



COMMONS REGISTRATION ACT 1965

Reference No.25/D/20

In the Matter of Hanworth Common,
Hanworth, Norfolk.

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No.C.L.23 in the Register of Common Land maintained by the Norfolk County Council and is occasioned by Objection No. 34B made by Major Henry Michael Barclay and noted in the Register on 23rd March 1970.

I held a hearing for the purpose of inquiring into the dispute at Norwich on 4th June 1972. The hearing was attended by Mr. M.J. Gray, the Secretary of the Hanworth Commons Committee, and by Mr. J.E. Bastin, solicitor for Major Barclay.

The dispute relates to a piece of land with an area of about 4 acres, lying at the southern end and forming a comparatively small part of the land comprised in the Register Unit. On the Tithe Map dated 1840 the land the subject of the dispute is shown as being in the same enclosure as a substantial part of the land comprised in the registration.

There was produced to me an indenture made 14th February 1851 between (1) Edward Vernon, Lord Suffield, lord of the manor of Hanworth; (2) Charles Heath, vicar of Hanworth, Joseph Durrell, Philip Wynell Mayow, Richard Clarke, and Fleetwood Churchill, vicar of Roughton; and (3) William Howe Windham. This recited that the parties of the second part were the owners and proprietors of all the messuages, cottages, lands, tenements, and hereditaments entitled to rights in, over, or upon the commons in the parish of Hanworth and provided that it should and might be lawful for Mr. Windham, his heirs, and assigns forthwith to enter into and upon and to take in, ditch, and inclose the land the subject of this dispute and to have, hold, use, occupy, possess, and enjoy this land in severalty and freed and discharged of and from the exercise of all rights of common and all other rights whatsoever of the parties of the first and second parts. In consideration of the leave and licence so given Mr. Windham covenanted to pay to the churchwardens of the parish of Hanworth the sum of £4 a year to be laid out by them in the purchase of coals and equally distributed among the poor householders in the parish on or about Christmas Eve.

This indenture was executed only by Mr. Heath and Mr. Windham, so that it was inoperative to extinguish the rights of common over the land in question to which the other parties of the second part were entitled. The existence of the indenture does, however, explain the subsequent conduct of the successors of those who were parties to it.

By a conveyance dated 23rd June 1902 the land in question was, with other property, conveyed to Henry Albert Barclay, the grandfather of the Objector.

Evidence was given by Mr. Ernest Atthew, now aged 73, who has lived in Hanworth all his life, his nephew, Mr. G.R. Atthew, aged 49, also a



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native of Hanworth, and the Objector. The accuracy of this evidence was not disputed by Mr. Gray.

The land in dispute has been fenced from the rest of the land the subject of the registration during the whole period of the memory of the witnesses. It has been used for the planting and felling of trees and has been managed with the rest of the woodlands on the Objector's estate. No one has exercised any rights of common over the land within living memory.

During the earlier years of this century the owner of the Hanworth Estate used to pay for coal, which was distributed to the poor. When this was discontinued, £4 a year was paid to the Vicar and this is now paid to the Commons Committee, the payment being made £20 at a time every five years.

Mr. Gray argued that nothing that had happened could affect the continued existence of the rights of common, because the commoners could not release their rights.

I do not accept Mr. Gray's proposition of law. Indeed, there is authority to the contrary dating from the Middle Ages in the treatise which goes by the name of Fleta, where it is stated in Bk IV, ch.20: "Communia dissolvi potest ex mutua utriusque voluntate". However, it seems clear that the indenture of 14th February 1851, while it may have extinguished Mr. Heath's rights, did not deprive the land in question of its status as common land, because the other commoners did not execute the indenture. The difficulty in the way of Mr. Gray's contention that the rights of common still exist lies not in the indenture of 1851, but in the fact that those rights have not been exercised within living memory.

Non-user of rights of common can be evidence of the abandonment of those rights. This not to say that a presumption of abandonment can be made from the mere fact of non-user: there must be other circumstances in the case to raise that presumption: see Ward v. Ward (1852), 7 Ex.338. In my view the circumstances in this case are such as to be capable of explanation only on the footing that all the commoners, although most of them did not execute the indenture of 1851, demonstrated by their long acquiescence in the fencing of the land in question from the rest of the Common their fixed intention never again to assert their rights of common themselves or to attempt to transmit them to others: cf. Tehidy Minerals Ltd. v. Norman [1971] 2.Q.B. 528, 553.

For these reasons I confirm the registration with the following modification: namely the exclusion of the land the subject of the objection.

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 25th day of July 1972

Chief Commons Commissioner