



COMMONS REGISTRATION ACT 1965

Reference Nos. 233/D/15
to 19 inclusive

In the Matter of The Holms,
The Pound and Broadheath, Shenstone,
Lichfield District, Staffordshire

SECOND DECISION

This second decision is supplemental to a decision dated 13 February 1981 and given by me after a hearing at Lichfield on 14 December 1977 for the purpose of inquiring into disputes relating to the registrations at Entry No. 1 in the Land Section and at Entry Nos. 1 and 2 in the Ownership Section of Register Unit No. C176 in the Register of Common Land maintained by the Staffordshire County Council, and occasioned as to the Land Section registration by Objection No. 23 made by Mr R Manley, Objection No. 33 made by Mr W J Ryman and Mr R M Foden (as trustees of H M Foden deceased), and Objection No. 40 made by Staffordshire County Council, and occasioned as to the Ownership Section registrations made on the application of Mr A C Smith and of Shenstone Parish Council by the conflict between them.

By a decision dated 30 April 1981 upon an application made by Shenstone Parish Council, I re-opened the said December 1977 hearing and set aside my said 1978 decision so far as it related to the registration in the Land Section except the pieces in my said decision called the West of the Railway Piece, the East of the Railway Piece, and the Broadheath Piece, and so far as it related to the registrations in the Ownership Section of any part of the Unit Land other than the Broadheath Piece. By my said 1981 decision I directed that the costs of the said application be costs of the hearing which as a result of such decision would be arranged.

I held the further hearing at Lichfield on 15 and 16 July 1981. At this hearing (1) Shenstone Parish Council were represented by Mr J A Haggett, solicitor of Moseley Chapman & Skemp, Solicitors of Lichfield; (2) Staffordshire County Council were represented by Mr C T Gray, solicitor and assistant clerk of the Council; and (3) Mr A C Smith was represented by Mr G J Topham of counsel instructed by Hand Morgan & Owen, Solicitors of Stafford. Messrs W J Ryman and R M Foden, although represented at the 1977 hearing and on the two occasions (in London on 25 November 1980 and 10 April 1981) when I held hearings about the said Parish Council application, were not represented at this July 1981 hearing, but their Solicitors sent a letter dated 25 June 1981 explaining that their clients having given careful consideration had decided they would not take any further part in the proceedings so that "the Commons Commissioner must come to his decision without our clients taking part"; however as mentioned below Mr J Piper Solicitor of Haden & Stretton, Solicitors of Lichfield attended for a short time at my request to deal with a question I raised about their said June 1981 letter. Also present at the July 1981 hearing was Mr S C Leppard a member of the Parish Council on behalf of himself and as representing Mr Ralph Brownlie Addison and Mr John Watkins who with him are trustees appointed in April 1981 to carry on the work of the Lammass Trustees set up in 1883 by the



Vestry under the direction of the Reverend L W Essington then Vicar of Shenstone. I had a letter dated 14 July 1981 from Godfrey, Diggines & McKay, Solicitors of Birmingham acting for the Trustees of M R Brain deceased saying they owned a piece of land adjoining the south side of the west part of the South of the Brook Piece.

By far the greater part of the hearing related to the part ("the Footpath Piece") of the South of the Brook Piece which is west of a fence ("the Dividing Fence") marked on the most recent OS map 1/2,500 as dividing OS No. 8700 ($4.72 + 1.64 = 6.36$ acres) from OS No. 1100 (2.65 acres). The Footpath Piece is coextensive with the said OS No. 8700 being on an earlier OS map 1/2,500 the west part of OS No. 432 containing 8.899 acres. The Footpath Piece is crossed by the Chesterfield Path (mentioned in my 1978 decision).

The remaining part ("the Mill Piece") of the South of the Brook Piece comprises the said OS No. 1100 (2.65 acres) and possibly also (my copy of the Register map is not clear) OS Nos. 1503 and pt 2300 (together 0.26 acres). The said 2.65 acres on the earlier map corresponds with the rest of No. 232 ($8.899 - 6.36$ acres) plus OS No. 321 (containing 0.101 acres) = 2.64 acres.

Mr Topham contended that no part of the Footpath Piece should have been included in the Land Section and that I should therefore exclude it. Mr Haggett before calling any evidence contended that whether or not the Footpath Piece was originally properly registered, I had no jurisdiction pursuant to any contention made on behalf of Mr A C Smith now to exclude it because:

(a) its exclusion was not asked for by any person who had in accordance with the Regulations made any Objection;

(b) its exclusion was not suggested in the grounds set out in any Objection which had been made; and

(c) Mr Smith who had made no Objection, had not under the Regulations on any question relating to the Land Section registration any right, and accordingly ought not, to be heard; he referred me to regulations 19, 23 and 25 of the Commons Commissioners Regulations 1971.

By the Commons Registration (Objections and Maps) Regulations 1968, the form of objection is prescribed, form 26 with a space for "grounds of objection"; and with notes (part of the form) which give guidance and as an example of grounds: "the land or some part thereof (describe the part by plan ...) was not common land at the date of registration". But the 1965 Act itself does not require an objection to specify any grounds; so under the Act, once an objection is made to any registration, a Commissioner may modify it without (so far as appears in the Act) any limitation whatever. However by regulation 26 of the 1971 Regulations a person who has made an Objection is not entitled "to rely upon any ground of objection not stated in his objection unless the Commissioner thinks it just in all the circumstances to allow him to put forward such additional grounds as appear to the Commissioner to be material". So if an objector fails on the ground stated in his objection, the registration will stand (unless otherwise it would be "just"), notwithstanding that there is no evidence in support of the



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registration or against other possible grounds of objection, apart from the short statutory declaration made when the registration was applied for (see Form 7 Schedule to the Commons Registration General Regulations 1966). Stating the effect of regulation 26 shortly, the position will then be as it would have been under section 7 of the 1965 Act if the objection had never been made.

The 1971 Regulations provide by regulation 18 that except as therein mentioned procedure shall be at the "discretion" of the Commissioner. The 1971 regulations do not deal particularly or even in some cases at all with the numerous complexities arising in proceedings as a result of death, illness, assignment of interest, etc. dealt with at length in the Rules of the Supreme Court. In my opinion the Commissioner should exercise the "discretion" conferred by regulation 18, and decide what is "just" under regulation 26 in accordance with the law as applied by the High Court in comparable circumstances.

Under regulation 23 of the 1871 Regulations a Commissioner may take evidence from any person present who gives his name and address. A person such as Mr A C Smith who has never made any Objections to the Land Section registration cannot be in any better position than a person who has made an Objection merely because he or his son or one of his friends has been allowed to give evidence under this regulation. In my view in this case I have to consider as best I can whether the High Court in comparable proceedings would allow a person who is not, but might if he had applied at the appropriate time have been a party to the proceedings, to interfere in them; and as to comparability, I must bear in mind that under sub-section (2) of section 5 of the 1965 Act a person like Mr A C Smith who has not made an objection within the prescribed time, is by the Act excluded from ever making an objection, and that under the Act and the Regulations made under it neither the High Court nor a Commons Commissioner or anyone else can enlarge the time.

When all persons present or represented at a hearing before me agree that a registration was in part a mistake and all persons who might be concerned to support it are either agreeable or apparently indifferent, I have usually considered it just to correct the mistake: see my decision of 28 July 1972 re Gleaston reported at page 60 of the decisions of the Commons Commissioners published in 1972 by Commons, Open Spaces and Footpaths Preservation Society. And in such a case it matters not I think that I can only make this correction as a result of an objection made on grounds wholly unconnected with the mistake, and that apart from such collateral objection, the registration would under section 7 of the Act have become final without any hearing before a Commons Commissioner and therefore incapable of being corrected by anyone.

When giving my 1978 decision by which I removed the Footpath Piece from the Land Section, as far as I can remember I had in mind that all those concerned with the Footpath Piece thought that its registration was a mistake except possibly the Parish Council who had by their non attendance showed themselves to be indifferent. My said decision does not indicate that I can properly at the request of Mr A C Smith do this against the wishes of the Parish Council; particularly as at the April 1981 London hearing it was on behalf of Mr A C Smith conceded that the Parish Council had sufficient reason for their absence from the 1977 hearing. On what is procedurally "just in all the circumstances", the wishes of the applicant for registration are important but not decisive; eg. when the evidence in support of an objection to



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part of a registration establishes that the whole registration is nonsense, it is I think just to disregard the applicant's wishes, as I did in another case where the registration included a police station, supermarket, cinema etc. So except in a simple case (which this is not), I cannot without hearing evidence say to what extent if at all I should pay attention to the contentions made on behalf of Mr A C Smith.

At the beginning of the 1981 hearing, having in mind the principles above set out, I indicated that at that stage I did not accept the contentions of either Mr Topham or Mr Haggett, and that because unavoidably I must hear evidence in relation to the objections made by the Foden Trustees and the County Council and in relation to the Ownership Section registrations I would hear evidence on all questions, and later give my decision on the said contentions. I also indicated that I would hear the evidence of any person who in the interest of Mr A C Smith might volunteer evidence.

Oral evidence was then given on behalf of the Parish Council by the 17 persons hereinafter named, such evidence except as regards (1) and (3) being given by reference to affidavits sworn (on the days specified) for the purpose of the April 1981 hearing:- (1) Mr S C Leppard (above mentioned) who has lived in Shenstone since 1956, was a member of the Parish Council for about 2 years and in about 1978 was asked by them to look through their records to check the references to the Lammas Lands (meaning the South of the Brook Piece, the East of the Railway Piece and two plots not registered under the 1965 Act west of the railway line being OS Nos. 472 and 473 of 0.250 and 1.570 acres) and who in the course of his evidence produced documents (PC/1-PC/15). (2) Mr John Watkins (19 December 1980) who has lived in Shenstone ever since 1936 (in 1936 and 1937 and since 1952 in Pinfold Hill), who has been a member of the Parish Council since about 1952 and who in 1953 was secretary of the Shenstone Playing Fields Committee which was formed to acquire land for new playing fields, and who produced documents (AW/2 to AW/11); (3) Mr Eric Gray Benney who since 1959 has resided at Claridge Cottage, Pinfold Hill just south-west of where the Chesterfield path joins it; (4) Mr Ralph Brownlee Addison (19 December 1980) who has lived in Shenstone since 1922 and who from February 1953 was Secretary of the Lammas Land Committee (Mr A C Smith was then a member) and who ceased to be such in June 1953 because he was then considering emigrating to New Zealand; (5) Mrs Kathleen Muriel Page (19 December 1980) who first came to live in Shenstone in 1934 at the age of 9 and who "had been collecting notes on Shenstone for many years" and who mentioned the Annals of Shenstone by the Reverend W R Essington, vicar of Shenstone 1848-1891 (printed octavo, 152 pages published Frederick Brown); (6) Mrs Margaret Lindsay Povey (19 December 1980) who has since 1917 (then a little girl) lived in Shenstone; (7) Mrs Alice Gertrude Simpson (19 December 1980) who was born in Shenstone over 60 years ago and lived there until 1965 and whose father Mr Joseph Alfred Hewkin was a member of the Committee on the Lammas Lands Trust; (8) Mrs Kathleen Muriel Crowther (3 March 1981) who was born in Shenstone in 1913 and lived there until she left to get married; (9) Mrs Mary Phyllis Davies (3 March 1981) who moved to Shenstone in around 1953 and lived there all her married life; (10) Mrs Francis Patricia Jones (3 March 1981) who from about 1934 (then about 11 years old) to 1948 lived near Shenstone and frequently went there and has since 1948 lived there; (11) Mrs Myra Harrison (27 March 1981) who came to Shenstone in 1935 as a young teacher who has lived



with Mr and Mrs Rock in a house opposite the end of Chesterfield Park (where it joins Pinfold Hill) until when the war was over they (she was married in 1940) went to live in another part of Shenstone; (12) Mr Frank Richard Jones (16 March 1981) who was born in 1912 and has lived in Shenstone most of his life; (13) Mrs Janet Maybury who is the daughter of Mr Percy Daubner who was from April 1943 until his death one of the trustees of the below mentioned Consolidated Stock; (14) Mr Trevor George Norman Stubbs (27 March 1981) who has lived in Shenstone all his life (61 years); (15) Mr Arthur Ford Harrison (16 March 1981), who is 68 years old and has lived in Shenstone all his life; (16) Mr Daniel Harrison (27 March 1981) has lived in Shenstone all his life, 63 years; and (17) Mr Andrew Clive Harrison (27 March 1981) who in 1953 was born in Shenstone and has lived there all his life.

After this evidence, on behalf of Mr A C Smith oral evidence was given by (1) his son Mr Christopher Leighton Alfred Smith who produced a deed of gift dated 18 November 1980 by which Mr A C Smith had conveyed the Footpath Piece to his three children the said Mr C L A Smith, Mr Graham Geoffrey Arthur Smith and Miss Elaine Elizabeth Smith; and (2) by Mr Albert John Warmington who has lived in Shenstone all his life, 76 years.

On the day after the hearing I inspected the Footpath Piece, the East Piece and the Pound Piece in the presence of Mr C L A Smith, Mrs S C Leppard and Mr J Watkins.

There was no dispute that the Footpath Piece had for many years been locally known as, or as part of the land known as, "the Lammas Land".

Mr A C Smith first became concerned with the land near the Footpath Piece when by a conveyance (ACS/1) dated 8 April 1948 the then Trustees of the will of Harry Foden (he died 12 May 1938) for £500 conveyed to him a field being OS No. 325 containing 2.57 acres fronting on Pinfold Hill. On this field afterwards was built a house 36 Pinfold Hill in which Mr A C Smith has lived ever since. By a conveyance (ACS/2) dated 23 November 1953 the Church Commissioners for England for £100 conveyed (or purported to convey) to Mr A C Smith land "being part of the Lammas Land of the parish of Shenstone containing four acres one rood and thirty seven and one half perches or thereabouts and more particularly delineated on the Plan annexed hereto and thereafter coloured red" subject to "the existing tenancy and subject to all Lammas rights and to all other rights of Common right of way, water, light and other easements (if any) affecting the same". The plan shows thereon coloured red the west part of (including the Chesterfield Path) of the Footpath Piece leaving uncoloured the east part, being much of the part west of the Dividing Fence.

The concern of Messrs Leppard, Addison and Watkins as trustees originated in a meeting held on 7 March 1883 held at Shenstone and convened by the London and North Western Railway Company under the Land Clauses Consolidation Act 1845 as recorded in two apparently contemporary documents (PC/9 and PC/10) signed by Rev R W Essington, G Titterton and E Gilbert as the committee thereby appointed to treat with the Railway Company for the compensation to be paid for the extinction of "all rights common and other rights in the nature thereof" over the land required for the intended railway (being the Railway Land on the west side of the Footpath Piece); the earlier document was also signed by three other persons who are therein described as being "a majority of persons entitled to the rights of common or other



rights in the right nature thereof over or in the above mentioned pieces or parcels of common or waste land present at the said meeting". In the later document the Committee acknowledge having received on 4 May 1883 £70 from the Railway Company in full for all compensation. In both documents the rights are described as "rights of Common or other rights in the nature thereof exerciseable by the Householders dwelling within the Brook within the Parish of Shenstone". There is now a holding of 2½% Consolidated Stock producing an annual income of £1.84np. With the help of the Bank of England letter of 9 July 1981 (PC/11) I identify this holding with 3% Consolidated Stock acquired by Rev R W Essington, G Titterton, and E Gilbert on 23 July 1883. The manner in which compensation received under the 1845 Act can be dealt with is set out in Halsbury Laws of England (4th edition 1974) volume 6 at paragraph 616 et seq; there was no evidence that any meeting had been held in accordance with a direction of the Secretary of State as therein mentioned and I infer there was not, and accordingly the persons to whom this stock was successively transferred between 1883 and 1981 acquired the said stock informally. By operation of law they became trustees; but I am not in these proceedings concerned with the trusts applicable. In my opinion the persons who were in 1883 appointed a Committee as above stated did not thereby acquire any powers over the remainder of the land then believed to be Common land, and the present Trustees of the Consolidated Stock although they may perhaps for practical purposes regard themselves as the successors of such a Committee have not as such any concern with the Footpath Piece, and accordingly their views are not particularly significant in these proceedings.

Nothing in the preceding paragraph must be regarded as discrediting in any way the evidence given by Mr Leppard or Mr Addison or Mr Watkins as witnesses called on behalf of the Parish Council or as suggesting what they and their predecessors did is necessarily irrelevant.

It was said at the hearing that the expression "within the Brook" contained in the 1883 documents referred to the River Crane and a tributary of it and that a large area which included the whole of the present Parish of Shenstone was by these words sufficiently identified. However this may be, in my opinion the words quoted above cannot be taken to be an accurate description in proper legal language of the rights which existed in 1883 and which the Railway Company were then desirous of extinguishing; it was not necessary for the Company or for the persons pursuant to the 1845 Act appointed as a Committee to formulate in an accurate way any such description, and I am inclined to infer that they never intended to do so. At least as far as this case is concerned these words are of no greater consequence than the below mentioned description of the rights given to me by the now living witnesses.

Nearly all the witnesses who gave oral evidence before me when describing the rights which they themselves thought they, or the public, had over the Footpath Piece, used some such words as "the Lammas Lands were free for the commoners of Shenstone for both recreation and grazing rights", "there was free grazing for the parishioners' animals on the Lammas Lands during the autumn and winter months", "Lammas Lands has common open for grazing during the autumn and winter" ... etc.

Inhabitants or other fluctuating bodies cannot as such in law be entitled to grazing rights see Gateward's case (1607) 6 Co Rep 59 and Halsbury ib. paragraph 594, and a pleading describing rights over alleged Lammas Lands in words substantially the same as those quoted in the previous paragraph is demurrable as showing no right



recognised by law, see *Baylis v Tyssen-Amhurst* (1877) 6 Ch D 500. This sort of criticism of the evidence given by witnesses at a trial was considered by the Court of Appeal in *De la Warr v Miles* (1881) 17 Ch D 535; of it Brett L J said that he "is claiming to exercise the right, which he did in fact exercise, in respect of some alleged title, which could not be supported, is in my opinion wholly immaterial ..."; and Cotton L J, having said "... and it is said here, that these acts, if they are made out in fact to have been done ... were done, not under what the Court thinks would give a good defence, but as under custom which the Court holds incapable of proof and not proved", and then (stating his own contrary view) "will see whether the Acts which the defendant claims a right to do ... are such as could be supported as lawful by custom, prescription or grant ...", at page 596; and "it is said however that nearly all the persons who cut litter did it not in respect of their own particular farms but under general supposition that the (1693) decree gave them a right to do so or that there was some custom which justified it. In my opinion as I have already said, it is not necessary ... that that acts done should at the time have been attempted to have been justified in any way which we think they can legally be justified ...". I think the above quoted observations, although made in circumstances not exactly similar to this case, guide me to the conclusion that I must pay regard not to what the witnesses thought was the legal justification of the acts they described but the acts themselves; their thoughts are irrelevant.

The possibly relevant acts done before 1953 (when Mr A.C. Smith first came) or which can be reflected back to such period were as follows:-

(a) In the map (transparency PC/3) annexed to the Shenstone Inclosure Award dated 17 September 1818 (made under Shenstone Inclosure Act 1811, 51 Geo 3. c. 3), the Footpath Piece is included in a large area south of Crane Brook marked "Lammas Lands"; the greater part of the Footpath Piece is part of "113 Home, Vicars Choral, leased to T Marshall"; the lesser part (on the east) are "Cook 149 Home, 148 Home Cowley and 151 Home Thos" (the "Thos" is part of Marshall written on 145 Pool and Meadow).

(b) In the minutes of the Vestry relating to a meeting held on 3 September 1834 it was reported that Reverend Mr Law proposed to grant a road down the Cherry Orchard "for the use of those persons entitled to the Land or Herbage in the Holme Meadow in consideration of the Parishioners of the Parish of Shenstone with the consent of Lord of the Manor allowing him the said Rev Chancellor Law to retain to his use the Land upon which the Pinfold or Pound in Shenstone is now standing together with the materials he will therefore enter into an agreement with the freeholders and inhabitants and householders of the Parish of Shenstone grant them a Right of Road into and from the Home Meadow through the Cherry Orchard ..." (extract from Stafford County Record Office: PC/12). Having inspected the land I agree Mr Leppard's identification of this Cherry Orchard Road with the part of the Chesterfield Path between the Footpath Piece and Pinfold Hill.



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(c) In the Tithe Award and map of 1839 (copy produced from the Vicarage "restored 1914 the missing pages inserted in pencil from J Maldens' copy of 1838" PC/2 and PC/5) the greater part of the Footpath Piece corresponds with 116C, and the lesser part with 152C, 151C and 150C on the Tithe map, (these plots being essentially identical with the 1818 Award Map Nos. 113, 149, 148 and 151 supra). The Mill Piece or most of it is 148C on the Tithe map (being essentially identical with the 1818 Award map No. 145). The relevant part of the Schedule of the Tithe Award (the Tithe map is attached to it) is:-

No	Owner	Occupier	Name of lands	State of Cultivation	ARP
C116	Lessee Mary Day	Hy Smith	Home	Meadow	5.1.35
(written in green ink at side. Ec Comm. Impropiator was Richd Hinckley)					
C152	J Weston	J Weston	Home	Meadow	0.1.36
C151	Rev Wm Cowley	Thos Hodgkins	--	Meadow	0.2.12
C148	Mary Day	Saml Day	Pool Tail	Meadow	3.0.28
C150	Mary Day	Saml Day	Home	Meadow	0.3.3

(d) On 4 May 1883 London and North Western Railway Company paid £70 for common rights, as appears from the above quoted 1883 documents. And the money was invested in Consolidated Stock (see Bank of England letter of 9 July 1981, PC/11).

(e) Shortly afterwards the interest for one year of the said Stock was devoted to planting the spot where a school had stood, see Essington supra page 132.

(f) Afterwards the interest at least while the Reverend Essington was vicar (until 1891) was applied for the purpose of enabling the village to be lit on dark nights with oil lamps, see Essington page 133.

(g) The vicar once turned in four stirks, and as they were all over the country very soon they had to be put elsewhere. He also on another occasion tried how a donkey would fare there. That animal found its way into a bog at once and after it had been hauled out the poor animal was inflicted with string halt; see Essington ib.

(h) Access to the grassland and to a trout stream had to be maintained for the benefit of the people however great the trouble might be and however unfertile the season during which the privilege endured, see Essington ib.



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(i) From 1930-1945 Mr Hugh Lynch a butcher and slaughter man who also kept the Railway Hotel (the slaughterhouse being in the yard at the back) kept 2 horses (Jasper and Florie) who pulled his trap and were put out onto the Footpath Piece; sometimes for one night; animals due for slaughter on the next day were put there instead of in the fasting pen (evidence of his daughter Mrs K M Crowther, and of Mr A F Harrison).

(j) Up to the 1940's Mr Aston who was the village fruiterer and sold vegetables kept his horse on the Footpath Piece (see evidence of Mrs K M Page and Mr D M Harrison).

(k) Until 1935 Mr F P Jones always turned his horses down onto the Lammas Lands the last 2 weeks in September when he went away on holiday (see evidence of his grandson Mr F R Jones).

(l) The father and grandfather of Mr A F Harrison had the keys of the gate south of the Footpath Piece (across the Chesterfield Path) and "used to take the gate off and bring it to the yard during the grazing season ... It was kept for mowing after the gate was taken off but the cattle would not go down there" (see his evidence and that of Mr Warmington). As I understood these witnesses the gate was put back during the grazing season to keep the animals in; for this purpose during the mowing season no gate was needed).

(m) The Footpath Piece was used generally for recreation purposes by the inhabitants, mention being made of picnicking, fishing and paddling in the stream, watching the trains, exercising a dog, ball games and camping.

In *Baylis v Tyssen-Amhurst* (1877) *supra* Jessel MR said at page 510:- "... where long continued user is proved of a beneficial enjoyment of rights of this kind, the tribunal ~~must~~ not be astute to destroy those valuable rights on any technical notion that a legal origin could not be attributed to them." And I have the above quoted judicial observations from *De la Warr v Miles* (1881) *supra*. A public charitable trust for the benefit of the inhabitants of a parish is recognised by law, see *Goodman v Saltash* (1882) 7 AC 633 and other cases; a trust for the inhabitants of ancient cottages to take turf off land is charitable, see *re Christchurch* 1888 38 ChD 520.

Upon these legal principles I find that from time immemorial at least up to 1953 some interest in the Footpath Piece was held upon a public charitable trust for the benefit of the inhabitants of the Parish.

Any uncertainty there may be as to the ownership of this interest was removed by section 17 of the Poor Act 1818 and the decisions of the Court as to the effect of such section. By the section the churchwardens and overseers of a parish were empowered to "accept and take and hold in the nature of a body corporate for and on behalf of the parish all land belonging to the parish". In *Doe v Hiley* (1830) 10 B & C 885, Lord Tenterden CJ held that this section had the effect of vesting in the churchwardens and overseers all the land belonging to the parish, notwithstanding that the land was not acquired for purposes relating to the poor.



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This decision has since been treated as applicable to all land "belonging" to a parish in the "popular sense of that expression", see *Doe v Terry* (1835) 4 A & E 274 at page 281 and *Haigh v West* (1893) 2 QB 19 at page 31; this last case although distinguished on the facts was recognised as stating law still applicable in *Wylde v Silver* (1963) 1 Ch 243 at page 271. The above mentioned interest in the Footpath Piece belonged to the parish in "the popular sense of that expression" such interest is by the operation of the Overseers Order 1927 now vested in the Parish Council.

So in 1953 when Mr A C Smith became concerned with the Footpath Piece, the Parish Council had an interest in it. In my view the advertisement he issued in the Lichfield Mercury on 18 April 1954: "The Villagers rights are from 14 August to 31 January annually are for grazing purposes only", shows that he realised this. Notwithstanding that he persuaded some of Villagers (eg Mrs L M Povey) rather than arguing with him about the existence of such rights to pay him something for their exercise, in my view nothing happened after 1953 and before 28 June 1968 (the date of the Land Section registration) to deprive the Parish Council of their interest. At that time the Footpath Piece was clearly common land within the popular meaning of these words and also within the meaning of them used by the Royal Commission on Common Land in their 1958 report and in the County Council's returns made to them. That the Footpath Piece could sensibly be registered under the 1965 Act was I infer recognised by Mr A C Smith not only by his making no objection to such registration but also by he himself on 14 January 1969 applying to be registered in the Ownership Section as owner.

As to the effect of the 1965 Act, Mr Topham insisted that the Footpath Piece could not be within the words "land subject to rights of common" used in paragraph (a) of the definition of common land in section 22(1) of the Act because no rights of common had been registered in the Rights Section, as was decided in *CDGB v Clwyd* 1976 1 WLR 151 and could not be within the words "waste land of a manor" in paragraph (b) of the said definition because of the date of the registration it had no connection with any manor, see re Box 1980 Ch 109. He contended in effect that whatever might be the procedural difficulties I ought as an inferior tribunal to follow these decisions.

During the period when first registrations under the 1965 Act were permitted applicants gave a meaning to the words "common land" far wider than that given years later in *CDGB v Clwyd* supra and re Box supra; and because no objection was made to their application, the resulting registrations became final under section 7 of the 1965 Act, with the consequence under section 10 that they became "conclusive evidence of the matters registered". The number of registrations now subsisting in every county which are not in accordance with these 1976 and 1980 decisions are very numerous, many hundreds I would say. That all these are conclusive evidence that the land so registered is what it is clerly not, may give rise to many problems; about this I was referred to a judgement of his Honour Judge A C Bulger dated 31 March 1981 relating to Temple and Meadow, Little Rissington, in the course of which draws attention to the observations of Lord Diplock in *Suffolk v Mason* 1979 AC 705.

I think I must read the Act as contemplating that just this result might happen, and for this reason there can be no principle of public policy against my reaching a decision which will be for procedural reasons place the Footpath Piece in the same



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ition as many hundreds of other registrations which have become final on the assumption that the law is quite different from what it was in 1976 and 1980 declared to be.

that I can and should do this is I think shown by Re Waring 1948 1 Ch 221 when Sirs J (as he then was) directed an annuity under a will for procedural reasons to be treated as reduced notwithstanding that the House of Lords had construed the will as entitling all annuitants thereunder to be paid in full. In my view Mr A C Smith by not objecting in due time to the registration of the Footpath Piece in the Land Section and by making an application to be registered as owner on the basis that it was common land put himself in essentially the same procedural position as the unsuccessful annuitant in re Waring. For these reasons my decision that the Footpath Piece should remain in the Land Section notwithstanding that Mr A C Smith had made an objection and the resulting dispute had become before the Commons Commissioner after CEB v Clwyd supra and re Box supra had been cited might have certainly succeeded in excluding it from the registration.

I should mention that in favour of such exclusion an additional argument was put forward based on Objection No. 33 made by the Foden Trustees. To deal with this, I must first dispose of this Objection as between them and the Parish Council.

Piper explained that the said due 1981 letter was not intended to be read as a withdrawal by the Foden Trustees of the Objection. Mr Haggett accepted this explanation and explained that the letter was not accompanied by any agreement between Foden Trustees and the Parish Council save that the Parish Council would not allow the Foden Trustees ask for any costs up to the date of the letter. On the substance of the Objection Mr Haggett simply submitted that I could regard myself only to the evidence given at the 1981 hearing but also to that given at the 1977 hearing and upon such evidence the Objection should fail. In accordance with the letter, I had no submission from the Foden Trustees.

Regarding the Mill Piece (being the same as is in my 1978 decision called the Foden Area) I had at the 1981 hearing the following additional evidence:- Leppard, Mr Watkins, Mr Stubbs and Mr A F Harrison treated the Mill Piece as part of that which they knew as Lammas Lands. Contra Mr Addison, Mrs Page, Mr Povey, Mrs Simpson, Mr Jones, Mrs M Harrison and Mr D Harrison excluded the Mill Piece from what they knew as Lammas Land. Mr Crowther and Mrs M B Davies thought the Mill Piece was Lammas Land but never went on there because it was inaccessible by reason of a fence. The words "Lammas Lands" on the 1813 Award map and on the 1813 map do not apply to the Mill Piece.

In my opinion this additional evidence quite apart from any legal considerations based on CEB v Clwyd and re Box supra provides no good reason for my reaching a conclusion different from that which I reached in my 1978 decision, that the Mill Piece (the Foden Area) is not properly registered; and to this extent at least my decision is that the Objection succeeds.

I explained in my 1978 decision the map attached to the Objection includes a small part of the Footpath Piece and the plan drawn on the 1920 conveyance is some



evidence that the Foden Trustees owned this part. It is to be noted that this part corresponds closely with the part of the Footpath Piece not delineated on the plan annexed to the 1953 conveyance to Mr A C Smith. However on my inspection after the 1977 hearing and after the 1981 hearing it was apparent that this part now has no reality the Dividing Fence being the true ownership boundary; as was expressly stated to me by Mr Foden during my 1977 inspection. I conclude therefore that as regards ownership either the 1920 conveyance map was mistaken or that under a grant which has been lost and which I should presume has been made the boundary was adjusted in accordance with the Dividing Fence. It having been made clear that the Foden Trustees were only concerned with what they owned and that their Objection was intended to be so limited as between them and the Parish Council I have no good reason for giving it any effect beyond the Mill Piece.

I reject the suggestion made on behalf of Mr A C Smith that I should treat this Objection as impliedly putting in issue the status of any part of the Footpath Piece. The circumstances of the Mill Piece and the Footpath Piece are quite different and I consider that merely because the map attached to the Objection mistakenly included a small part of the Footpath Piece provides no good reason why I should alter the conclusion against Mr A C Smith which I have upon other considerations, above set out.

I now mention an argument put forward by Mr Haggett based on the evidence which I now summarise:- In and before February 1953 there was a committee known as "The Lammas Lands Committee" and in some way connected with administration of the above mentioned Consolidated Stock which had since April 1943 stood in the names of Thomas Aston (Junior), Joseph Albert Hewkin and Percy John Daubner (PC/11). Of this committee Mr A C Smith was a member and Mr R B Addison was secretary, he having on 9 February 1953 as such secretary received from Thomas Aston as former secretary of the Trust (Lammas Lands Trust), Lammas Land minute book, Railway deeds, Holme Lane deeds, bank statements and cover and other correspondence concerning the above Trust" (evidence of Mr Addison). On 16 April 1953 a Parish Meeting was held for the purpose of discussing the provision of a Children's Playing Field, and the meeting resolved to establish a committee. On 23 April 1953 the committee so established of which Mr A C Smith was a member, met and after a proposal that the Lammas Lands be considered as a possible site, it was agreed that Mr A C Smith should make full inquiries and report back (JW/2). The committee met again on 12 June 1953, and as to Lammas Land, Mr A C Smith reported that he was still in some doubt about the holding and leasing arrangements and could not take the matter further. (JW/2). On 23 June 1953 Mr Addison on the basis that Mr A C Smith had succeeded him as secretary of the Lammas Land Trust handed to Mr Smith his documents and took from him a signed receipt which was in these words "I A Smith Esq of Shenstone trustee of the above lands have today received from the late secretary of the above lands all the literature appertaining to the said lands numbering 2 books 60 pieces (letters) and including 3 pieces in parchment consisting of 1. grant of Drift Road dated 10 August 1841, 2. receipt for compensation dated 7 March 1883, 3. resolution dated 4 February 1883" (PC/15). In June or July 1953 Sir Thomas Dugdale Minister of Agriculture in the House of Commons gave a written reply to a question by Mr Julian Snow MP about Shenstone Lammas Land, and about this time they received some publicity particularly in relation to a barbed wire fence which allegedly had been erected irregularly over the Lammas Land: the Minister's reply was: "The land in question is apparently



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ned by Church Commissioners and is parly in private hands in an Inclosure
p of 1818 the land is shown as Lammas Land but no trace has been found of any
ed or document governing its administration nor have I any evidence that the
blic have any legal right of access to this land for recreation" see
wspaper cuttings from Lichfield Mercury, Birmingham Post and 21 August 1953
lsall Observer PC/6, PC/7 and PC/8. The meeting of the Playing Fields
mmittee held on 2 July 1953 at which Mr A C Smith was not present, the
airman disclosed he had received information that Mr A C Smith was not now
pporting the objects of the committee and after some discussion the secretary
s instructed to write to him asking for an explanation (AW/2); and accordingly
was asked if he would attend a meeting on 26 August (JW/5) meanwhile the committee
proached the receivers for Church Commissioners with a view to the committee
rchasing the Lammas Land and were in a letter dated 25 August 1953 informed by
em that they had agreed to sell it to Mr A C Smith (JW/7). The committee met
26 August 1953 and resolved "the secretary should write to Mr Smith asking
ether he proposes to make the land available to use ...". Having been so
ked Mr Smith replied in a letter dated 28 August 1953 "I bought the Lammas Land
t do not intend to dispose of any at the moment furthermore I have no intention
entering into any negotiations until I have received two official apologies
) regarding your letter asking for my resignation, (2) informing the public at
rge of my private business I understand you have been offered other Lammas Land
d it would be interesting to know why it has not been accepted".

complete the story I record that in a letter dated 31 August 1953 the Shenstone
aying Fields Committee gave a detailed reply to Mr A C Smith to his letter of
August contending that he had no grounds for complaint against them and that
Snow obtained from Sir Thomas Dugdale a letter dated 11 January 1954 commenting
some detail on the position as he saw it on the information then available
him; and as above stated the conveyance of the land to Mr A C Smith is dated
November 1953 and his contentious advertisement in the Lichfield Mercury is
ted 16 April 1954.

the 1981 hearing it was said none of the documents handed by Mr Addison to
Smith in 1953 have been produced and no explanation had been given by Mr Smith
to their whereabouts so that in result such historical evidence as they may
ve contained has had to be reconstructed from other sources and the
rish Council have been put to considerable expense in the matter which could
ve been avoided.

e documents above quoted are capable of being read in a manner discreditable to
A C Smith in that it does seem extraordinary that he should while a number of the
aying Fields Committee and considered by some of them to be their secretary and
ving signed a receipt in which he is described as Trustee should have for himself
rchased land which they were desirous of acquiring. So it was perhaps unfortunate
never personally explained in person; he did not attend the 1981 hearing because,
his son Mr G G A Smith said, he was not well enough to do so. When Mr Warrington
s asked about this committee, he said he was a member that it was not set up by
A C Smith by Mr Hewkin and that Mr Aston said it was void because he knew nothing
out it; and when asked whether the object of the committee was to preserve the
mmas rights he, Mr Warrington said there were many arguments against this and that
t was all out of order and it was abandoned within a few hours; people had got
e idea it is a playing ground but it is not: it is Lammas Land." Mr G L A Smith (A)



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ould answer no questions about these 1953 happenings. In my view the documents above described are properly admissible in evidence for or against Mr A C Smith in these proceedings and are relevant and can I think without injustice to Mr A C Smith be used against him in that they or nearly all of them were before him when he made an affidavit on 26 March 1981 for the purpose of the said London hearing and if he had an explanation about this part of the the case of the Parish Council I think it reasonable to suppose that he would have been then advised to state it.*

In my opinion I have no jurisdiction in these proceedings to consider whether Mr A C Smith was guilty of a breach of trust when he bought for himself in 1953. The relevance of this evidence in these proceedings is that from the time he purchased he knew that a substantial number of persons in the parish of good reputation considered that the inhabitants had some interest in these lands and he had access to the papers on which this belief was based. As regards my conclusion about the Land Section registration of the Footpath Piece above recorded, it does provide an additional alternative ground for that conclusion.

I now consider the registrations in the Ownership Section so far as they relate to the Footpath Piece and on the basis that it is now finally registered under the 1965 Act as common land although like many other lands so finally registered, may not be within the section 22 definition as explained in *CEGB v Clwyd* and *Box supra*. The registration at Entry No. 1 (Mr A C Smith) relates to the Footpath Piece and the Pound Piece; the registration at Entry No. 2 (Shenstone Parish Council) relates to the Pound Piece and the Broadheath Piece. Clearly these registrations are in conflict, and by regulation 7 of the 1971 Regulations each is to be treated as an objection to the other. There is nothing either in the Act or in the 1971 Regulations to limit the extent of this "treated" Objection to the conflict, and regulation 26 above quoted is not applicable, see section 19(1)(h) of the Act. And even if regulation 26 was applicable to it, it would not be unjust in the circumstances of this case as outlined in my April 1981 decision and above this decision to allow the Parish Council to object to Mr Smith's ownership registration in respect of the Footpath Piece.

The name "Lammas Land" implies that the rights of the persons interested therein are in some way dependent on the taking of a crop, because Lammas or Loaf Mass denotes a public thanksgiving for a harvest. Sometimes the rights depend on the actual day of the feast, 1 August, and where such day has become customary, the date by the Calender Act 1751 now 12 August, see William's, *Lectures on Commons* (1830) page 80. But of the Lammas Land I have come across, the hearing has always proceeded on the basis that the actual gathering of the crop is the decisive date, an idea consistent with the feast being a thanksgiving for crops already gathered. In the case of a Footpath Piece, there can be no doubt about the crop: grass (hay). If it appeared, and no one suggested it could be otherwise. Of the Lammas Lands which I have been concerned, I can recall none for which the crop was other than hay. When I inspected the Footpath Piece (17 July), it had been mowed for hay and seemed to be well cared for; however Mr C L A Smith said he thought it had sometimes been grazed all the year round, and as I understood Mr Snelson at the December 1977 hearing, he as tenant grazed the Foden Area (the Mill Piece) all the year round but only grazed the Footpath Piece outside the Lammas Period; so it was not grazed by him from 1 August to 1 February.

Note. A letter from him which was handed to me during my inspection, dealt with other matters.



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So in accordance with the considerations set out above, I conclude that the interest of the Parish Council was during the Lammas Period (as to the proper meaning of this expression see below). As to the nature of this interest I can think of only three possibilities as worth consideration: either (1) the Parish Council own the fee simple subject to Mr A C Smith having outside the Lammas Period the right to take the grass and the hay crop (a right in some places called "a right of forshear"); or (2) Mr A C Smith owns the fee simple subject to the Parish Council being entitled to the grass during the Lammas Period; or (3) Mr A C Smith is entitled to the land in fee simple outside the Lammas Period and the Parish Council is entitled to the land in fee simple during the Lammas Period. As to (1) and (2) the right to take the grass (or all that is growing) is in law called a herbage (or vesture) and is under the 1965 Act deemed to be a right of common; with the result that (no right of common having been registered under the 1965 Act) either Mr A C Smith or the Parish Council are now precluded from exercising it. As to (3) such a movable freehold is recognised by law, see *Baxendale v Instow* (1981) 1WLR 1,055, citing with approval *Welden v Bridgwater* (1595) Cro. Eliz. 421; and is therefore properly registerable under the 1965 Act in the Ownership Section of the Register.

As between these three possibilities, but for the 1965 Act, the choice would matter little to anyone. I can deduce no general rule from the registrations made of other Lammas Lands, there being in my experience considerable variety, particularly where the hay crop is reputedly owned by several persons and for this purpose, the common is being treated as divided into strips.

In my opinion the circumstances ^{that} of the Footpath Piece was described by the witnesses and marked on the maps as being "Lammas Land" gives no guidance. I have not overlooked that Jessell MR in *Baylis v Tyssen-Amhurst* supra at page 507 says that he understands the meaning of the term to be that one person is owned in fee simple subject for half of the year to a right to pasturage owned by other people. But in the context of the rest of his judgement I do not regard him as deciding that the mere use of the words Lammas Land in general conversation or on a map is evidence that the legal situation is as he described. The words are used in the sense of possibility (3) in the (now repealed) Tithe Act 1839 section 13; and see also Halsbury Laws of England (4th edition) volume 6 (1974) paragraphs 517, 518 and 519.

I have nothing in favour of possibility (1). In favour of possibility (2) I have the 1953 conveyance made by the Church Commissioners. In favour of possibility (3) I have the view of the Reverend Essington: "During the aftermath season and winter the ownership lapses to the inhabitants of Shenstone hamlet", ib. at page 131. I have some indications from other sources; the 1818 map ("Vicar Choral"), the manuscript addition the 1845 Award ("Ec Com") and the heading of the Second Part of the First Schedule to the 1920 conveyance; and also Mr Snelson statement that as tenant of Mr Foden (and possibly sub-tenant of the Ecclesiastical Commissioners) he did not graze the Footpath Piece during the Lammas Period. In my view these other source indications are indecisive, and I must therefore choose between the 1953 conveyance and the Reverend Essington. I know nothing of the title of the Church Commissioners offer~~y~~ to Mr A C Smith when he bought in 1953. My guess is that he proceeded hopefully the basis of the 1953 answer given by Sir Thomas Dugdale in the House of Commons and was prepared to take anything the Church Commissioners might offer. However this may be, I know nothing of what motivated those of the Church Commissioners to execute the 1953 conveyance, and bearing in mind that the consideration for a conveyance of a little more than 4 acres of land was no



ore than £100, I cannot infer that any of them had any reliable knowledge about the question I am now considering. In favour of possibility (3) I have the views of the person who was Vicar of the Parish for 43 years and who has taken the trouble to write the history of the parish devoting a whole chapter of it to the Lammas Land. His statement is legally admissible evidence pointing in one direction and the 1953 conveyance is legally admissible evidence pointing in the opposite direction. Balancing the conflicting considerations as best I can, I prefer the Vicar.

s to the Lammas Period:- I reject the August 14 put in the 1954 advertisement by Mr A C Smith; I can think of nothing that supports this date. Jessel MR considered that a natural season was in law precise enough, see Baylis v Gyssens-Amshurst supra at page 508. I conclude that as regards the Footpath Piece the Lammas Period commenced when the hay crop was taken; and having been told that it was not always taken I favour the form set out below by reference to good agricultural practice for the same or comparable land. In this case I had no evidence as to when the Lammas Period ended. In other cases, it is not often mentioned, I suppose because most Lammas Land ceases to be worth grazing long before the grass effectively begins to grow. In other cases Candlemas is mentioned; Mr A C Smith in his advertisement mentioned "1 February" and this day I shall adopt.

o as regards the ownership of the Footpath Piece my decision is as above stated; in effect it belongs to Mr A C Smith for part of the year and to the Parish Council for the remainder of the year.

here remains the Pound Piece. About the history of the Pound, I had at the 1981 hearing much more information than was given to me at the 1977 hearing. As Mrs Page and Mrs Povey first remembered it, it was a triangular brick structure up to the 1940's usable and used as a pound (there were troughs there); by about 1952 the structure had all gone.

the Pound when there was used by the police and other villagers to round up stray animals and for cattle on a drive when the drover had to break his journey. Mr Stubbs mentioned an alcoholic drover who put his animals there without having as I understood Mr Stubbs any apparently good reason for breaking his journey. Mr A F Harrison remembered his father and grandfather had the keys. Mr Warrington put the height of the walls at about 7 feet and said they were of double bricks (old fashioned).

According to the Register map the Pound Piece is a very obtuse angled triangular area of which the largest side is about 30 yards. Clearly the Pound structure could only have occupied a very small part of the Pound Piece. Only Mr C L A Smith was asked to identify the actual site of the structure. He himself never knew it was a structure but remembered a visible rough triangular area which he understood was where the Pound had been and which used to be covered with rubbish and overgrown with nettles. During my inspection he pointed out this triangular area; it was distinct enough having on it little or no vegetation having sides of about 9, 9 and 10 paces and situate at the northwest corner of the Pound Piece, more or less the same as a triangular area so marked on some of the OS (1/2500) maps I had. Its east side is very near to the well grown hedge apparently the boundary of the garden of Mr A C Smith's nearby dwellinghouse; so the site of the Pound structure according to Mr C L A Smith is not enclosed as part of his father's garden. But the hedge is so close to the site that to rebuild the Pound on this triangular area with a view



to it being used as such would be impracticable or at least inconvenient, not only because of the proximity of the hedge but also because by reason of the driveway to the adjoining dwellinghouse there would be very limited access from the road to any such rebuilt structure.

At the 1977 hearing I understood Mr A C Smith to be saying that all the Pound Piece including the site of any pound there might have been on the land had ever since 1950 been part of its garden; and according to my recollection my 1978 decision was written on this basis. I now find that the structure site is not now and never has been part of his garden, so to this extent my 1978 decision should have this finding as an addendum, if not as a correction at least as a clarification. Mr Haggett contended that the Pound Piece should be considered as part of the Footpath Piece and accordingly if I decided that the Footpath Piece was properly registered I should not treat the Pound Piece differently. As to this contention, I will first consider the triangular area being the structure site.

My guess is that the Pound which the 1834 Vestry Meeting stated to have been then intended and the structure described by the now living witnesses are the same. Mr Leppard as I understood him, could not from his historical researches say with certainty that there was this identity. But even assuming that my guess is correct, I am unable to deduce from the minute of the 1834 meeting that the Pound then intended to be built was necessarily incidental to the Lammas Land or was intended to be anything other than a common pound.

A common pound is recognised by law; however land on which there is a common pound is not for this reason within the definition of common land in section 22 of the 1965 Act; nor is there any reason why land on which there is a common pound should not also be within the definition; as to this I have nothing to add to what I said in my 1972 decision re Pinfold, reported in Decisions of Commons Commissioners supra at page 33 and referred to at the 1977 hearing. In my view so far as now relevant such decision requires no alteration by reason of *CEGB v Clwyd* and re *Box* supra.

As to the triangular brick pound described by the witnesses being anything other than a common pound, I have no evidence at all. Nobody said that animals wrongly on the Footpath Piece or on what was known as Lammas Land were ever put there. Although animals wrongly on this Piece or on this Land requiring to be impounded would before 1950 probably have been put into the Pound I decline to deduce from this probability that it was in any now relevant way part of the Footpath Piece; the circumstances that Mr Harrison's father and grandfather kept both the keys of the gate to the Footpath Piece and the keys of the pound is not I think basis enough for any such deduction.

Many pounds (some well cared for and some more or less dilapidated) have been registered as commons under the 1965 Act, and such registrations may help their preservation for the benefit of those of the locality interested in history; but in my opinion such preservation is outside the scope of the 1965 Act. As also in my view is the preservation of the structure itself; so I express no opinion as to the allegations made at the hearing that the bricks of which the structure was formerly composed were taken away by Mr A C Smith or that he helped the structure to fall down.

So as regards the structure site, the evidence for and against Objection No. 40 made by the Staffordshire County Council in my view was at the 1981 hearing in all



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relevant respects the same as that given at the 1977 hearing; there was no evidence at either hearing that it was within the definition of common land in section 22 of the 1965 Act. The County Council as registration authority were entitled to make the objection with a view to requiring the Parish Council to produce evidence that the registration was properly made; I have no such evidence; and I conclude therefore that the registration as regards the structure site was not properly made.

There was no suggestion that the rest of the Pound Piece could have been properly registered apart from the structure site.

Summarising the position as regards all the Unit Land:- For the reasons set out in this decision and for the reasons set out in my 1977 decision as modified by this decision, I confirm the Land Section registration at Entry No. 1 with the modification that there be removed from the register: (1) the part of the land in this Register Unit east of the Lichfield-Sutton Coldfield road (A5127) being the part known as roadheath; (2) the part of such land adjoining Pinfold Road being the part at or near the northwest corner of which there at one time stood a structure known as the Pound; and (3) the part of the remainder of such land east of the fence marked on the most recent OS map 1/2500 as dividing OS No. 8700 (4.72 + 1.64 acres) from OS No. 1100 (2.65 acres). I confirm Ownership Section registration at Entry No. 1 with the modification that for all the words in column 4 there be substituted:- From 1 February in every year to the time when the hay crop has been taken later in the same year or if it is not taken (because the land has been grazed or for some other reason) the time when it would have been taken according to good agricultural practice if the grass on it (or on comparable land) had been left to grow for hay, of the part of the land in this Register Unit which on the most recent OS map (1/2500) is OS No. 8700 (4.72 + 1.64 acres). And I confirm the Ownership Section registration at Entry No. 2 with the modification that for all the words in column 4 there be substituted:- From the time in every year when the hay crop has been taken or if it is not taken (because the land is grazed or for any other reason) the time it would have been taken according to good agricultural practice if the grass on it (or on comparable land) had been left to grow for hay up to 31 January in the next following year of the part of the land in this Register Unit which on the most recent OS map (1/2500) is OS No. 8700 (4.72 + 1.64 acres).

Neither Messrs Ryman and Foden nor the County Council asked me to make any order for costs. As between the Parish Council and Mr A C Smith I had submissions both from Mr Topham and Mr Haggett.

As a general rule costs in proceedings before a Commons Commissioner do not follow the event as they do in most cases in proceedings in the High Court and other Courts. Under the 1965 Act a Commissioner is to hold an "inquiry" indicating that proceedings before him are not necessarily to be equated to similar proceedings in a Court. Further under the Act persons are required or expected to make applications for registration or to make objections without having any opportunity of investigating whether their actions will be opposed or knowing anything of the evidence which might be offered against them. It would not be just for a person to be at risk as to costs merely because he made a mistake while following the early stages of the registration procedure set up by the Act.

These proceedings in relation to the 1965 Act are exceptional in the following respects. By far the greater part of them was concerned with the question what were the estates and interests before 1965 in the Footpath Piece of Mr A C Smith



on the one hand and of the inhabitants of Shenstone and/or the Parish Council on the other hand. This question had arisen at least 10 years before, and I infer that in 1965 it must have been obvious to Mr A C Smith that by claiming that the Footpath Piece was exclusively his own he was likely to provoke legal proceedings of some kind. The provisions of the 1965 Act enables a Commons Commissioner to determine this question. I have not overlooked that in these proceedings questions also arose as to the applicability and effect of the Act on the estates and interests so determined and these questions may be difficult and perhaps important. But the additional costs incurred because it was necessary for me to consider these questions are negligible. The question as to the before 1965 estates and interests were always matter which ought, in the public interest, to be publically investigated in the presence of representatives of the Parish Council, and such an investigation I have now conducted. The costs of the investigation have been much increased by Mr Smith resisting (wrongly as I held in my April 1981 decision) the Parish Council application for it to be made and also by his failure to produce the documents very relevant in the investigation which were handed to him by Mr Addison in 1953. Further not being an Objector to the Land Section registration ~~its~~ ^{his} interference in the proceedings so far as they related to the Land Section was not the ~~of~~ consequence of anything done by him before the references I am now considering were made to a Commons Commissioner (15 October 1974); so when he did interfere he should have realised every claim he made would at some trouble and expense to the Parish Council have to be investigated to the extent necessary to deal with it adequately at a public hearing. In my opinion it just that in the exceptional circumstances above summarised that Mr A C Smith should pay to the Parish Council some of their costs of these proceedings.

I have selected the County Court's scale below mentioned having regard to the effect of the County Court (Amendment) Rules 1981 which came into operation on 1 October 1981.

Mr A C Smith should not be liable to costs relating only to the parts of the Unit Land about which my decision is against the Parish Council (the Foden Piece and the Pound Piece); I need not here consider particularly the Broadheath Piece about which the Parish Council have also been unsuccessful, because I assume that in respect of it they have incurred no costs, having abandoned any claim they had at about the same time as they became concerned with these proceedings. However a great many things done by or on behalf of the Parish Council in the course of these proceedings related both to the Footpath Piece and the Foden Piece and/or both Footpath Piece and the Pound Piece; so I consider whether there should be any apportionment. In my opinion the procedural situation was so complex that the Parish Council rightly as against Mr A C Smith neither abandoned nor reached any final agreement about the Foden Piece and the Pound Piece, because by doing so they might reasonably fear that their claims against Mr A C Smith might be prejudiced. None of the witnesses giving oral evidence on behalf of the Parish Council dealt only with the Foden Piece and/or the Pound Piece, and the duration of the hearing was not appreciably increased by their giving evidence not only about the Footpath Piece but also about the Foden Piece and/or the Pound Piece. Similar considerations are applicable to all the important documents produced by the Parish Council. In these circumstances I consider it just that the costs payable by Mr A C Smith should be the general costs incurred by the Parish Council in these proceedings excepting only the increase of such costs as a result of the acts and things done relating not only to the Footpath Piece but also to other parts of the Unit Land.



Having regard to the above considerations and to what I said about costs in my 1981 decision I shall order Mr A C Smith to pay to Shenstone Parish Council the costs incurred by the Shenstone Parish Council in respect of these proceedings and I shall direct that such costs be taxed as regards acts and things done before 1 October 1981 on Scale 3 prescribed by the County Court Rules 1936 as effectively amended before then and to be taxed as regards such acts and things if any done after 1 October 1981 according to Scale 2 prescribed by the County Court Rules 1936 as amended but subject to the following modifications: (1) there shall be disallowed costs of and expenses incurred in relation to acts and things not relating at all to the part of the land comprised in this Register Unit in this decision called the Footpath Piece; (2) there shall be allowed costs of and expenses incurred in relating to acts and things relating not only to the Footpath Piece but also to other parts of the part or land except only the increase of the said costs and expenses as a result of the acts and things relating additionally to some other part of the land; and (3) that the costs shall include (subject to the foregoing modifications) the costs of the part of these proceedings relating to the application made by the Parish Council and disposed of by my decision dated 30 April 1981.

I record that since the hearing I have received two letters from Mr A C Leppard, one dated 23 September 1981 enclosing some documents apparently received by "Shenstone Lammas Land Trustee Fund Committee" from the Church Commissioners and the other dated 22 October 1981 enclosing "Minute Book of Shenstone Playing Field Committee". I have not based any part of this decision on these letters or the enclosures because it would not be just to Mr A C Smith to pay any attention to them without giving him or his advisers an opportunity to comment on them. I am not giving him such an opportunity because the September letter and its enclosure neither adds anything to nor subtracts anything from information given me at the hearing and because the October letter and its enclosure adds nothing relevant to the extract from such minutes produced at the hearing.

After the greater part of this decision had been prepared the judgment of the High Court delivered on 19 November 1981 in re Sutton Common was reported in the Times Newspaper of 1 December 1981. Such judgment shows that although I rightly at the July 1981 hearing listened to the evidence given and arguments put forward on behalf of Mr A C Smith against the Land Section registration the reasons I then held (as recorded in this decision) for doing this may not have been right. In re Sutton Common the evidence offered was not heard at all and the judgment contained some brief general observations as to how a Commons Commissioner should consider evidence offered in a procedural situation not unlike that of Mr A C Smith in these proceedings. As I read the judgment the Court never contemplated evidence being given such as was given to me; in my opinion such general observations do not preclude me from applying the legal principles set out in the Waring supra, or from paying attention to Mr A C Smith having had since 1953 in his possession the more important documents relating to the Lammas Land; further as long as the disputes I am now considering had not been finally disposed of by a Commons Commissioner under the 1965 Act, it would have been impracticable for the Parish Council to litigate in the High Court the questions which had arisen between them and Mr A C Smith. So although if I had had before me at the hearing the judgment in re Sutton Common the case might then have gone differently, it does not I think provide me with any good reason for giving a decision essentially different from that I then considered I ought to give.



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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 28th —

day of January — 1982

A. A. Baden Fuller

Commons Commissioner