COMMONS REGISTRATION ACT 1965

Reference No.19/D/13

In the Matter of Halling Common,

Halling, Kent.

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No.C.L.9 in the Register of Common Land maintained by the Kent County Council and is occasioned by Objection No.61 made by Associated Portland Cement Manufacturers Ltd and noted in the Register on 30th September 1970.

I held a hearing for the purpose of inquiring into the dispute at Canterbury on 16th November 1972, and in London on 19th and 20th February and 12th and 19th March 1973. The hearing was attended by Mr. Vivian Chapman, of Counsel, for the Halling Parish Council, which applied for the registration, and by Mr. Gerard Ryan, of Counsel, for the Objectors. I also gave leave for Mrs. A. Wilks, whose application for registration was noted under section 4(4) of the Commons Registration Act 1965, to be represented by Mr. D. Thornewell, a fellow member of a local amenity society.

On the same day that this reference was made the Kent County Council referred two other disputes occasioned by conflicting registrations relating to the same land in the Ownership Section of the Register Unit, one registration having been applied for by the Parish Council on 15th March 1968 and the other by the Objectors on 10th September 1969. During the hearing Mr. Ryan took the point that I had no jurisdiction to deal with the disputes as to ownership because the Objectors' registration was a second period registration, i.e. one made after 30th June 1968, so that the period prescribed by reg.6(1) of the Commons Commissioners Regulations 1971 did not apply to those disputes and therefore the County Council had no power to refer them under section 5(6) of the Commons Registration Act 1965. Mr. Chapman agreed with Mr. Ryan's submission, but both Counsel said that it would be of assistance to the parties, if, should I decide to confirm the registration in the Land Section of the Register Unit, I were to express a view on the question of ownership. Although this would be but an obiter dictum, it could have the effect of enabling the parties to compose their differences and so avoid the necessity of having the disputes as to owenrship referred when the period for so doing had been prescribed under section 5(6) of the Act of 1965.

When looking at reg.6 of the Regulations of 1971 for the purpose of considering what course I should take upon this request, I have observed that while paragraphs (a) and (b) of reg.6(2) have the effect,as submitted by Mr. Ryan and agreed to by Mr. Chapman, of making the references of the ownership disputes premature, paragraph (c) of reg.6(2) has the same effect where a dispute is occasioned by an objection to a registration contained in a register unit which contains a second period registration. In my view this dispute as to the registration in the Land Section of Register Unit No.C.L.9 is such a dispute. Reg.4(5) of the Commons Registration (General)

Regulations 1966 provides that each register unit shall consist of three sections, called the land section, the rights section, and the ownership section. Register Unit No.C.L.9 contains a second period registration, namely the Objectors' registration in the Ownership Section. Therefore, their Objection No.61 to the Parish Council's registration in the Land Section falls within paragraph (c) of reg.6(2) of the Regulations of 1971, which therefore prevents reg.6 applying to that Objection, thus making the reference of the dispute occasioned by that Objection also premature.

If my interpretation of the relevant Regulations is correct, I have at present no jurisdiction in this matter. There cannot be any such jurisdiction until a further period has been prescribed under section 5(6) of the Act of 1965 and a fresh reference has been made by the County Council. However, having regard to the request that I should make an obiter pronouncement on the question of the ownership of the land, I have decided that my best course in the circumstances will be to make a similar pronouncement on the question whether the land has been properly registered as common land. While this would not preclude the parties from arguing the matter de novo before another Commissioner after the dispute has been correctly referred, it may be that, after incurring the trouble and expense of presenting their respective cases before me, they will be able to resolve their differences on the basis of my view of the matter. Should either party consider that view to be erroneous in point of law, it will not be possible to appeal under section 18 of the Act of 1965 at present, but it would be possible to avoid a repetition of the hearing by agreeing that I, or another Commissioner, should give a decision on the subsequent reference in the terms which I am about to state. It would then be possible to appeal against that decision.

The land the subject of the reference has an area of approximately 22.6 acres and is bounded on the east by the River Medway. The parties are agreed that the area is not correctly indicated on the Register Map and have agreed a plan which shows the land in question accurately.

So far as the evidence adduced before me is concerned, the history of this land begins with a map deposited in the Kent County Record Office. This is dated 1634 and has the legend "A map and Description of the Mannor of Hallinge in Kent". The reason for the making of this map is disclosed by a receipt, dated 6th May 1635, by which the Bishop of Rochester acknowledges that he has received the map from Sir James Oxenden, of Willingham, Kent, in accordance with a covenant in a lease of the Manor of Halling made by the Bishop to Sir James. The fact that the receipt is preserved with the map produced to me seems to indicate that this map is a duplicate made for and kept by the lessee. The map shows the various parcels of land comprised in the manor edged in blue, with the name and the area of each indicated in red ink. The manor did not comprise the whole of the parish of Halling: on the other hand, it included land not in the parish. The parcels of land adjoining those in the manor have no areas indicated and are named in black ink. Among the adjoining parcels is the land the subject of this reference, which has on it the words "The Comon (sic) Salts". The indication that "The Comon Salts" were not parcel of the manor of Halling is confirmed by a search among the surviving manorial records, which has disclosed no reference to this land.

I therefore find that this land does not fall within paragraph (b) of the definition of "common land" in section 22(1) of the Act of 1965, because it is not waste land of a manor. If the land is common land, it can only be on the ground that it falls within paragraph (a) of the definition by being subject to rights of common.

Mr. Chapman began his argument by contending that the Parish Council is the owner of the land and that it is not subject to any rights of common. He argued in the alternative that the land is subject to a right of sole vesture belonging to the Parish Council. I do not propose to approach the matter in this way. It seems to me that what I have to consider first is whether the land is subject to any rights of common. Only if the answer to that is in the affirmative should I go on to consider whether I am satisfied that any person is the owner. It is true that the evidence about the history of the land includes matter germane to the question of ownership and that the whole of this evidence must be taken into consideration, for it is impossible to separate it into that which is relevant to rights and that which is relevant to ownership, but that does not alter the true nature of my primary task, which is to discover whether the land is subject to rights of common.

The name or description "The Comon Salts" on the 1634 map may indicate that the land was at that time subject to some rights of common, but it is so vague that I do not find it of any real assistance.

After the 1634 map there is a gap of two centuries before the next piece of evidence, which is the tithe apportionment for the parish of Halling, dated 10th June 1843. In this document the land in question is described as "Common lands" with an area of 27a. 2r. 17p.; its state of cultivation is described as "Saltings"; the landowner is stated to be "Halling Parish"; and there is no entry in the column headed "Occupiers". The land also appears in the Summary at the end, again with "Halling Parish" as the landowner, but with the words "Common Lands" in the column headed "Occupiers". In neither place is any rent-charge stated to be payable in respect of the land.

Mr. Chapman pointed out that this information was included in the apportionment in performance of the statutory duty imposed by section 55 of the Tithe Act 1836, which required the apportionment to set forth the names of the proprietors and occupiers of the lands comprised in it, but that by section 12 of that Act the ownership of land is defined by reference to the actual possession or receipt of the rents or profits of the land. He argued that the proper inference to be drawn from the non-apportionment of any tithe rent-charge on this land is that it was not producing any rents or profits. From this it followed, so he argued, that the explanation of the statement that the land belonged to "Halling Parish" was that the parish owned the freehold or was in actual possession. To my mind it seems more likely that the correct inference is that the land paid no tithe by reason of its barrenness, using that word in the sense in which it is used in the statute 2 & 3 Edw.VI, c.13, s.5, i.e. unimproved and not converted into arable ground or meadow.

On the 6" to the mile Ordnance Survey Map of 1863 the land is indicated as marsh land and has on it the words "Halling Common". An enquiry made of the Ordnance Survey by Mrs. Wilks produced the answer that the original name-book for this edition is no longer held, so there is no evidence whence the surveyor derived the name.

The modern and continuous history of this land begins with an agreement made 1st August 1872 between (1) the Ecclesiastical Commissioners for England, and (2) Philip Hilton, John Andrew Anderson, William Curling Anderson and Ernest Frederick Hilton. The parties of the second part (hereafter referred to by their firm name of Hilton, Anderson & Co.) were the predecessors of the Objectors in the business of cement manufacturing at Halling.

The First Schedule to this agreement comprises sixteen parcels of land in the parish of Halling, the Second Schedule comprises thirty-nine more parcels of land and a ferry, the Third Schedule comprises the manor of Halling, and the Fourth Schedule comprises "All that piece of Common Land and hereditaments known as 'Halling Common Marsh' comprising 27a. 2r. 17p. of land or thereabouts". The first recital states that the Ecclesiastical Commissioners had become absolutely entitled to the fee simple of the hereditaments mentioned in the Second, Third and Fourth Schedules on the death of the Bishop of Rochester in 1867. The next recital states that by an agreement dated 30th May 1872 between (1) the Estates Committee of the Ecclesiastical Commissioners, and (2) Maximilian Hammond Dalison on behalf of himself and others, Mr. Dalison and the others agreed to convey to the Ecclesiastical Commissioners the land comprised in the First Schedule, a leasehold interest in the land comprised in the Second Schedule created by a lease dated 27th March 1833 from the then Bishop of Rochester to William Osmond Hammond and others, and all rights of common and other rights theretofore exercised and enjoyed upon or over Halling Common by the owners, lessees, and occupiers of the land comprised in the First Schedule and the Second Schedule or of any other land of Mr. Dalison. It appears from the provisions as to title that the lands comprised in the First Schedule were a comparatively recent addition to the estates of Mr. Dalison, having belonged to one Frances Isabella Masters, who made her will on 8th June 1811.

The agreement of 1st August 1872 went on to provide that the Ecclesiastical Commissioners should convey to Hilton, Anderson & Co. all the hereditaments comprised in the First, Second and Third Schedules in fee simple and all the estate and interest of the Ecclesiastical Commissioners either under the agreement of 30th May 1872 or otherwise of and in Halling Common.

The agreement of 1st April 1872 was followed by a conveyance dated 24th July 1873 made between the same parties. This purported to convey the freehold of all the hereditaments mentioned in the agreement, including that of Halling Common Marsh. Whatever interest in Halling Common Marsh was acquired by Hilton, Anderson & Co. under this conveyance passed to Mr. G.K. Anderson by a conveyance dated 29th December 1900, and Mr. Anderson, in his turn, conveyed his interest in the land to the Objectors by a conveyance dated 12th October 1928.

I now turn to consider the conduct of the Parish Council and the Objectors

and their respective predecessors in relation to the land in question since the conveyance of 24th July 1873.

At a Vestry meeting held on 25th March 1880 it was resolved that steps should be taken to adopt rules for the proper working of the Marsh and that the Marsh Keepers should collect the necessary information affecting it. At a meeting held on 24th March 1882 it was resolved that the Marsh Keepers should be empowered to expend £4 out of the receipts of the next year towards cleaning and repairing the Marsh ditches.

It thus appears that there were Marsh Keepers and that they were receiving money in excess of £4 a year in respect of some unspecified use of the Marsh by some unspecified persons.

Then comes a letter dated 1st April 1884, addressed to "the Ratepayers of the Parish of Halling" by Hilton, Anderson & Co. This states that the writers are owners of a piece of land bounded by the Halling Common Marsh on its eastern side, purchased by them from William Henry Poynder, and that they are willing with the sanction of the addressees to exchange this plot by allowing it to form part of the Common for another plot situate on the southern extremity of the Common and near their factory, the writers being at liberty to make what use they think fit of the second plot, "it being wholly our own". The letter was accompanied by a sketch plan showing the relative positions of the two plots of land. On the same day at an adjourned Vestry meeting it was resolved to agree to a report of a Committee recommending the proposed exchange.

There is a discrepancy between the letter from Hilton, Anderson & Co. and the report of the committee in that, while the letter describes the first plot as "bounded by the Halling Common Marsh on its eastern side" and the plan shows it as separated from the Marsh by a dyke over which there is to be a new bridge, the report describes it as "situate upon the Halling Common Marsh". Furthermore, the statement that this plot was purchased from William Henry Poynder is at variance with the facts that it is clearly shown on the map attached to the tithe apportionment as being part of the common lands stated in the apportionment to have an area of 27a. 2r. 17p., which is the area given for Halling Common Marsh in the conveyance of 24th July 1873.

It does not appear that there was ever any formal deed of exchange, but the transaction was put into effect, and Hilton, Anderson & Co. thereafter treated the second plot as their own property. Thus, on 8th January 1889 they granted to the Conservators of the River Medway a licence to construct an embankment along the river front of this plot, which has for many years been incorporated in the site of what are now the Objectors' works, being shown as such on the plan attached to the conveyance to Mr. G.K. Anderson dated 29th December 1900.

The rules foreshadowed in the Vestry meeting minute of 25th March 1880 were not adopted until a meeting held on 24th April 1885. These rules were as follows:-

"Rule 1: Every occupier of a house in the Parish of Halling shall have the privilege of turning out on the Halling Common Marsh one horse or cow, being his own bona-fide property, upon payment in advance of the fee fixed by the Vestry. No sheep, steers or entire horses will be admitted.

"Rule 2: Every occupier of land or tenements assessed to the Poor Rate at a rateable value of less than £10 shall have the right to turn out one head; at £10 and under £20, two head; at £20 and under £30 three head; at £30 and above, four head and no more.

"Rule 3: No animal shall be turned out on the Marsh before the first day of May in each year, nor permitted to remain after the last day of October, nor until having been in the possession of the owner, wishing to turn on, for fourteen days.

"Rule 4: A book of vouchers shall be provided by the Marsh Keepers for the purpose of securing that every person shall turn on his own bona-fide property and no other.

"Rule 5: At the Ladyday Vestry in each year two householders shall be appointed as Marsh Keepers and the rate to be charged per head fixed for the ensuing twelve months. The accounts for the past year are to be produced for examination and approved by the Vestry. The Marsh Keepers shall have the privilege of turning out one head each year free of charge."

It is worthy of notice that Mr. G.K. Anderson signed the minutes of the meeting held on 24th April 1885.

Whatever powers and duties in respect of the Marsh and whatever property in it the Vestry may have had were transferred to the Parish Council by sections 6(1) and 67(1) of the Local Government Act 1894.

On the map accompanying the letter of 1st April 1884 the entrance to the Marsh is shown as being over a bridge at the south-west corner. On 11th August 1896 Hilton, Anderson & Co. wrote to the Parish Council asking for approval of a proposal to move the access further to the north and to construct a new approach road over the land to the west. To this the Parish Council agreed, and on 14th October 1896 Hilton, Anderson & Co. stated in a letter that they would confer with the Marsh Keepers when the work neared completion in time for use the following May.

At a meeting of the Parish Council held on 4th May 1898 regulations for the proper government of the Marsh were approved and adopted. This set of regulations was identical with those adopted in 1885, save only that Rule 5 relating to the appointment of Marsh Keepers was omitted and that 1st April was substituted for 1st May in Rule 3.

It appears from minutes and correspondence in 1901 and 1902 that the Parish Council sought to obtain confirmation of bye-laws relating to the

Marsh from the Board of Agriculture and the Local Government Board, but were unable to do so, the reason given being that inasmuch as a fee had been charged and collected for each head of cattle turned on the land, it was not common in the ordinary meaning of the term.

The Parish Council erected a notice board, on which copies of the Marsh rules and regulations were posted, on the new Marsh road near the entrance to the Marsh. On 3rd February 1902 a firm of surveyors acting for Mr.G.K. Anderson complained that the notice board had been erected on land belonging to Mr. Anderson. They also stated that permission for turning out animals onto the Marsh was not granted until 1st May and asked that the notice be amended accordingly. At a meeting held on 3rd March 1902 the Clerk to the Council was instructed to state that by the Local Government Act 1894 the Parish Marsh, being parish property, came under the control of the Council, who were thereby empowered to make regulations for its proper government. He was also instructed to say that it was unnecessary to ask permission of anyone to place the notice board on the substituted road.

On 30th March 1903 Mr. G.K. Anderson's solicitors wrote to the Parish Council to protest against stock being turned on the Parish Marsh before 1st May as an excess of jurisdiction on the part of the Council. At a meeting on 30th April 1903 this letter was ordered to lie on the table.

During the winter of 1903/4 Mr. Anderson caused the gates at the entrance to the Marsh to be locked and chained and placed a notice nearby stating that it was his property and that persons turning stock on the Marsh between 31st October and 1st May would be prosecuted. A notice in similar terms was still being exhibited on 22nd August 1928, as appears from a letter written by Mr. Anderson's solicitors in connection with the sale to the Objectors, and on 7th November 1944, as appears from a letter from the Objectors to the Engineer to the Kent Rivers Catchment Board.

This led the Parish Council to take the advice of a solicitor, who was able to ascertain particulars of Mr. Anderson's title and to see the deeds. The Council were advised as follows:-

"I advise that the Parish Council are <u>not</u> the Freeholders of Halling "Common, and therefore cannot sell, enclose, nor lease any portion of it.

"It is abundantly clear from the Documents I have inspected (mentioned "in my last letter) that the Common was, and is, part of the Manor of "Halling the Fee simple of which is now vested in Mr. George Knox Anderson.

"The Tenants of the Manor (apparently all the inhabitants of Halling) "have a right of pasture over the Common, but by prescription and usage "such right seems limited to horses and cows and as regards times from "1st May to 31st October in every year.

"The Vestry, and now the Parish Council, collect fees for this "privilege which fees I think originally belonged to the Lord of the "Manor. It is only in consequence of the length of time these fees "have been diverted from the pockets of the Lord of the Manor to the "Vestry, and now Parish Council, that the Council has any right to the fees.

"But I think such right has now been acquired by prescription, but "beyond this the Council have nothing to do with the Common, except if "they so please, to maintain ways thereover, though I doubt if they can "be compelled to do this.

"On the other hand, the Lord of the Manor has no right to encroach "upon the rights of those who now enjoy the privilege before referred to, "and should he do so, proceedings can be taken against him (and I "think successfully) to restrain him from interfering with the rights "of the inhabitants and of the Parish Council (representing such "inhabitants)".

At a meeting on 29th February 1904 the Council resolved to follow this advice and as appears from the minutes of a meeting held on 28th March 1904, they arranged that no stock should be turned on the Marsh before 1st May.

At the meeting held on 2nd May 1904 it was reported that complaints had been made by persons desiring to turn stock on the Marsh that the gates were still locked, and the Clerk was instructed to write to Mr. G.K. Anderson's agents if the gates remained fastened. There is no record of any such letter, so presumably the gates were unfastened shortly afterwards.

These events were recalled when Mr. Anderson came to sell his property to the Objectors. The agreement for the sale, dated 6th September 1928, contains the following clause:-

"15. IN the year 1902 disputes arose between the Vendor and the Halling Parish Council as to the ownership of the part of the property known as Halling Common Marsh comprising 27a. 2r. 17p. or thereabouts the Council claiming that it was Parish Property and in March 1904 the Council passed a resolution that the freehold of the property was vested in the Vendor subject to common rights from 1st May to 31st October. The part in question of the property is sold subject to all common or other rights affecting it and without any obligation on the part of the Vendor to define them further than he is able and the freehold of the said part of the property having been in fact conveyed to the Vendor by the said Indenture dated the 29th of December 1900 the Purchaser shall assume that the freehold is in fact vested in the Vendor subject to those rights and shall not make any requisition or objection based on the suggestion that the said part of the property is Parish Property."

On 23rd November 1906 Mr. Anderson's agents informed the Ordnance Survey that the name Halling Common applied to "a portion of pasture land situated south of Halling Salt Marsh, east of Halling Fresh Marsh and west bank of the Medway. The parishioners have rights of pasture".

The records of the Parish Council show that from 1904 onwards the Council has frequently spent money on the maintenance of the Marsh and its gates.

During the years ending in March between 1904 and 1911 cattle belonging to various persons were turned on the Marsh on payment of 10/- per head

in 1904 and 1905, and 5/- per head from 1906 to 1911. There are no records from 1912 to 1916, but it appears from the minutes of a meeting of the Parish Council held on 31st March 1915 that the sum of £7.16.0 had been received on account of stock turned on the Marsh during the summer of 1914. It also appears that a water supply had been installed at a cost of £7.3.0 with the assistance of the Objectors. From 1917 to 1924 sums were received from "Marsh Lettings", but there are no particulars of the "tenants" or of how the totals were made up. From 1925 until 1931 stock were turned onto the Marsh by two or more persons in each year on payment of 10/- per head. In 1932 one person paid for two head of stock at 10/- per head. There is no record of any payment in 1933 and 1934. In 1935 a Mr. Forrester paid £2.10.0 for an unspecified number of stock, and in 1936 he paid £5. There is no record of any payments in 1937 and 1938. Then Mr. Forrester paid £5 for 1939, and £2.10.0 for each of the years 1940 to 1943. Mr. Forrester and a Mr. Whibley paid £2.10.0 in respect of 1944, and Mr. Whibley paid £3 for 1945. In 1946 a Mr. Chapman paid £4 in respect of 8 cattle and Mr. Whibley and a Mr. Hooker paid £2 each. In 1947 the sum of £8 was paid by unspecified persons, though it appears from a letter dated 13th May 1947 that one of them was Mr. Whibley, who also had permission to graze one horse free of charge.

The records for the next ten years are somewhat sparse, but Mr. A. Chapman was asked to pay £3.10.0 in respect of seven head of cattle on 17th August 1949, on which he said that he had only grazed five head, and there is a record of the receipt of £2.10.0. in 1950 from unspecified persons. This latter sum would also have been in respect of grazing during the 1949 season. On 6th May 1950 Mr. T. Chapman paid £10 in respect of the sole grazing until 31st October 1950.

In the autumn of 1950 the Clerk to the Parish Council had a form of invitation of tenders printed. This invited tenders from "persons resident within, and/or Owners of property within, the local government boundary of the Parish of Halling". The grazing season was stated to extend from 1st April to 30th (sic) October.

Mr. T. Chapman put in an offer of £10, which was accepted on 16th April 1951. In 1952 the Council accepted a tender of £20 from Mr. A. Chapman. It is not clear what happened in 1953, save that a tender from Mr. A. Chapman was not accepted. Finally from 1954 to the date of the registration under the Act of 1965 each year's grazing was taken by Mr. Chapman, first at £20, and later at £25 a year.

At a meeting of the Parish Marsh Committee of the Parish Council held on 27th November 1961 it was recommended that the Council should only let the grazing rights of the Marsh at annual rates and that grazing would date from 1st March to 30th November. It does not appear what, if any, was the reaction of the Objectors to these dates, which differed substantially from those accepted in 1904.

After his assertion in 1904 that he was the owner of the Marsh, on 11th June 1909 Mr. G.K. Anderson conveyed to the Strood Rural District Council certain land which he owned to the west of the Marsh for the

construction of sewage works and by the conveyance he also granted to the Rural District Council a licence to lay through the land to the east of that conveyed a sewer not exceeding 18" in diameter with the necessary manhole and tidal flap chamber. The plan attached to the conveyance shows part of the sewer and the tidal flap chamber as being situate on the Marsh and the right is stated to be subject to "all (if any) the rights of Commoners in Halling Common".

During the Second World War a road across the Marsh was constructed by the military authorities as a means of access to a temporary bridge across the River Medway. This roadway was built on a bank so high that the marshland became inaccessible to animals. On 4th March 1942 the Clerk to the Parish Council wrote to the Objectors "as the existing Owners of the rights of the lord of the Manor" to ask if the matter could be taken up with the military authorities with a view to the construction of suitable slopes or embankments "to enable Parishioners to continue to exercise their rights for the grazing of cattle during the Summer months". The Clerk added: "The Parish meeting would be grateful of your assistance in preserving these ancient rights". A week later the Objectors' Estates Manager wrote to the War Department Land Agent and Valuer, saying: "The matter is urgent as, otherwise, the Parishioners ..... will not be able to turn their cattle out to graze".

In 1943 the Objectors erected a notice board at the entrance to the approach road. The notice read:-

"N O T I C E

"THE ASSOCIATED PORTLAND CEMENT MANFRS. LTD., hereby give notice that this Approach Road to the bridge over the Medway has been constructed by the Military Authorities for their own purposes and that they and persons authorised by them alone have any right to use the road. The general public are permitted to use the road by the courtesy of the Company with the concurrence of the Military Authorities but the Company reserves the right to withdraw this permission at any time and to close the road to the general public and proposes to do so as soon as the present War is over.

"BY ORDER

"J. A. White.

"Secretary"

By a deed of grant dated 10th November 1961 the Objectors granted to the Central Electricity Generating Board the right to erect an electricity line across (inter alia) the south-western end of the Marsh. A plan attached to the deed indicates the site of a tower on this land. On 12th October 1965 the Objectors granted a wayleave consent to the South Eastern Electricity Board for the placing of an overhead electricity line with the necessary poles along the south side of the road across the Marsh.

It is clear from these facts that during the whole period of living memory the Parish Council and the Objectors and their respective predecessors

have believed that the Objectors and their predecessors in title have been the owners of the Marsh, and that the Marsh has been subject to rights of the parishioners of Halling to turn cattle upon it and have acted in accordance with such belief. It is equally clear that that belief must be mistaken in so far as it relates to any rights of the parishioners, for it is not possible in law for the inhabitants of a locality, unless they are incorporated, to be entitled to rights of common: see Gateward's Case (1607), 6 Co.Rep.59b. Nonetheless, this case is very different from the common run of cases in which it is unsuccessfully claimed that land is subject to rights of common merely because the inhabitants of a locality have been taking the produce of the land without objection from the owner. Here it has been claimed that the grazing is as of right and that claim has been accepted by those claiming to own the land. When parties are found to be consistently following a course of conduct on the footing that their relationship is governed by law, that cannot be dismissed out of hand just because it is found that they have misunderstood the law on the subject. As Kelly C.B. pointed out in Johnson v. Barnes (1872), L.R.8 C.P.527,529 (a case to which I shall have occasion to refer later), the inaccurate description of a right in a series of documents cannot interfere with the presumption which could otherwise be made from the facts with relation to the enjoyment of the right.

The way in which such a case should be approached was explained by Lord Selborne, L.C. in Goodman v. Mayor of Saltash (1882), 7 App. 633, at pp.639, 640, where he said:-

> "..... an open and uninterrupted enjoyment from time immemorial under "a claim of right seems to me to be all that is necessary for a "presumption that it had such an origin as would establish the right, "if a lawful origin was reasonably possible in law.
>
> "That in such a case a lawful origin ought to be presumed, if it "is reasonably possible, is established by many authorities".

Mr. Chapman submitted that it was reasonably possible in law that the Parish Council and its predecessors should have had a right of sole pasture, which is a right of common as defined in section 22(1) of the Act of 1965. In order to demonstrate this legal possibility, Mr. Chapman relied on the decision of the Court of Appeal in Haigh v. West, [1893] 2 Q.B.19. The facts in that case differ somewhat from those in the present case. There the parish (to use a neutral expression) had been receiving rent from certain land: here the money which has been received has not been by way of rent, but as payment for grazing rights. It was there held that there was a presumption that the land was vested in some person or persons as trustees for the parishioners, and that it had become vested in the churchwardens and overseers in trust for the parish by virtue of section 17 of the Vestries Act, 1819. Such a presumption cannot be made here, because the Parish Council, and previously the Vestry, has not been receiving the rents and profits of the Marsh, but the principle laid down in Haigh v. West, is, in my view, equally applicable to a right of sole pasture. It would have been open to a grantor to have granted a right of sole pasture in trust for

the parishioners. Such a right is an incorporeal hereditament, so that if such a grant had been made before 1819 it would have passed to the churchwardens and overseers under the Act of 1819, which applied to "hereditaments" as well as to "buildings" and "land". After the Act the grant could have been made to the churchwardens and overseers or to other trustees. In either case the incorporeal hereditament would have passed to the Parish Council - in the case of the churchwardens and overseers by virtue of sections 6(1)(c)(iii) and 67 of the Local Government Act 1894, or in the case of other trustees by virtue of section 14(1) of that Act.

Mr. Ryan argued that I should not be justified in making any such presumption as was made in Haigh v. West, because there has been no long settled practice upon which to base it. There have, he argued, been such changes in the way in which the grazing has been dealt with during the period of living memory that there has been an absence of that enjoyment in a uniform manner which Lord Selborne, L.C. postulated as being requisite in Goodman v. Mayor of Saltash, supra, at p.644.

In support of this argument Mr. Ryan contrasted the terms of the "Regulations for the Proper Government of the Halling Parish Marsh" adopted by the Parish Council on 4th May 1898 with those of the printed invitation to tender which has been in use since 1950. In the first place, the persons whose cattle may graze are differently defined. In 1898 they were every occupier of a house in the parish and every occupier of land or tenements assessed to the poor rate at various specified rateable values: in and since 1950 they have been persons resident within, and/or owners of property within, the local government boundary of the parish. Also the manner of charging for the grazing is fundamentally different. In 1898 it was stated that a fee was payable in respect of one horse or cow by each occupier of a house turning it out, nothing being stated about any fee being payable by the occupier of lands or tenements being assessed to the poor rate. The accounts show that a fee was charged for each head of cattle turned out. In and since 1950 tenders have been invited simply for "the grazing of cattle" without any reference to the number of head grazed. These changes, Mr. Ryan argued, showed a change from one objective to an entirely different one. What had been a means of regulating the exercise of rights by all qualified persons in the parish had been replaced by something entirely different in legal terms, namely a commercial letting providing an income for the Parish Council. No grant made in or after 1950 would have been consistent with what might have been a grant in 1898.

Mr. Chapman countered this argument by relying on the decision of the Exchequer Chamber in Johnson v. Barnes (1872), L.R.8 C.P.527, the facts of which are more fully set out in the report of the case in the Court below (L.R.7 C.P.592). In that case the corporation of a borough claimed and had from time immemorial exercised what was called an exclusive right of common of pasture in certain lands. The evidence went back to the reign of Henry VIII and was that at first the right was exercised by actual enjoyment by the free burgesses, but that from 1807 the right of common for each season was sold by auction by the corporation annually, both to persons who were and to persons who were not owners of the commonable lands and not free burgesses, the right being exercised accordingly by the purchasers. On these facts

it was held that according to the principle of law by which a legal origin is, if possible, to be presumed for a long-established practice, it must be presumed that what the corporation was entitled to was an exclusive right of pasturage over the lands in question. There was no limitation as to the number of cattle which might be depastured, except so far as the constitutions or regulations made by the corporation to limit the exercise of the right by the burgesses inter se were concerned.

The change in the modus operandi in 1807 did not prevent the Exchequer Chamber's affirming a judgment that the corporation was entitled to a right of sole pasture. Equally, it does not appear to me that the change in this case during the present century is any obstacle to my finding that the Parish Council in this case is entitled to a right of sole pasture. Everything which has been done is consistent with the exercise of such a right. It matters not how the owner of a right of sole pasture chooses to exercise his rights. He can turn out his own cattle, he can charge so much a head for the cattle of other persons, or he can let the whole of the grazing to one person.

Mr. Ryan sought to distinguish Johnson v. Barnes on the ground that the corporation there was one of great antiquity and that the evidence went back for many centuries. Here the evidence covers the whole period of living memory and there is no evidence that a right of sole pasture had not been enjoyed for an indefinite period before that. Indeed, the name "The Comon Salts" on the map of 1634 may indicate that such a right was then in existence. It is true that a right of sole pasture was not a right of common at common law, being only deemed to be such a right for the purposes of the Act of 1965, but the description "The Comon Salts" in 1634 ought not to be given any more weight than was given to the mistaken description of a right of sole pasture as a right of common in the documents in Johnson v. Barnes.

For these reasons I should confirm the registration of this land as common land had I now jurisdiction so to do.

Mr. Chapman asked that, should I come to this conclusion, I would direct that the Parish Council should be registered as the owner of a right of sole pasture. Quite apart from my lack of jurisdiction caused by the premature reference, it does not seem to me that I should have any power to give such a direction. My only jurisdiction under section 6(1) of the Act of 1965 would be either to confirm the registration, with or without modifications, or refuse to confirm it. What Mr. Chapman has invited me to do is to make an additional registration. This I should refuse to do for lack of jurisdiction to do it.

So far as the disputes as to ownership are concerned, if I had any present jurisdiction I should confirm the registration of Associated Portland Cement Manufacturers Ltd. The Parish Council's right of sole pasture is inconsistent with its ownership of the land, and, while there may be some doubt as to the title of the Ecclesiastical Commissioners, I am satisfied that the Objectors' predecessors acquired a possessory title. Although the Objectors and their predecessors have never been in day-to-day occupation of the land, they have openly claimed to be the owners and have acted, as by granting wayleaves, in a manner inconsistent with the ownership of the land by any other person.

Dated this 16th day of April 1973