COMMONS REGISTRATION ACT 1965

Reference No. 15/D/23
15/D/24

In the Matter of land numbered Pt. 90 and Pt. 91 on O.S. map in Letton, Leominster D., Hereford

DECISION

These disputes relate to the registration at Entry No. 1 in the Land Section of Register Unit No. VG.42 in the Register of Town or Village Greens maintained by Hereford and Worcester County Council and are occasioned (1) by (D/23) Objection No. 266 made by Mrs O.E. George, and (2) by (D/24) Objection No. 308 made by Mr P.H. George and Mr W.S. George and noted in the Register on (1) and (2) 24 September 1971.

I held a hearing for the purpose of inquiring into these disputes at Hereford on 12 June 1974. At the hearing (1) Mrs O.E. George, Mr P.H. George and Mr W.S. George were represented by Mr W.D. Turton solicitor of Lloyd & Son, Solicitors of Leominster, (2) Kinnersley Group Parish Council were represented by Mr H.G. Adams their chairman, and (3) the County Council as registration authority were represented by Mr G.H. Holman.

Miss D.S. Hubbard, Senior Assistant Archivist of the County Council produced the Hurstley Common (Hurstley township, Letton parish) Inclosure Award dated 10 April 1862. Evidence was given (1) by Mrs O.E. George who now owns High Moors farm under a conveyance dated 21 September 1950 and made to her husband Mr E.C. George (he died on 2 April 1965) and herself and who has lived in the farmhouse since 1928 (her husband then became the tenant of the farm); (2) by her son Mr P.H. George who (with his brother Mr W.S. George) now owns Hurstleywood Farm under a conveyance dated 15 November 1968; (3) by Mr J.F. Davies whose father Mr Sidney Davies (he died on 12 January 1964) was clerk of Kinnersley Parish Council for more than 50 years until just before he died and who was himself clerk of Kinnersley Parish Council at the date of registration and is now a councillor of the Group Parish Council; and (4) by Mr Adams who has been chairman of the Parish Council from about 1956. On the day after the hearing I inspected the land it having been agreed that I might do so unattended.

The registration was made by the County Council as registration authority without application, the land ("the Unit Land") comprised in this Register Unit being that allotted by the 1862 Award in these words:- "I declare that I have set out and do hereby set out allot and award unto the Churchwardens and Overseers of the Poor of the said Parish of Letton all that piece of land numbered 7 on the said map containing Four Acres to be held by them and their successors in trust as a place for exercise and recreation for the inhabitants of the said Parish and Neighbourhood and I direct that the fence against the road and the North End shall from time to

time be repaired and maintained by and at the expense of the Churchwardens and Overseers of the Poor of the said Parish for the time being".

The grounds of objection are in both Objections stated in substantially the same way (in effect) as follows:- The land (a) O.S. No. 91/ (b) O.S. No. 90 was not a village green at the date of registration; (a) Mrs O.E. George having owned/ (b) Messrs P.H. and W.S. George having owned and occupied the land (a) since September 1950/ (b) since 1968.

Mr Turton argued (stating the effect of his argument shortly):- (a) that the above quoted allotment was originally void because the words "and Neighbourhood" are uncertain, see Edwards v. Jenkins (1896) 1 Ch. 308, re New Windsor (1974) 2 All E.R. 511 and Inclosure Act 1845 section 15; (b) that the allotment became void because the fence mentioned in it was not repaired and maintained as thereby directed, see Inclosure Act 1852 section 15; and (c) that the title of the Churchwardens and Overseers or of their successors (and with such title the recreational trust imposed on them) has been extinguished by adverse possession; Mr Turton said Wyld v. Silver (1963) 1 Ch. 243 should be distinguished.

As to argument (a):- By the Annual Inclosure Act 1860 (23 Vict. cap. 7), the provisional order (among others) relating to Hurstley Common and dated 24 November 1859 was to be proceeded with.

I infer that the 1862 Award was made under the 1859 Order and the 1860 Act. Section 30 of the Inclosure Act 1845 expressly authorises the inclusion in an award of an allotment "for the purposes of exercise and recreation for the inhabitants of the neighbourhood", and section 73 provides that such an allotment shall be made to the churchwardens and overseers. An Act cannot be void for uncertainty; in section 30 the expression "inhabitants of the neighbourhood" is treated as having a certain meaning, and in my opinion an allotment made under the section which contains the same expression cannot be void for uncertainty.

As to argument (b):- Although the Churchwardens and Overseers under the above quoted allotment are liable to fence, the estate and interest they take in the land is not I think conditional on their doing this.

Argument (c) involves I think the questions of law and fact set out below.

Section 13 of the 1965 Act provides for land registered under the Act ceasing to be a town or village green. Section 22 defines a town or village green as including "land which has been allotted by or under any Act for the exercise or recreation of the inhabitants of any locality", that is, by reference to a past event which if it ever happened, can never sensibly be said to have ceased to have happened. These two sections must be reconciled somehow. Having regard to the word "is" in paragraph (a) of sub-section (1) of section 1 of the 1965 Act, to the powers of exchanging and selling allotments conferred by section 149 of the Inclosure Act 1845 and section 27 of the Commons Act 1876, to the possibility of land being compulsorily purchased under the Acquisition of Land (Authorisation Procedure) Act 1946 section 1(2) and First Schedule Part III para. 11 or otherwise, and to the absurdity of ascribing to

Parliament an intention that the Register shall include land which has lawfully ceased to be subject to any trust powers or provisions declared or contained in a recreational allotment, I construe the definition in section 22 as not including any such last mentioned land.

Geographically, the Unit Land does not now exist as a distinct plot of land such as is contemplated by the 1862 Award. The O.S. map (1904 edition) shows Nos. 90 and 91 (1.253 and 18.131 acres) as two fields bounded on the west by a road and on the south by a stream which runs in a nearly straight line. The road ("Green Lane") is a grassy track apparently used for farming purposes by the occupiers of the adjoining fields and little if at all used by anyone else. The footpath shown on the 1904 map as running south from the bridge over the stream is not obvious. Green Lane could be, and may be is used as a bridle way or as a short cut on foot from Kinnersley (about 1½ miles northwest) to Stainton on Wye (about 2 miles southeast); on the O.S. one inch map it is marked as a footpath, although any person now trying to use it would at one point on Green Lane have to go over or around (this would not be difficult) a wire fence apparently erected across Green Lane to prevent animals straying down it. The stream is on the O.S. one inch map called Letton Lake (Mr Adams said that in the past a number of streams in this County were called "Lakes", but that now this stream is the only one so called). On the map dated 1861 referred to in the 1862 Award, plots 6 and 7 and part of plot 8 (this plot is south of plot 7 and comprises most of O.S. No. 89 containing 1.006 acres) together make up Nos. 90 and 91 on the 1904 map. There is now no fence between plots 6 and 7 which under the 1862 Award should have been erected; the south boundary of plot 7 is shown on the 1861 map as the north edge of Letton Lake which apparently then followed an irregular channel. I infer that between 1861 and 1904 the channel of Letton Lake was straightened. When I inspected the land, O.S. Nos. 90 and 91 appeared as one field, (according to the O.S. map together containing 19.384 acres), and there was nothing to suggest that at the south end there was an area of 4 acres with a north and south boundary as delineated on the Register map (following the 1861 map) which was held in ownerships separate from the rest of the field or was held for any recreational or other public purpose.

About 2 years ago the hedge between O.S. Nos. 90 and 91 which had been there as long as Mrs O.E. George could remember was removed (she and her sons having become owners of both Nos.). This hedge divided the Unit Land as registered into two parts one a roughly rectangular piece of about 3½ acres and the other a triangular piece adjoining Green Lane of about half an acre. Before 1972 when this hedge was there the Unit Land geographically had no more (less I think) than now any existence as a distinct plot of land.

MrsO.E. George produced her documents of title to High Moors farm: (i) a tenancy agreement dated 25 January 1928 under which Mr E.C. George became a yearly tenant, (ii) an abstract dated 1949 of the title of the trustees of the will of Lord Brocket to the Kinnersley Castle Estate and (iii) the 1950 conveyance to Mr E.C. George and herself. The 1949 abstract commenced with a mortgage dated 30 May 1929 which recited a title originating with the settlement dated 20 February 1889 and made by

Thomas Reavely; the abstract included a vesting deed dated 23 September 1929 and a conveyance dated 13 February 1941 by which the Estate was conveyed by Mr C.T.H. Reavely to Lord Brocket. In these 1929 and 1941 documents High Moors farm was included in the Estate with many other farms thereby dealt with and the description of such farm included "91 ..... 18.0.21". In the 1951 conveyance the Farm was similarly described. The 1949 abstract included a statutory declaration made by C.T.H. Reavely on 5 February 1941 as to the possession of his predecessors in title of the Estate and as to it having been by a settlement dated 20 February 1889 conveyed by his grandfather Thomas Reavely. There was nothing in the documents to suggest that any part of the No. 91 was the subject of an allotment such as is above quoted from the 1862 Award.

Mr P.H. George produced the documents of title to Hurstleywood Farm now owned by Mr W.S. George and himself; (i) a bundle of copy documents commencing with an indenture dated 11 November 1919 and (ii) the 1968 conveyance to themselves. By the 1919 indenture, W. Pantall after reciting the seisin of Henry Pantall who died on 2 August 1886 conveyed Hurstleywoos Farm by a description which included O.S. No.90. The bundle included some mortgages and a conveyance dated 2 June 1950. In all the documents which contained any description of the farm, and also in the 1968 conveyance the description included O.S. No. 90. There was nothing in these documents to suggest that any part of No. 90 was the subject of an allotment such as is above quoted from the 1862 Award.

I accept the evidence of Mrs O.E. George, which was not disputed or contradicted, that ever since 1928 O.S. No. 91 has (apart from its south boundary fence removed 2 years ago as above mentioned) been the same as it is now, has not been used by anyone for games on it or for any other recreational purpose, and has always been in the possession of Mr E.C. George and herself. Although Mrs O.E. George was not concerned as tenant or owner of the part of the Unit Land comprised in O.S. No.90, because this part is much smaller than the rest (it could not be used for recreational purposes by itself) I shall treat (and this was agreed at the hearing) as being for all purposes in the same position as the part comprised in O.S. No. 90. Accordingly, I accept her evidence as applying (as I think she intended it to apply) to the whole of O.S. Nos. 90 and 91.

Mr J.F. Davies had heard his father Mr S. Davies say on many occasions that there was a piece of land usable by Letton and the surrounding villages for recreation and sports and that there was a cricket pitch; he understood his father to be referring to a piece of land somewhere on Hurstley Common; but he never identified the land or said that cricket had actually been played there. Mr Adams described similar conversations which he had had with Mr S. Davies. On their evidence I have little difficulty in concluding that Mr S. Davies must have known about the allotment above quoted; but although I am satisfied that Mr J.F. Davies and Mr Adams were doing their best to pass on the information that they had acquired from Mr S. Davies, I am unable (quite apart from such information being hearsay) to find that at any time before 1928 the Parish Council ever did any act of ownership in relation to the Unit Land or that any inhabitants ever played cricket or any other games there.

Equally I am unable to find from the evidence produced on behalf of the Objectors that the Parish Council or their predecessors the Churchwardens and Overseers or the inhabitants did not before 1928 do any of these things.

From the 1904 map I infer that the hedge removed in 1972 was there in 1904 and that th Unit Land did not then geographically exist as a distinct plot of land such as is contemplated by the 1862 Award.

Mr Turton pointed out that under the 1862 Award the plot numbered 6 was allotted to Thomas Reavely and plot No. 8 to Harry Pantall, and I accept his suggestions that these two allottees must be the same as the persons mentioned in the documents of title produced as above mentioned. I can however make no finding, only guess as to how it came about that these two allottees and their successors treated plot 7 as divided between as it appeared on the 1904 map.

On my inspection, I was impressed by the unsuitability and inconvenience of the Unit Land as a place for exercise and recreation. I cannot imagine how in 1862 or at any other time it could have been considered suitable or convenient. There was no sign of a cricket pitch ever having been made; an enthusiast could find 22 yards on which to bowl a ball at some enthusiast with a bat, but the result would not be cricket on a pitch; the Unit Land is so low lying, that it could not (even if the hedge removed 2 years ago had never been there) be made into a worthwhile cricket field. The site is so remote from any dwelling houses (apart from the two farms) that neither adults nor children would want it for casual games. Letton Church is about 1½ miles to the southwest; the Award map marks a roadway from Green Lane in that direction, but I could find none. None is marked on the O.S. one inch map; the site of that marked on the Award map is now overgrown by hedges and well established trees. The Unit Land does not appear to be or to have ever been a village green within any of the possible meanings of these words as generally understood. I infer that those who applied for the 1859 Order thought (see section 30 of the 1845 Act) that they would be in difficulties if they did not agree to part of Hurstley Common being allotted for recreation and that the valuer who made the 1862 Award did the best he could (he might have before he made the Award have substituted other land under section 4 of the Inclosure Act 1846 but perhaps nobody thought this worthwhile). I infer also that soon after the Award under some local arrangement agreed or acquiesced the Churchwardens and Overseers plot 7 was divided up between plot 6 and 8; Mr Adams said "it looks as if something happened not in accordance with the book", a view of the post 1862 history with which I agree.

The circumstances outlined above are in many respects similar to those considered in Wyld v. Silver supra in which the Court of Appeal decided that land which under a 1799 Act of Parliament was in 1803 awarded to X subject to the right of the inhabitants of Y. to hold the same annual fair or wake thereon as had been previously been held on adjoining land, was in 1961 still subject to this right of the inhabitants notwithstanding that no fair or wake had been held in the village within living memory (the last recorded occasion was in 1875); the Court held that the right was not capable of being lost by disuse or waiver but could only be taken away by Act of Parliament. Notwithstanding the similarity of the circumstances of that and this case, I am I think encouraged to consider closely any differences there may be, because Russell L.J. who after saying that the defendant (when purchasing the land he could not by an examination of his vendor's title deeds have discovered the existence of the right claimed against him) had his unqualified sympathy added: "If I could find a way to decide in his favour I should be happy to do so. Alas I cannot".

In Wyld v. Silver supra, the rights subject to which X an individual became entitled to the land were described in the 1799 Act as being rights which the inhabitants as such should have "for ever"; those who happened to be inhabitants at any one time could not by disuse or waiver bind future generations; the right conferred by the 1803 Award were not thereby vested in the churchwardens and overseers (if they had been they would have passed to the parish council who would therefore have been a necessary plaintiff). In this case the land was allotted to the Churchwardens and Overseers on trust; the inhabitants can only take as objects of such trust: although since 1876 by section 19 of the Commons Act 1876 it is not lawful except as provided in that Act (or any subsequent Act) to authorise the use of such land otherwise than in accordance with the allotment, no right is conferred on the inhabitants as such to use of the land; the use may be modified by a scheme made under sections 1 and 18 of the Commons Act 1899; the land may be exchanged and(in order to purchase other land) sold as above mentioned under the 1845 and 1875 Acts.

Land allotted by an award under an inclosure act, to a surveyor of highways for local purposes is not exempt from the operation of the Real Property Limitation Act 1833, so that the surveyors ownership can become extinguished under section 34, Smith v. Stocks (1869) 10B & S 701; the court followed Thew v. Wingate (1862, reported in the same volume at page 714) where Blackburn J. expressly assumed that churchwardens and overseers were within the 1833 statute. Where there has been a long continued possession and assertion of a legal right, the right should be presumed to have had a legal origin if such a legal origin is possible and the courts will presume that those acts were done and those circumstances existed which were necessary to the creation of a valid title, see Phillipps v. Halliday 1891 A.C. 228, recently quoted and followed by the Court of Appeal in Davis v. Whitby 1974 1 Ch. 186

In Wyld v. Silver supra, the 1799 Act and the 1803 Award in setting up new rights used a form of words consistent only with such rights lasting for ever, whereas the 1862 Award used a form of words consistent with the rights thereby set up being, so far as allowed by the Inclosure Acts, as liable to extinction by waiver abandonment or otherwise as any other grant or trust. From the proved use made since 1928 of the Unit Land by the Objectors and their predecessors, from the non-existence of the Unit Land as a distinct piece of land since the 1904 map was made and from the probable history of the land as I infer it from what I saw, I shall presume that the Unit Land has lawfully been taken over by the adjoining landowners under some order made under section 149 of the 1845 Act; the circumstance that it is unlikely that in fact any such order was made, is not a reason for making such a presumption for the purposes of regularising the circumstances now existing, see Tehidy v. Norman 1971 2 Q.B. 528 at page 552. It may be that I could reach the same results by following Thew v. Wingate supra, and concluding that the rights of the Churchwardens and Overseers and of the Parish Council as their successors have been extinguished by the Real Property Limitation Act 1833; but because there may be some question whether section 19 of the 1876 Act prevents such an extinction, I refrain, because I need not, from expressing any opinion on this question.

I conclude therefore that the Unit Land was not at the date of registration within the definition of town or village green in section 22 of the 1965 Act. This conclusion appears to me in accordance with the common sense of the position as it appeared to me when I inspected the land because to my mind the purposes of the 1965 Act would not be in any way furthered, nor would any inhabitants of the Parish of Letton derive any worthwhile benefit, but on the contrary the Objectors might suffer substantial injustice, if the Unit Land were to remain on the Register.

For the above reasons I refuse to 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 10th day of October 1974

a. a. Baden Fuller

Commons Commissioner