JL

COMMONS REGISTRATION ACT 1965

Reference No. 270/D/24 & 29

In the Matter of (1) Tract of land containing 2682 acres or thereabouts known as Ilkley Moor and Burley Moor, Bradford (CL 207) (2) Pieces of land known as Burley Moor, Burley in Wharfedale, Bradford (CL 295)

DECISION

1. These disputes relate to the registrations at Entry Nos. 8 and 9 in the Rights Section of Register Unit No. CL 207 and at Entry Nos. 4 and 5 in the Rights Section of Register Unit No. CL 295 in the Register of Common Land maintained by the former West Riding County Council and are occasioned by Objections Nos. 1270 and 1271 made by Ilkley Urban District Council and both noted in the Register on 7 June 1971.

2. I held a hearing for the purpose of inquiring into the disputes at Ilkley on 5 July 1983. The hearing was attended by (1) Mr R W Walls for the Registration Authority, West Yorkshire Metropolitan County Council. (2) Mr J M Collins, of Counsel, instructed by the Solicitor to Bradford Metropolitan City Council (successor to Ilkley Urban District Council) (3) Mr R Wakefield, of Counsel, instructed by Atkinson Dacre and Slack, Solicitors, for the applicants at Entry Nos. 8 and 9 (CL 207) and Nos. 4 and 5 (CL 295).

3. CL 207 is an area of some 2680 acres comprising Ilkley Moor (c.1750 acres) and Burley Moor (c. 930 acres), except for some small pieces of land on Burley Moor which together make up another unit CL 295. There is no physical boundary between the two moors. Ilkley Moor is owned by Bradford Metropolitan City Council and Burley Moor by three individuals as trustees ("the Burley Moor trustees").

Entry No. 8 (CL 207) and No. 4 (CL 295) are to the same effect. Each was registered on the application of G H Greaves and J W Greaves as attached to Cragg Top Farm, and specified a right to graze 500 sheep to the extent of 500 sheep gaits over the part of CL 207 to the east of the line dividing Ilkley Moor and Burley Moor and over the whole of CL 295. Entry No. 9 (CL 207) and No. 5 (CL 295) were both registered on the application of G H Greaves, J W Greaves and B T Greaves, both specify the grazing right set out above, but these rights are claimed to be attached to Hag Farm. The two Objections (Nos. 1270 and 1271) state the same grounds of objection viz. (a) that no such grazing rights exist. Any grazing rights would anyway be subject to:- (b) the number of sheep and cattle which may be grazed should be determined by the rule of levancy and couchancy and thus only as many sheep and cattle may be turned on to the servient tenement as the dominant tenement (ie. Cragg Top Farm and Hag Farm) will maintain by its produce through the winter: that number is less than the number stated in the Rights Entries.

4. It was agreed that the two cases (CL 207 and CL 295) should be heard together. At the hearing the Objector did not pursue ground (a) of the Objection and Mr Collins told me that the dispute was solely as to the number of animals. It

was common ground that the number of animals which could be grazed from the two farms was to be determined in accordance with the ancient principle of levancy and couchancy, though Mr Collins submitted that in the circumstances of this case, the principle applied with qualifications, to which I refer below.

The principle of levancy and couchancy is applicable for the purpose of determining the number of animals which may be grazed on common land in exercise of a grazing right appendant or appurtenant to a dominant tenement (in this case to Cragg Top Farm and to Hag Farm) where the number is not otherwise fixed, as for example by the terms of an express grant or of some agreement. The principle is that the number of animals is to be determined by reference to the number of animals which the dominant tenement is by its produce capable of maintaining ~~by its own produce~~ during the winter months, including hay and other produce from it during other seasons of the year.

5. In opening his case in support of the registrations by the Greaves, Mr Wakefield told me that Cragg Top Farm is now of about 15 acres and Hag Farm of about 60 acres. In the supplemental maps showing their respective areas at the time of registration the areas are 12 and 59 acres, which he accepted as the official figures. As regards the 500 sheep in the Entry registered for Hag Farm, he accepted that this was the maximum number his clients could now claim to graze (see S.15 Commons Registration Act 1965) although his evidence would show that on the levancy and couchancy principle the number was in excess of that figure. The claim in respect of Cragg Top Farm was now reduced to 300 sheep.

6. (a) His first witness was Mr Frederick M Lister FRCS, a principal in the firm of Lister and Sons, who has been in practice for some 31 years.

He has worked among farmers in Burnley and Ilkley for many years. The two moors are not physically separated and sheep graze from one to the other. They are low lying - less than 1000 feet: the vegetation consists of bracken, heather and grass, with some patches of Cranberry and Bilberry, and it is productive and useful ground for keeping sheep on. Over the past 30 years he has been a regular visitor to the moors - the heather seems largely to have been left to grow. The sheep thrive and can be kept there all the year round except for periods of severe weather, and in addition they come off to facilitate acts of husbandry on the moors. He did not think that the moors have been overstocked - some 1600 sheep could be grazed and up to 2000 if the moors were properly maintained.

Cragg Top Farm he had visited often over the years and knew it well. It is now about 15½ acres of which 12 acres around the farm buildings are good pasture land. It is about 625 feet above sea level and the sheep depend on moor grazing. There are sheep dipping structures which can cope with 500 to 600 sheep. There are about 20 cattle kept which manure the 12 acres of pasture, from which about 1100 bales of hay are produced. The sheep are brought in from the moor for three weeks in April for lambing, for 2 to 7 days in July for clipping and another three days for dipping and tupping. The winter period in which sheep could be required to come in off the moor would be short: they are not in fact so required as the winter is relatively benign. In that period he would say that the number of sheep that could be maintained on the farm was 30 sheep per acre.

Hag Farm he had also regularly visited. It lies between 300 and 600 feet above sea level. There are about 60 acres of low lying pasture land which is productive and maintains a small dairy herd. Its sheep are off the moor for perhaps a week longer than in the case of Cragg Top. Again he thought that about 30 sheep per acre could be maintained on home produced eatage during the winter period.

Mr Lister had known the Greaves brothers over the years and considered them to be competent farmers. Cragg Top is a farm dependent on sheep as its main enterprise: its equipment seems to cope for a flock of about 400 sheep and perhaps 500 is too large to claim. On Hag Farm a flock of sheep has been an important part of its economy but it has not been used to its full extent and the 500 claimed is less than it could support in winter.

In cross-examination Mr Lister said that in his view Burley Moor could take on average about 0.8 sheep per acre of moorland. In the early 1950s more people put sheep on Burley Moor than recently but it was not heavily over-stocked - sheep went from it to Ilkley and Hawksworth Moors naturally and not because of over-stocking. After 1956 when there was a fire the farmers reduced the numbers of sheep on the moors until the heather and other produce recovered. He was not aware of any generally accepted rate per acre of moor.

Asked whether, at a previous hearing of these disputes by another Commissioner, his evidence had been that the sheep spent about 75% of their time on the moors, Mr Lister said that he did not remember mentioning a specific percentage but that he was speaking of a national period of say two months when the sheep fed off the produce of the farms.

Mr Lister said that he would have supposed that a bale of hay would have fed 10 to 15 to 20 sheep a day, but that this question was impossible to answer because they would be eating off grass at the same time. His estimate of 30 sheep per acre was not just guesswork - he had applied his mind and done his best. An average bale of hay would be more than 36lbs. - say 46 to 50, and for two months there would be enough if one takes into account the natural grass. In reply to the question whether he would crowd 360 sheep on Cragg Top Farm, Mr Lister said he did not see why not but agreed that there might be some risk of disease. He agreed that the 12 acres slope up to the edge of the moor, but thought they would yield say about 1½ to 2 tons per acre. He did not think that the area of heather on the moors had been reduced over the last 20 years.

Asked by me as to the number of bales of hay that would be produced on Hag Farm, Mr Lister said that the Greaves would know better but he would think maybe 5000 bales, if there were no herd of cattle.

(b) Mr Wakefield's second witness was Joseph William Greaves. He lives at Hag Farm and the two farms are farmed by him in partnership with his brothers. He was born in 1928. In 1940 his father took a tenancy of Cragg Top, he ran about 400 sheep (including followers) on to Burley Moor and from there they went on to Ilkley Moor. A Mr Layfield ran sheep from Hag Farm where the witness went to work for him in 1943. Mr Layfield purchased Hag Farm in 1952 when he had between 500 and 600 sheep. Cragg Top was purchased by the Greaves family in 1948 and Hag Farm in 1967.

Mr Greaves said that the land on both farms is good grazing land. The Greaves are also tenants of other grazing ground. Their sheep come down from the moors at various times, but he did not think they had had to keep sheep on as long as three winter months. The winters vary and there can be some rough ones. Their flocks have slightly increased since they started and for the two farms they now have 700 lambing ewes, 186 hoggs and followers. The numbers for the purpose of registering the rights were entered at random.

In cross-examination Mr Greaves said that on registration perhaps they might have put down the most they thought they could get. After the fire on the moors some farmers stopped grazing but he did not think the Greaves had increased the number of their sheep. They had not had complaints of overstocking of the moors: he did not go to a meeting of the owners and graziers in 1954 and knew nothing of letters written in 1976 and 1980 on behalf of the owners of Burley Moor to the graziers, including George K Greaves, about the high number of sheep grazed on the Moor and stating that the rate was two sheep per acre. They did increase their stock of sheep when they bought Hag Farm. His father and Mr Layfield kept records of sheep for the purpose of subsidy and his brother kept such records. To the suggestion that at the time of registration fewer sheep were kept than were registered, Mr Greaves said that they had between 700 and 800 sheep, 150 hoggs and followers when they bought Hag Farm in 1967.

7. (a) The first witness called by Mr Collins was Mr John Pallister FRCS. He is aged 39 and has practised his profession throughout his working life. His work, he said, has been almost exclusively in agricultural areas - his area straddles the Yorkshire/Lancashire border and he is familiar with hill farms. He had visited Cragg Top and Hag Farms and discussed with the Greaves their system of farming. He made himself familiar with the moors and the farms concerned in CL 207 and CL 295. On hill farms generally he would expect something like 150 animals for a 50 acre farm - 50 animals would be a lot for a 12 acre farm. As he saw it the limiting factor is the amount of the stock kept on the farm - what you do with the farm land in relation to sheep and cattle.

In regard to Mr Lister's estimate that you could run 360 sheep on 12 acres, the witness said that was an answer to a theoretical question - it isn't practical. Sheep don't like being confined with not enough natural grass. Mr Lister's calculation of hay production - 1½ to 2 tons per acre - was too high: 1½ tons would be about right. On that basis the total for Cragg Top would be 18 tons and for Hag Farm about 90: one sheep would need at least 4½lbs per day, so that taking a winter period of 90 days the total tonnage of 108 tons would maintain approximately 600 sheep - 100 on Cragg Top and 500 on Hag Farm.

As regards the capacity of the moors to provide for grazing sheep, Mr Pallister said that from his experience of such moors and of the number of sheep grazed thereon the average was 1 sheep for every 2 acres of moorland, so that for Burley Moor with an area of some 930 acres a figure of 450 grazing sheep was not unreasonable.

Cross-examined by Mr Wakefield, Mr Pallister said that he agreed that for the Cragg Top farmland to accommodate 360 sheep would work out at 160 square yards per sheep. When he visited the farms in 1981 he did not go on every part and spent quite a lot of time talking to the Greaves. He would say that in a winter period of 90 days the two farms could from their natural produce keep 600 sheep,

and for a period of 60 days, 900 sheep - the total, in his view, to be allocated between the two farms proportionately to their respective acreages.

(b) Two further witnesses, Major L Ingham and Mr J A Bromet, were called by Mr Collins. They are two of the trustees of the Burley Hall Estate, who are not Objectors to the registrations. From their evidence and various copy documents they produced it appears that from the early 1950s they had regarded the Burley Moor as being seriously overgrazed and had sought to secure agreement to a grazing rate of 2 sheep for each acre of inbye land (the farmland constituting the dominant tenements). Major Ingham said that he believed the number of animals grazed by the Greaves had increased in recent years to 600/700 - he accepted that some of the increase was due to their increase of landholding but some represented the numbers which outgoing graziers no longer grazed. He thought the 2 sheep per acre of inbye land was a yardstick recognised by those concerned in running sheep on moors from upland farms. The estate was purchased in 1949 and Burley Moor was acquired as a grouse moor: in the early 1950s the total of sheep grazed was something like 1000. In time too many sheep spoil the habitat for both sheep and grouse. He would estimate that the moor in its present state could take about 450 sheep.

Levancy and Couchancy.

8. As mentioned above (para 4), Mr Collins submitted that the application of this principle in the present case was subject to qualifications.(a) The first of these arose by virtue of the decision in Corbet's Case (1585) 7 Co. Rep. 5a, which is to the effect that where the graziers on Common A have common of pasture over Common B by reason of vicinage they must not turn out on Common A more animals than that Common will feed: so that in the present case, those lawfully grazing on Burley Moor may not as against those with interests in Ilkley Moor turn out more animals than Burley Moor can feed. So, as I follow the submission, since the confirmed registered grazing rights over Burley Moor as distinct from Ilkley Moor already account for 146 animals, then if Burley Moor's capacity is for 450 sheep, not more than a further 300 should be allowed for the Greaves. In my opinion, this conclusion does not result from Corbet's Case, in which the decision neither expressly nor impliedly limits the number of animals which there may be rights to graze on Common A, but restricts the number which may in fact from time to time be put on Common A in exercise of those rights. If the number actually grazed exceeds the capacity of Common A to feed them, the pressure on Common B will necessarily be increased to the prejudice of those interested in Common B; they would have their remedies to protect those interests but, in my view, it is a ground not for denying rights which may be established to exist over Common A, but for challenging any exercise of those rights which involves an abuse of the vicinage rights over Common B.

(b) The second qualification to the levancy and couchancy rule advanced by Mr Collins was that in the case of a right acquired by prescription the rule does not operate to determine the number of animals which may be grazed from the dominant tenement at a figure higher than that established by the evidence of user, necessary to establish a prescriptive right. Mr Collins did not develop this submission which, I think, was prompted by a question I raised on this point with Mr Wakefield at an earlier stage in the hearing. Mr Wakefield submitted that the dicta in the judgment of the Court of Appeal in Robertson v.

Hartopp 1890 43 Ch. D 484 at pp. 515-7 indicate that the rule operates to determine the number of animals not only as an upper limit but as a positive entitlement to graze that number on the Common. The dicta do, I think, support that view, but in fact the question does not arise in this case since, the existence of the rights being accepted by the Objector, their origin whether by prescription or otherwise was not the subject of evidence or for decision, and it may be that they are rights appendant, the existence of which does not depend on prescription by user. Accordingly whether or not there is authority for the suggested qualification (and I was not referred to any decision on the point), it has no application in the present case where no finding as to the acquisition of the rights on the basis of prescription is involved.

9. In the application of the levancy and couchancy rule, by which the number of animals is to be determined, the sole test is the capacity of the dominant tenement to maintain that number during the winter period. That number is not affected by the actual number which a commoner is in the habit of grazing on the servient tenement: (See Robertson v. Hartopp 1890 43 Ch D. 484). Nor, as a matter of law, is the capacity of the servient tenement (the moor) to accommodate the number ascertained in accordance with the rule relevant to the entitlement of the farmer to graze that number. Overgrazing of the servient tenement may give rise to an understandable resistance to the numbers claimed not only by the owner of the moor but also by other commoners, and in practice may well lead to an agreement by the commoners to a reduced number: but a reduction cannot as a matter of law be imposed by the owner or others on one who is entitled to graze the number determined in accordance with the rule.

10. Mr Wakefield told me that the Greaves maintained their claim to graze 500 sheep for Hag Farm, but their claim in respect of Cragg Top was now reduced from 500 to 360 sheep. This he based on the evidence which, in his submission, established a ratio of capacity to maintain in the winter period at 30 sheep per acre of farm land.

Mr Wakefield in the course of his final submissions said that, the levancy and couchancy rule being the applicable law, the law requires the answer to a hypothetical question and that only the evidence of the experts is relevant. The question is hypothetical in the sense that, since the Greaves (and no doubt other farmers in the locality) have not in practice kept their flock during a specific period of winter each year maintained on their farmland by its produce, the criterion laid down by the rule cannot be applied with reference to practical experience of the farmland's capacity for such maintenance. It emerged from the evidence of both Mr Lister and Mr Pallister that, whilst they understood and accepted that they were having to deal with a notional question, it was not easy to make estimates without knowledge or experience of the farmland's capacity being tested in practice. As regards Mr Wakefield's suggestion that it is only the experts' evidence which is relevant, this does not seem to me necessarily correct as on some of the relevant matters, for example the length of the winter period and the capacity of an area of farmland to produce hay or to accommodate sheep, the evidence of practising farmers in the locality may be of considerable relevance.

Be this as it may, the capacity of the farmland required for the criterion has to be decided on a consideration of the evidence as a whole, and, in my view,

in respect of each farm separately from the other.

The number of sheep as registered in respect of Hag Farm is 500: the ratio of 30 sheep per acre, which Mr Wakefield contended results from the levancy and couchancy rule, produces some 1800 sheep. Mr Pallister's ultimate conclusion was that, taking a winter period of 90 days, 600 sheep could be kept on the two farms ~~of~~ out of natural produce, and 900 for a period of 60 days, which he would divide between the farms proportionately to their acreages. This conclusion would even on the 90 day period result in 500 sheep for Hag Farm. For the purposes of the dispute as to the registrations in respect of Hag Farm all I have to determine is whether the application of the rule produces a figure of at least 500 sheep. As to this minimal figure I cannot see that there is any conflict between the respective estimates of Mr Lister and Mr Pallister and it is for this purpose irrelevant that Mr Lister's estimate produces a larger figure.

11. It is otherwise in the case of Cragg Top. In seeking to apply the levancy and couchancy rule it seems to me that the two primary questions to be resolved are (1) the length of the winter period to be taken into account (2) the sufficiency of the natural produce of the farm, including stored produce. As to the first question, in the reported cases the statement of the rule refers to "the winter".

Mr Wakefield submitted that this derived from the period during which animals have to be taken off a common because of wintry conditions and should be decided by what in the particular locality is the period of such conditions. But there are localities in which other circumstances would be equally relevant, for example, the necessity to preserve the pasturage of the common by affording it a respite from grazing. I have found no authority for the view that in the statement of the rule "the winter" has a meaning to be ascertained by reference to the circumstances obtaining in each locality. In my opinion the expression describes, for the purposes of the rule, a close period for grazing generally and bears its normally accepted meaning, which I take to be the three month period of December to February. If I am wrong as to this, and the period of the local winter is what matters, the relevant evidence requires to be considered. Mr Lister gave evidence as to the comparatively benign winter climate which he said involves only short periods when, by reason of winter conditions, sheep have to come off the moors: and his estimate was based on a two month period. However, as recorded in the Decision of the Commissioner on the previous hearing of this dispute, Mr Lister did then say that sheep spend 75 per cent of the year on the moors and the remainder on the farms: before me he said that he did not remember a percentage figure being then given. Mr Greaves's evidence on the point was somewhat tentative: he said that though the winters vary and there can be rough ones he did not think that sheep had to be kept on the farms for as much as three months. On the assumption that local conditions are relevant to the length of the period to be applied to the calculations, on the evidence as a whole I do not find that the period is two months or anything less than three months.

The second question - the sufficiency of the natural produce during the winter period - does involve hypothesis and estimates. Mr Lister estimated the hay produce from the 12 acres at 2 tons per acre but felt unable to quantify the number of sheep which could be fed from this because they would be eating off the natural grass at the same time. Mr Pallister said that at his estimate of 1½ tons per acre that would suffice for 100 sheep at Cragg Top over a three month period. This estimate, as I understood it, allowed nothing for natural grass. I should add that on the question of overcrowding raised in Mr Collins's cross-examination of Mr

Lister, it would appear to me, though I do not know of authority on the point, that the question of the number of sheep that the natural produce can support does imply some reference to considerations of proper and acceptable management. In the present case, however, I do not take this into account since no evidence was given on the point by the Objector's witnesses and the question was raised only in relation to 360 sheep and not to any reduced number.

12. The levancy and couchancy rule is applicable in this case, but its antiquity seems to me to raise doubts as to its suitability for application at a time when developments in farming have substantially changed its practice. It understandably presented difficulties to both Mr Lister and Mr Pallister in arriving at their estimates of the number of sheep which could be wintered on the farms.

On the basis of a winter period of three months and a consideration of the evidence as a whole, my conclusion is that the number of sheep appropriate for the registrations in respect of Cragg Top should be reduced to 180. As indicated in para. 10 above, I can see no reason for reducing the figure of 500 registered in respect of Hag Farm.

In the result I confirm the registrations relating to Hag Farm at Entries No. 9 (CL 207) and No. 5(CL 295) without modification, and those relating to Cragg Top Farm at Entries No. 8(CL 207) and No. 4(CL 295) with the modification that the number of sheep be reduced to 180.

The Greaves have succeeded in resisting the Objections to the Hag Farm registrations and the objector has succeeded in maintaining his Objection to the Cragg Top Farm registrations: and I shall make no order as to 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 <u>in point of law</u> 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 24 November 1983

L.J. Mervis Arnold

Commons Commissioner