COMMONS REGISTRATION ACT 1965 Reference No. 209/D/91

In the Matter of Northam Burrows,
Northam, Devon (No. 1)

DECISION

This dispute relates to the registration at Entry No. 453 in the Rights section of Register Unit No. CL 9 in the Register of Common Land maintained by the Devon County Council and is occasioned by the conflicting registrations at Entry Nos. 1 - 42, 44 - 91, and 93 - 452 in the same section of the Register Unit.

I held a hearing for the purpose of inquiring into the dispute at Northam on 12, 13, and 14 January, 19, 20, 21 and 22 April and at Watergate House, London, WC2 on 24 October 1977. The hearing was attended by Miss Sheila Cameron, of counsel, on behalf of the Torridge District Council as successor to the former Northam District Council, the applicant for the registration and also on behalf of the Northam Town Council; Mr Ian McCulloch, of counsel, on behalf of the Devon County Council as registration authority; Mr J D Philipp, Mr L E Long, Mr J J Ferguson, and Mr R J Keast, solicitors, on behalf of a number of applicants for conflicting registrations; and Commander M B C Sumner, Mr J R Day, Mr R H K Evers, Mr R D Bradford, Mrs E P L Holman, Mrs P Lawes, Mrs L S Stead, Mr J Roberts, Mr J Woolf, Mr R Mills, Mr R G Cobley, Mr O T Squire, Mrs S Griffey, Mr F J G Dell, Mr L G Poole, Mrs M E Palmer, and Mr W E Bartlett, applicants or successors to applicants for conflicting registrations.

The registration at Entry No. 453 is of a right to graze 3,000 sheep or equivalent at N F U Scale attached to land described as being "at the Ancient Parish of Northam in the Parish of Northam and Borough of Bideford" as shown on the supplemental map numbered 453. The land shown on the supplemental map comprised the ancient parish of Northam, the reference to the borough of Bideford being occasioned by the fact that a detached part of the ancient parish to the south of the town of Bideford was at the date of the registration comprised within the borough. I was satisfied on the evidence adduced before me that the area of the ancient parish has at all material times also been the area of the manor of Northa It was stated in the application for the registration that it was made by the former Northam Urban District Council as trustees for the inhabitants of the former Parish of Northam.

Each of the registrations at Entries numbered between 1 and 452 is of a right of common of pasture attached to a defined area of land.

The most convenient way of dealing with this dispute is to consider first the registration at Entry No. 453. Miss Cameron did not seek to have it confirmed without modification. On the contrary, she put forward for my consideration four possible modifications as alternatives, should I decide to confirm the registration. However, before considering possible modifications of the registration it is necessary to examine the evidence upon which Miss Cameron relied in support of the registration.

The manor of Northam was granted to the Abbey of St Stephen in Caen by William the Conqueror and Queen Maud, his wife. There appears to be no copy of this grant in existence, but it is recorded in a charter of Richard I by which it was confirmed. The evidence of Richard I's charter put before me consisted of a translation of an inspeximus granted to Sir George Cary on 2 March 1610, in which the charter is recited. This translation is somewhat misleading, since it makes Richard I confirm a grant by "Our Great-grandfather". Richard I's

great-grandfather was Henry I. However, it appears from the Latin text of the charter printed in Calendar of Charter Rolls, iv. 271 that "Our Great-grandfather" is a mistranslation, for the charter speaks of "Rex W. abavns noster", i.e. "King William our great-great-grandfather." This is borne out by an earlier confirmation by Henry I, printed in Dugdale's Monasticon (2nd edn), vi. 1071, in which the grantor is referred to as "rex Willielmus pater mens". As will appear later, I regard this grant by William the Conqueror and Queen Maud as of great importance.

The manor was sold by the Abbey at some time between 1342 and 1362, and its subsequent devolution can be traced down to Roger Melhuish, who with his sons William and Thomas by an indenture dated 31 October 1743 demised the manor to William Barbor and John Spurway for a term of 200 years from William Melhuish's death, which occurred in 1770 (The account of this indenture given in The Royal North Devon Golf Club (1964), p. 76 is not entirely accurate). The leasehold interest so created passed through divers mesne assignments to Augustus Langham Christie, who assigned it to trustees for the Royal North Devon Golf Club on 6 May 1895. The lease was held by a succession of trustees for the Club until 1962, when it was assigned to the former Northam Urban District Council. When the lease expired the reversioners could not be traced, so trustees of the Melhuish Estate were appointed in proceedings in the Chancery Division. In 1973 the trustees so appointed sold the land the subject of the reference to the former Devon County Council, but retained the lordship of the manor.

At all material times the land the subject of the reference has been waste land of the manor of Northam, but the evidence relating to it is not of such high antiquity as that relating to the lordship of the manor. The earliest document relating to the land adduced in evidence is the foot of a fine levied in the Court of Common Pleas in Michaelmes term 1638 of certain messuages and land together with common of pasture appertaining thereto in Northam "Borrowes" and other places in Devon. After this somewhat uninformative document there is a gap until 1708, when Roger Melhuish, the lord of the manor, filed a bill in the Court of Chancery against one Thomas Vernon and others. It is recited in this bill that "by virtue of diverse grants, patents and charters which have anciently been made and given by the Crown touching and concerning the said Manor all the tenants and inhabitants within the said Manor have constantly from time to time had and enjoyed diverse privileges, exemptions and immunities as well in diverse matters relating to trade at sea as at land." The subject matter of the suit was, however, not a right of common, but the plaintiff's right to bushelage on cargoes unloaded in the manor and whether certain land bounded on the west by the "common called Northam Burroughs or Northam Commons" onto which the cargoes were unloaded was waste land of the manor. Only the pleadings in this suit survive, so it would be unsafe to accept the allegations on either side as evidence of anything. A number of Royal charters relating to the manor of Northam are recited in the inspeximus granted to Sir George Cary in 1610, but these do not refer to the tenants and inhabitants, and no evidence of the "diverse grants, patents and charters" relating to the tenants and inhabitants was adduced before me.

According to the recitals in an award made by George Buck and John Benson the younger on 23 July 1716 this was not the only suit in relation to the customs and privileges of the manor (sic) of Northam in which Roger Melhuish was involved. Buck and Benson were authorised and empowered by the parties to inspect and inform themselves of the nature of the customs and usages in the parish (sic) and to make such award thereon as in their prudence and judgement should seem meet. The award is set out under fifteen heads, of which only the tenth is directly relevant to these proceedings, though it is worth noticing that throughout the

document the words "manor" and "parish" appear to be used synonymously.
In so far as it relates to rights of pasture the tenth head provides as follows:-

"It is agreed between all the parties that the Burrows commonly called
"Northam Burrows or Common is and shall be enjoyed by the Inhabitants of the
"said Parish as hath been the ancient enjoyment and custom neither shall
"any person whatsoever have claim or be entitled to any privilege or benefit
"interest or enjoyment upon or out of the said Burrows or Commons but as and
"in common with the Inhabitants of the said Parish .... and whereas it
"is presumed to be an antient custom for the Parish to be under the government
"or direction of Twenty four men and that there have been Rules or Methods
"kept up for the better preservation of the said Commons to elect four by
"the majority of the 24 as Overseers to see the Boundaries Roads and Fences
"to be kept and preserved for the better security of the said Burrows or
"Commons and not to be overstinted or overstocked with cattle horses sheep etc.
"We do consider this a very laudable custom and ought to be continued for the
"time to come".

It appears from this document that the "Twenty four men" were what was known as a select vestry. The four overseers elected by them are not to be confused with the overseers of the poor, who were nominated by the County justices under section 1 of the Poor Relief Act 1601.

It is to be observed that while preceding heads of the award set out rules prescribed by the arbitrators for the future, the tenth sets out the previous position and provides for its continuance.

It appears that the practice described in the award continued to be followed, for in a case submitted for the opinion of Mr Charles Yorke in 1762 it was stated of Northam Burrows:-

"The Pasture of this Common belongs to all the Inhabitants of Northam without
"any Stint: and the poorer sort constantly collect the dung of Cattle
"depastured thereon for their Fewel: The Lord of the Manor and Royalty
"drives this Common and impounds the Cattle of Strangers with this the
"Inhabitants readily acquiesce".

Unfortunately, the point upon which the opinion was sought was concerned with the right of the Lord of the Manor to have a rabbit warren on the Burrows, so that although the 1716 award was referred to in his instructions, it was not necessary for counsel to express any view upon its legal effect.

There was shown to me a printed advertisement dated 8 March 1816 offering to let "All that Compact and desirable Estate called Watertown" in the parish of Northam together with "an unlimited Right of Common on Northam Burrows". I do not regard this as of any assistance in the present case, since it appears from an assignment of the term of 200 years previously mentioned dated 20 December 1775 that "the messuage and tenement called Watertown" was included in the parcels of the indenture of 31 October 1743, so that the assignee of the term of 200 years would be entitled to an unlimited right of common on Northam Burrows in his capacity of lord of the manor. That Watertown was still in the hands of the lord of the manor in 1816 is shown by the words "Manors of Northam and Abbotsham" at the head of the advertisement and by the statement that "to a Gentleman of respectability leave will be given to Sport over the Two Manors of Northam and Abbotsham."
It is therefore clear that the unlimited right of common referred to in the advertisement was the right of the lord of the manor and not a right appurtenant or appendant to Watertown.

At the court leet and view of frankpledge together with the court baron of the manor of Northam held on 22 October 1832 the jury presented three men to be drivers for Northam and two to be drivers for Appledore and that according to the determination of the jury certain specified charges were to be levied on cattle that trespassed, independent of the charges of the pound keeper. There were similar presentments on 27 October 1834.

On 24 January 1834 Thomas Mills, then Vicar of Northam, entered in the churchwardens' vestry book an acknowledgement that he had received from the underwriters of the ship "Elizabeth" £2 2s. as compensation for damage done to the Burrows by drawing part of the cargo and wreck over the same.

By a printed notice dated 4 March 1846 Mr T B Chanter was requested by a number of persons to call a meeting of the inhabitants of the parish of Northam who had a right on the Northam Burrows to take immediate steps for preventing further damage being done to the Burrows by the overflowing of the tide; and also to raise a sum of money for repairing the inroads already made by the sea.

At a meeting of the parishioners of Northam held on 9 July 1852 it was resolved that the North Devon Humane Society for the Preservation of Life from Shipwreck should be permitted to build a life-boat house on a spot of ground on the Northam Burrows not exceeding 60 ft square. The Committee of the Society announced in a printed notice dated 18 June 1853 addressed to all persons having a right of common on the Northam Burrows that they were prepared to pay £1 a year as an annual rent into the hands of the Vicar and Overseers of the Parish of Northam to be laid out by them for the improvement of the Burrows.

By a printed notice dated 4 June 1856 Mr T B Chanter, as lord of the manor, summoned a meeting of the parishioners of the parish of Northam to consider the system of stocking and to regulate the management, improvement, and protection of Northam Burrows.

The inroads made by the sea continued to give cause for concern. On 16 April 1861, the Vicar of Northam, the Rev. J H Gosset, issued for the consideration of the parishioners a proposal for securing the whole of Northam Burrows from the encroachments of the sea by the erection of embankments. The cost was to be defrayed by enclosing an area of 300 acres and letting it at a rent of £1 per acre. Mr Gosset said: "I suggest that we make up our minds to give up our right of Common over 300 Acres to save the remaining 600". A committee of twelve members was formed and held its first meeting on 6 June 1861, when it was decided to appoint Mr Nicholas Whitley of Truro to make a survey and report. Mr Whitley's report, dated 5 July 1861, was considered at a meeting of the committee held on 1 August 1861. It was then stated that land in the parish was always sold with the unlimited right of pasturage on the Burrows, and Mr Gosset suggested that the land owners should contribute 5s. per acre towards the cost of the embankments and improvements. It was further suggested by Mr Gosset that there should be a committee of parishioners for the management and improvement of the Burrows. The stock on the Burrows was to be regulated as to the quantity that each person should be allowed to put out to graze; no out-parishioner should be allowed to put any stock on the Burrows; no parishioner should be allowed to put any stock on the Burrows that did not belong to himself; and the Burrows to be driven whenever the committee should think proper to do so.

Mr Gosset then summoned a meeting of the owners and occupiers of land and houses in the parish of Northam to be held on 8 August 1861 to consider Mr Whitley's report. At this meeting a committee was appointed to consider Mr Whitley's plan and proposals, and to advise the parishioners generally in reference to the question of the best mode of preserving and improving the Burrows. The meeting was then

adjourned until 12 September to consider the Committee's report.

The committee advised that steps should be taken to convert the Burrows into a regulated pasture under sections 113 to 120 of the Inclosure Act 1845. Nothing, however, seems to have come of this proposal, but the committee, now named the Northam Burrows Committee, remained in being.

The rules of the Northam Burrows Committee are of some interest. The Committee was to be re-appointed annually from among those potwallopers who were 21 or over. A potwalloper was defined as a person who was normally resident within the boundaries of the ancient manor of Northam. No person was to be considered as being normally resident within such boundaries until he or she had been resident for twelve calendar months and residence in an hotel, boarding house, or guest-house (other than as owner or member of the owner's family) so (sic ? not to) count. The version of these rules before me must have been drawn up after the coming into operation of the Local Government Act 1894, since it requires an advertisement in a newspaper circulating in the Urban District of Northam, but it probably derives from an earlier version.

The word "potwalloper" was in use in relation to Northam Burrows as early as 21 March 1867, when it appeared in a letter in the North Devon Journal, while it had a precursor in the 1856 edition of Kelly's Post-Office Directory of Devon where it was stated that Northam Burrows were "in times gone by given to the 'Pot-boilers' of the parish in perpetuity by one of our Monarchs on landing from Wales". It may be that "pot-boilers" or "potwallopers" came into use in the early 1850's, since White's Directory, published in 1850, merely states that the inhabitants have common right on the Burrows. Nevertheless, the meeting for the election of the Committee was called a "Meeting of Parishioners" in the minutes as late as 6 May 1949, and on 1 May 1953 it was "The annual meeting of the Inhabitants of the Manor of Northam", but on 11 May 1956 it was "The Annual General Meeting of the Potwallopers of the Manor of Northam".

On the evidence it is clear that from time immemorial persons, to use a neutral expression, have been grazing animals on Northam Burrows in the purported exercise of a right to do so. It is therefore necessary to consider first who these persons have been and then whether the right which they have claimed has any existence in law.

In the documents the persons who have grazed their animals on the Burrows are variously described as tenants and inhabitants within the manor, inhabitants of the parish, the inhabitants of Northam, the parishioners, the pot-boilers of the parish and the potwallopers of the manor. The expression "potwallopers" seems to have been used by different persons with different meanings at different times, and there is nothing to show that it had any definite meaning other than inhabitant householders. Having regard to its late appearance, I doubt whether there is any assistance to be derived from it. Since the boundaries of the manor and the parish were coincidental, the inhabitants of the manor and the inhabitants of the parish were the same persons. It is, however, important to consider whether in grazing their animals on the Burrows these persons were acting as inhabitants of the manor or inhabitants of the parish. This is not a matter which can satisfactorily be determined by comparing the numbers of the occasions on which the words "manor" and "parish" occur. To my mind, the key to the matter is to be found in the statement in the award of 1716 that there had been rules or methods set up for the better preservation of the commons by the four overseers elected from the twenty-four select vestrymen. This indicates that it was a parochial and not a manorial matter, and that the persons who put their animals onto the Burrows did so in their capacity as inhabitants of the parish.

This was, on the face of it, directly contrary to the decision in Gateward's Case (1607), 6 Co. Rep. 59b that inhabitants of a place, who are not a corporation, cannot prescribe for any right of common as having been enjoyed from time immemorial by them as inhabitants of the place. However, the decision in Gateward's Case has been considerably eroded by later decisions in which the courts have endeavoured to support claims by inhabitants. The basic principle was stated by Lord Selborne, L.C. in Goodman v. Mayor of Saltash (1882) 7 App. Cas. 663, at p.639 in these terms:-

> "...... an open and uninterrupted enjoyment from time immemorial under a "claim of right seems to me to be all that is necessary for a presumption "that it had such an origin as would establish the right, if a lawful origin "was reasonably possible in law".

In the search for lawful origins which were reasonably possible in law it has in some cases been presumed that there was a grant by the Crown to the inhabitants of the right in question, since such a grant would have the effect of incorporating them. However, such a grant will not be presumed if the presumption is inconsistent with the past and existing state of things, and there is no trace of such a corporation having existed at any time: see Lord Rivers v Adams (1878), 3 Ex.D.361. In this case, the Crown was never in a position to make such a grant after the manor of Northam was granted to the Abbey of St Stephen at Caen, and there is no evidence of any corporation which would have been created by any earlier grant ever having existed.

In other cases, a grant to a corporation in trust for the inhabitants has been presumed, but in this case there is no evidence of the existence of any corporation to which such a grant in trust could have been made.

There is, however, another possible presumption. The grant to the Abbey of St Stephen at Caen by William the Conqueror and Queen Maud could have been made subject to a condition or proviso that the inhabitants of the parish of Northam should enjoy the right to graze their animals on the Burrows. A grant subject to a condition or proviso of this description was presumed to have been made in Goodman v. Mayor of Saltash, supra and was there held to constitute a charitable trust, which was not void on the ground of perpetuity: see per Lord Selborne, at p.642. There is no evidence of such a condition or proviso in this case, nor was there in Goodman v Mayor of Saltash. On the other hand, there is nothing in the evidence inconsistent with there having been such a condition or proviso. Indeed, the evidence is consistent with it, for the successors in title of the Abbey, and possibly also the Abbey itself, acquiesced in the grazing as of right during the whole period regarding which there is any evidence. This is a stronger case than Goodman v. Mayor of Saltash, for that case not only was the condition or proviso presumed, but the grant itself. Here there is evidence of the grant to the Abbey, all that has to be presumed being the terms upon which the grant was made.

For these reasons I find that there is a charitable trust in favour of the inhabitants of the ancient parish of Northam.

Of this trust the former Northam Urban District Council claimed to be the trustees. Miss Cameron traced the devolution of the trusteeship through a complex series of statutory provisions to the Northam Town Council. I have, however, come to the conclusion that this is not a matter within my jurisdiction. There is no requirement to state in the Register who is entitled to a registered right of common. Column 3 has to contain the name and address of every applicant for registration, and the capacity in which he applied. Entry No. 453 states that the former Northam Urban District Council of Council Offices, Windmill Lane, Northam applied for the registration as trustees. This is a correct historical statement, and

it seems to me that, being correct, I have no power to alter it.

My only jurisdiction is over the particulars contained in columns 4 and 5 of the registration. Miss Cameron accepted that the particulars of the right in Column 4 were too extensive and should be reduced to a right to graze 1200 sheep and 100 horses, and that the particulars of the land in column 5 should be deleted.

Although this dispute has been referred as a conflict, it does not appear to me that it would be impossible as a matter of law for the conflicting registrations to remain on the Register. Therefore, I have not dealt with the conflicting registrations in this decision, leaving them to be dealt with in my decision in the disputes occasioned by objections to those registrations.

For these reasons I confirm the registration with the following modifications:- namely the deletion of the words: "To graze 3000 sheep or equivalent at N F U Scale" and the substitution of the words: "The right of the inhabitants of the ancient parish of Northam (as shown edged in red within the boundary of the supplemental map bearing the number of this registration) to graze 1,200 sheep and 100 horses", and the deletion of the words in column 5.

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 21st day of Nov. 1977.

[signature]

Chief Commons Commissioner