddesley Ensor. Although the parcels in these documents are in somewhat general terms, it would appear that the messuages referred to were those later occupied by Charles Chetwynd referred to in the indenture of 1922.

Although there is no mention of horses in any of the documents before me, the word "cattle" in the indenture of fine is wide enough to include horses: cf. the statute 22 and 23 Car. II, c.7, which refers to "horses, sheep, beasts, and other cattle". It also appears from orders made by the jury at the court leet and court baron of the manor of Baddesley Ensor held on 13 July 1867 that the word "cattle" was there used to embrace horses, oxen, cows, calves, sheep, and asses. I therefore feel no doubt that the right of common attached to the two messuages could have included a right to graze horses, but that is not to say that it did include such a right. The indenture of fine of 1832 refers to "all

cattle", which could indicate that the right included a right to graze horses and all other animals regarded as "cattle" within the manor of Baddesley Ensor. Whether the right did include a right to graze horses must depend upon whether it was a right to graze certain numbers of animals or whether it was a right limited by levancy and couchancy. If the latter, it could not include horses, for on the evidence the dominant tenement was not large enough to support any horses levant and couchant: at best it could only support a limited number of smaller animals.

The nature of the right also affects the next matter to be considered, namely, severance of the right from the two messuages. On this it is sufficient to cite Daniel v. Hanslip (1672), 2 Lev. 66, where Holt C.J. said that

> "if a man hath common appurtenant to a messuage and land for certain "number of beasts, he may alien the same; aliter if it be common for all "his beasts levant and couchant upon the land, he cannot by his "alienation sever that from the land"

This and other cases to the like effect were cited with approval by Buckley J (as he then was) in White v. Taylor (No.2), (1969) 1 Ch. 160, at p.190.

The only evidence of the nature of the right of common formerly attached to the two messuages is the description of the right in the indenture of fine of 1832 as "common of pasture for all cattle" and its description in the indentures of 1917 and 1922 as appendant or appurtenant. If it was appendant, it could only have been limited by levancy and couchancy, while if it was appurtenant, the absence of any mention of the number of cattle leads to the conclusion that the number was limited by levancy and couchancy, so that whether the right was appendant or appurtenant the purported severance of the right from the two messuages was ineffective.

While there is clear authority that a conveyance of land excluding any right of common limited by levancy and couchancy extinguishes the right, there seems to be no authority regarding the effect upon the right of the converse case of a conveyance of the right while retaining the land. The correct view appears to be that such a conveyance is entirely ineffective, so that the right remains attached to the land. Here the houses were demolished about ten years ago, but the land which formerly comprised their curtilages still remains as capable as ever it was of supporting animals. It would seem therefore that a valid application for the registration of a right to graze a suitable number of suitable animals (eg. sheep) attached to the land which formed the curtilages of the two messuages might have been made, but that the application which was made was defective in that it referred to the wrong class of animals and failed to state that it was attached to land.

For these reasons I refuse to confirm the registration.

Mr George applied for an order for costs should his clients be successful. In order to assist my consideration of this application I have been provided with copies of letters passing between the Solicitors for the parties, and I have also considered letters which were sent to me by the Solicitors for each party by mutual agreement. On this material I have come to the conclusion that there

is no reason why the costs should not follow the event, and I shall therefore order the Parish Council to pay the costs of Mrs Whiteside, Mr Paul and Sir William Dugdale on Scale 2 prescribed by the County Court Rules 1981 as amended.

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 14th day of November 1983

Chief Commons Commissioners