



COMMONS REGISTRATION ACT 1965

Reference No 15/D/20 & 21

In The Matter of Colwall Green
and the Verge Near Evendine House
Colwall
Malvern Hills D

DECISION

These disputes relate to the registration at Entry No 2 in the ownership section of Register Unit No. VG 13 in the Register of Town or Village Greens maintained by the former Herefordshire County Council and are occasioned by the conflicting registration at Entry No. 3 in the ownership section of the said Register Unit.

I held a hearing for the purpose of inquiring into the disputes at Hereford on 25th June 1975. The hearing was attended by Mr. D.L. Judge Deputy Clerk to the Malvern Hills Conservators and Mr. Davis of Messrs Foster and Finley solicitors to the Colwall Parish Council.

By their Entry at No 2 in Ownership Section of the Register the Malvern Hills Conservators claim ownership of the whole of the land in question and by its Entry at No 3 Colwall Parish Council claims ownership of part of the said land. Neither the Conservators or the Parish claim ownership by virtue of a paper title; each of them claims a possessory title.

It will be convenient to deal first with the case put forward by the Conservators. Mr. Judge produced the Malvern Hills Acts of 1884, 1909 1924 and 1930. By Section 5 of the 1884 Act the Conservators were constituted a body corporate with power to hold and manage lands. The 1884 Act provided by Section 26 that nothing in the Act should prejudice or affect the rights of any Lord of any manor on or over the lands subject to the Act which include the land in question.

Section 20 of the 1924 Act is in the following terms :-

"20 The Malvern Hills shall be regulated and managed by the Conservators in accordance with this Act and the Acts of 1884 and 1909"

The four above - mentioned Acts also conferred upon the Conservators express powers, to some of which I shall have to refer later.

At the very outset I indicated to Mr. Judge that he would have to convince me that the Conservators could rely upon Acts done in the exercise of their statutory powers, to which the owner of the land could not raise any valid objection, in support of a claim to have acquired a possessory title, and this Mr. Judge failed to do.

In these circumstances Mr. Judge sought to rely upon acts done by the Conservators which he said were beyond their statutory powers. He classified these acts under six heads as follows :-

1. The grant of what were called wayleaves
2. The sale of firewood cut from trees
3. The provision of sports facilities
4. The provision of bus shelters
5. Permission granted to local authorities
6. Drainage works



- 2 -

By Section 7 and the 1909 Act power was conferred upon the Conservators to construct, fix and maintain shelters, and by Section 4 (a) of the 1930 Act power was conferred upon the Conservators to drain any part or parts of the Malvern Hills, and Mr. Judge cannot therefore derive any assistance from activities in categories 4 and 6. Section 10 (1) (c) empowers the Conservators to make Byelaws for regulating games to be played and other means of recreation on the Malvern Hills. The evidence as to sports facilities is that there are two football pitches on Colwall Green, and in the light of section 10 (1) (c) aforesaid it cannot in my view be beyond the powers of the Conservators to permit the land to be used for sports, and it is only the use of the land which can give rise to a possessory title. The Conservators have at all times been jealous of their power to maintain trees and if in the course of such maintenance they cut wood they must in my view have an implied power to remove and sell any firewood so cut. It was not suggested that the proceeds of sale would exceed or indeed approach the cost involved in the relevant maintenance. For these reasons I am of opinion that the Conservators cannot rely upon categories 2, 3, 4 and 5. As regards permission granted to local authorities, the main objective of the Conservators has at all times been the preservation of the Malvern Hills and while there is room for argument as to the extent of their powers of management from time to time, it is clear beyond doubt that any work on the land required their permission and they had power to prevent any such work. There was no evidence given as to the permission granted to local authorities nor as to the receipt of any rents and profits by reason of any such permission having been granted, and for the reasons given above. I am of opinion that category 5 does not assist the Conservators. What the Conservators have described as wayleaves are the grants of rights to householders whose land borders the Malvern Hills to make access roads to their land over land subject to the Regulation and Management of the Conservators. Originally these wayleaves were granted against payment of small annual sums but these have now been commuted and new wayleaves have since 1961 been granted for lump sum payments.

I was provided with a wayleave Deed of grant dated 6th July 1966 which I was told was in the common form used by the Conservators which states that the grant is made :-

"by virtue of any right the Conservators may possess but not further or otherwise"

The Conservators in granting wayleaves in the common form Deeds were not acting or purporting to act beyond their powers, and for this reason I am of opinion that the Conservators cannot rely on these wayleaves to establish a possessory title. However by virtue of Section 4 (1) (c) of the 1930 Act the Conservators have express power to make and maintain ways over the Malvern Hills and it can be argued that it is implicit in this power that they can authorise a third party to do the work which they themselves have power to do.

John Wilfred Roberts the Chief Ranger on the Malvern Hills for the past 20 years and Clarice Francis Pullen assistant to the Clerk of the Conservators gave evidence. The last mentioned witness did no more than produce the "wayleave" grant referred to above and to prove that wayleave had been granted over the land in question. He told me that the lump sum payments were 2/6 per yard with a minimum payment of £2.10.0



- 3 -

Mr. Roberts' evidence supported the facts as set out above. He did refer to the Conservators having purchased land to enable a full size football pitch to be made. This land is not comprised in the land claimed by the Parish.

Mr. Davis took the point that if the Conservators acted ultra vires: such acts were in law a nullity and therefore not acts upon which the Conservators could rely for the purpose of establishing a possessory title. Since in my opinion the Conservators have not established any relevant ultra vires acts on their part it is not necessary for me to give a decision on this point. I say no more than that it will come as a surprise to me if a statutory corporation can base a claim on its ultra vires acts, and that the point is open to Mr. Davis if I am required to state a case.

For the reasons given above I refuse to confirm the Entry at No 2 on the ground that the Conservators have not established the possessory title which they have claimed. It will be open to the Conservators to establish their title to any land which they have purchased on the unclaimed land reference which must follow my decision in this case.

Mr. Davis in support of the Parish Councils' claim to ownership produced extracts from the minutes of the Colwall Parish Council commencing in the year 1898. These minutes disclosed that from about 1899 the Council had planted and maintained trees on the green, having in 1898 obtained the consent of the Conservators. By Section 6 of the 1909 Act express power was conferred upon the Conservators to plant and maintain trees and shrubs. The minutes also contain a reference to drainage in 1899 and some references to the prevention of damage to the green by horses, sheep and dumping of rubbish.

In the course of the hearing Mr. Ballard informed me that his late father was prominent in local affairs over a long period and played a large part in securing the passing of the 1884 Act. He had held high office as a Conservator, on the Parish Council and in other local authorities. Mr. Ballard himself had rendered similar public service. Mr. Ballard expressed the view that it was unrealistic to attribute any particular activity to any particular authority. He gave me the impression that his late father was very much "a power in the land" deeply concerned with the preservation and improvement of the Malvern Hills and that he was able to achieve his purpose by virtue of his influence with all the relevant authorities.

On the evidence available to me I am not satisfied that the activities of the Parish Council were such as to confer upon it a title by virtue of adverse possession as against the true owner of the land. Certainly from and after 1909 the true owner could take the view that trees were being planted and maintained by virtue of the express power conferred by the 1909 Act.

For this reason I must refuse to confirm the Entry of No. 3. In due course there will have to be a reference under Section 8 of the Commons Registration Act 1965. This decision will not preclude either the Conservators or the Parish Council making such submissions as they may think fit to the Commissioner on the hearing of that reference.



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.

Dated this ^{4th} day of ^{August} 1975

C A Little

.....
Commons Commissioner