COMMONS REGISTRATION ACT 1965

Reference No. 236/D/148 127

In the Matter of Brookwood Lye, Woking, Surrey (No. 1)

DECISION

This dispute relates to the registration at Entry No. 1 in the Land section of Register Unit No. CL 414 in the Register of Common Land maintained by the Surrey County Council and is occasioned by Objection No. 131 made by the former Woking Urban District Council and noted in the Register on 22 July 1970.

I held a hearing for the purpose of inquiring into the dispute at Guildford on 6 October 1977. The hearing was attended by Mr T R Salt, solicitor, on behalf of Mr and Mrs T A McLaurin, the applicants for the registration, and the Woking Borough Council was represented by Mr R A Payne, its Principal Legal Assistant.

The land comprised in the Register Unit consists of part of an area of 2118 ac. 1r. 4p., which was formerly waste and common land of the manor of Woking and was purchased by the London Necropolis and National Mausoleum Company under the London Necropolis and National Mausoleum Act 1852. The Company paid £15,000 as compensation for the extinction of the commonable and other rights over or in the land.

The land comprised in the Register Unit has never been used for the purposes of the Act of 1852 and the basis on which Mr Salt supported the registration was that the rights registered had been subsequently acquired by prescription. There was no evidence to support such a claim in respect of the rights of grazing and pannage, but there was evidence to support rights of estovers and turbary, both of which were included in the application, though only the right of estovers was inserted in the Register.

Mr Payne accepted that rights of estovers and turbary had been acquired by prescription, but he argued that these rights were not rights of common within the meaning of the Commons Registration Act 1969. Each of these, so Mr Payne argued, was merely a private profit à prendre. Although the owner of the land could also take wood and turf from the land, that would be an exercise of his rights as owner and did not make the prescriptive rights of estovers and turbary rights of common.

Mr Payne's point is a basic one in the law of commons. A right of common is defined in 6 Halsbury's Laws of England (4th edn) 504, quoting Cooke's Inclosure Acts (4th edn) 5, as "a right, which one or more persons may have, to take or use some portion of that which another man's soil naturally produces". Other old authors, e.g. Elton on Commons, pp.2,3, Burton on Real Property, para.1132 and 1 Stephen's Commentaries 648, give similar definitions, but Woolrych on Rights of Common, p.1 states that: "Common is an "incorporeal hereditament, and may be said to exist where two or more, by virtue "of a grant, prescription, or custom, take in common with each other from the "soil of a third person a part of the natural products thence produced".

Woolrych seems to be the only old author who regarded it as necessary for there to be at least two commoners for their rights to be rights of common. That his view was unsound is indicated by Coke, who said that "to exclude the owner of the "soyle ..... is against the nature of this word common, and it was implyed by the "first grant, that the owner of the soyle should have his reasonable profit there,

"as it hath been adjudged" (Co. Litt. 122a). What Coke called "the nature of "this word common" is satisfied if only one person in addition to the owner of the soil has a right to enjoy some of the natural produce of land. This is borne out by a passage in 1 Rolle's Abridgment 396, where the case is put of the owner of the soil granting common to another - not to several others.

It therefore appears to me that the correct view is that any right to share the natural produce of land with the owner is a right of common, even if there is only one such right.

Such is the general law. However, for the purposes of those proceedings it is necessary to consider whether the land comprised in the Register Unit is subject to rights of common within the meaning of the Commons Registration Act 1965, for the part of the definition of "common land" in section 22(1) of the Act which is relevant in this case is "land subject to rights of common as defined in this Act".

The definition of "rights of common" is:-

" 'rights of common' includes cattlegates or beastgates (by whatever name known) "and rights of sole or several vesture or herbage or of sole or several pasture, "but does not include rights held for a term of years or from year to year".

The definition therefore embraces rights to take the natural produce of land to the exclusion of the owner of the soil, which are, in Coke's words, "against the nature of this word common". In my view, the proper construction of the definition is that in addition to these rights it also embraces all other rights to take the natural produce of the land of another person. It seems to me impossible to construe the definition as excluding such a right held by one person where the owner of the soil can also take part of the produce, when it is extended to include such a right held by one person to the exclusion of the owner.

For these reasons I confirm the registration.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 6 weeks from the date on which notice of the decision is sent to him, require me to state a case for the decision of the High Court.

Dated this 4th day of Nov 1977

Chief Commons Commissioner