COMMONS REGISTRATION ACT 1965 Reference Nos 5/D/13, 14 & 15

In the Matter of Newchurch Common,
Marton, Vale Royal D

DECISION

These disputes relate to the registration at Entry No 1 in the Land Section and the Entry at No 1 in the Rights Section of Register Unit No CL. 4 in the Register of Common Land maintained by the Cheshire County Council and are occasioned by Objection No 14 made by S Lewis and noted in the Register on 30 October 1970, and Objection No 9 made by Weston Bros (Sandiway) Ltd and noted in the Register on 26 June 1969.

I held a hearing for the purpose of inquiring into the dispute at Chester on 26 January 1977. The hearing was attended by Mr W J Glover QC and Miss S Hamilton instructed by Messrs Rollitt Farrell & Bladon who appeared for Hoveringham Group Ltd the successor to Weston Bros (Sandiway) Ltd.
Mr Humphreys of Messrs Jeseph Keogh appeared for Mr S Lewis.
Mr Spencer appeared for the Cheshire County Council and Mr MacFall represented his father John MacFall the applicant for Common Rights.

It is right that I should mention at the outset that Mr Harry Macfall had notified me prior to the hearing that owing to his financial circumstances he did not feel able to attend or be represented at the hearing and his solicitors had also informed me that he did not qualify for legal aid. In these circumstances I did prior to the hearing indicate to the Cheshire County Council that it would be helpful if the Council could attend and if Mr Harry Macfall's son who I was led to believe still resided in the area could also attend. I am very grateful to both the County Council and Mr Harry Macfall's son for the assistance they rendered.

The land in question was in 1928 part of the Vale Royal Estate as also was a farm known as Nova Scotia. A substantial part of the Vale Royal Estate was put up for sale by auction in lots in 1928. The land in question was Lots 199 and 200. Lot 199 was described as Newchurch Common (Part of) a capital sporting property and Lot 200 was described as valuable common land. Nova Scotia was a small holding described as a convenient sized dairy holding - comprising 31.836 acres including "two enclosures of arable and temporary grass land south of the Railway Line". It is these two enclosures Nos 533 and 532 on the Sale Plan which have in large measure given rise to these disputes. Mr John Macfall the father of Harry Macfall purchased Nova Scotia which was conveyed to him on 10 April 1929. Lots 199 and 200 were not sold at the auction. Now it is clear beyond doubt that there cannot have been any rights of common appurtenant to Nova Scotia in 1929 since all these lands were in the same ownership and it is well settled that an owner cannot have rights of common over his own land. The conveyance to John Macfall was sent to me by Harry Macfall and it is also clear beyond doubt that on the true construction of that document it did not grant any rights of common in favour of Nova Scotia.

It follows from what I have said above that any rights of common appurtenant to Nova Scotia must have been acquired by prescription.

Mr Harry Macfall sent me a statutory declaration made by him, an unsworn statement by a Mr Fred Robinson and his son at my request gave oral evidence. Mr Harry Macfall in his declaration stated that at the time of his late father's purchase there were attached to Nova Scotia "certain rights of grazing driving and watering cattle over the unenclosed portion of Newchurch Common"and that he has continuously exercised these rights notwithstanding ploughing and sand quarrying on the land in question.

Mr Harry Macfall may be forgiven for believing that the rights which he claimed were appurtenant to Nova Scotia. Lot 199 was sold to Westons in 1948 and Lot 200 was leased to one Leech in 1950 and it is not disputed that from 1929 to 1948 he and his father made the same use of Newchurch Common as they had prior to 1929, and it was put to Mr Macfall when he gave his evidence that Major Jackson the agent for the Vale Royal Estate had been asked if this was in order and had said that it was. In the absence of Major Jackson I cannot place any reliance on this conversation and I doubt if either Mr Macfall or Major Jackson had in mind whether the activities of the Macfalls were "as of right" or with permission or indeed the precise nature of those activities. Those activities are dealt with in greater detail in the unsworn statement of Mr Robinson and were explained to me at the hearing by Mr Macfall's son.

The convenient access from Nova Scotia to the two above mentioned fields south of the railway is over Lot 199 and Lot 200 and across a railway crossing. The alternative means of access is some miles round by the road. It was not disputed that Nova Scotia had used this means of access for very many years - and I believe still does by some route. I am not concerned with rights of way or the right to water cattle and the question which I have to decide is whether when cattle from Nova Scotia were on Lots 199 and 200 they were grazing or merely in transit to and from the field south of the railway.

Mr Macfall in evidence said he habitually took cattle to the fields south of the railway; they would go out in the morning and come back in time for milking in the evening and each trip could be done in about half an hour; they would graze and water on the common in the course of their journeys back and forth.

Mr Robinson's statement is to the same effect; he stressed his use of the roads over the common for the 26 years he was in the employment of the Macfalls and mentioned that Mr Macfall was given a key to the crossing gates over the railway when the gate house was taken down. The most relevant passage from his statement is "I have taken cattle to and from the fields over the Common and have grazed and watered them on the Common". The rest of his statement deals with vehicles.

The conclusion I have reached is that when stock from Nova Scotia were on Lots 199 and 200 it was in transit to and from the fields south of the railway and not exercising grazing rights. Neither father nor son Macfall nor Mr Robinson gave any evidence of cattle grazing unattended on Lot 199 which is north of and divided from Lot 200 by the railway. Mr Macfall in evidence said the cattle had to have a herdsman in order to cross the railway and he admitted that the cattle never went north of a fence erected in about 1950 which divided Lot 199 in two and that no objection was made to the erection of that fence.

Mr Leech and Mr Weston gave evidence on behalf of the Objectors and apart from speaking of the erection of fences and the making of roads they were both emphatic that the Common has always been unsuitable for grazing being covered with heather and silver birch trees and there being on the land a large pit which was a natural bathing pool for children, and there being very little grass. The herd at Nova Scotia was I was told a dairy herd, and the Common was not suitable for grazing such a herd. No doubt the herd while in transit to the lush meadow south of the railway did take such nourishment on their way as they could find and may even have had a stop on their way while the man in charge took a rest, but the picture painted by all the witnesses, those on both sides, was that of a herd of cattle in transit and not one of the exercise of a common right of grazing. For these reasons I refuse to confirm both the Entry in the Land Section and the Entry in the Rights Section.

Mr Glover made an application for costs. He accepted that Mr Macfall had acted in good faith in making his application but submitted that when he or his solicitors saw the sale particulars he should have appreciated that he had no common rights.

The view which I take in a case where an applicant acts in good faith is that if an objector intends to apply for costs he should inform the applicant of the case he has to meet and warn him that if he fails to meet that case, he will ask for costs. In my view neither side appreciated the factual situation prior to the hearing and by way of illustration I mention that Mr Glover produced statutory declarations by Mr Weston and Mr Leech that cattle had never been grazed, driven or watered over the land. Mr Glover accepted that as regards the driving of cattle this evidence could not be supported. Mr Humphreys in fact produced a document made between Mr Leech and Mr Lewis which in terms referred to the cattle being driven over the land. In these circumstances I have come to the conclusion that I should make no order as to costs. Mr Humphreys indicated that he was going to make an application for costs but had to leave the hearing before the time arrived for him to make that application. If having considered this decision he still wishes to make that application I will give him an opportunity so to do.

I repeat I am not concerned with rights of way, and do no more than express the hope that Mr Macfall may be assured of his convenient access to his fields south of the railway. Mr Humphreys did in fact indicate that Mr Lewis was willing so to do. I am of course not expressing any view whether Mr Macfall has or has not the benefit of a right of way.

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 22 day of February 1977

C A Settle

Commons Commissioner