



COMMONS REGISTRATION ACT 1965

Reference No. 236/D/415-420

In the Matter of Itchingwood Common,
Limpsfield, Tandridge D

DECISIONNO. 1

These disputes relate to the registration at Entry No. 1 in the Land Section and Entries Nos. 2 to 8 and 11 to 14 in the Rights Section of Register Unit No. CL 418 in the Register of Common Land maintained by the Surrey County Council. They are occasioned by ~~five~~ ^{four} Objections, ~~five~~ ^{four} of which Nos. 268, 299, ~~268, 299~~ and 136 were made by Mr K D Day and were noted in the Register respectively on 25 September 1970, 8 October 1970, ~~25 September 1970,~~ ^{No. 451} ~~8 October 1970~~ and 11 August 1970, and the ~~sixth~~ ^{fourth} by Miss V E G Macewen, noted in the Register on 22 October 1970.

I held a hearing for the purpose of inquiring into the disputes at Oxted on 6 and 7 May 1981. At the hearing, Mrs A Williams, Solicitor, appeared on behalf of Limpsfield Parish Council (the applicant for registration in the Land Section) and of Mr Pitman (applicant for registration at Entry No. 6 in the Rights Section): Mr Magill, Solicitor, on behalf of Miss Macewen, applicant for registration at Entries No. 1 and No. 7 in the Rights Section as well as an Objector: Mr M Templeman, of Counsel on behalf of Mr T F Hornett successor to the applicant for registration at Entry No. 8 in the Rights Section: and there appeared in person Mr K D Day and the following applicants for registration in the Rights Section - Mr E F Thomas (Entry No. 2), Mr W Edwards (Entry No. 11), Mrs A H Edwards (Entry No. 12) and Miss E P Quigley (Entries Nos. 13 and 14).

Mr Day was prepared to accept some of the rights, so that the registration in the Land Section will stand, and accordingly I confirm that registration.

Rights Section

Entries Nos. 1 and 7 Mr Magill told me that Entry No. 1 and the claim to turbarry in Entry No. 7 were withdrawn. It has been agreed that the claim to estovers in Entry No. 7 should stand but limited to the taking of one cord per annum. Accordingly I refuse to confirm the registration at Entry No. 1 and confirm that at Entry No. 7, modified by the exclusion of turbarry and with this limitation on the right to estovers.

Entry No. 6 It was agreed that this right should be modified by excluding the right to grazing and limiting the right of estovers to the taking of $\frac{1}{2}$ cord per annum. I confirm the registration modified accordingly.

Entry No. 8 The hearing of the dispute as to this right was adjourned to a future day and place to be notified.



Entries Nos. 11 and 12 These are the Edwards rights which I have considered in my Decision on CL 419 (Ref: 236/D/408-414). The evidence as regards CL 419 was agreed to be applicable in this case and for the reasons given in that Decision, I refuse to confirm the registrations.

Entries Nos. 13 and 14 These are the Quigley Rights, also considered in my Decision on CL 419. Miss Quigley said that her evidence was similar to that given in relation to CL 419 and again for the reasons given in that Decision I refuse to confirm the registrations.

Entries Nos. 2, 3, 4, 5 Each of these Entries comprises the same rights, which are claimed in each case to be attached to property known as the Horns: they were separately registered by E P Thomas as owner (No. 2), by R G Thomas as owner (No. 3), by W Faulkner as tenant (No. 4) and by Mabel Faulkner as tenant (No. 5). These are self-evidently replications of the same rights and it was accepted that Nos. 3, 4 and 5 should be cancelled, and I refuse to confirm their registrations.

The rights claimed in Entry No. 2 are the right of pasture for 6 cattle, 2 horses, 40 sheep with lambs, 2 donkeys and 6 geese with young, and the right of estovers.

Mr Thomas gave evidence, in the course of which he said that no firewood was taken from the Common, no horses or geese were grazed, "perhaps one donkey" and not much in the way of sheep, which he grazed mainly on a nearby common. The Thomas family went to live in the Horns about 58 years ago and grazing rights had been exercised by himself and his father before him. On the evidence given by Mr Thomas, both on his own account and under cross-examination by Mr Day, I found it difficult to form any clear picture of the periods in which the rights were exercised or of the numbers of animals grazed. He himself was grazing in 1966 - 4 or 5 cattle some of the time, and his father had grazed quite a lot at one time or another - he was grazing in the early 1940s. Other witnesses called by Mr Thomas testified to occasions when they had seen his cattle on the Common:- Mrs Granger, who from 1957 onwards took her riding ponies there, used to see a cow and calves on the common with Mr Thomas in charge but had not seen them in the last ten years: Mr Walter Edwards who in the last 20 to 25 years had seen cattle of Mr Thomas, perhaps six, on the common, but not every year: and Miss Quigley who in 1969 saw some of Mr Thomas's cattle there. Mr Young, who has a farm which is between the Horns and the Common, and has known the Thomas family over 50 years, said that their animals - cattle sheep and horses were grazed fairly regularly in the 30s or 40s by Mr Thomas's father - a few of each, the number varying considerably. Mr Huxtable whose family farmed Trenchley's farm at the north-eastern corner of the Common, and who was born in 1930 and lived there till 1959 said that "we all grazed there, including Mr Thomas". Mr Day called a number of witnesses who had known the Common from the 1940s onwards and said that they had never seen cattle of the Thomases there. This evidence did not, in my view, displace the more positive evidence of Mr Thomas and his witnesses, but more significant was the evidence of Mr F E Howard, who has known the Common for some 65 years and lived for 60 years



- 3 -

in a cottage near to it. From about 1920 when he was 12 years old until about 1945 he regularly grazed his family's cows on the common, often spending most of a day on the common and had never seen any member of the Thomas family graze animals there. There were three lots of cattle grazing on the common during this period (1920-1945), including his family's, but not the Thomases.

On the evidence, the only available basis for claiming the rights is acquisition by long user ie. prescription. For this purpose continuous user for a period of upwards of 20 years must be shown. As to this there is no evidence of grazing by geese or donkeys or of taking wood (estovers). Mr Young spoke of user by Mr Thomas senior in "the 30s or 40s" for grazing cattle, sheep and horses but there was no firm evidence as regards sheep or horses in any other period. As regards cattle it is not possible to find an approximate date from which their grazing started: there is nothing to show a time earlier than "the 30s" and in the light of the evidence of Mr Howard (who was regularly on the common before 1945), I am not able to find that any such grazing was continuously carried out before 1945. As to subsequent years, whilst I accept the evidence of Mr Thomas and his witnesses to the effect that on occasions there were a few cattle on the common, I find no regular user for a continuous period before 1970 (when Mr Day's Objections were registered) sufficient to establish a case for prescription.

Quite apart from this finding on the evidence, there is a further formidable difficulty as to the period of user. In July 1930 Mr G C G Leveson Gower, the Lord of the Manor and owner of the Common executed a deed whereby Section 193 Law of Property Act ~~was~~ 1925 was applied to the Common, following which by an Order dated 16 December 1938 the Minister of Agriculture and Fisheries prescribed conditions regulating the public's rights of access to the common. The conditions provided that without lawful authority no person should (inter alia) permit horses cattle, sheep or other animals to graze or stray on the land. This Order, I understand, continued in force until 1968 so that any grazing without lawful authority during the years 1938-1968 was prohibited. There was evidence given to the effect that farmers who were grazing on the common continued to do so despite the Order: this may be so, but such grazing would be contrary to the Order unless done with lawful authority. There was no evidence that the Thomases had such authority: if the Horns had acquired a prescriptive right before 1938, the Order would not have affected that right, but the evidence fell far short of establishing user for the necessary period before 1938. Further user by them for grazing during the years 1938-1968 was therefore contrary to the Order and that period cannot in my view be taken into account for the purposes of a claim by prescription. (See *Hulley v Silverspring Bleaching Co.* 1922 2 Ch 268, *Cargill v Gotts* 1981 1 WLR 441 at p. 446). This being so, such evidence as there was of user in those years (which, as I have indicated, in any event did not in my opinion establish the requisite user) is of no relevance as it related to user during a prohibited period.

In the result I find that none of the rights registered at Entry No. 2 have been established and I refuse to confirm the registration.





- 4 -

To summarise, I confirm the registrations at Entry No. 1 in the Land Section and those at Entries Nos. 6 and 7 in the Rights Section, modified as above mentioned, and I refuse to confirm the registrations at Entries Nos. 1, 2, 3, 4, 5, 11, 12, 13 and 14 in the Rights Section.

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 15 June 1981

L. J. Morris Smith

Commons Commissioner

