COMMONS REGISTRATION ACT 1965

Reference No. 209/D/424

In the Matter of Haytor Down,
Ilsington, Teignbridge District,
Devon

SECOND DECISION

This second decision is supplemental to my decision dated 18 March 1985 and made in this matter about 53 registrations in the Rights Section of Register Unit No. CL25 in the Register of Common Land maintained by the Devon County Council after a hearing at Exeter on 10, 12 and 13 April 1984. This second decision is concerned with and only with the registration at Entry No. 54 made on the application of Charles Michael Limbrey Toll and Celia Mary Katherine Toll of rights attached to Woodhouse Farm, Ilsington, of estovers, turbary, and to graze 14 cattle and/or ponies and 70 sheep. This second decision is occasioned by letters dated 21 May, 14 August and 30 November 1985 from Mr Brett A Day, the relevant parts of which are set out in the Schedule hereto.

Mr Day's letters are in effect an application that my said April 1984 hearing be reopened, so that he can then produce evidence which will, so he says, establish that there are attached to Woodhouse Farm, Higher Brimley, containing (according to the application of Messrs Toll) 14a.3r.30p., ⟶ rights as in the registration, with the consequence: such registration, instead of confirmation of it being as in my said 1985 decision refused, will be confirmed.

Mr Day sent a copy of his said letters of 14 August and 30 November (1) to the Ilsington Commoners' Association who by their chairman Mr H H Whitley made Objection No. 968 applicable to (among others) Entry No. 54, the grounds of which are that the rights do not exist at all; and (2) to Devon County Council as so I assume, successors of Mr R C Longsdon who made Objection No. 1039 applicable to (among others) Entry No. 54, the grounds of which are "that if the right does exist, it should comprise fewer animals ... 9 cattle or 9 ponies or 36 sheep ... or such smaller numbers as shall restrict the total grazing ... to the equivalent of 500 bullocks". I have a letter from the County Council dated 13 December 1985 saying that for reasons therein set out they oppose the reopening of the hearing and that Mr H Whitley who is chairman of the Ilsington Commoners' Association is also opposed to the reopening of the hearing. I also have a letter dated 30 January 1986 from Mr Day commenting on the said County Council letter.

Having concluded my hearing about these 53 disputed registrations and given my decision about them, I may not except in circumstances allowed by law reopen it; that Mr Day asks me to reopen the hearing is not by itself enough; see R v Cripps, ex p. Muldoon 1984 QB 68. So before reopening the hearing I must consider the circumstances judicially and decide whether they justify it. Such consideration may be: (1) in one stage, by calling on all concerned to present their evidence and arguments before me (possibly at a public hearing and possibly hearing further evidence); or (2) by first considering whether the scheduled letters written by Mr Day do or do not disclose circumstances by law recognised as good grounds for reopening a hearing such as I held as a Commons Commissioner under the Commoners Registration Act 1965, and if I decide that none such are disclosed, going no further. Course (2) has the disadvantages that if I consider that the scheduled letters do disclose such circumstances I must then follow course (1). But course (2) has the advantage that if I am against Mr Day, many people are saved much trouble and expense. Because the investigation of the

position between 1680 and 1838, the establishment of rights "for all times at the purchase of Woodhouse Farm in 1838", and the actual grazing of cattle and sheep by Mr Mortimore and his family from 1838 to near 1938, would be likely to be lengthy and expensive, I ——→ in this decision follow course (2).

Mr Day's application is expressed to be made under paragraph 8 of the Eighth Schedule to my 1985 decision which refers to "any liberty to apply in this decision granted". The only liberty which could be relevant is that granted at page 25 which refers to the part of my decision dependent on "agreements and statements about which there may herein be some mistake or error which ought to be corrected without putting the parties to the expense of an appeal ...". As regards mistakes and errors, I am by regulation 33 of the Commons Commissioners Regulations 1971 given power: "to correct ... any clerical mistake or error arising from any accidental slip or omission".

In my 1985 decision I correctly omitted to say that Mr Day either attended or was represented at the hearing; this accords with his August letter. Under the heading "Others" at page 24, I consider the registration at Entry No. 54; it is specified in Mr Wills' list (RNW/10); there was no evidence or argument in support of the registration. I have no reason to suppose that anyone present at the hearing by any mistake or error said anything which he did not intend or that I mistakenly ascribed to him anything which he did not say. My refusal of the confirmation of the registration in my 1985 decision is as I intended, and having reconsidered what happened at the hearing, my then intention was not I think mistaken. My present decision is therefore: as regards this registration there has been no mistake or error within the meaning of the words above quoted from page 25 and paragraph 8 of the Eighth Schedule is inapplicable, and on this ground the application of Mr Day as now expressed fails.

But in case I am attaching too much importance to the first paragraph of Mr Day's November letter, I now treat his application as being made under any legal provision which could be applicable to the circumstances set out in his letters.

Because he was not present at the hearing, the legal provisions relevant are those applicable to decisions given against absent persons. By regulation 21 of the Commons Commissioners Regulations 1971 a Commissioner "may ... reopen the hearing and set aside any decision on such terms as he thinks fit if he is satisfied that (the absent) person had sufficient reason for his absence"; any application for any such reopening "must be made within 10 days from the date on which notice of the decision was sent to that person". Notice of my 1985 decision was sent to those concerned under cover of letters dated 17 May 1985; Mr Day's May letter in effect acknowledges receipt of the decision shortly afterwards but contains no request for it to be set aside; his August letter is expressed to be sent "for the Commissioner to read and report on", and for no other expressed reason; his November letter includes a request "for a reopening of the hearing", and is the first indication from him that this is what he wants. He is therefore out of time.

Even if I have (which I doubt) ——→ power to enlarge the time fixed by regulation 21, Mr Day's letters contain no grounds for any such enlargement. Nevertheless I now consider what my decision might be if any time limit on the application has been extended.

In giving such decision I consider I should follow the law as established by the High Court in relation to judgments given against a person in his absence; "where the judgment was obtained regularly there must be an affidavit of merits meaning that the applicant must produce to the Court evidence that he has a prima facie defence; see Evans v Bartlam (1937) AC 473 at page 480; compare Grimshaw v Dunbar 1953 1QB 408 and Hayman v Rowlands 1957 1WLR 317. Notice of my April 1984 hearing was sent to all concerned under cover of a letter dated 15 February 1984; Mr Day in his May 1985 letter impliedly acknowledges its receipt. My 1985 decision was therefore by all concerned against Mr Day "obtained regularly". I must therefore be satisfied that Mr Day has "merits"; for his benefit I will read his letters as affidavits. Merits by themselves are not necessarily enough: "obviously the reason if any for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion", see Evans v Bartlam ib.

I am not favourably impressed by Mr Day's reasons for not attending or not being represented at my April 1984 hearing: in his August letter he said such reasons were set out in his May letter; from it I infer that if he had attended he would have had to admit that he knew nothing about the questions under discussion or about the rights of common possibly attached to the Farm (Woodhouse) which he had purchased in March 1982. I cannot imagine he would then have persuaded me that I should adjourn the hearing for his benefit on the chance that he might be able to build up a case such as is set out in his August and November letters or that I should first give a decision as regards all the registrations accept No. 54 so as to enable him to decide whether the building up of any such case was worthwhile. His ignorance and lack of preparation was of course in a sense "sufficient reason" for his absence, but in my opinion his reason was not "sufficient" within any meaning which could be relevant to the said regulation 21.

As to "merits" I have the following observations on his letters:- (1) As to the grazing rights on the Unit Land in 1680, as to what and how the manorial lands were disposed of between then and 1838, as to any grant of rights made in 1838 to Mr Mortimore when he acquired Woodhouse Farm and as to the grazing by him and his family from then until 1935, Mr Day says: "all these facts can be checked in the property deeds, Devon record office and the manorial book of Ilsington", and (as to the 1838-1935 grazing) "this can be substantiated by local reliable sources"). A judicial determination of legal rights as they existed more than 300 years ago and as they have been exercised more than 100 years ago is not only for persons interested in local history (although they can often help very much) but for the application of legal principles to the documents produced; so at any re-opened hearing it would not be enough for Mr Day to say what he thinks could be deduced from documents which could be made but which are not then available. His failure in his letters to set out the actual wording of the documents on which he relies is a serious defect casting doubt on the "merits" of his application. (2) Although rights of common once established are not lost by non-exercise, see Tehidy v Norman 1971 2QB 528, it is wrong to interpret circumstances proved to have existed 30 or 50 years ago ignoring all that has happened since, see Copestake v West Sussex 1911 2 Ch 331; it is noticeable that Mr Day nowhere in any of his letters says that there has been any grazing on the Unit Land from Woodhouse Farm since 1935. (3) Even assuming that the Tithe Award records "right to depasture on Haytor Down" as being attached to land which can be identified with the about 15 acres now known as Woodhouse Farm, the claim of Mr Day is not wholly equatable with that made at the hearing by Mr M R Sanders for rights attached to Great Lonston. Mr Sanders said his farm had been previously owned by Mr Frank Berry (from whom his father bought it about 1955) who put stock on the Unit Land as did his father before him; this statement was made at a public hearing and although perhaps

inadmissible in a Court of Law as hearsay. In the absence of any cross-examination or suggestion by any person present I considered it to be a reliable indication of the known use of the farm after the 1939-45 war. (4) Woodhouse Farm being "but three-quarters of a mile up a country lane and quite accessible" to the Unit Land raises I think no presumption of it being reputed to have grazing rights over it, even although there may be some farms further west having a now final registration. (5) Our historical heritage is important: but it is not I think the purpose of the Commons Registration Act 1965 to provide for an accurate record of history; and although much history has come out as a result of hearings by Commons Commissioners, some of the provisions of the Act necessarily result in the Register not being historical.

Having regard to the 5 matters mentioned in the preceding paragraph and disregarding any difference there may be about any other matters specified in the letters of December 1985 and January 1986, my decision is that the circumstances set out in Mr Day's scheduled letters do not disclose any sufficient grounds for my re-opening the hearing.

It is said in the December 1985 letter that any grazing rights attached to Woodhouse Farm "have not been exercised for some 50 years and they are mainly of historical interest to him (Mr Day)". In his January 1986 letter Mr Day in effect accepts this as being a true statement. Subject to any appeal Mr Day may make against this my second decision to the High Court, my refusal to confirm the registration at Entry No. 54 contained in my 1985 decision, stands.

I have not overlooked the costs aspect of Mr Day's application. By section 17 of the Commons Registration Act 1965, a Commons Commissioner may make an order for costs. I suppose if the hearing was re-opened as Mr Day requests and if he was wholly unsuccessful, it is likely that he would be ordered to pay the costs of all other persons attending; so Mr Day's confidence in his prospect of success and his willingness to risk such an order being made against him, might be regarded as an argument in favour of re-opening the hearing, see Grimshaw v Dunbar supra. But against this, other persons by any such re-opening would be put to trouble and expense for which an order for costs would not be adequate compensation, and I must therefore for their protection consider "merits". Further if Mr Day is not so confident of success, such requirement is also some protection for him against the risk of considerable loss. It is my experience as a Commissioner that the consideration of the legal effect of documents more than 100 years old, and the determination of the surrounding circumstances as they existed when the documents were made and the consideration of how far the legal position as it was more than 100 years ago may be treated as still subsisting, are time consuming processes involving those concerned in considerable expense; the cost of the further hearing for the purpose of considering these and the other matters mentioned by Mr Day in his letters might run to hundreds of pounds.

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.

SCHEDULE

Part I: Letter dated 21 May 1985

When I purchased this property in March 1982, I was informed, and assured by my Solicitors, Messrs Bell & Co' of Torquay, that the Moorland Rights which had been enjoyed for generations by the previous owners of this property had been re-applied for or registered under the new Commons Registration Act.

Since the date of my domicile I have received only two lots of correspondence on this matter. The first dated 15th February 1984 referring to disputes and objections being heard at Exeter before a Commons Commissioner on the 10th April of that year. The second being correspondence received just recently, 17th May 1985. From either of these I have been unable to ascertain whether or not I have a registered claim to any form of rights on the Moor.

As this situation is very unsatisfactory from my point of view I would be very pleased if you would inform me whether in fact there are rights registered in the name of my holding. Should the reply be in the negative I would be very pleased indeed to receive any information and or advice as to my standing in this matter.

Part II: Letter dated 14 August 1985

First, I did not attend the hearing at Exeter on 10th April 1984 for the reasons stated in my letter of 21st May 1985, for which I apologise. I have now investigated my claim more thoroughly and am still of the opinion that Woodhouse Farm does have Moorland Grazing Rights (M.G.R.) on Haytor Down for the Following reasons:-

1. Originally Woodhouse Farm, was part of land owned by the Lord of the Manor of Ilsington.

2. The Manor had the sole grazing rights on Haytor Down for this locality prior to 1680.

3. In 1680 or thereabouts, the then Lord of the Manor, sold off many of the tenanted farms to the occupiers etc, but not the M.G.R. However, each farm was allocated M.G.R. and was called upon to pay a rent called the Chief Rent. This sum was settled around 1680 when most properties were sold and remained I believe a near static sum - payable 3 yearly.

4. Woodhouse Farm remained the property of the Manor however, and was in a unique position along with Pinchaford Farm; namely that these two properties were the last to be sold off by the Manor. For Woodhouse Farm this sale occurred in 1838, when the Lord of the Manor of Ilsington, a Miss Emlyn Phillmore, sold Woodhouse Farm to a Mr William Mortimore, along with M.G.R.

5. Now the Chief rents for the M.G.R. came into effect around 1680 with the sale of the first tenanted property. By 1838 - 150 years later, this Chief rent was obviously so small a sum that it was not a condition in the allocation of M.G.R. to Woodhouse Farm. Indeed at this time, many of the existing Chief rents were not paid & had been forgotten about.

6. That this was so and that Woodhouse Fm, indeed had legal grazing rights on Haytor Down is shown in the Tithe Survey of 1840 (2 yrs after Mr Mortimore's purchase). This states that Woodhouse Farm "Has the right of departure on Haytor Down". The deeds indicate the same. The Tithe Survey is to be found in the Devon Record Office at Exeter.

7. Mr Mortimore was known to have grazed cattle & sheep & use the M.G.R. for the near 100 yrs that he & his family farmed at Woodhouse. This can be substantiated by local reliable sources. This right has never been disputed and the rights to departure is all encompassing of buildings & pasture belonging to the property in question.

8. It seems that in 1935 when the "Law of Property" act came into effect, the chief rents were abolished (the sum had also become meaningless by that time) & each owner had the right to redeem it & pay a once & for all lump sum.

9. However, as mentioned, Woodhouse Fm, was never bound by the fact of having to pay a Chief Rent & therefore there was never any question of having to pay a lump sum for the Moorland Grazing Rights. The M.G.R. had already been established for all times at the purchase of Woodhouse Fr in 1838, & from my information that is so. This I feel negates the objections raised.

10. The Manorial Book of Parish Surveys contains the Chief rents & payments made, & it is obvious that by 1830 many payments by those supposed to pay had indeed fallen behind, as the supposed importance was lost due to the ever decreasing value of the sum involved.

11. In conclusion, I firmly believe that Woodhouse Fm, has moorland grazing rights on Haytor Down & therefore should be allowed for registration. The relatively late sale by the Manor in 1838 meant that the M.G.R. which went with Woodhouse when the deeds were drawn up were all part of the original sale - no Chief rents were required to be paid - the farm was not subject to them and therefore never had to be "purchased" after 1935. This is further supported by the Tithe Survey of 1840 as mentioned. All these facts can be checked in the property deeds, Devon Record Office & the Manorial Book of Ilsington Parish held by Rendles (Auctioneers) of Newton Abbot Devon.

I hope that this letter has put forward my claim in a clear enough way. New facts are coming to light all the time, but I now have to send this letter to you for the Commissioners to read and report on. To this day Woodhouse Farm is registered on a farm holding and I raise cattle on it. It is a working farm. The open moor is but three-quarters of a mile up a country lane and quite accessable

I do feel that these old historical rights should be preserved & every effort made to show that an old right exists. Because one may not exercise their rights all the time should not negate their claim. Similarly, those few people who use all the M.G.R. at the present time should not expect to monopolise the rights as a matter of course.

I do not feel that any "status quo" would be altered by granting the registration to properties legally entitled to them whether they be big or small now, as compared to their size at the outset. Our heritage is very important to keep hold of.

Part III: Letter dated 30 November 1985

I wish to apply for a reopening of the hearing relating to grazing rights upon Haytor Down (Unit No. CL 25) for the holding known as Woodhouse Fm, Higher Brimley, Bovey Tracey. This I make under the terms of the Eighth Schedule of the Decision Table, paragraph 8, & wish for this application to be placed on record on an addendum & clarification of my letter of Aug 14th 1985.

The evidence I wish you to consider is referred to in my letter to you dated Aug 14th 1985 & can be produced either as Property Deeds, signed statements and photocopies of relevant documents.

Please accept this letter as my application & also to note that as required by Schedule 8, paragraph 8, I have informed the two objectors of my intent to reopen the hearing & to contest their objections & indicate my evidence in support of my claim to grazing rights. I have also notified the Ilsington Commoners' Association via their secretary Mr R Wills of Narracombe Fm. The information furnished comprises a copy of my letter to the Commons Commissioner of Aug 14th 1985 and a copy of this letter Objector (1) Mr Longsdon No. 1039 (now Dartmoor National Park), Objector (2) Mr H Whitley No. 968.

In reply to Mr Longsdon, his sole objection was "the number of animals permitted to graze". This objection is duly noted. The Dartmoor National Park is now the successor to Mr Longsdon and is represented by Mr Sullivan-Gould. However, from the "Decision Document", page 5 (top), the Commissioner would appear to have accepted what I understand to be Mr Sullivan-Gould's appraisal of a sensible & fair way of apportioning the number of animals allowed to graze, once rights are established as "... for each ¾ acre of inbyland, one head of cattle, one pony or 4 sheep. This yardstick would appear to have been adopted by the Commissioner.

By applying the same yardstick to Woodhouse Farm, which has 14 acres of pasture, that is equivalent to 18 head of cattle or 72 sheep etc for which in-wintering facilities exist.

Further, I note that Mr Sanders of Great Lounston, has had identical objections, & was later granted continued use of his grazing rights with in fact an increase in the number of permitted animals (Page 9, top). Woodhouse too, has a "right of departure on Haytor Down as written in the Tithe Survey Schedule of 1840.

As for the objection of Mr Whitley, this clearly is incorrect and should be dismissed. The chief rent (in payment for grazing rights to the Manor) does not apply to Woodhouse Farm for the reasons stated in my letter of Aug 14th 1985. But to recap, they were not a necessary part of the sale agreement in 1838 between Miss Phillimore, then owner of Ilsington Manor, & Mr Mortimore who was the interested purchaser of Woodhouse Fm. Obviously those chief rents in operation pre 1838 were still required to be paid & collected every 3 years, right up until 1935. Thus Woodhouse Fm, is not to be found in the Manorial Book of Ilsington Parish (which contained entries relating to chief rents paid), & on which perhaps Mr Whitley based his objection. At this time however, Woodhouse is found in the Tithe Survey of 1840 showing it has a "right of departure on Haytor Down". This was an accepted fact. Further, that Woodhouse was a part of Ilsington Manor is

clear from the Survey of Ilsington Manor of 1566, when the then tenant, a Joanna Lamsede paid 14s 6d rent to the Manor.

I trust that the above will help confirm the registration for grazing rights to the above holding.

Dated this 5th day of March 1986.

A. A. Baden Fuller.

Commons Commissioner