COMMONS REGISTRATION ACT 1965

Reference Nos 209/D/217 to 224 inclusive

In the Matter of (1) Knowstone Inner Moor, Knowstone Outer Moor and Hares Moor (or Hares Down), Knowstone, and (2) Three pieces additional to Outer Moor and Hares Moor, two in Rachenford and one in Knowstone, all in North Devon District, Devon

DECISION

These 8 disputes relate to the registrations at Entry Nos. 4, 5, 17, 19 and 20 in the Rights Section and at Entry No. 1 in the Ownership Section of Register Unit No. CL127 in the Register of Common Land maintained by the Devon County Council and the registrations at Entry Nos. 4 and 15 in the Rights Section of Register Unit No. CL158 in the said Register and are occasioned by Objections Nos. 868, 869, 870, 871, 890 and 891 made by Knowstone Parish Council and noted in the Register on 17 December 1970 and 10 February 1971, and Objections Nos. 946 and 947 made by Mr Frederick Gordon Petch and Mr Peter Malet Barrington and noted in the Register on 5 January 1972.

I held a hearing for the purpose of inquiring into the disputes at Barnstaple on 25 March 1981. At the hearing: (1) Mr Herbert Renny Ferdinando as successor in title of Messrs F G Petch and P M Barrington (the said Objectors and also the applicants for the CL127 Right Section Entry No. 19 registration) were represented by Mr C M Harper, solicitor of Stephens & Scown, Solicitors of Exeter as agents for Cameron & Markby, Solicitors of Moor House, London Wall, London; (2) Mr William John Middleton and Mrs Josephine Mary Middleton (applicants for the CL127 and the CL158 Rights Section Entry No. 4 registrations) were represented by Mr C Verney, solicitor of Crosse Wyatt & Co, Solicitors of South Molton; and (3) Knowstone Parish Council were represented by Mr R Poole their chairman.

The land ("the CL127 Land") in Register Unit No. CL127 is a tract of open moor land containing about 342 acres; from its most northwesterly point to its most easterly point it is about 1½ miles long. On the OS map and for the purpose of the Right Section Entry Nos. 5, 7 and 19 it is divided into two parts: (1) Knowstone Inner Moor all north of Sturcombe River being OS No. 741 containing 91.518 acres; and (2) Hares Down and Knowstone Outer Moor being OS No. 802 containing 250.129 acres. Within and for the most part not very far from its west boundary runs the public road from Knowstone on the north to Rackenford on the south; near and within the north part of the CL127 Land is a cross roads ("Knowstone Moor Cross"); near and within the southwest corner is a T road junction ("Hares Down Cross"), one of the roads from which (that leading northeastwards) is the southeast boundary of the CL127 Land. Completely surrounded by the CL127 Land is an area ("Little Comfort Area") which is not included in the registration containing about 23.740 acres and being enclosed farm land and woodland; on this area is a dwelling house (Holmedale). In the Rights Section there are 21 Entries of which 16 being undisputed have become final. At Entry No. 1 in the Ownership Section is registered Mr Donald Robert Ivar Campbell as owner of all the CL127 Land.

The land ("the CL158 Land") in Register Unit No. CL158 comprises 3 pieces together containing about 10 acres, OS Nos 9, 104 and 802, being respectively a strip near Hares Down Cross on the south side of the said road leading northeastwards, an area about 250 yards long and nowhere more than about 45 yards wide further along the said road on the northeast side of the Sturcombe River and an area of about 8½ acres near Hares Down Cross lying on the west side of the said Knowstone-Rackenford Road. In the CL158 Rights Section there are 14 registrations which correspond with 14 out of the said 21 CL127 Right Section registrations and of which 14, 12 being undisputed have become final. The disputed registrations at Entry No. 4 and No. 15 of the CL158 Rights Section correspond with the disputed registration at Entry Nos. 4 and 21 of the CL127 Right Section. At Entry No. 1 in the CL158 Ownership Section Mr Cecil Manley and Mrs Betty Amelia Manley are registered as owners of all the CL158 Land.

At the hearing I first considered Objection No. 868 (Parish Council) to the CL127 Ownership Section registration (Mr Campbell). On the map attached to the Objection Hares Down and Knowstone Outer Moor are divided, the former edged red (about ⅔rds of the whole) and the latter edged blue (the remaining ⅓rd). I have a letter dated 11 March 1981 from Mr Campbell withdrawing his claim to ownership of Hares Down. If the registration had originally comprised Knowstone Inner Moor and Knowstone Outer Moor (without Hares Down) it would have become final under section 7 of the 1965 Act; Mr Campbell's ownership of these two Moors is consistent with the below mentioned extract from his conveyance dated 5 November 1946. In these circumstances, Mr Poole being satisfied with this withdrawal, I confirm the registration at CL127 Ownership Section Entry No. 1 with the modification that there be removed from the register Hares Down as shown edged red on the plan attached to Objection No. 868.

In the result I proceeded at the hearing on the basis that the owner of Hares Down is now unknown; so unless in proceedings hereafter to be held under section 8 of the 1965 Act a Commons Commissioner is satisfied about its ownership, it will remain subject to protection under section 9 of the Act.

By far the greater part of the hearing was concerned with Objection No. 946 (Messrs Petch and Barrington) to the CL127 Rights Section registration at Entry No. 4 (Mr W J and Mrs J M Middleton); such registration being of a right of common attached to Little Comfort Farm (being nearly all the Little Comfort Area) over all the CL127 Land, described as: "Sporting Rights. To graze: 30 cattle 2 horses 2 sheep' The grounds of the Objection are: "That the sporting rights do not exist at all". Mr Harper said he was instructed not to pursue the registration at CL127 Right Section Entry No. 19 made on the application of Messrs Petch and Barrington, being of a right attached to Rackenford Manor to graze 25 cattle and 100 sheep over Outer Knowstone Moor and Hares Down.

In support of the registration oral evidence was given by Mr W J Middleton, his wife Mrs J M Middleton and their son Mr J F Middleton (born 17 September 1955). In the course of this evidence were produced: (1) an abstract dated 1946 of the title of Mrs Emily Tucker including a conveyance dated 29 September 1915 to Messrs R and W H Blake of "Little Comfort" comprising 21 a, 2 r, 39 p.; (2) a conveyance dated 14 November 1946 by Mrs Emily Tucker to Mr W J Middleton of Little Comfort containing about 21 a. 3 r.; (3) a conveyance dated 21 December 1951 by which Mr W J Middleton conveyed a half share in the premises to Mrs J M Middleton; and (4) a letter dated 18 June 1953 from Fosse Wyatt & Co to Mr W J Middleton. The

relevant words in the 1946 conveyance are: "Together also with all rights of stocking and sporting which the Vendor may have on Hares Down Common No. 802 on the Ordnance Survey Map ... and containing 250.214 acres". The 1915 conveyance appears from the abstract to have contained identical or very similar words.

Mr W J Middleton said (in effect) that from 1946 to 1955 he had lived at Little Comfort in the farmhouse being on the edge of Hares Down. He had exercised his sporting rights under the 1946 conveyance mainly by shooting rabbits. He had never seen a pheasant there. Once or twice a long time ago he had exercised sporting rights over Sturcombe River. After he left Little Comfort in 1955, he lived about 4 miles away; the farmhouse was after he left occupied for about 3 or 4 years, and after that it had been unoccupied, and vandalised; but they continued "to run the land". After he left the farmhouse he continued to shoot over Hares Down, "it could be 3 or 4 times a year". The main thing was rabbits, but there could be a crow or a magpie (pests). About once a year he had fished the River; there could be trout.

Mrs J M Middleton said she had never herself exercised the sporting rights. However Mr F J Middleton said (in effect):- He remembered particularly going to Hares Down at Christmas time to shoot rabbits; "Boxing Day was for rabbitting"; probably every Christmas.

Oral evidence was also given by Mr William Ernest Norman of Great Wadham who had known Hares Down Moor very well for over 30 years, who was Chairman of the Parish Council for about 4 or 5 years ending about 1971 and who before that had been a member for some years. He said (in effect):- He had always understood that Mr Middleton had sporting rights over it, and he knew that he went shooting there. However in his opinion the Moor was not worth going there to shoot; the land is poverty stricken with very little keep for animals; in his opinion practically worthless.

Mr Harper said (in effect):- Mr F G Petch now deceased and a Mr P M Barrington was and now is a partner of Cameron & Markby. At the date of the Objection No. 946 (17 December 1971) they were trustees of a Ferdinando family settlement which included land to the southwest (Canworthy Plantation) and the land to the south (Rackenford Moor and the land between it and the said Plantation) of the CL127 land, all the land in the settlements containing about 1,200 acres; Rackenford Manor was included. Since the Objection much of the trust estates had been split up, parts including Canworthy Plantation having been sold leaving unsold Rackenford Moor and the land between it and the Plantation.

Mr Ferdinando in the course of his oral evidence said that he had known the Estate since 1968 and spoke as if for all purposes now relevant he had ever since then been the owner. He said (in effect):- He owned all the lands south of and adjoining the CL127 Land (I am treating the part of the CL158 Land in between as negligible) including Rackenford Moor and the said land in between it and the Plantation. About 2 years ago he sold the balance of the Estate including the big house; what he retained was about 750 acres. He reared pheasants. He had a keeper. Two of his main covers come very close to the boundary between his land and the CL127 Land. The pheasants stray on to Hares Down and they have to be made to come back as best they may! The shooting is very interesting because

there is a great deal of game of all kinds; it is specially good for woodcock, and there are quite a number of snipe; and from time to time there are literally hundreds of golden plover; it is one of the few places where you can find a curlew nesting; the ducks fly in the evening to the ponds, one of which is near Hares Down just within his land. He had never fished in Sturcombe River because he did not think there were any fish there.

Mr Ferdinando was questioned about a statement he made at the beginning of his evidence that he had since 1968 shot over Hares Down regularly. The result provided much information about his shooting activities. As I understood him the guns were never except possibly on a few occasions of no significance in this case, ever active on the CL127 Land; although his keeper probably walked over it a good deal, particularly for the purpose of driving back pheasants to his land. He made it clear that he did not as a result of any of his shooting activities claim that he had any rights of shooting or of any other kind over the CL127 Land.

At the conclusion of the evidence above summarised, Mr Verney agreed that as regards the CL158 Land, "Sporting Rights" in the registration at Rights Section Entry No. 4 could be deleted.

Two days after the hearing I inspected the CL127 Land and the CL158 Land for the most part from the public roads which either cross these lands or run next to them.

The attitudes to the CL127 Land of Messrs Middleton (interested in rabbits), of Mr Norman (valueless) and of Mr Ferdinando (interested in woodcock, snipe, golden plover etc) were as appears above astonishingly different. During my inspection I was at first inclined to think that Knowstone Inner Moor and Knowstone Outer Moor were practically useless for anything but occasional grazing and that Hares Down was practically useless for anything; but on further consideration it was evident that the interests of Messrs Middleton and Mr Ferdinando although quite different were both reasonable. I consider that as regards their attitudes there was no conflict, requiring any decision on my part, between the evidence of Messrs Middleton, Mr Norman and Mr Ferdinando and that the difference in their attitudes is of no significance in these proceedings.

Mr Verney contended that because neither of the Objectors nor Mr Ferdinando either have or claim any estate or interest in the CL127 Land, I should disregard Objection No. 946 altogether, and confirm the registration at Entry No. 4 so as to produce the finality which would have followed under the Commons Registration Act 1965 if such Objection had never been made. Although the evidence on this point was not clear (no documents were produced), I consider it just that Mr Ferdinando should in these proceedings be able to support the Objection to the same extent as the Objectors would have been entitled to do if they had at the hearing been represented; no questions were put to Mr Ferdinando asking him to explain how he had become entitled under the family settlement; and although it is possible that he is now no more than a beneficiary (perhaps the only substantial beneficiary) under the settlement, I conclude that I ought in these proceedings treat him as entitled to support the Objection as effectively as if he had made it himself. Neither the 1965 Act nor any of the regulations made

under it requires that an Objector shall have any estate or interest in the land registered; and I cannot imply any such requirement. Further although I accept that neither the Objectors nor Mr Ferdinando have ever had any estate or interest, he is at least practically concerned with any shooting rights on the CL 127 Land; as he explained if as the result of these proceedings Mr Campbell's ownership of part of the Land is established he is hopeful of obtaining his permission either to shoot or to get from him other advantages ancillary to the shooting he enjoys on his own land and hopeful too of obtaining such advantages on Hares Down from the Council or other persons possibly interested. I do not regard Mr Ferdinando's part in these proceedings as being in any way vexatious.

However I accept Mr Verney's contention to this extent: Mr Ferdinando's evidence neither conflicts with any of the evidence given by or on behalf of Mr Middleton nor is directly relevant to any question I have to decide. Nevertheless I thank Mr Ferdinando for his help at the hearing.

Mr Harper contended first that the evidence given by or on behalf of Mr Middleton did not establish (as a matter of fact) the existence of any sporting rights owned by Mr Middleton (or anyone else); and secondly the sporting rights are not (as a matter of law) registrable under the 1965 Act. The second contention is or maybe outside the grounds of the Objection; but because it is of first importance as being relevant to my jurisdiction to consider the facts at all, I consider I should deal with it. I record that if need be I would under regulation 26 of the Commons Commissioners Regulations 1971 allow this contention as an additional ground.

The relevant words of the 1946 and 1915 conveyances are "right of ... sporting"; and the relevant words of the registration are: "Sporting Rights". There is nothing in the conveyances to indicate that these words were in them used otherwise than in their ordinary sense; being I think "rights" for the purposes of sport to take such animals, birds and fish as may be appropriate to the land; in this case those mentioned being rabbits, pheasant, woodcock, snipe, golden plover, duck and trout.

There is no doubt that such rights are recognised by law as a profit a prendre; definable as a right to enter another's land and to take some profit of the soil or a portion of the soil itself for the use of the owner of the right; see Halsbury Laws for England (4th edition) vol. 14 para 240. Under the Commons Registration Act 1965, I am concerned (in these proceedings) only with "rights of common"; these are not in any now relevant way defined in the Act, so I have to determine whether apart from the Act "Sporting Rights" are or are not rights of common. As stated in Halsbury ib. para 244 note 2, almost all rights of common are profits a prendre, but all profits a prendre are not necessarily rights of common.

In my view the essence of a right of common is that it is a right exercisable in common, that is exercisable at the same time as is exercisable at least one other like right (including a right exercisable as such by the owner of the land). The 1965 Act supports this view in that it provides expressly for the right of sole vesture and herbage to be included as a right of common, apparently assuming that if not in the Act expressly included such sole rights would not be rights of common.

I have not overlooked that many sporting rights are owned or actually exercised by more than one person, sometimes described as a syndicate, under formal or informal agreements; in such circumstances the right may properly be said to be owned "in common"; but rights although owned by more than one person in common are not rights of common unless they are exercisable at the same time as other like rights. The plurality of the expression "Sporting Rights" indicates the choice between different kinds of animals, birds or fish; there is only one right. A sporting right held in fee simple (being the only holding with which I am concerned) in my view in ordinary language carries with it the idea of exclusiveness; as being a right which must be enjoyed without interference from anyone exercising at the same time a like right. This idea of exclusiveness has not I think been abrogated by the statutory exception from it of ground game under the Ground Game Act 1880. For these reasons my decision is that a sporting right whether expressed in the singular or in the plural is not a right of common within the meaning of the 1965 Act.

However Mr and Mrs Middleton should not lose the benefit of their registration merely because when they made their application they chose the wrong words to describe the right they have. So I now consider whether I can modify the registrations by substituting some such words as "right of rabbitting" which could in law be found to exist upon the activities described by him and his son.

In Samford and Havel's case (1612) Godb. 184, in answer to a claim for trespass for taking hares and coneys, the defendant pleaded that he had a right of common in the place for 240 sheep and the "common was surcharged with coneys to hunt them, kill them, and carry them to his messuage"; the court while conceding that a man may prescribe to have so many coneys "to spend in his house", rejected the plea. I can find no other case dealing with a possible right of common to take rabbits. However as regards taking fish, that a right of common to do this (not claimed in gross and limited) cannot be inferred from any practice, is I think clear law; see Chesterfield v Harris 1908 2 Ch 397 1911 AC 623; in particular see the judicial observations about the possibility of inferring a legal right to take fish without limit.

From these cases I conclude that a right to take rabbits can only be a right of common if the rabbits are (as was said more than 300 years ago) "spent" in the "house", that is taken for the purpose of being there eaten. In Harris and Ryan on Common Land (1967) it is observed at page 42 in relation to a possible right to take birds and rabbits: "proof would undoubtedly be difficult in cases where there was a wide deviation from the kinds of right (of common) more generally recognised". However I do not regard such a right as impossible in modern times because while acting as a Commons Commissioner I have at least in one other case been told by a witness that in the 1920s rabbits off the common were to him an important part of his food.

Messrs Middleton in their evidence made it clear that from 1955 their rabbitting had nothing to do with any house on Little Comfort. I conclude therefore that any shooting of rabbits done by them provides no grounds for finding that they have a right of rabbitting which could be a right of common within the meaning of the 1965 Act.

No suggestion was made at the hearing that Mr and Mrs Middleton did not have a right of grazing as registered, and I accordingly conclude that this part of the registration was properly made. But they cannot justify their rabbitting under the 1880 Act merely because they have over the land a right of common to graze; see Halsbury ib. vol. 2 para 253.

My conclusions as set out above are essentially the same as those reached by the Chief Commons Commissioner in circumstances somewhat similar; see re Lustleigh Cleave, Devon Unit No. CL 57. Other judicial decisions relating to the questions above discussed are mentioned in his decision (dated 2 May 1978, reference 209/D/114-130).

As to Mr Harper's first contention that the sporting rights claimed by Mr Middleton "do not exist at all" (as stated in the grounds of Objection, I express no opinion). Although Mr Ferdinando would, as I understood him like a decision as to this, I consider that I must leave this question open to be decided if he or anyone else wishes, by the High Court or other tribunal having jurisdiction; having myself concluded that sporting rights are not within the 1965 Act, it follows that they are outside the jurisdiction of a Commons Commissioner.

Accordingly for the reasons set out above, I confirm the registration at Entry No. 4 in the CL 127 Rights Section and in the CL 158 Rights Section with the modification in each case that the words "Sporting Rights" be deleted. And I refuse to confirm the registration at CL 127 Rights Section Entry No. 19 (F G Petch and P M Barrington).

As to the registration at Entry No. 20 and No. 15 in the Rights Section of Register Unit Nos. CL 127 and CL 158 respectively, each made on the application of Mr R T and Mrs V D Ayre, and now disputed by Objections (Parish Council) No. 871 and No. 390 respectively on the grounds "local inhabitants confirm and testify that Poole Farm never had rights on Knowstone Moors or Hares Down":- Mr Norman in the course of his evidence produced a letter dated 11 April 1980 from Veitch & Co., which they on behalf of Mrs V D Ayre widow of the late Mr R T Ayre abandoned the application for this registration. I have letters dated 27 February, 20 March and 11 April 1980 from Veitch & Co to the Commons Commissioners to the same effect. In these circumstances I refuse to confirm these two registrations.

As to the registrations at Entry Nos. 5 and 17 in the CL 127 Rights Section made on the application of Mr Adam Lapinskas and Messrs Harry Roland Hinton and Jeffrey Beverly Charles Hinton respectively (both as tenants) to graze animals attached (No. 5) to land at Moortown, Barton and Brownsford (an area about $1\frac{1}{2}$ miles long and $\frac{1}{3}$ a mile wide) and (No. 17) to part of Brownsford (an area little under $\frac{1}{2}$ a mile long and about $\frac{1}{4}$ wide):- The ground of the relevant Objections (Parish Council) Nos. 869 and 870 are (except for one sentence) the same: "Information and local recollection confirm that Moortown never had common rights on Knowstone Moors or Hares Down and there was never a Manor Farm, Moortown until Mr R D I Campbell called part of Moortown "Manor Farm". The fact that a property known as Brownsford (which exercised rights in the past) was sold by Mr Campbell and most of the land was divided between his two tenants of Moortown Barton and Manor Farm Moortown, does not automatically give to either farm common rights. The farmhouse, all the buildings, and a small portion of the land are the property of the purchaser and present owners of Brownsford, now called Great Comfort."

These registrations were not supported by anyone present or represented at the hearing, although I then received a letter dated 24 March 1981 from Mr Ivar Campbell of Tiverton Castle saying that Mr A Lapinskas and Mr M Dalton of Moortown Barton and of Manor Farm as his tenants had asked him to explain the rights they claimed under their leases on Knowstone Inner and Outer Moors, as set out in the Schedule hereto.

Against the registrations Mr Norman produced as explaining how the Objections came to be made: (1) copy letter dated 14 August 1967 to Mr Walter Berry of Meadow View and his reply dated 20 September 1967 to the effect that Moortown was bought by his cousin Mr T Berry who sold it to Mr Alexander and they never had any common rights on Knowstone Moor; (2) a statement by Mr F Newton dated 28 December 1970 that he had lived in Knowstone for 92 years and that he did not recollect that Moortown had common rights on Knowstone Moors or Hares Down; and (3) a letter dated 5 October 1967 from Hughes & Wilbraham land agents of Exeter regarding some sale particulars and saying in effect that a 1763 terrier showed that Moortown did not and as far as he knew never had belonged to the Throckmorton Estate and therefore could not be part of the manor of Knowstone which had belonged to the Throckmortons for centuries, and that any change of the ancient name of Moortown to Knowstone Manor was rather a "local joke" when a certain Mr Alexander changed it. Mr Norman explained that Mr Berry lived with his cousin at Moortown to the time the Berry family sold it in the 1920s to Mr Alexander (as appears from the enclosure to his 1981 letter Mr Campbell acquired Moortown Farm from Mr A J P Alexander under a conveyance dated 5 November 1946). He (Mr Norman) also produced the particulars of sale dated 30 October 1919 of the Knowstone Estate referred to in the said October 1967 letter. Mr Norman clearly intended me to infer from his evidence that I could properly rely on the statements of Mr Berry and Mr Newton as being in accordance with such enquiries that the Parish Council had been able to make.

So there is some conflict between the information put before me by Mr Campbell and by the Parish Council.

In my view an objection to the registration of a right of common puts on those concerned to support it the burden of proving that the registration is proper. They should, if a detailed objection is made by the local parish council come to the hearing at least with some evidence of the existence of the right and be prepared to meet to some extent the points raised in the objection. In my view a letter sent on their behalf, unless cogent, is not enough.

As I understand Mr Campbell's March 1981 letter, his tenants on behalf of whom he is writing are in effect claiming in respect of lands of which they are his tenants a right of common over other lands also owned by him. The 1965 Act in its definition of rights of common expressly excludes those held for a term of years; so I am not concerned with the rights his tenants may have under their tenancies. No "ordinary" right of common can in law exist for the benefit of land over other land in the same ownership. The law recognises that a person may have a quasi right of common in certain circumstances, which right may be registrable; but the information in the letter falls short of showing any such right.

I thank Mr Campbell for his attempt to assist his tenants and myself. But knowing no good reason why his tenants should not (notwithstanding that he unfortunately was at the date of the hearing indisposed) have attended the hearing to prove any rights they had and answer (if they had an answer) points made by the Parish Council. In these circumstances I consider I should give full effect to the evidence of Mr Norman and resolve such conflict as there is in favour of the Parish Council.

Accordingly for the above reasons my decision is that the registrations at Entry No. 5 and No. 17 in the CL 127 Rights Section were not properly made, and I refuse to confirm them.

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
(Mr Campbell's letter)

1. I enclose a photostat copy of page one of my Title Deeds, from which you will see that I own the freehold of Knowstone Inner and Outer Moors, 181.487 acres, and the Lordship of the Manor of Knowstone.

2. I understood from Mr Alexander who sold it to me, that Moortown Barton had grazing rights on the Inner Moor.

Brownsford Farm, (now known as Great Comfort) has always had grazing rights on both Knowstone Inner and Outer Moors, (and by vicinage only on Haresdown.)

I sold Brownsford (house and 13 acres) in the 60s, expressly excluding to the Purchaser any common rights.

The remaining Brownsford land was divided and leased to the two tenants of Moortown Barton (Mr Lapinskas) and Manor Farm (now Mr Dalton.) I was advised that they could take over the common rights that formerly pertained to Brownsford.

I might mention that the above tenants have never used their common rights, nor are they likely to do so. But in all fairness, I and they, would like them to retain the rights in case there was ever a severe food shortage in the future.

Dated this 5th day of October 1981.

A. A. Baden Fuller

Commons Commissioner