



COMMONS REGISTRATION ACT 1965

Reference No. 212/U/103

In the Matter of Lexden Road Pond,
West Bergholt, Colchester District, Essex

DECISION

This reference relates to the question of the ownership of land known as Lexden Road Pond, West Bergholt, Colchester District being the land comprised in the Land Section of Register Unit No. CL 29 in the Register of Common Land maintained by the Essex County Council of which no person is registered under section 4 of the Commons Registration Act 1965 as the owner.

Following upon the public notice of this reference West Bergholt Parish Council said (their clerks letter of 23 June 1977) that the Council held title under the Inclosure Award of 1865; and Mr P J Hill of Sackville Cottage, 108 Lexden Road said (letter of 5 August 1977) that since he moved to the village three years ago, he had had various discussions with the Parish Council in an attempt to trace the owner in order that he might purchase it with a view to improving its appalling overgrown state and turning it into a feature to complement his own property and that corner of the Village. No other person claimed to be the owner of the land in question or to have information as to its ownership.

On 25 July 1979 Mr Commissioner C A Settle QC at Colchester held a hearing for the purpose of inquiring into the ownership of the land. At this hearing West Bergholt Parish Council were represented by Miss E D Atkins their clerk, and Mr Hill attended in person. Mr Commissioner Settle adjourned the proceedings for Mr Hill to endeavour to establish a possessory title.

On 17 October 1979, at Chelmsford I held the adjourned hearing. At this hearing: (1) West Bergholt Parish Council were represented by Mr D P Smith, one of their members; (2) Mr Hill attended in person as before; and (3) Mr D J Hope of High Meadow, 110 Lexden Road attended in person.

The land ("the Unit Land") in this Register Unit is on the west side of and for about 45 yards adjoins the road which runs from Nayland to Lexden through or by West Bergholt. At the hearing it was treated as the same as OS (1/2500) plot No. 7847 containing as marked on the most recent (or an earlier) edition 0.26 (or 0.29) of an acre. On its north and west sides it adjoins the garden and other land held with Sackville Cottage (an old building which has in modern times been altered and added to); on its south side it adjoins the garden and other front land held with the dwellinghouse High Meadow.

Mr Smith said that the Parish Council did not now claim ownership, but contested claims by others, because they wished the Unit Land to remain subject to section 9 of the 1965 Act.

Mr Hill in the course of his evidence produced three statutory declarations made on 3, 3 and 15 October 1979 (1) by Mrs Margaret Branch, (2) by Mr Peter Gotts, and (3) by Mr George Fearis, an aerial photograph (framed) taken 28 May 1977, three other photographs, the most recent OS map (1/2500), and three copy conveyances dated 1939, 1941



and 1975. From the conveyances I deduce that the ownership of Sackville Cottage and the land held therewith (in 1962 some land to the north with a frontage to the road of 115 feet was sold off) has been as set out in Part I of the Schedule hereto.

Mr Hill who as I understood him was for himself and Mrs Susan Louise Hill claiming a possessory title to the Unit Land, said (in effect):- He had lived at Sackville Cottage since October 1974. He had always maintained the Pond. At the end of the summer it became a morass of mud; after a dry summer it is possible to walk across it; but at the end of a wet period it is all water. By "maintained", he meant that he had removed dead trees which had fallen into the Pond, cleared the banks of scrub and brambles, cleared the water of weeds, and carried out regular grass cutting around the banks.

Mr Hope, who as I understood him, was claiming to own the Unit Land by the combined effect of the 1865 Award and of his ownership of the land edged green ("the Green Land") conveyed to him by a conveyance dated 30 April 1971, produced a copy of the said conveyance. From it I deduce the ownership of High Meadow (built about 1972 on a piece of land which was previously part of Red Barn Farm) and of the land edged red ("the Red Land") mentioned in the said conveyance as being as set out in Part II of the Schedule hereto.

Mr Hope understood that by the 1865 Award (he had seen it in the County Record Office) the Unit Land (allotment no. 102 on the Award map) had been awarded as a public pond and watering place and that the Award provided that this pond should be maintained "for the time being by the owners and proprietors of allotment no. 103" being a small pond adjoining and south of no. 102 (now the Green Land above referred to). He said (in effect):- His contract to purchase the Red Land and the Green Land was dated 16 January 1971. As to the Green Land which was by the 1972 conveyance conveyed "for all the right or title and interest (if any) of the Vendors therein", the contract was similar; his solicitor advised him that there had been some confusion in the title to the Green Land as it had been left out of the Barrow deeds. As he (Mr Hope) understood the 1865 Award, no. 103 was allotted to Robert Bradbrook like the rest of Red Barn Farm. When he purchased (1971) the Green Land was about 9 feet lower than the Red Land; subsequently all except a small part of the Green Land had been filled in and it is now partly access to his garage and partly lawn. The water from the Unit Land flows down to the Green Land, where now except for a short distance it runs southwards through underground clay pipes; when he purchased it ran down an open ditch.

Mr Smith said that the Parish Council had in their possession the 1865 Award (or a copy of it), and by it the Unit Land was allotted as a public watering place.

Three days after the hearing I inspected the Unit Land and the nearby parts of the land held with Sackville Cottage and High Meadow.

Although neither the 1865 Award nor any copy of it was produced at the hearing, I conclude from the information then put before me that the Unit Land was by an Award dated 8 June 1865 and made under the Second Annual Inclosure Act 1862 (25 & 26 Vict. c. 94), allotted as a public watering place. The contrary was not alleged by any one at the hearing; and the appearance of the Unit Land and its registration under the 1965 Act support this conclusion.



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By section 8 of the 1965 Act, I am required to say whether I am "satisfied" as to the ownership of the Unit Land. Although I may treat a statutory declaration as evidence by the deponent, I am not obliged to treat every statutory declaration put before me as satisfactory evidence of everything which is said in it. In her declaration Mrs Branch who "lived at" Sackville Cottage from her marriage in 1955 to Mr Branch to his death in 1974, uses the word "occupation" once in relation to all the Sackville Cottage Land including the Unit Land and uses the words "use and occupation" twice in relation to the Unit Land. Land which is a pond may be occupied and may be used; but these words in relation to a pond, particularly a pond which is a public watering place, can only be used in a sense quite different from that in which they are used in relation to a dwellinghouse or to garden and other land ordinarily occupied with a dwellinghouse. Of her use of these words Mrs Branch in her declaration gives no explanation. Mr Hill who prepared the declarations, said he thought she used the words in relation to the Unit Land in much the same sense as he used the word "maintain". I decline to give Mrs Branch's declaration any larger meaning and feel doubtful when I can even go so far; for I do not know what she and Mr Branch did and my guess is that whatever it was was less than that done by Mr and Mrs Hill.

Mr Gotts in his declaration says that Mrs Upton on one occasion said and that Mr Branch on many occasions said that she and he owned the Unit Land. Such statements in the absence of evidence as to the context from which I can infer the reasons held by the speaker for claiming ownership, are I think of no weight at all. Mr Gotts mentions that Mr Branch had difficulties in persuading local residents not to tip rubbish into the pond; which suggests that local residents at least considered that the pond was not in Mr Branch's ownership in any ordinary sense, as indeed it could not be having been by the 1865 Award allotted as a public watering place.

Mr Fearis said that he lived at Sackville Cottage from 1903 to 1924 and that from time to time his family "occupied" the areas (meaning Sackville Cottage, the garden and other lands held with it and the Unit Land) from 1903 to (as I read his declaration) 1930, that the lands were known as "Fearis Cottage", "Fearis Pond", and Fearis Meadow" and that it was their responsibility to maintain the pond and that he believed the pond and the cottage have always since 1924 been in the same ownership. It is clear from the copy conveyances produced by Mr Hill that Sackville Cottage was never owned by Mr Fearis (Mr Hill suggested that he was only a tenant) and that cottage was in 1939 known as "Donards Cottage". Mr Fearis does not say and I decline to guess why he believed that the Unit Land was in the same ownership as Sackville Cottage; although in law the ownership could be the same, the Unit Land being a public pond would not be within the same ownership within the ordinary meaning of these words.

Although in law a public watering place may be occupied by or in the possession of a non-public individual, the activities relied on to establish such occupation or possession must be activities distinct from and not associated with it being a public pond. The activities of Mr Hill as described by him in the context of the Unit Land as it appeared to be when I saw it, in my opinion falls short of showing that he had taken or had ever been in possession or occupation. He has I think done no more than such things as might be expected for a person who occupied land next to public land. Mrs Branch in her declaration says that no fence was ever in existence along the north and west boundaries of the Unit Land; the statement may be true if



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the boundaries be taken to be the waters edge; but there is now visible the remains of a fence along the top of the bank and I accept the evidence of Mr Hope that this fence was more substantial than it now appeared when he first came. Whether this fence was intended merely to prevent young children getting too near the pond, its existence prevents me without some explanation from Mrs Branch attaching significance to her statement about the non-existence of fences.

From the considerations outlined above, my conclusion is that the Unit Land is not owned by Mr and Mrs Hill.

As to the claim by Mr Hope:- I infer from what he said about the 1865 Award that the Unit Land was not thereby expressly allotted to any one. That I should without seeing the Award or any copy of it find that the Unit Land was impliedly allotted to any one would I think be unsatisfactory and outside anything contemplated by section 8. Further even if it was impliedly allotted to Robert Braybrook and even if I assume that Mr C A Barrow somehow acquired a possessory title to the Green Land, the Unit Land would not impliedly pass to Mr Hope under the 1971 conveyance to him; even if it can be regarded as "waters" within section 62 of the Law of Property Act 1925 it was not in my view appertaining or reputed to appertain or enjoyed with the green land within the words of that section.

For these reasons I reject Mr Hope's ownership claim. In case I am wrong in declining to imply a grant ~~and~~ an award of which I have no copy I will now express an opinion on the assumption (which may perhaps be regarded as a reasonable guess) that the 1865 Award accords with my recollection of an award made about the same time which was produced to me some time ago in another county and which provided that the watering places thereby allotted should be maintained by the owners for the time being of adjoining allotments. However in my view such proviso in relation to the Unit Land is no indication that it was intended to be in the same ownership as allotment no. 102. Because the green land is lower than the Unit Land a dam or bank of some kind must (as ~~it~~ was obvious during my inspection) be maintained if the water level for the Unit Land is to be kept up; ~~but~~ I think it unlikely that in 1865 anything more was contemplated, for at that time the possibly that horse traffic would cease (the pond would no longer be wanted, would never have been thought of. It would in my opinion be outside the scope of an Inclosure Award to provide that the ownership of the Unit Land and of allotment no. 102 should for ever afterwards be kept in the same ownership. So I think it unlikely that if the 1865 Award had been produced to me by the Parish Council or by the County Archivist I would have reached any conclusion favourable to Mr Hope.

From the considerations outlined above I am not satisfied that any person is the owner of the Unit Land and it will therefore remain subject to protection under section 9 of the Act of 1965. Towards the end of the hearing Mr Smith indicated that the Parish Council would be prepared to negotiate with Mr Hill and Mr Hope about the future of the Unit Land; on my inspection it seemed to me that some agreement between might be advantageous to all concerned, so I record nothing in this decision to be taken as casting any doubt on the assumption made in the letter of 28 November 1974 by the Parish Council to Mr Hill that they would sell the Unit Land "subject to agreement and permission of the Charity Commissioners"; the power conferred on such Commissioners by section 18 of the Commons Act 1899 appears to me



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to be ⁱⁿ no way conditional on the Parish Council being the owner of the land allotted for "public or ~~p~~arochial purposes".

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: Owners of Sackville Cottage

31 March 1915	Will of John Horace Round; recital in 1939 conveyance of his seisin of the property thereby conveyed.
24 June 1928	John Horace Round died: under his will, third codicil and vesting assent of 6 December 1933 James Gray Round became entitled as tenant for life.
5 April 1939	Conveyance by James Gray Round with the concurrence of his trustees to Norman Royce Upton of Donard Lodge of the cottage known as Donard's Cottage OS 291 containing .601 acres and part of OS No. 294 containing .39 acres.
29 June 1942	Norman Royce Upton died.
24 May 1943	Conveyance by Philip John Jackson as his executor to William Gooden Branch.
25 March 1974	William Gooden Branch died.
2 October 1974	Conveyance by James Gunn Bain and Florence Gertrude Bain as his executors to Peter James Hill and Susan Louise Hill.

Part II: Ownership of High Meadow

21 November 1958	Charley Arthur Barrow of Red Barn Farm died; recital in 1971 conveyance he was then seized of the property thereby conveyed.
1 September 1970	Assent by Charles Edward Barrow and Leslie Gordon Barrow as his personal representatives in favour of themselves (similarly recited).



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30 April 1971

Conveyance by them to David John Hope of
(1) piece of land part of Red Barn Farm
edged red and (2) land to the west edged
green.

Dated the 18th day of Decer 1979

a. a. Baden Fuller

Commons Commissioner