COMMONS REGISTRATION ACT 1965

Reference Nos 206/D/395
to 400 inclusive

In the Matter of Shallow Water
Common, Blisland, North Cornwall
District, Cornwall

SECOND DECISION

This decision is supplemental to a decision ("my 1979 decision") dated 5 November 1979, relating to Register Unit No CL 187 and made by me in this matter upon evidence and argument given at a hearing held by me at Truro on 4 and 5 July 1979.

I held a further hearing for the purpose of inquiring into the disputes mentioned in my 1979 decision so far as they had not been thereby disposed of, at Bodmin on 2 December 1980. At this further hearing (1) Blisland Commoners Association were as before represented by Mr V K Leese, solicitor of Stephens & Scown, Solicitors of St Austell; (2) Mr Harold James Winn on whose application the registration at Rights Section Entry No 38 was made, attended as before in person; (3) Mr Eric Ronald Cornelius one whose application for the registration at Rights Section Entry No 52, was represented as before by Mr M C Culver, solicitor of Coningsbys, Solicitors of Bodmin; and (4) Mr Richard Smith (formerly 71) on whose application the registration at Rights Section Entry No 94 was made, attended in person.

The registration at Entry No 52 (Mr Cornelius) is of a right attached to Moss Farm and part of Churchtown to graze 70 cows and 65 horses and 200 sheep over all the Unit Land and the land in 12 other Register Units, 6 of which were the subject of hearings on or shortly after the day of this hearing, being Nos CL 143, CL 144, CL 145, CL 154, CL 183 and CL 184. The grounds of the relevant Objection No X1356 made by the Commoners Association are: that the rights do not exist at all.

Mr Culver said (in effect):- Since the date of registration (13 June 1969) Moss Farm and Churchtown comprising the land ("the Original Attached Land") to which the right was attached, has been divided by Mr Cornelius making a conveyance dated 6 June 1972 by which part ("the Sold Off part") containing about 10 acres was conveyed to Mr and Mrs Weaving (he understood that they had since as owners been succeeded by Mr and Mrs A H Burberry). About this there had from 15 March 1979 to 16 June 1980 been correspondence (a copy of which he produced) between his firm acting for Mr Cornelius, and Messrs Stephens & Scown acting for the Association from which it appeared that they were agreed that in 1969 a proper registration would have been 11 Units, meaning "11 head of cattle or 6 ponies or 55 sheep", but that they differed as to the effect of the division of these numbers as between the Sold Off Part and the rest of the Original Attached Land

In the said correspondence:- It was said for Mr Cornelius that when he sold off the Sold Off Part no arrangements were made between himself and his purchaser as to the transfer of any grazing rights and that at the time Mr and Mrs Burberry purchased, no grazing rights were transferred to them, so it followed that all the 11 Units were retained by him. It was said for the Association that if this was a correct result, the time could come when one person could own a considerable number

of Units without any land attached. Contra for Mr Cornelius it was said that Counsel in the course of a discussion had agreed that as the 1965 Act made no provision for a pro rata division of common rights it was feasible and legitimate on the splitting of any unit for only such units to be transferred or not transferred as the parties as between themselves agree.

As to these contentions apart from the 1965 Act:- It maybe that where a common is stinted or gated or the rights are in some way limited by numbers, part of the stints or gates or numbers may when the land is divided be dealt with as the parties to the division may agree. But a right may be attached to land in such a way that the attached land is an essential part of the right, eg a right to graze animals levant and couchant, or a right which as between the the commoners customarily depends on the areas of good land, rough land and non-productive land which together constitute the land to which the right is attached; in such cases it would be very strange if to the possible detriment of other commoners, the customary nature of the right could be altered merely by the agreement of the parties to the division.

As to the position under the 1965 Act, I doubt whether the requirement of Section 15 that the number of animals shall always for the purpose of registration be quantified, enables the owner of the right to change the nature of the right in a way which he could not do before the right was registered under the Act.

Section 13 of the 1965 Act provides that regulations may be made for the amendment of registers where any rights are apportioned. The Commons Registration (General) Regulations 1966 (amended in 1968) so provide, see regulation 29; an application must be made to the registration authority; they must give notice to every person appearing to be interested; then if they think the application is well founded they are required to make the necessary amendment. Section 14 of the 1965 Act provides (in effect) for an appeal to the High Court. These provisions show how the problem discussed in the correspondence between Mr Cornelius and the Association as outlined in the preceding paragraphs, could be dealt with; under the regulation a Commons Commissioner is not concerned at all with the provisions.

Without laying down any general rule that a Commons Commissioner can never be concerned with the problems arising out of land to which a registered right is attached being divided after the date of registration, it seems to me that I should not concern myself with any such problems without good reason. In this case I have I think no good reason; if the register is modified so as become as it is now agreed it should have been at the date of registration, those concerned with the problem will be in no way prejudiced and it can be resolved in accordance with the Act and the said Regulation.

Further I consider I ought not to investigate the effect of the conveyance of the Sold Off part in the absence of notice to Mr and Mrs Burberry. They might wish to claim rights apportioned in some way to the land they have acquired; it does not necessarily follow that because the conveyance to and Mrs Weaver did not (172) deal expressly with rights over the Unit Land, that they did not take an apportioned part of such rights under it; nor does it follow that because no rights were expressly mentioned in the conveyance to Mr and Mrs Burberry that

they did not get the benefit of any rights which Mr and Mrs Weaver may have had; see Law of Property Act 1925 Section 62.

For the above reasons I refuse to express any considered opinion as to the effect of the said conveyance, and I deal with this dispute on the basis that I am not concerned otherwise than with what the registration ought to have been at the date of registration. There being agreement about this, I confirm the registration at Entry No 52 with the modification that for the words in column 4: "70 cows and 65 horses and 200 sheep" there be substituted "11 head of cattle or 6 ponies or 55 sheep".

The registration at Entry No 38 made on the application of Mr Winn as tenant is of a right attached to Menzie Downs to graze 50 head of cattle or 25 ponies or 250 sheep over the Unit Land and Register Unit No CL 166. The grounds of Objection No X1356 are: "Rights do not exist".

Register Unit No CL 166 is a V shaped tract known as Sprey Moor, being bound along one of its nearly straight sides (about 1½ miles long) by the A30 road and along the other of its nearly straight sides (about 1 mile long) by Register Unit No CL 165 known as Brockabarrow Common. This Common is between the Unit Land and Sprey Moor, their nearest points being the west corner of the Unit Land and the north corner of Sprey Moor, which are about ⅓ of a mile ~~long~~ apart along a line where there is a small stream, such stream being the north part of the east boundary of Brockabarrow Common.

In support of his registration, Mr Winn in the course of his evidence produced: (1) a letter dated 7 January 1972 from Mr R J Chegwyn who was then 76 years of age and died a few years later and who said to his knowledge tenants had grazed from Menzie Downs on Sprey Moor Round Hill and Shallow Water most of the 1900s, including particularly Messrs Worden, Weary, Braddon, Daw, Witton and "yourself" (meaning Mr Winn); and (2) a letter dated 31 January 1973 from Mr W J Holman who said that he had lived at Menzie Downs Farm from 1914 with his uncle Mr Weary while in his employment and that his uncle had a number of cattle which he used to turn out on Sprey Moor and Shallow Water; as also did Mr R Braddon. Mr Winn himself said that he became tenant in 1941 and they had always turned out cattle onto the Unit Land from Menzie Downs.

In the course of the proceedings it was agreed that if there was any right over the Unit Land to graze from Menzie Downs the appropriate registration was for 25 Units, that is, 25 head of cattle or 12 ponies or 125 sheep. The cross-examination of Mr Winn was on the basis that it was unlikely or improbable that animals were grazed from Mensie Downs upon the Unit Land because Menzie Downs was not only separated from the Unit Land by the A30 road but also at a considerable distance from it, and the two lands were not conveniently situated in relation to each other for any such grazing; particularly they were separated by Brockabarrow Common over which Mr Winn had claimed no rights. Mr Winn said that Menzie Downs mentioned in the Register was a farm of about 184 acres all situated south-east of the A30 road and on the Register map marked as Higher Menziesdowns Farm; he explained the route taken by the animals from his farm to the Unit Land changed in the 1950s when he learned that some animals had been killed on the road (about 12 or 14 years ago the road was fenced by the County Council); before the 1950s the animals were driven most of the way over Sprey Moor

and then to the Unit Land over a comparatively short strip of Brockabarrow Common; after the 1950s they were driven along a short length of track (between 150 and 200 yards) which crosses Sprey Moor near its north end, and then along a track a short distance north of and outside Sprey Moor and then onto Brockabarrow Common at a point on its boundary between the north-west corner of Sprey Moor and the west corner of the Unit Land.

Two days after the hearing attended by Mr Winn and Mr W M Rowe I walked from the A30 road to the farm buildings of Higher Menziesdowns Farm and also from the A30 road along the track which Mr Winn indicated as a route taken by his animals after the 1950s. We went as far as a point on the north part of the north-west boundary of Brockabarrow Common which point is a short distance from the west corner of the Unit Land and from which the Unit Land is plainly visible.

Having heard Mr Winn's evidence at the hearing and having as above-stated walked over the said land to which he was referring, I accepted his evidence that the Unit Land has from his farm since 1941 being grazed as he described; on this basis I accept the statements of Mr Chegwyn and Mr Holman showing that it has been similarly grazed for many years before.

For the above reasons I find that at the date of registration there was such a grazing right; accordingly I confirm the registration at Entry No 38 with the modification that for the words in column 4 "50 head of cattle or 25 ponies or 250 sheep" there be substituted 25 head of cattle or 12 ponies or 125 sheep".

The registration at Entry No 94 (formerly No 71) made on the application of Mr Richard Smith is of a right in gross to graze 10 head of cattle or 10 ponies over all the Unit Land except a specified part (a comparatively very small area on the west side being for the purposes of this decision negligible). The grounds of Objection (X1356) are "the Rights do not exist".

Mr Richard Smith in support of his registration said (in effect):- He claimed that he had a right to graze ponies over the Unit Land because he had done it all his life in succession to his father who succeeded his grandfather. His farm Woolgarden was at least 6 miles from the Unit Land, He explained that by rights in gross he understood that he had a right of user. He had used the Unit Land for cattle some years ago but not for some time. He put the ponies on the Unit Land in the spring and there they stayed; he had done it all his life since he was about 8 or 10 years old (for the first time after the war; he is now 45 years of age). In the course of his cross-examination he insisted that he claimed the right "for no farm".

Mr Rowe who has since 1960 been Secretary of the Blisland Commoners Association in the course of his evidence said that the commoners had never agreed the rights in gross. On my giving Mr Richard Smith an opportunity of cross-examining Mr Rowe, he instead gave further evidence in the course of which he said he had had 9 or 10 ponies on the Unit Land in the last 35 years and described how he visited them; he said that his father died when he was 7 years old and that he put the ponies on the land with the help of his 4 brothers. After saying this he was further cross-examined by Mr Leese in the course of which it was suggested that he put the ponies on the Unit Land in the evening when nobody was likely to see him do it,

that the ponies he put on included stallions and that during the annual round up of ponies on the Unit Land questions were raised about his ponies being there.

There are or maybe special legal considerations applicable to claims for rights in gross based on use only; but at least upon any such considerations the use relied on must be as of right; meaning that the use must in some way be capable of being referable to the right claimed. A right in gross is essentially different from a right appurtenant to land, in that a right appurtenant passes from owner to owner or tenant to tenant without being expressly mentioned in the conveyance or lease; a right in gross cannot so pass either in succession from father to son or otherwise without some kind of writing. Mr Richard Smith gave no explanation how he between the age of 7 and 10 years on the death of and in succession to his father became solely entitled to this alleged right in gross to the exclusion of his brothers.

As a general rule a person who from his farm puts ponies on some part of Bodmin Moor more than 6 miles away could hardly fail to realise if he thought at all about it that his actions were wrongful and could only be justified by some special or exceptional circumstances. On this point I accept the evidence of Mr Rowe as to the views of the commoners and that their views were representative of the local attitude. So even if I accepted Mr Richard Smith's evidence I would not be satisfied that what he did was ever as of right in any now relevant sense.

However it was apparent that Mr Richard Smith during his said cross-examination realised it was being suggested to him that his evidence was unreliable. From his replies to these suggestions and from his demeanour generally I consider his evidence to be unreliable and am therefore unable to make any finding about his use of the Unit Land from which I could properly conclude that he has any such right as he claimed.

For the above reasons I refuse to confirm the registration at Entry No 94 (formerly No 71).

The registration at Entry No 30 was made on the application of Mr Wesley Smith, and is of a right attached to Deweymeads and Meniridden to graze animals as therein mentioned. The grounds of Objection (X1356) are: "Rights do not exist". Mr Rowe in the course of his evidence said (in effect):- No rights over the Unit Land exist with these farms. They are quite a distance away from the Unit Land; he had never seen any animals from these farms grazing on the Unit Land. In the absence of any evidence in support of the registration, I conclude that it should not have been made. I record that I have a letter dated 1 December 1980 (received in the office of the Commons Commissioners after the hearing) from the Director of Administration, South West Water, saying that the Authority had purchased the rights in connection with the building of a new reservoir and that in the absence of background information in support of the original claims the authority would not wish to pursue them. In the foregoing circumstances I refuse to confirm the registration at Entry No 30.

The registrations at Entry Nos 90 and 92 (formerly 66 and 68) made on the application of Mr J L Smith are of rights attached to (90) Tredaule Manor, Altarnum and to (92) Barton Bolventor, Altarnum to graze the animals therein mentioned. The

grounds of Objection (X1356) to Entry No (90) are: "Rights do not exist". No objection by the Commoners Association refers expressly that Entry No 92, but the registration is in issue in these proceedings by reason of Objection No X425. Mr Rowe in the course of his evidence said (in effect) that the lands to which these rights are attached are too far from the Unit Land to have grazing rights. In the absence of any evidence in support of these registrations, I conclude that they should not have been made, and accordingly I refuse to confirm the registrations at Entry Nos 90 and 92.

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 16th day of March 1981

A. A. Baden Fuller

Commons Commissioner