COMMONS REGISTRATION ACT 1965 Reference No. 211/D/113

In the Matter of Edmundbyers Common, Edmundbyers,
Co. Durham (No. 3)

DECISION

This dispute relates to the registration at Entry No. 3 in the Rights Section of Register Unit No. CL 76 in the Register of Common Land maintained by the Durham County Council and is occasioned by Objection No. 159 made by Sir Arthur Collins and others and noted in the Register on 12 October 1972.

I held a hearing for the purpose of inquiring into the dispute at Durham on 15 and 16 March 1982. The hearing was attended by Mr R A Bibby, Solicitor, on behalf of Mr and Mrs K J Anderson, the applicants for the registration, and by Mr C J Thompson, Solicitor, on behalf of the Objectors.

The registration is of a right to graze 100 cattle and 1000 sheep, a right to cut turf, gather peat, rushes, bracken and heather/burns, and a right of piscary over most of the land contained in the Register Unit attached to Pedams Oak Farm.

So far as the right to graze cattle and sheep is concerned, Mr Bibby claimed it to be a right of common appendant. He founded his argument on an ancient charter preserved in the muniments of the Dean and Chapter of Durham.

Turning first to the applicant's title to Pedams Oak Farm, the charter on which Mr Bibby relied records the grant by Alan Bruncoste to Master Arnald de Auclent for his homage and service all the grantor's land at 'Pethuneshak' near Edmundbyers with all its appurtenances, rendering one besant or two shillings annually for all service. The charter is undated, but the first name in the witness-list is that of Emeric, archdeacon of Durham, who was appointed at some time before April 1197 and held office until 1217. The charter, being before the Statute of Quia Emptores (1289), operated as a sub-infeudation. It appears from a feodary of the Priory of Durham drawn up in 1430 that Arnald de Auclent's estate under the charter was then held by the Master of Sherburn Hospital.

By an indenture made 25 July 1919 between (1) The Master and Brethren of Christ's Hospital in Sherburn (2) Five of the Governors of the Hospital (3) John Lee Heppell the north-eastern part of what is now the applicants' land was conveyed to Mr Heppell, and by an indenture made 31 December 1919 between (1) The Master and Brethren of Christ's Hospital in Sherburn (2) Five of the Governors of the Hospital (3) Harold Ward Sample, William Ernest Stephenson, and Eliza Maud Stephenson the south-western part of the applicants' land was conveyed to Mr Sample, Mr Stephenson, and Miss Stephenson. By a conveyance and assignment made 29 May 1959 between (1) Joseph Fenwick Carr (2) John Stephen Hart-Jackson (3) J F Carr and J S Hart-Jackson (4) Kenneth Thompson Anderson and Hilda Mary Anderson both parts of what had been the property of Sherburn Hospital were conveyed to the applicants.

The applicants are thus the successors in title of Arnald de Auclent. Mr Bibby argued that Arnald de Auclent became entitled to a right of common appendant by virtue of the grant from Alan Bruncoste. A grant of arable land made before the Staute of Quia Emptores carried with it a right of common on the lord's waste for animals to draw the plough and manure the ground without any express grant of such a right. There is no need to prescribe for such common, it being said to belong to such land of common right. Assuming that the land the subject of the grant was arable, a simple grant of the land would carry with it a right of common appendant. However, it is necessary to consider the whole of the wording of the charter. After the words of disposition and the parcels, the habendum, and the reddendum, the grantor states that he wishes the grantee to have and to hold the land with all its appurtenances as freely and peaceably as Robert Bruncoste had it and held it in woodland and open country, in meadows and pastures, in moors and marshes, in all easements and in all things and places with all liberties and free customs appertaining to it. This string of common-form general words is followed by the words which are crucial to this case, namely, salva communi pastura predicte ville de Edmundesbyres.

Mr Bibby invited me to construe this saving as that of rights of other persons who had rights of common over the granted land whilst it lay fallow. While the construction of so ancient a document is not without difficulty, I find myself unable to construe the saving as relating to rights of third parties to which the granted land may have been subject. It seems to me to be an exception from the grant of a right which had previously been held by Robert Bruncoste, what Coke described as "an exception (which is ever of part of the thing granted and of a thing in esse) for which exceptis, salvo, praeter, and the like, be apt words" (Co. Litt. 47b).

Mr Bibby relied on Tyrringham's Case (1584), 4 Co. Rep. 36b as authority for the proposition that a right of common attached to arable land of common right, and could not be severed from it, and he argued that therefore a grantor could not except such a right from his grant. However, the question of the possibility or validity of such an exception did not arise in Tyrringham's Case, and that case is not, in my view, an authority for Mr Bibby's proposition. While there seems to be no direct authority relating to the exception of a right of common appendant from a grant of arable land, some assistance is to be obtained from Kenson v Reading (1591), Cro. Eliz. 244. In that case Foster arguendo said that "the exception of that which is expressly granted is void, otherwise [if] it is of a thing that passeth only by implication", and his argument was accepted by the court. Applying this to the charter under consideration, I have come to the conclusion that the parcels contained by implication a right of common appendant and that that right was excepted by the words salva communi pastura predicte ville de Edmundesbyres.

Mr Bibby argued in the alternative that the applicants are entitled to the registered rights by prescription.

The indenture of 25 July 1919 conveyed the land with all powers and privileges in respect thereof in as full and ample manner as the vendors of other owners or persons entitled to the land were entitled to, and the indenture of 31 December 1919 conveyed the land with all existing rights of stintage on the common land and other rights of common belonging or in anywise appurtaining

(sic) to it with all powers and privileges as described in the indenture of 25 July 1919. These general words were repeated in the subsequent conveyances, but do not, of course, necessarily imply that there were any such rights in existence.

There was no evidence to support the registration in so far as it related to matters other than grazing rights.

There was no evidence relating to the exercise of grazing rights before the indentures of 1919, but evidence was given by Mr Richard Patrick, now aged 80, who was the shepherd at West Pedams Oak from 1920 to 1923. Mr Patrick said that the sheep from that farm were grazed on Edmundbyers Common and he remembered that sheep from East Pedams Oak were also grazed on the Common. Mr Joseph Wheatley Dodd, an Edmundbyers farmer with a registered right to graze on the Common, who was born in 1902, said that sheep from Pedams Oak had grazed on the Common during the whole of his time. Mr Arthur Collingwood, aged 70, whose grandmother came from West Pedams Oak, remembered that sheep from that farm were constantly grazed on the Common.

The more recent evidence is less precise. When Mr Anderson purchased Pedams Oak Farm in 1959 he took over from Mr J F Carr, his predecessor, 1385 sheep, but these also included the sheep on another farm called Sunnyside. Mr Carr also paid £25 a year for the right to graze 390 sheep on the Common. Since the sheep are kept on the Common all the year round, it is not possible to identify particular sheep as belonging to Pedams Oak Farm.

After Mr Anderson took over Pedams Oak Farm he began to put cattle on the Common. These cattle are taken off the Common during the summer months and grazed on about 30 acres of the farm, so that there is a nexus between the farm and the Common. However, there is no evidence that cattle from Pedams Oak Farm were grazed on the Common before 1959: Mr Carr certainly did not put cattle on the Common.

There can be no question in this case of a right to graze either sheep or cattle having been acquired by prescription at common law. Such prescription depends upon user from time immemorial, which is taken to be the first year of the reign of Richard I (1189). Even if there was then a right in existence, that right was extinguished by being excepted from Alan Bruncoste's charter.

For prescription under the Prescription Act 1832 at least 30 years' continuous enjoyment before the date of the Objection (26 July 1972) is required: see Commons Registration Act 1965, Section 16(2). While there is evidence of sheep from Pedams Oak Farm having been grazed on the Common as long as 60 years ago, the evidence relating to the period immediately before 26 July 1972 is only that Mr Anderson kept sheep on the Common. Since he has undisputed rights to have 1280 sheep on the common attached to other farms and his sheep are never taken off the Common, it is impossible to say that there is evidence that he has kept sheep on the Common by virtue of his ownership of Pedams Oak Farm. Therefore, there is no evidence that a right attached to the farm has been enjoyed without interruption for the necessary period before 26 July 1972.

While cattle from the farm were being grazed on the Common down to 26 July 1972, that only began in 1959 and had therefore not continued long enough for prescription under the Act of 1832.

In the alternative, Mr Bibby invited me to presume a lost modern grant. This is, of course, a legal fiction, but it is now well established that a lost grant can be presumed if there is evidence of user for a substantial period, which is usually quantified as 20 years. So far as the grazing of sheep is concerned, there is, as I have indicated above, no evidence relating unquestionably to Pedams Oak Farm during the applicants' ownership. There is however, evidence that sheep from the farm were grazed on the Common 60 years ago. Mr Patrick's evidence related only to the period from 1920 to 1923, which would not be nearly long enough to support a presumption of a lost grant, but Mr Dodd said that sheep from Pedams Oak had grazed on the Common "all my time". Although "all my time" is somewhat imprecise, I have come to the conclusion that there is just sufficient evidence for me to be able to presume a lost grant, while there is no evidence to rebut such a presumption. So far as the grazing of cattle is concerned, this did not start until 1959, and little more than half that time had elapsed when the registration was made on 27 July 1970.

Having come to the conclusion that the right to graze sheep can be sustained by the fiction of a lost modern grant, it is now necessary to consider whether its quantification at 1000 sheep as registered is correct. The test to be applied in such a case is that of levancy and couchancy, namely, the number of animals which can be maintained during the winter on the fodder produced on the dominant tenement and the winter eatage thereon.

The number of animals levant and couchant can only be an estimate, for Mr Brian Anderson, who farms at Pedams Oak in partnership with his father, said that he did not know how many sheep could winter on the farm, because the sheep are wintered on the Common.

In any such estimate there are three elements - the amount of hay required by one sheep per day during a winter of average severity, the number of days on which it would be necessary to feed sheep during an average winter, and the amount of hay which could be grown on the farm. With so many imprecise elements it is not surprising that the estimates made by the witnesses who gave evidence on this topic varied very widely in relation to each element. In addition to Mr Brian Anderson, these witnesses were Mr Collingwood, already mentioned, and Mr E E Hessel, who holds a degree in agriculture and manages four farms, three of them being upland farms.

I find it difficult to attach much weight to Mr Brian Anderson's calculations, for they produced the astonishing figure of 10,476 sheep, based upon producing 205 tons of hay to be fed at 44 lb per sheep for a whole winter. On the other hand, Mr Hessel's estimate of the amount of hay which could be produced cannot be regarded as having a high degree of reliability, since he had only seen the farm from a road 1½ miles away.

The very approximate nature of any such estimates is shown by comparing Mr Hessel's figure of 400 sheep with his figure of 50 cattle. Mr Hessel said that 1 cow would eat as much as 10 ewes, so that his evidence considered as a whole gives a figure of between 400 and 500 sheep.

When in danger of drowning in a sea of conflicting estimates one clutches at a straw of reality. This was provided by Mr Collingwood, who said that he had 40 ewes and 4 beasts on 10ac. of land at Stanhope this winter so that if one applied Mr Hessel's multiplier to the beasts one would arrive at a total of about 8 sheep to the acre. Unfortunately, there is no evidence relating to the comparative qualities of Mr Collingwood's land and the Pedams Oak land, but on the other hand, there was no suggestion that they were materially different. Mr Brian Anderson said that 40.12 ac. of Pedams Oak Farm is cut for hay every year and 24.636 ac. from time to time, while 12.582 ac. could be cut if necessary.

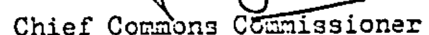
Doing my best with the widely conflicting evidence, I have come to the conclusion that the correct quantification of the right of grazing is 480 sheep.

There is a registration in Register Unit No. CL 75 relating to Muggleswick Common of similar rights attached to Pedams Oak. Mr Thompson suggested that should I decide to confirm the grazing right in relation to Edmundbyers Common, the number of animals at which I quantified levancy and couchancy should be divided equally between the two Register Units. This does not seem to me to be the correct way in which to deal with the matter. Clearly, there could not be a right to graze 480 sheep on Edmundbyers Common and another 480 sheep on Muggleswick Common, but there is no reason why the whole 480 sheep should not be on one of the Commons at one time. It is not uncommon for rights over more than one register unit to be attached to one dominant tenement. Ambiguity can be avoided by referring in each registration to the other registration.

For these reasons I confirm the registration with the following modifications: namely, the deletion of the words "100 cattle and" and "a right to cut turf, gather peat, rushes, bracken and heather burns and a right of piscary", the substitution of the figure "480" for the figure "1000", and the addition of the words "being the same right which is also registered in the rights section of Register Unit No. CL 75 the said right being exercisable over this register unit and over register unit No. CL 75 at the same time provided that the total number of sheep grazed at any one time in pursuance of such right shall not exceed the number aforesaid".

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 <u>in point of law</u> 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 8th day of April 1982



Chief Commons Commissioner