COMMONS REGISTRATION ACT 1965

Reference Nos. 37/D/61-63

In the Matter of Telscombe Tye, Telscombe, East Sussex (No. 1)

DECISION

These disputes relate to the registrations at Entry Nos 1 and 2 in the Rights Section of Register Unit No.CL.2 in the Register of Common Land maintained by the former East Sussex County Council and are occasioned by Objection Nos. 32 and 33 made by the late Mrs D Neville and Mr R C Neville and both noted in the Register on 13 August 1970 and Objection No. 122 made by Mr G Janson and noted in the Register on 30 October 1970.

I held a hearing for the purpose of inquiring into the dispute at Lewes on 14 and 15 March 1970 and at Watergate House, London WC2 on 22 March 1979. The hearing was attended by Miss Sheila Cameron, of Counsel, on behalf of the Trustees of the Charity known as Gorham's Gift, the applicants for the registration at Entry No 1, by Mr A J Turner, solicitor on behalf of the Minister of Agriculture, Fisheries and Food, the applicant for the registration at Entry No. 2, and by Mr Ian McCulloch, of Counsel, on behalf of Mr Neville. There was no appearance by or on behalf of Mr Janson.

The land comprised in the Register Unit, though described comprehensively in the Register as "Telscombe Tye", in fact consists of three geographically separate areas. The largest of these areas lies to the South-West of the village of Telscombe. There is a smaller area (referred to during the hearing as "the E-shaped area") to the North-East of the village and a still smaller area to the North-West of the village. Only the largest area is designated as "Telscombe Tye" or "The Tye" on the maps which were put in. This area will hereafter be referred to as "The Tye". Neither of the smaller areas appears to have a distinctive name. All three areas are shown on the plan referred to in the Inclosure Award dated 14 March 1811, made under the Telscombe Inclosure Act of 1810 (50 Geo.III, c.cxii), and each of them is described on the plan as "Sheep Down". In the Act they are referred to collectively as "Open or Common Pastures or Sheep Downs", but in the Award the Tye is so named and the small areas are sometimes called "Telscombe Tenantry Down" and sometimes "the Tenantry Down of Telscombe". The total of the three areas was stated in the Act and the Award to be 236a.2r.35p. In the Tithe Apportionment for the parish of Telscombe made in 1842 the three areas are numbered, together 127 and are collectively designated "Tenantry Downs".

At the time of the passing of the Act of 1810 part of the parish of Telscombe consisted of open or common fields. Parts of these fields were held in small parcels by copy-holders of the manor of Telscombe and by the rector of Telscombe as part of the Glebe, and the residue, which was formerly demesne land of the manor, was held in fee simple by the Trustees of the Estate of Henry Smith, Esquire, a charity hereafter referred to as "the Smith Trustees". The purpose of the Act was the division and allotment of the open fields in order to make them capable of improvement. Rights of common of pasture on the "Sheep Downs" were appurtenant to the open fields. It is not stated in the Act how those rights were quantified, but it is stated in S.13 that the Smith Trustees enjoyed an extra right, which the Commissioners were empowered to lessen or alter if they found it convenient to do so for the purpose of equality of division, and it is stated in the Award that the Smith Trustees are to have the extra right of pasture for 20 sheep instead of for 40 sheep which they had hitherto had or claimed to have. The Award goes on to order that the expenses heretofore borne and paid by the Smith Trustees be reduced to one moiety, i.e. from two yard lands to one yard extra, the Commissioner having

in their allotment to the Trustees award full compensation for the reduction of the right or claim for pasturage. This is the only reference in the Award to numbers of sheep.

There were six common fields called North Dean Laine, West Laine, Mill Laine, Croxdean Laine, Church Laine and South Laine. Each of them, with the exception of North Dean Laine, was divided into two or more furlongs. The Commissioners divided the land in each field into strips of various sizes and allotted strips in each field and in each furlong to the Smith Trustees and to each of the five copyholders in proportion to their previous holdings, which were measured in yard lands, each yeard land being an aggregate of what the Act described as very small parcels greatly intermixed with other very small parcels. The Smith Trustees were allotted two strips in North Dean Laine, two in Long Furlong in West Laine, two in Church Fulong in Church Laine, three in Hither Old Lands in Church Laine, two in Further Old Lands in Church Laine, two in Coney Furlong in South Laine, two in West Down Furlong in South Laine, and one in each of the other eight Furlongs, making 23 strips in all, having a total area of 181a. Or.8¾p. With the exception of two small areas of Glebe, the remaining strips were allotted to the five copyholders. A table on the plan referred to in the Award shows that there were previously 36 yard lands, of which 14½ belonged to the Smith Trustees.

The allotments to the Smith Trustees and the rector were by virtue of S.13 of the Act to be freehold and the allotments to the copyholders were to be copyhold. The "Sheep Downs" were by virtue of S.23 of the Act to remain vested in the Lord of the Manor subject to the pre-existing rights of common.

It is recited in the Act of 1810 that Henry Shelley was the Lord of the Manor. The lordship continued in members of the Shelley family, who were succeeded by Henry Eardley Aylmer Dalbiac. By an indenture made 5 December 1900 made between (1) Mary Dalbiac (2) James Ambrose Harman the lordship was conveyed to Mr Harman, and by an indenture made 1 September 1924 between (1) James Ambrose Harman (2) Charles William Neville Mr Harman conveyed it to Mr C W Neville, the father of Mr R C Neville. These conveyances included the freehold of the land comprised in the Register Unit.

The registration at Entry No 1 is of "Open and Common Pastures or Sheep Down for 222 ewes and 77 tegs and estovers" over the whole of the land comprised in the Register Unit attached to Telscombe (otherwise Charity) Farm. Miss Cameron stated that the claim to estovers was not being pursued.

The applicants for this registration, the Trustees of the Charity known as Gorhams Gift, are the freeholders of Telscombe Farm.

The earliest document in evidence relating to Telscombe Farm as a unit is an indenture made 17 September 1923 between (1) Charles Henry, Duke of Richmond and Gordon and others (2) Ambrose Gorham, whereby the Smith Trustees conveyed to Mr Gorham Telscombe Farm, having an area of 179a.2r.34p, with the sheep rights or common of pasture for 222 ewes and 77 tegs over 214a.3r.6p of the down called the Tye

The parcels of this indenture call for comment in two respects. Although the area of Telscombe Farm (179a.2r.34p) is nearly the same as that of the 181a Or.8¾p. of the la allotted to the Smith Trustees in 1811, the plan on the indenture shows that Telscombe Farm was not a comprehensive name attached to the totality of the Smith Trustees' allotments. Telscombe Farm did not include any of the land allotted to the

Smith Trustees in North Dean Laine, West Lane, Mill Laine and Croxdean Laine, nor did it include parts of the allotments to the Trustees in Coney Furlong and West Down Furlong in South Laine. On the other hand, it included all the land in Church Laine and also four of the strips in Coney Furlong allotted to copyholders, and one strip in West Down Furlong allotted to a copyholder. It also included two small parcels not in the Laines. These were the farm building and gardens with an area of 1a.1r.36p and pasture land with an area of 3a.1r.35p. which was described in the Schedule as "part Portobello Furlong", but which the plan shows to be south of the Brighton-Newhaven road and so not in Portobello Furlong, but part of the southern extremity of the Tye as shown on the Award plan. Thus Telscombe Farm consisted in 1927 of 175a.3r.3p. of land in the Laines allotted to various persons by the Award, together with the two small areas not within the Laines. As will appear later, this is a matter of some significance.

The plan on the indenture shows that what is described as "The Tye" included the smaller areas to the north-east and north-west of the village. Thearea of 214a.3r.6p. is less than the 236a.2r.35p shown on the Award plan, but the plan on the indenture shows that in addition to the 3a.1r.35p wrongly described as "part Portobello Furlong", the Tye no longer included some other land to the south of the Brighton-Newhaven Road.

Mr Gorham died in 1933 and by his will left his residnary estate(which included Telscombe Farm)" including my grazing rights at Telscombe Tye" to the Brighton Corporation to be retained in perpetuity and preserved in order that the public and especially the inhabitants of Telscombe, Piddinghoe, and Brighton might have recourse thereto for quiet and peaceful recreation and meditation. Effect was given to the testator's wishes by a scheme made in the Chancery Division of the High Court in 1934, which entitled the Charity "Gorham's Gift". It appears from the plan annexed to the Scheme that in addition to Telscombe Farm the testator had acquired the whole of North Dean Laine (except the strip allotted to the rector for Glebe) and the whole of West Laine. On the other hand, he had disposed of his holding in Portobello Furlong and part of that in West Down Furlong and Coney Furlong in South Laine.

Evidence was given regarding grazing on the Tye by tenants of Telscombe Farm. At the conclusion of the evidence Mr McCulloch indicated that he accepted that there were some grazing rights appurtenant to the farm, but he did not accept that those rights any longer extended to the smaller areas to the north west and north-east of the village or to the small areas to the south of the Brighton Newhaven Road, nor did he accept that the quantification of the rights at 222 ewes and 77 tegs was justified.

Mr McCulloch relied on the description of the areas to the north-west and north-east of the village in the Award as "Tenantry downs" as indicating a distinction between the main part of the Tye on the one hand and the two smaller areas on the other. This, so Mr McCulloch argued, shows that it was the copyholders who had rights of common on the tenantry downs, while the freeholders were entitled to graze on the main part of the Tye. If this were so, it would mean that the copyholders who had 21½ yard lands between them before the Award had a much smaller area on which to graze than the freeholders, who had only 14½ yard lands. This is so improbable that I could only accept it as correct if it were the only possible interpretation of the terms of the Act and the Award.

There is nothing in the Act to indicate any distinction between different parts of the sheep downs,while the Award gives one total area of 236a. 2r.35p for the sheep downs, and on the plan referred to in the Award all three parts are marked "Sheep Down" and the name "Tenantry Down" does not appear. I have therefore come to the conclusion that all three areas together constituted one common. For what it is worth, the Tithe Apportionment draws no distinction between the parts of the common, including all three in one parcel.

However, even if it were right that only the copyholders had rights to graze on the small northern areas, this would not exclude the Trustees of Gorham's Gift from those areas, because parts of the land now included in Telscombe Farm were allotted to copyholders. These parts have since been enfranchised, but the enfranchisment would not extinguish the rights of common appurtenant to those parts.

Mr McCulloch further contended that the rights of grazing over the northern areas had been extinguished by abandonment, for there was no evidence of any substantial exercize of such rights over those parts for many years. If each of the northern parts was a separate common, it might be possible on the evidence to draw an inference of abandonment, though in the circumstances of this case that would be difficult, since the trustees of Gorham's Gift have always asserted their right to graze on these parts and ought not to be prejudiced by the failure of their tenants to exercise the right, which has been included in their leases. However, in my view, as already indicated, it could be wrong to regard the sheep downs as three seperate commons. The three were but parts of the waste land of the manor over the whole of which each commoner was entitled to graze. It is well settled, and accepted by Mr Mc Culloch, that evidence that grazing has been confined to one part of a common does not prove abandonment of the right over the remainder.

So far as the land to the South of the Brighton-Newhaven Road is concerned, Mr McCulloch argued that the grazing rights over that land had been extinguished because the traffic on the road had increased to such an extent that it had become impracticable to graze sheep on it. It seems obvious that no sensible flock-master would turn out sheep on the land to the north of the road and leave them to wander across the road to the land to the south. On the other hand, there is grass on the land to the south and it would be physically possible to put sheep to graze on it, though the cost of shepherding on such a small area would probably be uneconomic. While there appears to be no direct authority on the point, it appears to me that a right of common only becomes extinguished when it is impossible to exercize it, and that if it is possible to exercise the right it remains in existence, even though the person entitled to it may choose not to exercize it.

Mr McCulloch challenged the quantification of the rights appurtenant to Telscombe Farm at 222 sheep and 77 tegs on the ground that the basis of such quantification is unknown and that the only evidence for it is the indenture of 1923, which is not binding on the Lord of the Manor, being res inter alios acta. The proper quantification of the rights, so Mr McCulloch argued, would be by reference to levancy and couchancy or, in default of evidence of that, by reference to the actual exercize of the right within living memory, which could be put at about 150 sheep.

If the 1923 indenture were the only evidence on this aspect of the case, I should be inclined to accept Mr McCulloch's argument. To my mind, however, the key to the matter is to be found in the Award and the plan referred to in it. At the foot of the plan there is a summary of the allotments to the Smith Trustees and each of the copyholders with a statement of the yard lands to which they had respectively been entitled. The part of the Award dealing with the extra rights of the Smith Trustees already referred to makes it apparent that each yard land carried with it the right to graze 20 sheep. The Smith Trustees formerly had 14½ yard lands which gave them t right to graze 290 sheep and their extra right gave them another 40. After the Award they still had their right to 290, but the extra right was reduced to 20. Therefore, if the allotments to the Smith Trustees had remained in their ownership

hey would have been entitled to graze 310 sheep. However, by the time that they sold elscombe Farm in 1923 they had disposed of some of their own allotments and had cquired some of the copyholders' allotments.

lthough there is no direct evidence of these transactions, in the absence of evidence o the contrary it must be assumed that the Smith Trustees took the grazing rights ppurtenant to the allotments which they acquired and parted with the rights appurtenant to those of which they disposed. The problem, therefore, is to determine what rights the Trustees were left with at the end of this series of transactions.

Since the table on the plan referred to in the Award only gives the total number of yard lands represented by the allotments of each allottee, and the Smith Trustees' ultimate holding was made up of fractions of the total numbers of allotments of a number of allottees, the table does not directly give the number of yard lands represented by the Smith's Trustees' ultimate holding. However, the table does provide the answer indirectly.

A comparison of the previous holdings of yard lands with the areas set out in the table of the allotments made in substitution for those holdings shows that in each case the allottee received something over 12 acres in substitution for each yard land. The fractions of an acre over 12 are not constant, but the average works out at slightly under 12½ acres. Therefore, since the part of Telscombe Farm which consisted of former allotments had an area of 175a 3r. 3p. in 1923, that part must have represented 14 of the former yard lands and therefore carried with it a right to graze 280 sheep. The Smith Trustees also had under the Award the extra right to graze 20 sheep (reduced from the former 40). Therefore, the total number of sheep which were appurtenant to Telscombe Farm on this basis in 1923 was 300. The discrepancy between this and the 299 animals mentioned in the indenture of 1923 may be due to the fact that 12½ acres to the yard land has been calculated from the areas as surveyed in 1810, while the area stated in the indenture was based on the modern Ordnance Survey Map.

However this may be, the division in the indenture of the 299 animals into 222 sheep and 77 tegs remains unexplained. Accepting Mr McCulloch's point that the 1923 indenture was res inter alios acta and considering only the evidence which is binding on the Objector, I have come to the conclusion that in 1923 there were attached to the land then consisting Telscombe Farm the total number of animals stated in the registration without any division of that number between sheep and tegs.

It now remains to consider the effect of the disposal by Mr Gorham of the southernmost part of the land which he purchased in 1923. It would have been possible for him to have agreed with the purchaser that he should retain all the rights of grazing for the benefit of the land which he retained. There is, however, no evidence that he did so. In the absence of evidence to the contrary, the general rule is that, save in special circumstanc rights of grazing are apportioned on the disposal of part of the land to which they are attached rateably to the areas of the alienated part and the retained part: see per Buckley J (as he then was) in White v Taylor (No. 2)(1969) Ch. 160, at p. 190. Miss Cameron argued that there were special circumstances in this case in that the land was sold for building development, for which grazing rights would have had no value. The land has in fact been so developed, but what has happened since the sale is, in my view, irrelevant. The circumstances which have to be considered are those at the date of the sale. There is nothing in the evidence to indicate that the sale of an area of agricultural land was in any way unusual. It was, so far as is now known, open to the

purchaser to continue to use the land for agriculture. If he had it in mind to use it for some other purpose, he might have bargained for a reduced price if he took the land without any grazing rights, but there is no evidence that he did this. I have therefore come to the conclusion that I must proceed on the basis that the rights were apportioned rateably to the areas sold and retained. The total area sold was about 33 acres, but if the land to the south of the Brighton-Newhaven road is left out of account, the area sold to which rights were attached was 29ac. 1r.35p. Applying the divisor of 12½ derived from the Award, this was equivalent to 2.437 yard lands and would carry with it the right to graze 47 sheep. Miss Cameron suggested that the apportionment to the part sold should be 55 sheep, but her calculation was based on the total area of the land comprised in the 1923 conveyance and the total area of the land subsequently sold, but having observed that neither of these areas consisted solely of land in the former common fields, it seems right that I should make the necessary adjustments. I shall therefore confirm this registration with the reduction of the specified animals to 252 sheep.

The registration at Entry No. 2 is of grazing for up to 100 sheep over the whole of the land comprised in the Register Unit attached to Kirby Farm. Kirby Farm consists of two areas in West Down Furlong and Coney Furlong in South Laine, having total area of 97.04 acres. This land, having been allotted by the Award, must have had grazing rights attached to it at that time. Its total area of 97.04 acres is equivalent to 7.76 yard lands, which would have carried a right to graze 155 sheep.

The Ministry acquired Kirby Farm by a conveyance made 26 April 1955 between (1) William Elijah McComb (2) Minister of Agriculture, Fisheries and Food. There is no mention of grazing rights in the parcels of this conveyance, but any such rights which were then attached to the land would pass under the conveyance by virtue of S.62 of the Law of Property Act 1925.

Mr McComb acquired the farm by a conveyance made 5 June 1919 made between (1) Frederick William Harman (2) William Elijah McComb. The parcels of this conveyance included the right of grazing 100 sheep (but not more) upon and over the Telscombe Tye. The conveyance includes a covenant to produce an indenture of conveyance on sale made 5 February 1917 between (1) C S Beard and E D Beard (2) F Holmes (3) F W Harmer and a declaration of 30 January 1917 of Charles Steyning Beard. If the quantification of the grazing rights at 100 sheep is correct, there must have been a conveyance at some time between 1811 and 1919 in which grazing rights were not apportioned rateably according area. This may be the reason for the inclusion of the words "(but not more").

My attention was drawn to an indenture made 13 June 1905 between (1) James Ambrose Harman (2) Steyning Beard. It is therein recited that Mr Harman was desirous of using the Tye containing 236a 2r.35p. for the purpose of golf, that Mr Beard claimed that he had the right to graze sheep on the Tye attached to "his Telscombe Farm", and that such claim was not admitted by Mr Harman. The indenture dealt with several other matters, but it included a provision that Mr Beard should not use the Tye for grazing during January, February and December in any year if requested not to do so by Mr Harman or anyone authorised by him.

This indenture can only be material for the purposes of the present case if Steyning Beard was the predecessor in title of the Minister and "his Telscombe Farm" consisted of the land now known as Kirby Farm.

It appears from the covenant to produce documents contained in the indenture of 5 June 1919 that Frederick William Harman had acquired the land now known as Kirby Farm with other land from Charles Steyning Beard. Charles Steyning Beard was not the same

rson as Steyning Beard. This is shown by their tombstones in Rottingdean Churchyard. eyning Beard died on 3 December 1909, aged 64, and Charles Steyning Beard died on February 1962, aged 80. While it is possible that Charles Steyning Beard acquired rkby Farm from Steyning Beard there is nothing to indicate that he did so, or if he d, that Steyning Beard owned Kirby Farm in 1905 or, if he did, that "his Telscombe Farm" as the land later known as Kirby Farm. Indeed such evidence as there is indicates the ontrary.

he records of the Court baron of the manor of Telecombe show that the connection of the eard family with the manor began on 31 July 1834, when Charles Beard of Rottingdean, eoman was admitted as the tenant of several copyhold tenements formerly held by homas Rogers. These tenements did not include the allotments in the Laines made to ogers in the Award of 1811. Charles Beard, by now described as "gentleman", acquired further copyhold tenement in 1842 and later required a number of others. As Charles eard,"esquire", he made his Will on 17 December 1867. His executors were his ephews Steyning Beard and George Humphrey Beard, who were granted seizin by the rod of ll his copyhold tenements on 31 July 1871. These tenements are described in detail n the record of the Court and they included only two of the allotments in the Laines, amely the strips numbered 1 and 2 in Porto Bello Furlong, which had been allotted to lizabeth Shergold and Thomas Rogers. It is thus clear that Steyning Beard did not equire the Kirby Farm land through Charles Beard. There is no evidence that he owned hat land at any time. The only known connection of that land with the Beard family is that Charles Steyning Beard owned it in 1917. I therefore cannot draw the inference that Steyning Beard owned it in 1905. Furthermore, even if he did own it in 1905, there is no evidence that it was the only land with rights of common attached which he owned in Telscombe, which would have to be proved in order to identify "his Telscombe Farm" with the Kirby Farm land.

There is no evidence that sheep from Kirby Farm have been grazed on the Tye for many years. In the absence of such evidence, Mr McCulloch argued that I ought to find that the rights attached to the Kirby Farm land had been abandoned. However, non-exercise of a right of common is not in itself an abandonment of the right. Abandonment is a matter of intention, and non-exercise is evidence from which an inference of intention to abandon can be drawn. That evidence must, however, be considered with any other relevant evidence. On 29 May 1941 the Tye was requisitioned under the Compensation (Defence) Act 1939. On 20 July 1956 a joint claim for compensation for the requisitioning was made by Mr Neville as owner of the freehold, Mr M Thornton-Smith (the tenant of the Gorham's Gift Trustees) in respect of sheep leases for 299 sheep, the Rev. H M Harries, in respect of sheep leases for 8 sheep, and Mr McComb in respect of sheep leases for 100 sheep, the last-named until the date of acquisition by the Minister. This claim was signed by Mr Neville and by Surveyors as agents for the other claimants. From this I draw the inference that Mr McComb had no intention in 1956 of abandoning his grazing rights and that Mr Neville accepted that those rights were still existing.

For these reasons I confirm the registration at Entry No. 1 with the following modifications:- namely, the substitution of the figure and word "252 Sheep" for the figure and words "222 ewes and 77 tegs" and the deletion of the words "and estovers", and I confirm the registration at Entry No. 2 without modification.

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Miss Cameron asked for an Order for Costs against the Objector should the registration at Entry No 1 be confirmed. Since Miss Cameron has succeeded on some points and Mr McCulloch on others, I have come to the conclusion that the proper order is that the Objector should pay half the costs of the Gothic Trustees to be taxed on County Court Scale 4, if not agreed.

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 17th DAY OF May 1979

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CHIEF COMMONS COMMISSIONER