COMMONS REGISTRATION ACT 1965

Reference No. 9/D/3

In the Matter of Crosses Hole Watering Plot,

Clayhidon, Devon

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No. C.L.138 in the Register of Common Land maintained by the Devon County Council and is occasioned by Objection No.658 made by Mr. R.M. Kallaway and noted in the Register on 16th February 1971.

I held a hearing for the purpose of inquiring into the dispute at Exeter on 12th April 1972. The hearing was attended by Mr. M.R. Rose, solicitor for the Clayhidon Parish Council, and Mr. T. Harding, solicitor for Mr. Kallaway.

Register Unit No. C.L.138 consists of six pieces of land known respectively as Clayhidon Turbary, Wiltown Turbary, Wiltown Green, Grayshill Quarry, May's Watering Plot and Crosses Hole Watering Plot. In the Ownership Section of the Register Unit the Clayhidon Parish Council is registered as the owner of all six pieces of land included in the Register Unit.

Mr. Kallaway's objection relates only to Crosses Hole Watering Plot. In section 6 of the objection (Section of register in which registration appears) all the alternatives "Land/Rights/Ownership" have been struck out, but there has been written above them the word "Land", authenticated by Mr. Kallaway's signature. The grounds of objection in Section 8 are stated as follows:-

"This land has been part of Crosses Farm and included in the sales "of the property and on the Deeds at least as far back as 1939 and "probably much longer. Tithe was paid on the piece. The land was not "common land at the date of registration".

The first sentence of the grounds of objection is, of course, inconsistent with the statement in section 6 that the objection relates only to the Land Section of the Register. Nevertheless, the registration authority accepted the objection as relating only to the Land Section of the Register. The first sentence of the grounds of objection appears to have been regarded as surplusage, since it would only be appropriate to support an objection to the Ownership Section. There being no other objection to the Ownership Section of Register Unit No. C.L.138, the registration of the Parish Council as the owner of all the land comprised in the Register Unit became final on 1st October 1970. It is not for me to express any view about Mr. Kallaway's present position with regard to the ownership of Crosses Hole Watering Plot. The only matter which has been referred to me is his objection to the registration of this land in the Land Section of the Register.

The land in question appears with the description "Watering Plot" in two entries in the tithe apportionment for the parish of Clayhidon, once as part of Crosses Farm and once under the general heading of "Waste Lands". It was included in a conveyance of Crosses Farm to William Warren dated 29th July 1871 and also in the conveyance dated 18th October 1967 of the farm to Mr. Kallaway. In both conveyances it is described as "Watering Plot".

Oral evidence was given by Mr. J.A. Blackmore, who has been a parish councillor for 50 years, though he has not seen the land in question since World War II; by Mr. A.F. Bishop, who was the tenant of Burrow's Farm from 1940 to 1945; by Mr. Kallaway, the objector; and by Mr. C.M. Kallaway, his father. By agreement of the parties there was read a written statement by Mr. G.J. Warren, who was born at Crosses Farm 74 years ago, his father also having been born there.

There was no material conflict between the evidence of these witnesses. It appears that the land in question has never been fenced against the road, and it has never been ploughed, but used for rough grazing. The actual watering hole was at one time roughly stoned up in order to keep the soil back from the spring, but the stones, or what remain of them, are now scattered around it.

The only evidence regarding the user of the watering hole by persons other than the owners of Crosses Farm was that successive tenants of Burrow's Farm used it for watering cattle and horses, and Mr. C.M. Kallaway said that he remembered cattle from Luppit Common using the hole on one or two occasions.

Mr.Rose argued in support of the registration on two grounds. The first was that the land in question fell within the first limb of the definition of "common land" in section 22(1) of the Commons Registration Act 1965 because it was subject to a right of common in gross exercisable by the inhabitants of the parish of Clayhidon. As a sub-head of this branch of his argument Mr.Rose suggested that such a right could be held by the Parish Council on behalf of the inhabitants of the parish. His second and alternative ground was that if the land was not subject to rights of common, it fell within the second limb of the definition of "common land" as being waste land of a manor.

Dealing with Mr. Rose's grounds in order, while it is legally possible for the inhabitants of a particular place to justify the watering of their cattle by immemorial custom (see Manning v. Wasdale (1836), 5 A.& E.758, per Patteson, J., at p.764), I am not satisfied that the evidence in this case is sufficient to support such a custom. While the user by the tenants of Burrow's Farm stretches back over the whole period of living memory and could therefore be evidence upon which a user from time immemorial could be found, I do not consider that the only other evidence of user by persons other than the owner of the land, namely the one or two occasions on which cattle from Luppit Common used the hole, is sufficient to enable me to find that there has been a user from time immemorial by the inhabitants at large. Perhaps I should point out that I am not deciding that there is no such right in the inhabitants at large. What I am saying is that the right has not been proved to my satisfaction in these proceedings. The matter will not be res judicata in any subsequent proceedings. However, even if the evidence could be said to support a right of the inhabitants of the parish to water their cattle at the watering hole, there is, in my view, an unsurmountable obstacle in Mr. Rose's path. This is that such a right would not be a right of common. A right of common is a profit à prendre, but a right to take water is an easement: see Race v. Ward (1855), 4 E. & B.702. Mr.Rose said that what was being claimed was not a right to take water, but a right of refreshment. However, this distinction between consumption on and off the

premises is unsupported by authority: indeed both forms of consumption were dealt with on the same footing in Manning v. Wasdale, supra. Mr.Rose also suggested that the right for cattle to consume water on the premises was coupled with a right of grazing. There was no evidence about grazing. While it might fairly be assumed that animals would nibble a few blades of grass on their way to and from the watering hole, far stronger evidence than this would be required to support a right of common of pasture. There is also a further difficulty in that a right of common in gross from time immemorial in the inhabitants of a parish or township is unknown to the law: see Davies v. Williams (1851), 16 Q.B. 546, 559. It is only because it would not be a right of common that a right in the inhabitants of the parish to water cattle at the watering hole could be supportable, if the evidence justified it.

I turn now to Mr. Rose's alternative argument that the land in question is manorial waste. It could fairly be said to have the physical characteristics of such waste in that it is "open, uncultivated and unoccupied ", as Watson B. put it in Att.-Gen. v. Hanmer (1858), 27 L.J. Ch. 837, at p. 840. Mr.Rose's difficulty on this aspect of the case is that he has not been able to show that this land satisfies the rest of Watson B.'s definition of manorial waste by being "parcel of the manor ..... other than the demesne lands of the manor". The only evidence as to the manorial status of the land is negative. The manor of Clayhidon was inclosed by an award made in 1821 under the Act 52 Geo. III, c.52 (private). The map referred to in this award does not include the land in question and shows that the manor of Clayhidon does not extend into this part of the parish. Mr.Rose suggested that, although not parcel of the manor of Clayhidon, it should be assumed to be parcel of some other manor in the parish. This I find myself unable to accept. While it may be that at some time the area of the parish was divided between two or more manors and that the land in question was parcel of one of them, that cannot be assumed. There is no presumption that every piece of land is parcel of some manor. Furthermore, land can cease to be parcel of a manor, for it is possible for a manor to be extinguished, e.g. by partition by act of parties: see R. v. Duchess of Buccleugh (1702), 6 Mod.150. I am, therefore, far from being convinced by the second limb of Mr.Rose's argument.

For these reasons I refuse to confirm the registration of Crosses Hole.

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 4th day of May 1972

Chief Commons Commissioner