Reference Nos 210/D/190 - 201

COMMONS REGISTRATION ACT 1965

In the Matter of About 655 acres of Land,
Portland, Weymouth and Portland,
Dorset (No. 1)

DECISION

These disputes relate to the registration at Entry No. 2 in the Land section of Register Unit No. CL 2 in the Register of Common Land maintained by the Dorset County Council and are occasioned by Objection No. 11 made by Kingston Minerals Ltd and noted in the Register on 30 September 1969, and Objection No. 30 made by the Ven. A. V. Hurley and Mr D. G Sansom (hereafter referred to as "the Sansom Trustees"), Objection No. 38 made by Mrs M B H Hallowell-Carew, Mr J J H Murray and Miss O M Hallowell-Carew, Objection No. 40 made by the Secretary of State for Defence, Objection No. 43 made by Devenish Weymouth Brewery Ltd, Objection No. 48 made by the British Railways Board, Objection No. 52 made by Mr W G-B Comben, Objection No. 95 made by Mr H W Legg and Mrs D Legg, Objection No. 215 made by the former Portland Urban District Council, Objection No. 253 made by Kingston Minerals Ltd, Objection No. 364 made by the Hon. Peter Pleydell-Bouverie, Mr J K Lowther, and Mr M P Wyndham (hereafter referred to as "the Ilchester Trustees"), and Objection No. 478 made by the former Dorset County Council and all noted in the Register on 20 May 1971.

I held a hearing for the purpose of inquiring into the dispute at Dorchester on 21, 22 and 23 September 1976. The hearing was attended by Mr J S Morris, the applicant for the registration, Mrs R Colyer, whose application was noted under Section 4(4) of the Commons Registration Act 1965, Mr N Butterfield, of counsel, on behalf of the Commoners and Court Leet of the Island and Royal Manor of Portland (hereafter referred to as "the Commoners") and the Crown Estate Commissioners, whose applications were also noted under Section 4(4) of the Act of 1965, Mr T R Epton, solicitor on behalf of Kingston Minerals Ltd, the Sansom Trustees, Mrs Hallowell-Carew, Mr Murray, and Miss Hallowell-Carew, Devenish Weymouth Breweries Ltd, and Mr Comben, Mr Butterfield on behalf of the Secretary of State for Defence, Miss R Cullen, of counsel, on behalf of the Ilchester Trustees, Mr R Doylend, solicitor, on behalf of the Weymouth and Portland Borough Council, and Mr D S Harper, solicitor, on behalf of the Dorset County Council. Mrs Legg appeared in person and the British Railways Board was not represented.

The County Council indicated before the hearing that it wished to "withdraw" Objection No. 478.

Much of the land comprised in the Register Unit is not the subject of any objection, it being accepted by all parties that it falls within the definition of "common land" in section 22(1) of the Act of 1965 as being land subject to rights of common. This land is the subject of the noted applications made by the Commoners and the Crown Estate Commissioners. The applications made by Mr Morris and Mrs Colyer include this land but also comprise additional land.

Before the hearing Mr Morris had agreed to the exclusion of several areas from his registration. At the beginning of the hearing he informed me that he had agreed that an area round the lighthouse included in the Commoners' application, the land the subject of Objections Nos 40, 48, and 364, and part of the land the subject of Objection No. 215 should be excluded from the Register Unit. During the course of the hearing Mr Morris informed me that he was also agreeable to the exclusion of some other small areas. Mr Butterfield stated that the Crown Estate Commissioners and

the Commoners agreed to these exclusions in so far as they affected land included in their respective applications. Mr Butterfield also stated that the exclusion of a few other small areas was accepted by his clients, though not by Mr Morris. These exclusions do not affect the point of principle at issue in these disputes, and it will not be necessary to refer to them further until the end of this decision.

The land which remains the subject of dispute is situate on the perimeter of the Island and consists mostly of what are known on the Island of Portland as "wears", sometimes spelt "wares" or "weirs". Wears are pieces of land used for dumping rubble from the quarries. For the most part they consist of land from which the stone has been quarried, though some of them still contain some stone.

The present state of all the land remaining in dispute is such that it can fairly be described as unfenced, uncultivated, and unoccupied. It is not, however, without value, for the owners can obtain payment for allowing it to be used for the further tipping of rubble or for allowing stone to be taken from it. There are no rights of common registered in respect of any of it. It can, therefore, only fall within the definition of "common land" in section 22(1) of the Commons Registration Act 1965 if it is waste land of the manor of Portland. Local historians have expressed the view, which may well be correct, that the Island was at one time bounded by common land and that quarrying commenced on the sea side and gradually worked inwards, leaving wears which were used for the disposal of the rubble from the quarries further inland. If this theory, and I do not think that it can be fairly described as more than a theory, though a very probable one, is correct, the wears would originally have been in the ownership of the lord of the manor as waste land of the manor. Such ownership is, however, not now claimed by the Crown Estate Commissioners. Much of the land in question is in the ownership of Objectors, some of whose title deeds go back to the early part of the nineteenth century. It further appears that there were wears in private ownership in the eighteenth century for in the accounts of the Stone Grant Fund for 1788 (printed in J. H. Bettey, The Island and Royal Manor of Portland (1970), p.60) there appear the following items:-

> "Paid the Owners of Knights Ware for Laying Rubbige for the
> "year 1788 from Goslings Green as per Bill - 1732 Tons £21. 13. 0.
> "Paid the Owners of Greens Ware for Laying Rubbige
> "as per Bill - 457 Tons £5. 14. 3."

Also printed in the same work (p.145) is a copy of a deed dated 11 June 1791 whereby an undivided part of a "weir or rubble ground" was conveyed. I have been furnished with a photo-copy of a similar deed dated 19 April 1758 whereby a moiety of a "pece of pasture ground or ware" was conveyed. These conveyances were stated to be according to the custom of the Isle and Manor of Portland and subject to a yearly rent payable to the lord in chief of the manor. I was also furnished with a copy of an indenture dated 30 July 1914 whereby (inter alia) certain wears were conveyed subject to the quit rents (if any) payable to the lord of the manor and to the rights and customs of the manor.

After the hearing Mr Morris and Mr L W Heeler, on behalf of Mrs Colyer, inspected a number of other deeds in the possession of Kingston Minerals Ltd and furnished me with reports upon them.

Although the documentary evidence is comparatively modern, it leaves no doubt in my mind that the land to which it related was customary freehold held of the Manor of Portland. It has not been possible for such a freehold to be created by a lord of a manor since the coming into operation of the Statute of Quia Emptores (18 Edw. I, c.1) in 1290, so the original constitution postulated by the local

historians, under which all the land which now forms the wears was unquarried waste land in the ownership of the lord of the manor, must have ceased to exist at some time before 1290. There is nothing in the evidence before me to indicate that the freehold interest in any of the land remaining in dispute has ever been in the ownership of the lord of the manor since 1290, and the documentary evidence makes it quite clear that some parts had ceased to be in such ownership by that year.

There was adduced for my consideration a considerable volume of evidence, both oral and documentary. This evidence was both interesting and necessary for a proper understanding of the case, but in the end the matter resolves itself into one short question of law.

Before considering that question I ought to refer to a submission of law made by Mr Morris. He said that the Commons Society had advised him (and he adopted that advice as part of his argument) that in defining waste land of a manor one of two things has to be established:-

(a) that it was once subject to rights of common and has remained open and unenclosed; or

(b) if there was no evidence that it was ever subject to rights of common, that it is open land of a particular manor.

The first of these alternatives appears to contain an echo of the definition of "waste land of a manor" in Section 37 of the Commons Act 1876. That definition was, however, intended for a special purpose and has no relevance in proceedings under the Commons Registration Act 1965: see per Slade, J. in Re Britford Common, Britford, Wiltshire (1976), unrep. In considering whether land is waste land of a manor for the purposes of the Act of 1965 it is immaterial whether it has ever been subject to rights of common. Waste land of a manor may still be subject to rights of common: it may have ceased to be subject to such rights: or it may never have been subject to such rights.

The second alternative is equally defective in that it is dependent on the non-existence of rights of common, while the words "open land of a particular manor" have, for reasons with which I shall state later, no precise legal significance and can at best be only regarded as rephrasing "waste land of a manor" in less accurate terms.

I turn now to the fundamental question in this case. It was contended by Mr Morris (whose argument was adopted by Mrs Colyer) that the land in question falls within the definition of "common land" in section 22(1) of the Act of 1965 as being waste land of a manor not subject to rights of common. As authority for this contention reliance was placed on the oft-quoted passage in the judgment of Watson, B. in Att. Gen. v Hanmer (1858) 27 L.j. Ch. 837 where he said: "The true meaning of 'wastes' "or 'waste lands', or 'waste grounds of the manor' is the open uncultivated, and "unoccupied lands parcel of the manor .... other than the demesne lands of the manor". On behalf of theObjectors it was contended that this land does not form part of the waste land of the manor because the freehold is not vested in Her Majesty the Queen as Lady of the Manor.

The land in question has all the physical characteristics of waste land as described by Watson, B., and there can, in my view, be no doubt that if it were in the same ownership as the lordship of the manor, it would be waste land of the manor. The question for my determination is, therefore, whether land which has these characteris is waste land of the manor when it is in the ownership of the successors in title of customary freeholders of the manor.

The all-important words for the purposes of this case are "waste land of a manor"

in section 22(1)(b) of the Act of 1965. The Act contains no definition of that expression, so it must be construed in accordance with the general rules to the construction of statutes. As Lord Truro said in Stephenson v Higginson (1852), 3 H.L.C.638, at p.686:-

> "In construing an Act of Parliament, I apprehend every word must be understood "according to the legal meaning, unless it shall appear from the context that "the legislature has used it in a popular or more enlarged sense".

Fry, L.J. put the same rule in different words when he said in R. v. Commissioners of Income Tax (1888), 22 Q.B.D. 296, at pp 309 - 310 :-

> "The words of a statute are to be taken in their primary, and not in their "secondary, signification. If, therefore, the words are popular ones they "should be taken in a popular sense, but if they are words of art they should "be prima facie taken in their technical sense. That was laid down by "Lord Wensleydale in Burton v. Reevell (1847), 16 M. & W. 307, where he says: "'When the legislature uses technical language in its statutes, it is supposed "'to attach to it its technical meaning, unless the contrary manifestly appears' "That rule is not, in my opinion, the less applicable when the words have a "distinct technical meaning and a vague popular one".

I do not know whether the expression "waste land of a manor" has any popular meaning, but it certainly has a technical one among lawyers, and it is my task to ascertain what precisely that technical meaning is and in particular whether it can include land which was customary freehold until manorial incidents were abolished on the coming into operation of the Law of Property Act 1922 on 1 January 1926. It may be that it is still correct to describe such land as customary freehold, since the manorial system was not abolished, but only radically modified, by the Act of 1922, but this is a matter of merely technical interest which can have no practical effect at the present time.

The decision in Att.-Gen. v. Hanmer, supra is, in my view, not a direct authority on the point which I have to consider, for in that case the land the subject of the proceedings was undoubtedly in the ownership of the lord of the manor, the only question in issue being whether the coal in it was included in a grant of the coal within the waste grounds of the manor. To determine whether waste land of a manor includes land which is geographically situate within the manor, but not in the ownership of the land of the manor, it is necessary to consider the constituent parts of a manor.

Scriven on Copyholds (7th edn. 1896) p.4 describes the constituent parts of a manor as follows:-

> "A manor usually consists of and comprises the following particulars, that "is to say:- (1) The manor house (or mansion house), with the demesne "lands occupied therewith; (2) The freehold tenements holden of the manor; "(3) The copyhold tenements holden of (and which remain also parcel of) the "manor; (4) The waste lands of the manor, with the soil thereof, and the mines "and minerals therein or thereunder; and (5) The services, which are to be "rendered by the tenants of the manor, together with the Court Baron".

The manor of Portland is somewhat unusual in that it has never had any copyhold tenements, all the manorial tenants being freeholders, each of whom paid a quit-rent and each of whom was entitled to rights of common. The quit-rents were extinguished under Part VI of the Law of Property Act 1922, but the rights

of common still exist. The manor of Portland, though lacking one of the constituent parts enumerated by Scriven, appears to have been normal in every other respect. The question in issue is these proceedings can therefore be re-stated as whether Scriven's particulars (2) and (4) are mutually exclusive, or whether land can simultaneously be included under both heads.

Mr Epton cited to me the form of charge to the jury of the court leet of a manor in Giles Jacob's Complete Court-Keeper (6th edn. 1764), p.37, where the members of the jury are directed to inquire (inter alia)"if any Incroachment hath been made upon the Lord's Waste or any of the Lord's Lands be unjustly withheld from him". Jacob's work contains several other references to the waste. Thus, at p.65 there ia a form of petition to the Justices of the Peace for erecting of a cottage on the waste, the prayer of which is that

> "Your said Petitioner may be enabled to set up a Cotage for an Habitation "for himself and poor Family, on some convenient Place on the Wast within "the Manor aforesaid, to be assigned by his Lordship or his Steward".

At p.146 there is a specimen presentment by the jury of a court baron:-

> "That A. W. Widow, lately inclosed a certain Piece of the Lord's Waste "near W. Common; and thereupon it is ordered, That if she shall not throw "down the Inclosure within a Month next ensuing, she shall forfeit to the "Lord of the Manor 5s.".

At p.180 there are further specimen presentments, one for "an Incroachment on the "Lord's Waste", another that A.B. "dug and enclosed Parcel of the Lord's Waste", and a third for "digging the Waste Ground of the Lord of this Manor", and at p.181 there is a presentment "for Depasturing the Herbage growing upon the Waste of the "Lord of this Manor".

Jacob was also the author of A New Law Dictionery, in which appears the entry:-

> "Waste is taken for those lands which are not in any man's occupation, but "but lie common; which seem to be so called because the lord cannot make such "profit of them as of his other lands, by reason of that use which others have "of it in passing to and fro; upon this none may build, cut down trees, dig, & c. "without the lord's licence".

These passages make it clear that Jacob regarded the manorial waste as being in the ownership of the lord of the manor. So did John Cowel, who in his Interpreter stated:-

> "Waste ground is so called because it lies as wast, with little or no profit "to the Lord of the mannor, and to distinguish it from the demesnes [redacted] "in the lords hands".

Turning to more recent authority, Hall, V.C. said in Hall v. Byron (1876), 4 Ch.D.667, at p.675:-

> "The law I consider to be that the lord may take gravel, marl, loam, and the "like, in the waste, so long as he does not infringe upon the commoners' "rights, his right to do so being quite independent of the right of approvement "under the Statute of Merton or at Common Law, and existing by reason of his "ownership of the soil, subject only to the interests of the commoners".

I am left in no doubt that to these authors and to Hall V.C. the meaning of the expression "waste land of a manor" was waste land in the ownership of the lord of the manor. Mr Morris's argument is that such a definition of the expression "waste land of a manor" is not exhaustive, and that while it comprises waste land in the ownership of the lord of the manor, it also comprises other waste land which is situate within the manor. Mr Morris did not cite any authority for this proposition, and so far as my researches have led me, it does not appear that any such authority exists, but he relied upon the use of the words "parcel of the manor" in the judgment of Watson, B. in Att. -Gen. v. Hanmer, Supra. It is therefore necessary to consider the meaning of those words and whether Mr Morris correctly equated them with "situate within the manor".

In the first place, it is to be observed that in his enumeration of the constituent parts of a manor Scriven states that the copyhold tenements remained parcel of the manor, but that he made no such statement with regard to the freehold tenements. In the second place, if waste land not in the ownership of the lord were parcel of the manor, section 62(3) of the Law of Property Act 1925 (which replaced section 6(3) of the Conveyancing and Law of Property Act 1881) would produce the remarkable result that a conveyance of the manor would operate to convey another person's freehold land, for such a conveyance is deemed toconvey with the manor (inter alia) all wastes to the manor appertaining or reputed to appertain, or reputed or known as part, parcel, or member thereof. This legislation reflected the previous practice of conveyancers and was designed to obviate the necessity for the inclusion of long strings of general words in conveyances. If the use of the words "parcel of the manor" by Watson B. can be properly construed as having such consequences, I can only say that to that extent it was an obiter dictum, for it was not necessary for the decision of the case before him, where the land in question was in the undoubted ownership of the lord of the manor, the only question being whether it was waste. In fairness to Watson, B., however, I should state that I do not construe his judgment in this sense. In my view, he was using the word "parcel" in the technical sense of property which passes on a conveyance and the expression "parcel of the manor" to mean land which would pass on a conveyance of the manor. At the time when Watson B. was speaking, a conveyance of a manor would operate to convey the benefit of any manorial incidents attached to the freehold tenements (in the case of the manor of Portland, the right to receive the quit rents) and also the waste, but would not operate to convey the soil of the freehold tenements (see Shepherd's Tonchstone 92). The only difference in the position since that time is that manorial incidents have been extinguished by statute.

That Scriven omitted the words "and which remain also parcel of" from his description of the "freehold tenements holden of the manor" deliberately and not per incuriam is shown by his citation four pages later of the decision of the House of Lords in Delacherois v. Delacherois (1862) 11 H.L.C.62. The point in issue in that case was whether in the circumstances of the case a freehold tenement holden as of a certain manor became reunited to the manor on its purchase by the lord of the manor. It is not necessary for the purposes of this case to consider why it was decided that the tenement was not by the purchase re-annexed to the manor so as to pass by a devise of the manor. The important point is that it was accepted by both parties and by all the judges concerned in the various stages of the litigation that until the purchase of the tenement by the lord of the manor it was not parcel of the manor, despite being holden as of the manor. This, as I see it, is exactly the position in this case. The Objectors' lands are holden of The Queen as of her manor of Portland, but are not at present parcel of the manor, though they might become so if the Objectors' interests were to be purchased by Her Majesty. This distinction between land within a manor and held of it and land which is parcel of the manor is particularly clearly drawn in Delacherois v. Delacherois, at p.105 and again at p.106. Lord Kenyon drew the same distinction in Bradshaw v. Lawson (1791) 4 T.R. 443

at p.446, where he said that certain land "was no longer parcel of the manor, nor held of the manor".

I have therefore come to the conclusion that land on the Island of Portland which is (or was) customary freehold cannot be waste land of the manor of Portland.

The direct evidence of customary freehold tenure relates to only part (though the major part) of the land remaining in dispute. The Commissioners have, however, denied ownership of any of the disputed land. If the Commissioners do not own it to-day, it must have been customary freehold created before 1290 for there is no evidence that the lords of the manor alienated any part of it until certain land was sold for defence purposes in the nineteenth century. The denial of ownership by the Commissioners, though not conclusive, seems to me to throw upon Mr Morris and Mrs Colyer the onus of proving that the land as to which there is no direct evidence has never been customary freehold held of the manor. This they have not been able to do. I have therefore come to the conclusion that all the land in dispute is (or was) customary freehold and therefore not parcel of the manor and so not waste land of the manor.

This is sufficient to determine this case. It might have been possible to decide it much more shortly on the ground that the land in question is not in the ownership of the lord of the manor. If that were the correct way to approach the case, it would not matter whether the diversity of ownership was due to the creation of a customary freehold before 1290 or the alienation of part of the waste at some more recent date. I have not expressed any view on this point because there has been a difference of judicial opinion upon it in two recent cases. In <u>In the Matter of Britford Common, Britford, Wiltshire</u> (1976), unrep. Slade J. in holding that the land in dispute was waste land of a manor, said:-

> "The land is parcel of the manor of Britford and, as the Commissioners found, "the land and the lordship have been in the same ownership during the whole "period of living memory".

On the other hand, in the subsequent case of <u>Re Yateley Common, Hampshire</u> (1976), unrep. Foster J. said that the decision of Slade J. did not assist him on this point because the land and the lordship of the manor had been in united ownership through the whole period of living memory, and held that land which had been sold by the lords of a manor in 1891 was still waste land of the manor within the meaning of section 22(1)(b) of the Act of 1965.

Should this case go to appeal, it will be open to the Objectors to argue, as they did before me, that Slade J. was right.

On the basis that the land in dispute is (or was) customary freehold held of the manor of Portland, I have decided to confirm the registration with the exclusion of all the land which is not the subject of either application No. 137 made by the Crown Estate Commissioners or application No. 263made by the Commoners. The land so excluded includes some which is not the subject of any objection, but where there is an objection to a registration the Commissioner selected to deal with the matter has, in my view, jurisdiction to deal with the registration as a whole and is not in so doing restricted by the terms of the objection. There will also be excluded the areas the subject of applications Nos. 137 and 263 previously referred to, which the Crown Estate Commissioners and the Commoners agreed should be excluded. These areas are the land surrounding the lighthouse at Portland Bill the subject of application No. 263, the land the subject of Objections Nos. 40, 48, 52 and 364,

and parts of the land the subject of Objections Nos. 34, 38, and 95, which were indicated on plans put in and which will be shown on plans annexed to the notice of the final disposal of the registration. It is not necessary for me to refer specifically to the areas not the subject of those applications, which Mr Morris agreed should be excluded.

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 31st day of December 1976

Chief Commons Commissioner