



Reference Nos. 209/D/430
209/D/431
209/D/432

In the Matter of Trendlebere
Down, Lustleigh, Teignbridge
District, Devon

DECISION

These disputes relate to the registrations at Entry No. 1 in the Land Section, at Entry Nos. 2 to 7 inclusive, 10 to 14 inclusive and 16 to 23 inclusive in the Rights Section and at Entry No. 1 in the Ownership Section of Register Unit No. CL58 in the Register of Common Land maintained by the Devon County Council and are occasioned by Objection No. 29 made by Hugh Millar Peskett and noted in the Register on 17 September 1979, by Objections Nos. 127, 128, 129, 130, 131 and 132 made by Hugh Millar Peskett, Margaret Ann Peskett, Charles Richard Gore-Lloyd and Celia Margaret Ann Gore-Lloyd and noted in the Register on 9 and 14 September 1970 and by Objections Nos. 611, 615 and 884 made by Mrs B MacDonald and noted in the Register on 13, 10 and 30 November 1970.

I held a hearing for the purpose of inquiring into the disputes at Exeter on 10 April 1984. At the hearing (1) Mrs B MacDonald who made Objections Nos. 611, 615 and 884 attended in person; (2) Mr Colin Noel Evans who applied for the Rights Section registrations at Entry Nos. 3 and 4, attended in person; (3) Mr Maurice Harold Retallick as successor of his father Mr Harold George Retallick (he died in 1981) who as tenant (with Mr Herbert Hugh Whitley as owner) applied for the Rights Section registration at Entry No. 5 and as owner (alone) applied for the Rights Section registrations at Entry Nos. 6 and 7, attended in person; (4) Mr Herbert Hugh Whitley who applied (as aforesaid with Mr H G Retallick) for the Rights Section registration at Entry No. 5, attended in person; (5) Mr Kurt Eric Allerfeldt and Mrs Evelyn Joan Allerfeldt who applied for the Rights Section registration at Entry No. 14 were represented by Mr A H D Mellor, solicitor of Tozers, Solicitors of Newton Abbot; (6) Mr David William Coysh who applied for the Rights Section registration at Entry No. 17 was represented by his friend Mr R N Wills, secretary of Ilsington Commoners Association; (7) Dr Patrick Gerald Kidner and Mrs Grizelda Flora Kidner who applied for the Rights Section registration at Entry Nos. 18 and 22, were represented by Mr R Keast solicitor of Stephens & Scown, Solicitors of Exeter; (8) Mr Frank Perryman who applied for the Rights Section registration at Entry No. 19 was represented by Mr M G Cleave clerk with H Priscott & Co, Solicitors of Newton Abbot; and (9) Mrs J Roe of the Mill House, Lustleigh as successor of Mrs Moyra Congdon Lucas who applied for the Rights Section registration at Entry No. 20, attended in person.

The land ("the Unit Land") in the Register Unit is a tract of about 306 acres, approximately triangular, bounded on the west by Register Unit No. 103 being Black Hill, bounded on the south mostly by Yarner Wood (National Nature Reserve) and at its east end by Register Unit No. CL81 (being the part of Trendlebere Down in the parish of Bovey), and bounded on the northeast by a line a short distance from the River Bovey. The Unit Land slopes generally from its southwest corner down to the River: it is crossed by and open to the road B3344 from



Manaton to Bovey Tracey. In the Ownership Section at Entry No. 1 Mr Hugh Millar Peskett of Knowle, Lustleigh is registered as owner of the whole of the Unit Land. The grounds of the Objections are set out in the Schedule hereto.

About Entry Nos 18 and 22 (Dr P G and Mrs F G Kidner), Mr Keast said that the rights registered were derived from the old Water Estate of which Beckhams formed part and that common rights on Trendlebere had been referred to in all conveyances ever since. Mrs F G Kidner in the course of her oral evidence said (in effect):- They had since 1965 lived at Beckhams in Manaton. She was well acquainted with Trendlebere Common and its use. They had grazed it with cattle since 1965, except that recently they had not grazed because of the risk of scab and brucellosis. There is some grass, but it is mostly heather; the grazing is poor; for stock it is useful for shelter and rest, if they have been fed elsewhere. She contended that you do not lose your rights if you do not stock a common. About the other registrations, Mrs Kidner thought that Knowle House Limited who were the owners of Knowle sold about 10 years ago and that there was another sale next month (May 1984). She could not comment on all the Rights Section registrations but as below mentioned gave me some information about some of them.

Mr K E Allerfeldt of Yarner said (in effect):- That sheep which have from Yarner (farm) or from Yarner Down (CL 184) strayed on the Unit Land (about 300 yards away) tend to wander down, especially in stormy weather.

After the hearing I inspected the Unit Land from various points on the B3344 road. The view of it as a landscape to look on, is very fine; when I saw it the colours and shadows produced a beautiful effect. The walk over it in fine weather would be a pleasure to many. Whether anyone would ever want to graze it much, to me seemed doubtful; but that some might wish to graze some of it sometimes, to me seemed evident enough. The Unit Land appeared at least to be common land within the popular meaning of these words.

In considering whether Dr and Mrs Kidner have discharged the burden of proving the validity of their registrations, I can I think take into account that they are only particularly specified in one Objection, the Peskett and Gore-Lloyd No. 130 and that nobody attended the hearing to support either this Objection or the Land Section Objection No. 127 and that if neither of these Objections had been made the registrations would have become final under section 7 of the 1965 Act without the need of a Commons Commissioner's hearing; and also that nobody at the hearing suggested that there were not rights as registered attached to Beckhams. I infer that the grazing of Dr and Mrs Kidner since 1965 can properly be reflected back at least to the sale of the Water Estate and that such grazing together with the conveyances mentioned by Mr Keast show that the registrations ~~was~~ properly made. Accordingly I CONFIRM the Rights Section registrations at Entry Nos 18 and 22 without any modification.

As a necessary consequence of my decision so far, the Unit Land must be within the definition of "common land" in section 22 of the Commons Registration Act 1965. So, I CONFIRM the Land Section registration at Entry No. 1 without any modification.

As to the Ownership Section registration and the other Rights Section registrations, the circumstance that Mrs MacDonald said that her Ownership Section Objection was withdrawn and that nobody attended to support the Peskett and Gore-Lloyd Objections is for my producing the same result as would follow under section 7 of the 1965 Act



if these objections had never been made. Once an objection has been made to a registration, the burden of proof is on the person who seeks to support it and nobody at the hearing concerned with any registration (except Mrs Kidner) gave any evidence in support of any registration. Further in view of the sales of Knowle and the absence of any notification among the papers of the Commons Commissioners of the successors in title if any of Messrs Peskett and Gore-Lloyd, it may be that the absence of any evidence in support of the Objections made by them, was an oversight. In these special circumstances I consider I should do the best I can on the information put before me by Mrs Kidner and others at this Unit Land hearing and on my knowledge of the locality as a result of what I saw on my inspection and have been told during hearings held by me about adjoining or nearby Register Units.

Entry Nos 11 (A F Cowlard, E D Riley and C M Cowlard), 13 (G D Hart), 19 (F Perryman) and 21 (R C and H M Longsdon and F J Dymond) are expressed as "to stray". For the reasons stated under the hearing "straying" in my decision dated 30 June 1983 and made in re Forest of Dartmoor (CL 164), I consider that such registrations in the absence of any evidence of special circumstances (I have none in this case) are irregular. About No. 11, Mrs Kidner said that she had never heard of animals straying from Ullacombe; about No. 13 I have a letter (yellow form) addressed to County Hall dated 2-1-71 and signed by Mr G D Hart agreeing to the Entry "being cancelled"; and about No. 19 Mr Cleave on behalf of Mr Perryman said that the registration was withdrawn. On these considerations I conclude that registrations were not properly made and I REFUSE to confirm the Rights Section registrations at Entry Nos 11, 13, 19 and 21.

Entry Nos 3 (C N Evans), 4 (C N Evans), 5 (H G Retallick and H H Whitley), 6 (H G Retallick), 7 (H G Retallick), and 17 (D W Coysh) are of rights attached to lands in Ilsington. In the course of a hearing about Register Unit No. CL 103 (Black Hill in Manaton), I had detailed evidence about the grazing on it from farms in Ilsington, and about such grazing I have given a decision of even date avoiding all the registrations of rights attached to such farms. The relative situation and the appearance of Ilsington, Black Hill, and the Unit Land are against any farms in Ilsington which have no right over Black Hill having any right over the Unit Land. At this Unit Land hearing, Mr H G Retallick and Mr H H Whitley said that Entry No. 5 was withdrawn and Mr R N Wills on behalf of Mr D W Coysh said that Entry No. 17 was withdrawn. I conclude that these registrations were not properly made, and accordingly I REFUSE to confirm the Rights Section registrations at Entry Nos 3, 4, 5, 6, 7 and 17.

About Entry No. 14 (K E and E J Allerfeldt), Mr Mellor said the Entry was withdrawn. About Entry No. 12 (W E Wills), Mrs Kidner said that Rudge Farm is about 3 miles away and she knew of no grazing of the Unit Land from it. About Entry No. 16 (P A Keogh), Mrs Kidner said that there had been no grazing on the Unit Land from Deal Farm. About Entry No. 23 (P M Roberts), Mrs Kidner said that the land at Lower Hisley is about 3 miles down the valley and is now a pony stud. In the absence of any evidence in support of these registrations, I conclude that they were not properly made; accordingly I REFUSE to confirm the Rights Section registrations at Entry Nos 12, 14, 16 and 23.

About Entry No. 2 (J F H Dadd), Mrs Kidner said that she could not help. About Entry No. 20 (M C Lucas), Mrs Rowe as a person concerned to support the registration suggested that I confirm it; I have no note or recollection of Mrs Kidner saying anything about it. As to No. 2, Whisselwell Farm is in



Bovey Tracey and is some distance from the Unit Land and there is a cattle grid between it and the Unit Land across the B3344 road; nevertheless the existence of the right registered is not unlikely. As to No. 20 I have been unable to find Mill House on any map, but I think I can assume that Mrs Kidner, knowing that Mrs Rowe was present, would ~~criticised~~ the registration if she knew of anything against it. On these considerations I conclude that these registrations were properly made and accordingly I CONFIRM the registrations at Rights Section Entry Nos 2 and 20 without any modification.

About the Ownership Section registration at Entry No. 1 (H M Peskett) of all the Unit Land and the Rights Section registration at Entry No. 10 (H M Peskett) "quasi right by virtue of ownership of the soil", there was some discussion. Mrs MacDonald said that her Ownership Section Objection No. 615 is withdrawn on the basis (as I understood her and was apparently accepted by others present) that Mr Peskett was in 1968, when the registration was made, the owner, and it was said that I ought for this reason to confirm his Rights Section registration at Entry No. 10. Notwithstanding that no person claiming as successor in title of Mr Peskett attended to offer evidence of ownership, I ought not I think to require him or them to produce evidence if it would not be contested by anyone and I was doing no more than achieving the same result as would have followed under section 7 of the 1965 Act if Mrs MacDonald had never made her Objection. For these reasons, I CONFIRM the Ownership Section registration at Entry No. 1 without any modification.

About Entry No. 10, the considerations are I think different. The right as now described in the Register is expressed to be attached to "The land at Trendlebere Down ...", that is, the Unit Land itself. I accept that the owner of the soil of a common may have a registrable quasi right of common over a common which belongs to him attached to other land of his, see *Musgrave v Inclosure* (1874) LR 9 QB 162; eg where there is grazing on the common, from a farm belonging to the owner of the common on the same terms as there is grazing on the common from a farm not belonging to the owner of the common. But a quasi right of grazing from the common itself, is I think not recognised by law. For this reason I REFUSE to confirm the Rights Section registration at Entry No. 10.

Because at the hearing there appeared to be some confusion about the position of the successors of Mr Peskett and because arising out of some complication not appreciated by those present at the hearing, this decision may contain some mistake which ought to be put right without putting those concerned to the expense of an appeal, I give to the successors in title of Messrs Peskett and Gore-Lloyd and to the persons who attended the hearing or were entitled to be heard at it, and to their successors in title, liberty to apply to correct any mistakes or errors there may be in this decision.

It might help to finalise the said registrations if any person who reads this decision and who knows the present owners of the Unit Land, suggested to them that they write to the Clerk of the Commons Commissioners giving their names and addresses and summarising how they claim to be entitled in succession to Mr H M Peskett.

Any application pursuant to the said liberty to apply should be made within THREE MONTHS from the day on which this decision is sent out (or such extended time as a Commons Commissioner may allow) and should in the first instance be by letter to the Clerk of the Commons Commissioners stating the mistake or error and the



applicants reasons for thinking it should be corrected. A copy of the application should be sent to any person who might be adversely affected by the application being granted and for their information to the County Council as registration authority. As a result of the application the Commons Commissioner may direct a further hearing unless he is satisfied that the error or mistake is obvious and all those concerned are agreeable to it being corrected. Of such further hearing notice will be given only to those persons who on the information available to the Commons Commissioner appears to him to be concerned with the registration in question. Any person who wishes to be given notice of any such further hearing should by letter inform the Clerk of the Commons Commissioners as soon as possible specifying the registration, a further hearing about which he might wish to attend or be represented at.

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
(Objections)

Part I: Land Section

No. 127: by H M and M A M Peskett and C R and C M A Gore-Lloyd; (a) the whole of the land comprised in this Register Unit was not Common Land at the date of Registration. (b) The whole of the land comprised in this Register Unit was not Manorial Waste at the date of this Registration. (c) No rights of common at all subsist on the land. (d) If rights of common did ever exist, these were extinguished. (e) There is documentary evidence of Inclosure of the land. (f) There have been no modern grants of rights of common. (g) If the land was ever manorial waste, such status ceased on or before 21 December 1805.

Part II: Rights Section

Note: by subsection (7) of section 5 of the Commons Registration Act 1965, Objection No. 127 must be treated as an objection to all the Rights Section registrations.

No. 29: by H M Peskett applicable to Entry Nos 2, 3, 4, 5, 6 and 7; over this land there are no rights of common whether of pasture or estovers or turbary by reason of appurtenance to dominant tenements in the Parishes of Ilsington or Bovey Tracey are rights of common by reason of vicinage to the lands shown on the Commons Register by unit numbers CL 25 and CL 184 according to the rule in the Commissioners of Sewers v Glasse 1874 LR 19 Eq 134 namely that the lands are not contiguous.

No. 128 by H M and M A M Peskett and C R and C M A Gore-Lloyd; applicable to Entry Nos 12 and 20; without prejudice to whether or not the land is common land (a) the rights do not exist. (b) The rights never have existed. (c) If such rights ever did exist they have been extinguished by implied release by abandonment. (d) If such rights ever did exist they were extinguished by the terms of the Auction



of 1961, whereby the Vendors, in the particulars conditions of sale and contracts, expressly conveyed all such rights if any that they possessed in or over Trendlebere Down to the Purchaser of Lot No. 1. These registrations relate to other lots at that auction. (e) No rights have been granted since the Sale in 1961.

No. 129: by H M and M A M Peskett and C R and C M A Gore-Lloyd; applicable to Entry No. 23; without prejudice to whether or not the land is common land (a) The rights do not exist. (b) The rights never have existed since at least 10 February 1663. (c) Any rights which did exist were extinguished by unity of seisin on or before 27 and 28 January 1831, and no new rights were granted when unity of seisin ceased. (d) Any rights which did exist have not been exercised for at least 30 years, which constitutes implied release by abandonment if any rights existed. (e) There are numerous documents over 3 centuries to show the rights of common appurtenant to the farm in question were solely and specifically on Lustleigh Cleave.

No. 130: by H M and M A M Peskett and C R and C M A Gore-Lloyd; applicable to Entry Nos 13, 16, 18, 21 and 22; without prejudice to whether or not the land is common land (a) The rights do not exist. (b) The rights never have existed. (c) A right of common by reason of vicinage, by definition can only exist where: (i) the lands are contiguous and not separated by a barrier; (ii) the rights are mutual between the lands and rightholders concerned. These conditions do not apply because a barrier has existed, and Trendlebere Down has been enclosed and documentary evidence survives. Further that there is no evidence of the existence of mutual rights on CL 103 from Trendlebere Down, at all. (d) There is no record of any grant of such rights subsequent to Inclosure or otherwise. (e) Straying livestock have been regularly driven off without protest or dispute from other persons.

No. 131: by H M and M A M Peskett and C R and C M A Gore-Lloyd; applicable to Entry Nos 3, 4, 5, 6, 7, 14, 17 and 19; without prejudice to whether or not the land is common land (a) The rights do not exist because a right to stray or to graze away from a commoner's home common can only exist, by definition; where: (i) the lands are contiguous; (ii) the rights are mutual between the lands concerned and the rightholders, and neither condition applies, for these registrations. (b) The persons making this objection have regularly driven off all straying stock without protest or dispute from other persons. (c) Title Deeds of Trendlebere Down and other records show no evidence of such rights existing at least since 20 June 1630. (d) The rights do not exist.

No. 132: by H M and M A M Peskett and C R and C M A Gore-Lloyd; applicable to Entry Nos 2 and 11; without prejudice to whether or not the land is common land. (a) The rights do not exist because a right to stray or graze away from a commoner's home common can only exist, by definition, where: (i) the lands are contiguous; (ii) the rights are mutual between the lands concerned and the rightholders and neither condition applies for these registrations. (b) The persons making this objection have regularly driven off all straying stock without protest or dispute from other persons. (c) Title Deeds of Trendlebere Down and other records show no evidence of such rights existing at least since 20 June 1630. (d) The rights of common appurtenant to Shewte, Soldridge, Five Wyches, Whisselwell and Ullacombe Farms, and the Colehayes and Parke estates, were extinguished by consent in exchange for allotments of land on Lower Down, conveyed by William Kitson in or after 1865. The agreement, plan and other documents are at the Devon Record Office, Reference: 312M/TH.911-915. (e) The rights do not exist.



No. 611: by B MacDonald; applicable to Entry Nos 2, 3, 4, 10, 11, 13, 14 and 22; excessive number of stock for area of grazing to carry; distance too far from home farm.

No. 884: by B MacDonald; applicable to No. 19; that the right does not exist at all.

Part III: Ownership Section

No. 615: B MacDonald; claim to ownership of CL 58 is nullified by claims for grazing (common) right made by same claimant.

Dated the 18th day of March - 1985

A. A. Baden Fuller

Commons Commissioner