COMMONS REGISTRATION ACT 1965

Reference Nos 209/D/425
209/D/426-427

In the Matter of (1) Buckland Common and Pudsham Down, Buckland-in-the-Moor, and (2) Rushlade Common and adjoining land, Ashburton, both in Teignbridge District, Devon

DECISION

These disputes relate to the registrations at Entry Nos. 5, 6, 7, 17 (replaced by Nos. 40 and 41), 18, 19 and 25 in the Rights Section of Register Unit No. CL124 in the Register of Common Land maintained by the Devon County Council and to the registrations at Entry No. 1 in the Land Section and at Entry Nos. 1, 2, 3 and 4 in the Rights Section of Register Unit No. CL248 in the said Register and are occasioned as regards CL124 by Objections No. 163 and No. 609 made by H J Lentern and noted in the CL124 Register on 9 October and 14 December 1970, and as regards CL248 by Objection No. 134 made by H H Whitley and noted in the CL248 Register on 15 October 1970.

I held a hearing for the purpose of inquiring into the disputes at Exeter on 10 April 1984. At the hearing: (1) Mr Herbert Hugh Whitley who applied for the CL124 Rights Section registrations at Entry Nos. 3 and 4 (being undisputed now final) and at Entry No. 5 (as owner with Harold George Retallick as tenant), and for the CL124 Ownership Section registration at Entry No. 1 (on behalf of William Wallace Whitley and 6 other persons named in the Register, and who made the CL248 Objection, attended in person; (2) Mr Horace John Lentern who applied for the CL124 Rights Section registration at Entry No. 16 (being undisputed now final) and who made the CL124 Objections, was represented by the said Mr H H Whitley; (3) Mr Maurice Harold Retallick of Bagtor Barton, Ilsington as successor of his father Mr Harold George Retallick (he died in 1981) who applied (as tenant with Mr H H Whitley as owner) for the CL124 Rights Section registration at Entry No. 5 and (as owner alone) for the CL124 Rights Section registrations at Entry Nos. 6 and 7 attended in person; (4) Mrs J Sykes as successor of Mr John Luscombe Horton who applied for the CL124 Rights Section registration at Entry No. 17 was represented by Mr P J R Michelmore, chartered surveyor of Michelmore Hughes, Chartered Surveyors of Newton Abbott; (5) Mrs Anstice Brown who applied for the CL124 Rights Section registration at Entry No. 24 and the CL248 Right Section registration at Entry No. 2, was also represented by Mr P J R Michelmore; (6) Mr Patrick Wrayford Coaker who with Mrs Edith Patricia Coaker applied for the CL124 Rights Section registration at Entry Nos. 18 and 19, attended in person on his own behalf and as representing her; (7) Mrs Mary Miranda Russell of Scobitor Farm as successor of Mr Kenneth Johnson who applied for the CL124 Rights Section registration at Entry No. 25, and the CL248 Rights Section registration at Entry No. 3 was represented by Mr T Garratt chartered surveyor of Rendells, Chartered Surveyors of Chagford; and (8) Mr Frank Perryman who applied for the CL124 Rights Section registration at Entry No. 26 (being undisputed now final) and for the CL248 Rights Section registration at Entry No. 4 was represented by Mr M G Cleave, clerk with H Priscott and Co, Solicitors of Newton Abbott.

The land ("the CL124 Land") in Register Unit No. CL124 is an L-shaped tract of about 105 acres. The eastern part known as Buckland Common is a little over 1½ miles long from north to south and has a varying width of between ¼ and ⅓ of a mile: at its north end it is crossed by a public road running from Cold East Cross on the east to the south side of Pudsham Down and thence to Widecombe-in-the-Moor on the west. The western part known as Pudsham Down may be regarded as separated from Buckland Common by Blackslade Water (a stream); it is about ¾ of a mile long from east to west and has an average width of about ¼ of a mile or less. The north part (about half) of the east boundary of Buckland Common adjoins the north part of the CL248 Land, and has at its north end point contact (by Blackslade Ford) with Blackslade Down (part of Register Unit No. CL69). In the CL124 Rights Section there are 27 (not counting replacements) registrations of which all except the 7 abovementioned being undisputed have become final. In the Ownership Section Mr H H Whitley is registered as owner for as aforesaid of all the CL124 Land except two comparatively very small parts at the south-east corner of Buckland Common; of these parts Mr Herbert Pascoe and Mr Henry and Mrs Irene Clarice Bennett are registered as owners. The grounds of Objection No. 163, applicable to Nos. 5, 6, 7, 8, 19 and 25 are that "CL124 is a manor common and the rights are confined to those with land in the parish of Buckland-in-the-Moor; those to which objection is taken have no land in the parish". The grounds of Objection No. 609 applicable to Entry No. 17 are: "this farm has no common rights and therefore can have no straying right".

The land ("the CL248 Land") in Register Unit No. CL 248 is a strip a little under 2 miles long from north to south and compared with the CL 124 Land very narrow. For the purpose of exposition, it may be regarded as divided near its middle point into 2 parts by the said public road from Cold East Cross. The east side of the CL 248 north part (not named) is along and open to the public road from Cold East Cross to Hemsworthy Gate and along its other sides adjoins and is open to the common lands, near Grey Goose Nest (CL 27), Blackslade Down (part of CL 69) and the CL 124 Land. The northeast side of the CL 248 south part (Rushlade Common) is along or near the public road from Cold East Cross souteastwards to Owlacombe Cross; its west side adjoins the CL 124 Land and its southwest side adjoins enclosed lands; it is crossed by and open to the public road running southwards from Cold East Cross. Of the CL 248 no person is in the Ownership Section registered as owner. The grounds of the Whitley Objection No. 134 are: (1) the land was sold to me as freehold without a common right, (2) the land is situated in the parish of Ashburton which parish has no commoners, (3) straying stock has been driven off the area regularly to my knowledge for over 40 years without complaint, and (4) nobody has claimed a common right on the land only a straying right.

At the hearing I considered first the CL 248 land.

About the Rights Section registration at Entry No. 4, Mr Cleave on behalf of Mr Perryman said that the right to graze was withdrawn subject to a right "to stray" from the CL 124 Land being substituted; so that in the result all the CL 248 Rights Section registrations would be of "to stray".

Mr Whitley in support of his CL248 Objection No. 134 in the course of his oral evidence said (in effect):- His father who died in 1957 bought the CL248 Land in 1927 as freehold without any common rights (over it); he employed from 1928 to his death a moor keeper who drove all stray animals off it regularly. In about 1928 or 1929 he started having drifts taking in all stock and starting at Grey Goose Nest and including Rushlade Common and Buckland Common; the drift animals were impounded in a barn situate on Welstor Farm; this he did on several occasions and people took away their impounded animals none then claiming a common right on the CL248 land (only straying rights). The CL248 land is situate in the parish of Ashburton where there are no commoners.

Questioned by Mr Cleave, Mr Whitley said (in effect):- He agreed that Mr Perryman had a right to graze on the adjoining Buckland Common and Pudsham Down (CL124 land). It was not possible to prevent stock straying on to the CL248 Land (there was no relevant cattle grid). Although they had not had a moor keeper since 1960 he did not agree after 1960 no one drove straying cattle off; cattle were driven off if they had to be; for example "if we (those at Welstor) had a bull there we should have to drive the animals off, otherwise the bull would get among the heifers". Mr Perryman since he came to Buckland, never had any stock on the CL248 Land, so there were none to be objected to; he did not object to the stock of others if they did not get in the way, otherwise "we shift them".

Next Mr Cleave and Mr Michelmore asked me to adjourn the CL248 part of the hearing so as to come on with or after the part relating to the CL124 Land.

About the CL124 Land:- Mr Retallick said that the registrations at Entry Nos. 5, 6 and 7 are withdrawn. Mr Whitley said that Mr Lentern was at the date of his Objections chairman of the Buckland Commoners Association. Mr Michelmore said he wished to support the registrations at Entry Nos. 17 and 24 notwithstanding they were expressed as "to stray", but would offer no evidence.

Next Mr Patrick Wrayford Coaker of Bittleford Farm gave oral evidence in support of the CL124 Rights Section registrations at Entry Nos 18 and 19, saying (in effect):- He was born in 1938 and married in 1961. Until her father's death in 1943, his wife and her family since about 1912 or just after lived at Bittleford Farm (Entry No. 19), and since 1900 or possibly before in Widecombe-in-the-Moor; took over the farm in 1961; from 1943 to 1961 the farm was let; it is situated east of Jordan (see OS map 1/50,000), about 1 mile southwest of Widecombe-in-the-Moor. Rowden Farm (Entry No. 18) is close to Broadaford (see said OS map), about 1½ miles west of Widecombe-in-the-Moor; in 1943 it was sold by the executors of his father-in-law, and in 1965 re-purchased by his wife and himself. He claimed the registered rights for each Farm to "graze 40 units & followers, NFU scale)" by prescription because his wife had had ponies on the CL124 Land ever since 1961 and they had never been turned away; they are grazing there now (April 1984); he had never had any instruction from Mr Lentern to remove them. His father-in-law kept ponies at Bittleford Farm which between 1920 and 1930 went on to CL124 Land and the adjoining commons, (not necessarily the CL124 land).

In answer to questions by Mr Whitley, Mr Coaker said (among other things):- Before Mr Whitley came to Buckland the ponies of his wife's father went onto the CL124 Land and he said this because local farmers tell him that they were always collecting them once a year when their ponies were being gathered during the first week of October.

Next, Mr Whitley continued his oral evidence saying (in effect):- The CL124 Land was in the parish of Buckland-in-the-Moor. He knew of only two cases of persons not having land in that parish:- (1) Mr Curnock turned out cattle for a period of about 7 or 8 years, although repeatedly told that his cattle had no right on Buckland Common; and (2) Mr Dawe who always said that he had no common rights there and every year wrote for permission to cut ferns on it for bedding. Mr Curnock maintained that in 1200 the farm belonged to the monks of Torre Abbey and that there existed a deed which can be seen and that Mr Seymour in his history of Torre Abbey confirms this. His (the witness) father in 1925 bought the Buckland Estate which included the CL124 Land; he (born in 1912) started working on the Estate in 1930.

During the course of his evidence, Mr Whitley submitted that Mr Dawe had never claimed common rights, that any common rights granted in 1200 to the Monks had lapsed ("on this question we would like an answer") and that Mr Coaker's grazing from 1961 was not long enough to establish a right. He explained that the Objections had been made by Mr Lentern because at the time he (the witness) was and had been since 1952 (and still is) chairman of the Dartmoor Commoners Association and had told Mr Lentern that because the CL124 land was a manorial common everybody outside the Parish should be objected to; in the result they agreed that the Objection should be made by Mr Lentern (he as chairman of the Buckland Commoners Association being the more directly concerned).

Mr Garratt after explaining that much of what he stated was based on what Mrs Russell had been told by Mr Curnock (her vendor) who could give evidence if required, made a statement to the following effect:- Scobitor Farm (Entry No. 25) is situated on the northwest corner of the CL124 Land and comprises about 51 acres. This farm was part of a much larger estate given in the 13th century to Torre Abbey; the Farm has since then remained largely the same size. It is very definitely a holding which would expect to have a common right. In a memorandum (Russell/1) made by Mrs Russell of a conversation with Mr Curnock there is an extract of a translation from the Cartulary in Trinity College, Dublin, folio 122B, CL.XXXVI (pencil no on memorandum "186"):-

> "I have also granted to them (Canons of Torre Abbey etc) common of pasture in my manor of Bokelande & brushwood for hedges & fences to the same land in my Wood of Hokemore";

also an extract from CL.XXXVII (pencil no. on memorandum 187):-

> "I have also granted to the aforesaid Canons & to their men reasonable common of pasture throughout the whole of my land of Bokelande & Husbote & Haybote in my wood of Hokemore ..."

Scobitor includes 5 fields which adjoin Pudsham Down, and none of the rest of the farms having registered rights adjoin the CL124 Land. There is a valley which runs to the north of the Farm on the western end which effectively cuts off the farm from the remainder of the Parish of Widecombe-in-the Moor; this farm the only one on the south side of that valley. Mr Curnock did turn out cattle on the common CL124 Land and he agrees that Mr Whitley told him that he should not but Mr Lentern had never raised the point with him and notwithstanding Mr Whitley's objections he continued to turn them out. Mr Dawe mentioned by Mr Whitley was owner of Scobitor before Mr K Johnson (the applicant for

Entry No. 25); after him the ownership succession was Mr Benson, next Mr Curnock and now Mrs Russell. As to the 13th century charters, he referred to Torre Abbey by Deryck Seymour (printed quarto 1977, published James Townsend & Sons Ltd, Exeter), a copy of which was produced at the hearing.

Mr Whitley said he knew of the book, and conceded that Lower Venton Farm mentioned in the CL124 Rights Section registration at Entry No. 1 (not disputed and therefore now final) was wholly in Widecombe-in-the-Moor.

Next I considered again the CL248 Land and Mr Cleave made submissions about the Rights Section registration at Entry No. 4.

After the hearing I received from Mr Garratt a copy of pages 3, 4 and 127 to 131 of Seymour supra and a typewritten extract from the Exchequer Cartulary of Torre Abbey in the PRO London (2 other charters about the manor of Bokelande).

Four days after the hearing I inspected accompanied by Mr P W Coaker and Mr F A Mortimore of Lizwell (from the road) Rowden and Bittleford Down (Register Unit No. CL70) and other nearby register units and saw the relative situations of Rowden Farm, Bittleford Farm and the CL124 land; also unaccompanied I motored by the entrance of Scobitor Farm and across the CL124 land.

As regards the Scobitor registration at Entry No. 25, Mr Garratt relied particularly on the said extracts from 13th century charters. There is no mention in these extracts of Scobitor Farm and so far as I can judge from them they are grants of rights of common in gross. Such rights could not have devolved on Mrs Russell (or any of her predecessors) except by a deed expressly mentioning them, see sections 52(1) and 205(1) (ix) of the Law of Property Act 1925; none being produced I assume (as seems likely) there was never any such Deed. It is implicit in the registration now under consideration that it is of a right of common appurtenant to Scobitor Farm.

Seymour supra includes a chapter headed "Buckland-in-the-Moor" with a subheading "Scobitor" under which he extracts 3 charters, the first of which is:-

> "76. in perpetual alms made to the Canons of Torre by Roger de Bokelonde: it is the land of Scobitor which his grandfather, William de Bokelonde, gave to the Canons with his body. Grazing Rights throughout his land of Bokelonde are given and husbote and haibote in his wood of Hokemore ... date: c.mid 13th century.
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> MS: Folio 81."

Of the second "78" he says:

> "This and 76 appear identical ..."

The third does not help Mrs Russell. Of these charters he says:

> "The original charter granting Scobitor to the Canons is not to be found in either Cartulary; 76 is merely a confirmation of it. None of the Buckland charters are dated ..."

As to whether any charter extracted by Seymour was a grant of a right of common appurtenant to the land at Scobitor thereby or previously given to the Canons and whether it was limited to the waste of the manor or was a grant of a right in gross, I find it impossible to say. Seymour does not himself consider the question. The extracts made by Mr Curnock may be from a different Carulary, his reference numbers are not the same as those given by Seymour. The expression "the whole of my land in Bokelande" raises the question as to whether the donor intended a right extending beyond the waste land of the Manor. The expression "& his men" favours the enjoyment by the Canons not necessarily appurtenant to the land at Scobitor an idea consistent with all the charters being eleemosynary.

Assuming in favour of Mrs Russell that at least one of these charters in effect granted to the Canons, Scobitor Farm together with a right of grazing, houseboat and haybote over the CL124 Land, the legal effect was:- As a conveyance of land it was an act of possession, see Blandy-Jenkins v Dunraven 1899 2Ch 121 at page 126 and Malcolmson v O'Dea there cited (1863) 10 HLC 593 at page 614; possession is in law some evidence of ownership of the right expressed to be granted, and accordingly the charter is some evidence that in the 13th century there was then a right of common so appurtenant. At its best for Mrs Russell the charter is evidence against any person claiming under Roger de Bokelande precluding him from contending that in the 13th century such a grant could not be made. I reject the suggestion that any such charter is a piece of local legislation which for ever establishes until it is shown somehow to have been repealed, that there is a right of common as mentioned in the charter appurtenant to Scobitor Farm; it is no more than an item of evidence to be balanced with any other evidence for or against the existence of a right as specified in the registration and in 1969 claimed by Mr Johnson. And I reject too the idea that a conveyance of land because it is more than 700 years old is special evidence of ownership of an interest in land, comparable with the evidence usually accepted of the ownership of land: recent possession and production of conveyances made within living memory consistent with that possession.

For the right as registered I have also the circumstances that the situation of Scobitor Farm is such that from it grazing on the CL124 land would be easy and convenient and the evidence that Mr Curnock during his ownership grazed it. But against the registration I have (a) the registration has no resemblance to the right granted by the charter in that the registration includes "turbary, piscary, shooting, common in the soil" and the right claim is also identically claimed over Bonehill Down (Register Unit No. CL68 Entry No. 67): (b) no conveyance or other document relating to Scobitor Farm made within living memory mentioning that it was enjoying rights granted to the Canons of Torre Abbey in the 13th century or that it enjoyed any rights at all on the CL124 land, was prduced, and I infer that there is no such conveyance* (c) Mr Dawe's statement to Mr Whitley that

* Note:- At a hearing on the next day relating to Register Unit No. CL68 (Bonehill Down in Widecombe-in-the-Moor) was produced 1929 particulars of sale under which was sold Scobitor Farm described as in the occupation of W Dawe and in which although mention was made of rights in the Widecombe Manor, no mention was made of any other right of common; see my CL68 decision of even date.

he had no rights on the CL124 Land; (d) Mr Whitley's evidence that the CL124 land is "a manor common" and the rights are confined to those with land in the parish of Buckland-in-the-Moor (see the grounds of the Objection).

In considering this conflict:- The Objection having been made, the burden of proof is upon those concerned to support the registration. It is not for me to say whether I require Mr Curnock personally to give evidence; most of what Mr Garratt said he could say was conceded by Mr Whitley, particularly that his grazing of cattle was after verbal protest by Mr Whitley and after the Objection; I have no reason for reflecting such grazing back to an earlier ownership, so by it the legal position of Mrs Russell is made no better. I have not overlooked that rights granted are not lost by abandonment merely because the persons entitled to them have not exercised them, see Tehidy v Norman 1971 2QB 528; but I decline to infer that what has been or could now be done from Scobitor Farm has any now relevant resemblance to what 600 years ago was done by the men of the long since dissolved Abbey of Torre. From the apparent convenience of the CL124 Land for grazing from Scobitor mentioned by Mr Garratt, someone who knew nothing of the parish boundary might be inclined to infer that a right of grazing was appurtenant; but mere convenience is not enough; against I have the evidence of Mr Whitley and the existence all over England and Wales, and in the Dartmoor National Park particularly, of Commons which are accepted by many as grazeable only from farms in the same manor or in the same parish. Notwithstanding that Mr Whitley did not at first mention Lower Venton Farm (nobody at the hearing was asked to explain why it was exceptional, but obviously from its situation it might be) I accept his evidence that Mr Dawe said that he had no rights over the CL124 land (meaning that any of his cattle there were strays). I prefer a comparatively recent statement of Mr Dawe to anything deducible from the somewhat vague information I have about grants made more than 600 years ago, and my decision is therefore that there were in 1969 no rights such are registered appurtenant to Scobitor Farm, and accordingly I REFUSE to confirm the CL124 Rights Section registration at Entry No. 25.

As to the registration at Entry Nos 18 and 19 made on the application of Mr and Mrs Coaker:-

The land in Register Unit No. CL70 (Rowden Down and Bittleford Down) is conveniently grazeable from Bittleford Farm and Rowden Farm situate to the south and west of them. That ponies put on to the CL70 land would stray from it onto the adjoining west part of the land in Register Unit No. CL69 (Dunstone Down) is both possible and likely. Between this part of the CL69 land and the CL124 there are extensive enclosed lands in the valley of the East Webburn River which flows southwards from the nearby village of Widecombe-in-the-Moor. Ponies could from the CL70 and CL69 land stray onto the CL124 land along the roads which cross the enclosed lands either over Dunstone Bridge by Scobitor (about 1½ miles) or by Cockingford Bridge (about 1¼ miles); or ponies could go direct from Bittleford Farm to the CL124 land without going onto either the CL70 or the CL69 land by the Cockingford Road, but the distance would be about the same or more.

To establish a right under a presumed grant, grazing as of right for 20 years is necessary, see Tehidy v Norman supra. By analogy with section 16 of the Commons Registration Act 1965 or because grazing after an objection made (except in special circumstances) could not be as of right, I consider that this 20 years should be measured back from the date of the Objection: 24 July 1970.

The only grazing (ponies from Bittleford and Rowden) described Mr Coaker as within his own knowledge was from after 1961. I accept that between 1961 and 1970 some of his or his wife's ponies would be on the CL124 land. For them to be there as of right within the now relevant legal meaning of the words, their presence on the land must not have been "secret" in the sense that reasonable persons concerned with the CL124 land could have known or be taken to have know that they were there intentionally and not merely strays whose presence could be tolerated because they did no harm. Having regard to the nature of the lands in between these two farms and the CL124 land, and the great distance between them a reasonable person could in the absence of special circumstances (of their being any such Mr Coaker gave no evidence) infer that his or his wife's ponies were on the CL124 land as strays and could be tolerated because they did no harm. The circumstances that they were found in October drifts does not established that they were there as of right. I conclude that this 1961 to 1970 grazing was not as of right.

Even if it was as of right, it was not for long enough. I decline to infer that there was any such pony grazing as described by Mr Coaker between 1943 and 1961 when the Farms were let and not owned by his wife or himself. Even if his father-in-law had ponies before 1943, and even if some of them from time to time were on CL124 land, I decline to infer from anything Mr Coaker said that they were as of right, or otherwise than as strays.

For these reasons my decision is that there were in 1968 no rights appurtenant to either Rowden Farm or Bittleford Farm such as have been registered; accordingly I REFUSE TO confirm the CL124 Rights Section Registrations at Entry Nos 18 and 19.

I record that at hearings held after this Unit Land hearing, I had more evidence from Mr Coaker about the grazing of his ponies on the CL69 land and on other nearby Register Units. During my inspection Mr Coaker amplified what he said at this CL124 hearing. In the reasons set out in my CL69 decision of even date I rejected his claim to rights over the CL69 land; so even if his amplified evidence had been available at this CL124 hearing my decision would have been the same.

As to the four other disputed CL124 Rights Section registrations:- No evidence was offered in support of those at Entry Nos 5, 6 and 7, and as above stated Mr Retallick said they were withdrawn. As to the registration at Entry No. 17 (now replaced by Nos 40 and 41) expressed as "to stray", for the reasons stated in my decision dated 30 June 1983 re Forest of Dartmoor (CL164) under the heading "Straying", I consider that any such registration should in the absence of special circumstances be avoided; no evidence or argument was offered in support of it. So my decision is that these registrations were not properly made, and accordingly I REFUSE to confirm the CL124 Rights Section registrations at Entry Nos 5, 6, 7 and 17 (including those at Entry Nos 40 and 41 which replace 17).

As to the CL248 Rights Section registrations:- Those at Entry Nos 1, 2 and 3 are expressed as "to stray"; against them I have the above summarised evidence of Mr Whitley; no evidence or argument was offered in support of them; upon like considerations to those mentioned in the preceding paragraph, my decision is that they were not properly made. The said evidence was also against the registration at Entry No. 4, expressed as "to graze"; no evidence was offered in support of it and Mr Cleave in effect conceded that unless it was modified by substituting "stray" for "graze" it was not proper. Even if such a substitution was made it

would be in no better position than the registrations at Entry Nos 1, 2 and 3. So my decision is that this registration too was not properly made. Accordingly I REFUSE to confirm the CL248 Rights Section registrations at Entry Nos 1, 2, 3 and 4.

The CL248 Land Section registration can only have been properly made if the land was at the date of registration within the definition of common land in section 22 of the Commons Registration Act 1965: being (stating its effect shortly) either (a) land subject to rights of common, or (b) waste land of a manor. Having concluded that all the Rights Sections registrations should be avoided, it follows that the land was not within paragraph (a) of the definition. As to paragraph (b), I have no evidence for, and the evidence of Mr Whitley is if anything against it. So my decision is: because it was not properly made, I REFUSE to confirm the CL248 Land Section registration at Entry No. 1.

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 22nd day of April 1985

A. A. Baden Fuller

Commons Commissioner