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## COMMONS REGISTRATION ACT 1965

Reference Nos. 35/D/10  
35/D/11

In the Matter of the Hurst, Holywell Row,  
Mildenhall, Forest Heath D., Suffolk

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These disputes relate to (1) the registration at Entry No. 1 in the Land Section and (2) the registration at Entry No. 1 in the Rights Section of Register Unit No. CL. 67 in the Register of Common Land maintained by Suffolk County Council and are occasioned respectively (1) by (D/10) Objection No. O/48 made by the Conservator Forestry Commission Cambridge and noted in the Register on 26 August 1970, and (2) by (D/11) Objection No. O/52 made by Mr. H.G. and Mrs. W.L. Goodchild and noted in the Register on 18 September 1970.

I held a hearing for the purpose of inquiring into the disputes at Bury St. Edmunds on 27 April 1972 and 25 June 1974.

The said Entry in the Rights Section is of "A right (a) to cut and take litter (b) to graze 16 animals (c) of Estovers (d) of Turbary over the whole of the land comprised in this register unit", and such right as now provisionally registered is not attached to any land; the Entry was made pursuant to an application dated 26 June 1968 and made by Mr. A. Morley, Mr. J. Stebbed, Mr. E. Butcher, Mr G.R. Peachey and Mr. E.C. Tyrell of 56, 62, 25, 50 and 54 respectively The Street, Holywell Row. The said Entry in the Land Section was in consequence of the said application. The names of Mr. A. Morley and Mr. J. Stebbed were in 1970 and at their request removed from column 3 (the applicants) of the Rights Section.

The Land ("the Unit Land") comprised in this Register Unit is a triangular piece on the northeast side of the Hurst Drove (a continuation of Eldon Lane, which leads out of the east side of Holywell Row) and contains (on a rough estimation) about 7 acres.

The grounds stated in Objection No. O/48 are:- "The land coloured pink on the attached plan was not common land at the date of registration"; on the attached plan the land coloured pink is a triangular piece containing (according to the schedule to the below mentioned conveyance) 0.376 acres, being the southeast corner of the Unit Land. The grounds stated in Objection No. O/52 are:- "That the rights do not exist at all in the alternative have been abandoned".

At the 1972 hearing Mr. E. Butcher, Mr. G.R. Peachey and Mrs. G.M. Tyrell (widow of Mr. E.C. Tyrell: he died in 1971; before his death he conveyed his property No. 54 to her) were represented by Mr. E.J. Wells. Before the hearing the Conservator Forestry Commission and Solicitors acting for Mr. and Mrs. Goodchild, had written letters to the Clerk of the Commons Commissioners dated 8 March 1972 and 12 April 1972 respectively stating (in effect) that their Objections would not be proceeded with. There being (by reason of other business) no time to inquire into the disputes, I adjourned the proceedings.



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At the 1974 adjourned hearing, Mr. E. Butcher, Mr. G.R. Peachey and Mrs. G.M. Tyrell were represented by Mr. P.J. Diver solicitor of Hall Ennion & Young, Solicitors of Cambridge; the Forestry Commission were represented by Mr. W.D. Curnock, Solicitor of the Legal Department of the Ministry of Agriculture and Fisheries, and Mildenhall Parish Council were represented by Mr. R.A. Wallis, their clerk.

Before the adjourned hearing, the Solicitor acting for Mr. and Mrs. Goodchild sent to the Clerk of the Commons Commissioners a letter dated 29 May 1974 in which they, although not objecting to the registration of the rights, made various statements apparently intended to show that such rights could not exist. The Clerk also received letters from Mr. Wallis, Mr. Wells and the Solicitor of the Forestry Commission, apparently written with a view to avoiding (because all were agreed) the expenses of an adjourned hearing.

At the adjourned hearing evidence was given by Mrs. B.L. Wells who had known the Unit Land since she was 8 years old (she is now 68 years old); she lived in Holywell Row until she was 20 years old; she has lived at Beck Row (an adjoining village) for the last 6 years.

Mr. Diver submitted that in view of the above mentioned letters of 8 March and 12 April 1972 withdrawing the Objections, the registrations under section 7 of the 1965 Act "became final" on the day when the letters were received in the Office of the Commons Commissioners and accordingly that I was obliged to confirm the registrations without any modification; alternatively that I should confirm the registrations on the evidence of Mrs. Wells and disregarding the unproved statements in the above mentioned letter of 29 May 1974.

Mr Curnock produced a conveyance dated 19 January 1934 by which there had been conveyed to the Forestry Commission 1,565 acres 1 rood 7 perches of land including the above mentioned south east corner of the Unit Land. He said that while recently standing on this corner, the Forester had stated that the land they saw (the Unit Land) was common land, and in the circumstances, the Forestry Commission not only withdrew their Objection, but also supported the registration of the Unit Land as common land. Mr. Wallis on behalf of the Parish Council supported the view that the Unit Land should be treated as common land.

Section 7 of the Act so far as relevant is: "If ... all objections to ... registration are withdrawn, the registration shall become final ... at the date of withdrawal". Read in isolation, this section exactly fits the circumstances of this case: the two Objections have at least for all practical purposes, been withdrawn. But in my view, I, as a Commons Commissioner am bound by sections 5(6) and 6(1) of the Act, which so far as relevant are: "Where ... an objection is made, then, unless the objection is withdrawn ... before such period as may be prescribed, the registration authority shall refer the matter to a Commons Commissioner ... (He) ... shall inquire into it and shall either confirm the registration, with or without modification, or refuse to confirm it; and the registration shall, if it is confirmed, become final, and if the confirmation is refused become void ...". The Objections in this case were not withdrawn before 17 December 1971 (the end of the period prescribed for the purposes of section 5 by the Commons Commissioners Regulations 1971), so the matter was rightly referred, and in the result I am by section 6(1) obliged to hold this inquiry and have power to refuse the confirmation with the result that if I do so the registration will become void. Section 6 and Section 7 are therefore on a first reading in direct conflict.



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Where such a conflict exists in an Act of Parliament, the sections must somehow be reconciled: it seems to me that the only way of doing this is to read Section 7 as being inapplicable to a withdrawal which is made too late to prevent the operation of section 5(6). However this may be, section 6 is directly and distinctly applicable to me and I conclude therefore that I am not in this case obliged by section 7 of the 1965 Act to confirm the registrations without any modification.

Nevertheless, I accept Mr Diver's first submission to this extent:- an objection which is withdrawn after a reference to a Commons Commissioner may prima facie be treated as an objection which never had any foundation, and although the applicants for the registration may not be exonerated altogether from proving their case, the cogency of the evidence needed is substantially reduced. Generally on this matter, I adhere to what I said in my decision dated 2 February 1973, in re Pound, Compton Dando reference 32/D/19. The statutory declaration in support of the application for registration may in some cases be enough if the registration is in accordance with the intention of the applicants and properly describes a right recognised by law.

However in this case none of the conditions mentioned at the end of the preceding paragraph are in the Rights Section fulfilled. The right of estovers and turbarry being, as registered, without limit and unqualified, would permit the person entitled to sell it to a person not resident in the Village who could take from the land everything which was growing or which had ever grown there; this, so Mrs. Wells said, would not be what any of the applicants intended. The right of grazing is ambiguous, it being not clear by whom and in what circumstances the 16 animals can be put out. Further a right of turbarry and estovers without limit held in gross is not recognised by law.

Mrs. Wells described in a general way how the owners and occupiers of these cottages in The Street ever since she could remember had for use in the cottages and the lands held therewith taken fuel and sticks from the Unit Land. A right to do this is recognised by law, and may be established by long use. The circumstances that those who took the fuel and sticks may have supposed that they were exercising a customary right exercisable by any inhabitant of the Village (such a custom is not recognised by law) is irrelevant; it is enough that the benefit claimed has been actually enjoyed for a long period as of right, see de La Warr v. Miles 1881 17 Ch. D.525. As to grazing Mrs. Wells's evidence was not very precise; that the applicants had in mind effecting a registration which would benefit the Village rather than themselves particularly, is evident not only from what Mrs. Wells said, but also from the words "in common with all other residents of Holywell Row" in their applications. Having regard to the area of land held with the cottages in the Street, I conclude that for each tenement a grazing right for one animal or at the most for two animals would be appropriate.

For the reasons above set out I confirm the registration at Entry No. 1 in the Land Section without any modification, and I confirm the registration at Entry No. 2 in the Rights Section with the modification that for the words in column 4 "(a) to cut and take litter (b) to graze 16 animals (c) of Estovers (d) of Turbarry" there be substituted the following words: "for use on the three tenements described in column 5 to cut and take litter of estovers and of turbarry and a right to graze 6 animals levant and couchant on the said three tenements (2 animals in respect of each of the said tenements) and that for the word "None" in column 5 there be substituted the following words. "The tenement: being the cottages or dwelling houses known as No. 25 The Street, No. 50 The Street and No. 54 The Street all in Holywell Row, Bury St. Edmunds and the lands at the date of registration occupied or held therewith.

I am required by regulation 30 (1) of the Commons Commissioners Regulations 1971 to



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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 19<sup>th</sup>

day of July

1974

a. a. Baden Fuller

COMMONS COMMISSIONER