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147

COMMONS REGISTRATION ACT 1965

Reference No 213/D/136

In the Matter of Bradley Green,
Craigmere, Stroud District, Gloucestershire

DECISION

This dispute relates to the registrations at Entry Nos 1, 2 and 3 in the Rights Section of Register Unit No CL138 in the Register of Common Land maintained by the Gloucestershire County Council and is occasioned by Objection No 0b 188 made by the Dursley Rural District Council and noted in the Register on 14 May 1971.

I held a hearing for the purpose of inquiring into the dispute at Gloucester on 22 November 1978. At the hearing (1) Stroud District Council as successors of Dursley Rural District Council were represented by Mr D C Parker legal executive in their employ; (2) Mr Edward Grimes (Rights Section Entry No 2 was made on his application) was represented by Mr H Davies Solicitor of Goldingham and Jotcham Solicitor of Wotton-under-Edge; (3) Mr Richard John Pullen (Rights Section Entry No 3 was made on his application) and Mrs Jean Mary Pullen were also represented by Mr H Davies; (4) Mr Malcolm Rodway of Bradley Green , and (5) Mr Christopher Dunn of 3 Weavers Close, Kingswood attended in person as being interested as members of the public.

Mr Parker said that Mr Francis Charles Penley (Rights Section Entry No. 1 and the only Ownership Section Entry was made on his application jointly with Mrs Ena Doris Ley and an application by them is noted in the Land Section) had telephoned to say that he would not attend: on my file I have a copy of a letter dated 20 July 1973 from Penley Milward & Bayley, Solicitors of Dursley to the County Solicitor in which they say: "our clients are prepared to modify their registration in respect of objection 188".

The land ("the Unit Land") in this Register Unit comprises a number of pieces amounting altogether to (according to the Register) about 10.38 acres and situate at or near the junction of a road from Bushford Bridge and Charfield on the southwest to North Nibley on the north, with a road from Wotton-under-Edge on the east. For the purposes of exposition, I shall call these two roads "the North-South Road" and "the Wotton Road", although I have no note or recollection of anyone at the hearing giving them these or any other names; and also treat the Unit Land as divided into: (a) an area ("the North-South Road Area") being the pieces on either side of and open to the North South Road; (b) an area ("the South Area") being the piece (one of the larger) adjoining Corner Farm and the piece a little to the west (the other side of the road leading to this Farm); and (c) an area ("the Miscellaneous Pieces Area") being the remaining pieces which are on both sides of the Wotton Road and on both sides of the road ("the Short Road") which leads southwards off the Wotton Road towards Corner Farm and the dwelling houses opposite to it. The Unit Land surrounds a fenced area ("the Central Area") which is not included in the registration and which contains (as I read the OS map a little over 11 acres; of this Central Area, part ("the Dwellinghouse Part"; being a little over one acre) is garden ground and other land apparently occupied with dwelling houses; the rest is agricultural land, which

although when I saw it appeared to have been recently cultivated, was, I was told formerly pasture. The Rights registrations are of; (1) a right (not attached to any land) "to graze 10 cattle, 20 sheep and 2 horses"; (2) a right (attached to Corner Farm)" to graze 25 cattle, 30 pigs, 30 sheep and 100 fowls"; and (3) a right (attached to Cannons Court Farm) " of pasture for 130 cattle". The grounds of objection are: "That the rights do not exist at all".

In support of the registrations oral evidence was given: (1) by Mr Edward Grimes who is now and has been since 1928 the owner of Corner Farm; (2) by Mrs E J Pullen whose father Mr Weeks owned Cannons Court (she was born there, and on his retirement she and her husband took over the farm and farmed it until about 1964); (3) by Mrs P M Gale (she, another daughter of Mr Weeks, was also born at Cannons Court and lived there until her marriage in 1930); (4) by Mrs M N Holpin whose father Mr Edward Griffith lived at Bradley Green from 1912 to 1927 (all her life until 1957 she lived there); (5) by Mrs J M Pullen (her husband is now and has been since 1964 the tenant of Cannons Court); and (6) Mr R C Dunn.

In the course of such evidence, the following documents (or copy documents) were produced (none of which was disputed);- (a) a scheme made on 5 September 1913 by Dursley Rural District Council (approved 20 September 1913 by the Board of Agriculture and Fisheries) under the Commons Act 1899 for the regulation and management of Bradley Green; (b) by-laws made under the scheme on 6 February 1914 (approved 8 April 1914 by the Board); (c) a conveyance dated 11 August 1914 by which Mrs E G J Prior conveyed to Mr Harry Grimes (the father of Mr E Grimes) Corner Farm containing 13A. 3R.; (d) a conveyance dated 23 April 1928 by which after reciting the deaths on 15 August 1923 of Mr H Grimes and on 17 February 1928 of his widow Mrs E Grimes, Corner Farm as described in the 1912 conveyance was conveyed to Mr E Grimes; (e) letter of 31 December 1963 by Dursley Rural District Council to Mr E Grimes; (f) letter of 10 April 1964 by the Secretary of the National Farmers Union on behalf of Mr Grimes to the said Council; (g) and (h) letters of 15 and 19 September 1969 from the said Council to Mr R J Pullen; and (i) an extract from the latest OS map (1/2,500).

Two days after the hearing, I inspected the Unit Land.

No evidence was offered in support of the registration at Entry No 1. On the evidence herein mentioned about the other registrations, and from what I saw at my inspection, it is unlikely that Mrs Ley and Mr Penley could both be the owners of the Unit Land and have a right (in gross so I assume) to graze 10 cattle, 20 sheep and 2 horses. The application for the Rights Section registration was made after that for the Ownership Section registration, I suppose in case the ownership was disputed, which it was not. The July 1973 letter indicates that Mrs Ley and Mr Peley do not wish to support the registration. On these consideration my decision is that registration at Entry No 1 should not have been made.

As regards the registration at Entry No 2 (Mr Grimes), no evidence was given about grazing of pigs, sheep or fowls from Corner Farm; accordingly my decision is that this part of the registration should not have been made. I am therefore concerned only with the rights of cattle grazing claimed by Mr Grimes and Mr Pullen.

As against these rights, so far as supported by actual grazing, Mr Parker referred to the 1914 by-laws: "16. A person shall not without lawful authority turn out or permit to remain on the common any horse, cattle ..."; and contended as I understood him that after 1914 there could be no grazing on the Unit Land of cattle "as of right". It may be that this by-law would be an answer to a claim which although not supportable by prescription at common law, could be supported under the Prescription Act 1832 or by a presumed lost modern grant; but in this case there is no reason why the rights claimed should not have existed from time immemorial, and therefore be supportable by prescription at common law. The by-law I think contemplates that before and after it a person might graze, in exercise of a right existing before 1914; I read "lawful authority" as including an authorisation by such a right. Mr Grimes and Mrs E J Pullen said that the 1914 Scheme and by-laws were a result of representations made by Mr H Grimes and Mr Weeks and possibly by others living near the Unit Land, for the purpose of discouraging gypsies; in my view neither the scheme nor the bylaws made under it, are any indication against there being when they were made (or afterwards) rights of cattle grazing such as are now claimed.

With particular reference to the claim of Mr Grimes, Mr Parker referred to the 1963/64 letters and his subsequent annual payment of £5.00 to the District Council. Proof that an annual payment has been made for doing something is evidence that the thing was not done "as of right" unless the contrary be proved, see Gardner v Hodgson 1903 AC 228; so I am concerned to consider whether the contrary has been proved. Under the 1914 scheme, the management of the Unit Land became vested in Dursley Rural District Council but the ownership was not thereby vested in them. A scheme made under the 1899 Act often produces a state of affairs that makes it easy for the managing council to acquire ownership by possession but this is not a necessary consequence; in this case Mrs Ley and Mr Penley have under the 1965 Act been finally registered as owners without any objection by the Council, so I cannot regard the £5 annual payment as being made to or received by anyone claiming as owner. The 1964 letter is: "We are requested by the above (Mr Grimes) to submit to the Council an application for consent to graze dairy cows on Bradley Green annually during the period April to October inclusive. As you are aware Mr Grimes has in fact grazed the Green for over 15 years and his predecessors for many years before him, gaining access by a gate leading directly from his land on to the Green. This gate has been in existence for over 50 years, and probably very much longer. The question of Common grazing rights is obscure in this instance, but Mr Grimes wishes to co-operate with the Council in ensuring that the green is kept in good order and feels that controlled grazing will be in the best interests of all concerned". The reply to this letter was not produced and I infer from it that there was no separate written application for consent. Neither the 1963 nor the 1964 letter mentions the possibility of any annual payment, and the only evidence I have about such payment is what Mr Grimes said in reply to questions by Mr Barker. Although Mr Grimes agreed that it was "for the right to graze" he explained "people before grazed without consent ... the Rural District Council put a charge on the Common to graze the Common". In the context of the 1964 letter, I conclude that payment was made not as an acknowledgement that Mr Grimes had no right of grazing but as an acknowledgement of the Council's powers of management.

But even if I am wrong about this conclusion, so that in the result any claim by Mr Grimes under the 1832 Act is defeated, because he may not have been grazing as of right after 1964 and before 1971 (the date of the objection), this is no conclusive answer to any claim he now makes at common law (which as I read the 1964 letter quoted above it was the intention of the writer to preserve). I accept Mr Grimes evidence that cattle were grazed from Corner Farm on the Unit Land or at least on the South Area for as long as he can remember (he was at the hearing just under 78 years of age) without payment being made (other than the £5 annual payment since 1964) and without the consent of anyone.

The present appearance of the South Area and its surroundings is consistent with it having been grazed from Corner Farm from time immemorial: the advantage and convenience of so grazing and the practical impossibility of preventing it are obvious. Mrs Holpin said that Mr Edward Griffiths who lived at Bradley Green grazed the Unit Land from 1912 to 1957 and Mr Philpott from where the Andrews now lived (? Harrow Farm) grazed a horse, a donkey and goats. Mrs Gale who lived from 1950 (?1949) to 1966 on Bradley Green opposite Corner Farm said that she started grazing there with calves and later kept goats (tethered). Mrs E J Pullen spoke generally of grazing (in addition to that from Cannons Court) by others. Although no registrations in respect of this grazing have been made under the 1965 Act, the circumstance that it took place is an indication (as Mrs Holpen said in effect) that the Unit Land has for long been regarded as common land open to anyone prepared to tether or look after animals on it, and that such grazing gave rise to no difficulty (Mrs E J Pullen suggested that this was because no one owned enough cattle to be able to graze objectionably).

Cattle put on the South Area would be unlikely to be much attracted by anything growing on the Miscellaneous Pieces Area. Although not tethered or looked after (unlike those from Cannons Court there was no evidence that cattle from Corner Farm ever were) it is perhaps unlikely that they were often on the North-South Road Area or much affected vehicular traffic on the Wotton Road; their presence on the Short Road would not be of any consequence to anyone. The gap on the west side of the South Area between it and the North-South Road Area is so narrow that it could be easily for cattle obstructed (as it was when I inspected), so that in effect grazing from Corner Farm would be practically confined to the South Area. Nevertheless nobody suggested at the hearing that the registration should be limited to the South Area or challenged Mr Grimes's statement that his cattle grazed over the whole of the Unit Land. On the considerations summarised above, I conclude that cattle (untethered and untended) have from time immorial been grazed from Corner Farm on the Unit Land, and my decision is that notwithstanding the £5 annual payment made since 1964, a right to do this has been proved to exist.

Looking at Mr Grimes' documents of title, it appeared that the land to which his rights were registered as being attached included OS No 235 (7.186 acres) which he did not own, and did not include OS Nos 236 and 239 (4.628 + 1.991 acres) which he did own. At the hearing it was agreed, without prejudice to all other questions, that if I decided to confirm the registration I should modify it so as to correct this mistake.

In support of the registration at Entry No 3 (Mr R J Pullen), none of the documents of title relating to Cannons Court Farm was produced; however at the conclusion of the hearing Mrs J M Pullen marked on a map the extent of their

farm (about 130 acres she said) showing it as including the Central Area and an area of between 20 and 30 acres east of the North-South Road and north of Bradley Court; the rest of the farm apart from roadside strips extending south-wards nearly to the B4058 road) is west of the North-South Road. Her marking of this map was agreed by those at the hearing, although I record that it seems to me that by including the above-mentioned dwelling house part (OS Nos 272 and 273) of the Central Area she was enlarging the description in column 5 of the Register. However this may be, I shall in this decision assume that the 130 acres so delineated by Mrs J M Pullen have at all relevant times been owned by Mr Weeks and his successors in title, being persons different from the owners of the Unit Land and I shall treat the said dwelling house part as being of no significance.

Mrs E J Pullen said (in effect):- Cattle from Cannons Court Farm had always grazed on the Unit Land; The Farm was on both sides of the Common and cattle had to cross over it to get between the parts; "the only stipulation was somebody had to be there to look after them". Mr Parker questioned Mrs E J Pullen about "this stipulation"; it became clear that she was not using the word in the sense of there being an agreement, undertaking or regulation requiring this looking after and that she meant this was how the grazing she described was done. Looking after the cattle while they were grazing would be for the advantage of their owner, in that they could be stopped from straying some distance down the North-South Road or the Wotton Road; it would also be for the advantage of the public because they could be stopped getting in the way of vehicles.

Mrs J M Pullen was asked about the 1965 letter in which there was some complaint about an electric fence, and either expressly or impliedly, rejected the "looking after" qualification particularly mentioned by Mrs E J Pullen. Having regard to the comparatively small part of the relevant period before the date of objection, May 1971) of which Mrs J M Pullen had personal knowledge, I cannot regard her evidence as supporting any right larger than that described by Mrs E J Pullen, although I do regard her evidence as showing that the right described by Mr E J Pullen as having been exercised before 1964 was exercised afterwards.

There was no evidence that anybody in respect of grazing from Cannons Court Farm ever paid any annual or other sum to the Council. On my inspection it appeared that the North-South Road Area must have always been advantageous and convenient for grazing from Cannons Court and that it would always be practically impossible to prevent such grazing, particularly when cattle were being moved to and from the Central Area from and to other parts of the Farm. So except as regards an annual payment and as regards the said "stipulation", the evidentiary considerations applicable to grazing on the Unit Land from Cannons Court Farm are the same as those above mentioned in relation to Corner Farm.

I consider that the stipulation, the animals grazed from Cannons Court would always be looked after, is, having regard to the total area of Cannons Court Farm (10 times that of Corner Farm) and its situation in relation to the Unit Land, and to the North-South Road which crosses it, an essential qualification to the right as exercised, and not merely a restriction imposed by the owners of the cattle for their own convenience. This way of looking at the right so exercised, is I think confirmed by the words "providing a herdsman is present" used by Mr R J Pullen in his form of application (CR form 9 dated 20 June 1968). In my view a right so qualified can properly be claimed at common law. I conclude that cattle tended have from time immemorial grazed from Cannons Court on the Unit Land and my decisions that a right so qualified has been proved to exist.

During the course of the evidence, Mr Parker asked questions about numbers. Mr Grimes agreed that he put 25 for his cattle as "a convenient number" and that he had never exceeded this number; as I understood him, certainly on some occasions, he had as many as 25 cattle, at any rate if you included calves and 18 month old bullocks; at one time he had 25 milking cows. Mrs E J Pullen according to my notes and recollection never specified the number of cattle grazed from Cannons Court Farm; she regarded the questions about numbers as hypothetical because nobody at any time with which she was concerned ever had got sufficient number of cattle or other animals to graze on the Unit land in a manner which would be likely to be objectionable to anyone else. Mrs J M Pullen said that number "130" was put in the application for registration, because that was the acreage she and her husband were then farming.

In the notes attached to the forms of objection, see Schedule I to the Commons Registration (Objections and Maps) Regulations 1968, among the examples of grounds of objection suggested is "that the right should comprise fewer (state how many) animals or other (state which) animals". The grounds of objection set out in that (No 188) which I am now considering contains no such words: and I have no reason to suppose that if rights of grazing are exercisable at all from Corner Farm and Cannons Court Farm, the Council are much concerned with the numbers. Mr Grimes and Mr R J Pullen who might be concerned not to compete with each other, are agreeable. Apart from the 1965 Act, a right of common appurtinant to land can be claimed without specifying the number of animals (a limitation by reference to levancy and couchancy or otherwise in general should be pleaded); I do not regard the vagueness shown by Mr Grimes and Mrs E J Pullen as to numbers as in any way against there being a right of grazing such as they claimed. The 1965 Act requires a number to be inserted in respect of every application for registration; but neither the Act nor the regulations made under it give any guidance to to how such number is to be determined. It may be that Mr Grimes and Mr R J Pullen may have put in their application forms larger numbers than have ever been grazed for any substantial period. However this may be having regard to the above considerations, I do not think fit to treat the grounds of objection (either by way of amendment, which was not asked for, or otherwise) as requiring me to modify the numbers in any way.

About the electric fence mentioned in the evidence of Mr Dunn and also in one of the 1964 letters, I decline to express a definite opinion. It may be that it is to the advantage of everybody concerned that cattle from Cannons Court Farm should be grazed on the Unit Land, particularly on the North-South Road Area, which would otherwise become unsightly as some of the Miscellaneous Pieces Area is now: it may be that to look after cattle while they are grazing is now uneconomic, and this tended grazing is now practically obsolete. To prevent misunderstanding, I record that although it seems to me that the burden on the Unit Land of 130 tended cattle is substantially different from that of 130 cattle enclosed by an electric fence, it may be (as a matter of law or common sense) that the right which I have said has been proved, would if the erection of the electric fence is now, or somehow becomes lawful, include a right to graze a less number of cattle within such a fence.

In accordance with my decisions as above set out, I refuse to confirm the registration at Entry No 1, I confirm the registration at Entry No 2 with the modification that in Column 4 the words "30 pigs, 30 sheep and 100 fowls" be deleted and that the map mentioned in Column 4 be altered by excluding from the

land shown edged red thereon OS No 235 (7.186 acres) and including No 236 (4.628 acres) and No 239 (1.991 acres), and I confirm the registration at Entry No 3 with the modification that in column 4 the word "tended" be inserted before the word "cattle".

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 5th — day of April — 1979

Commons Commissioner

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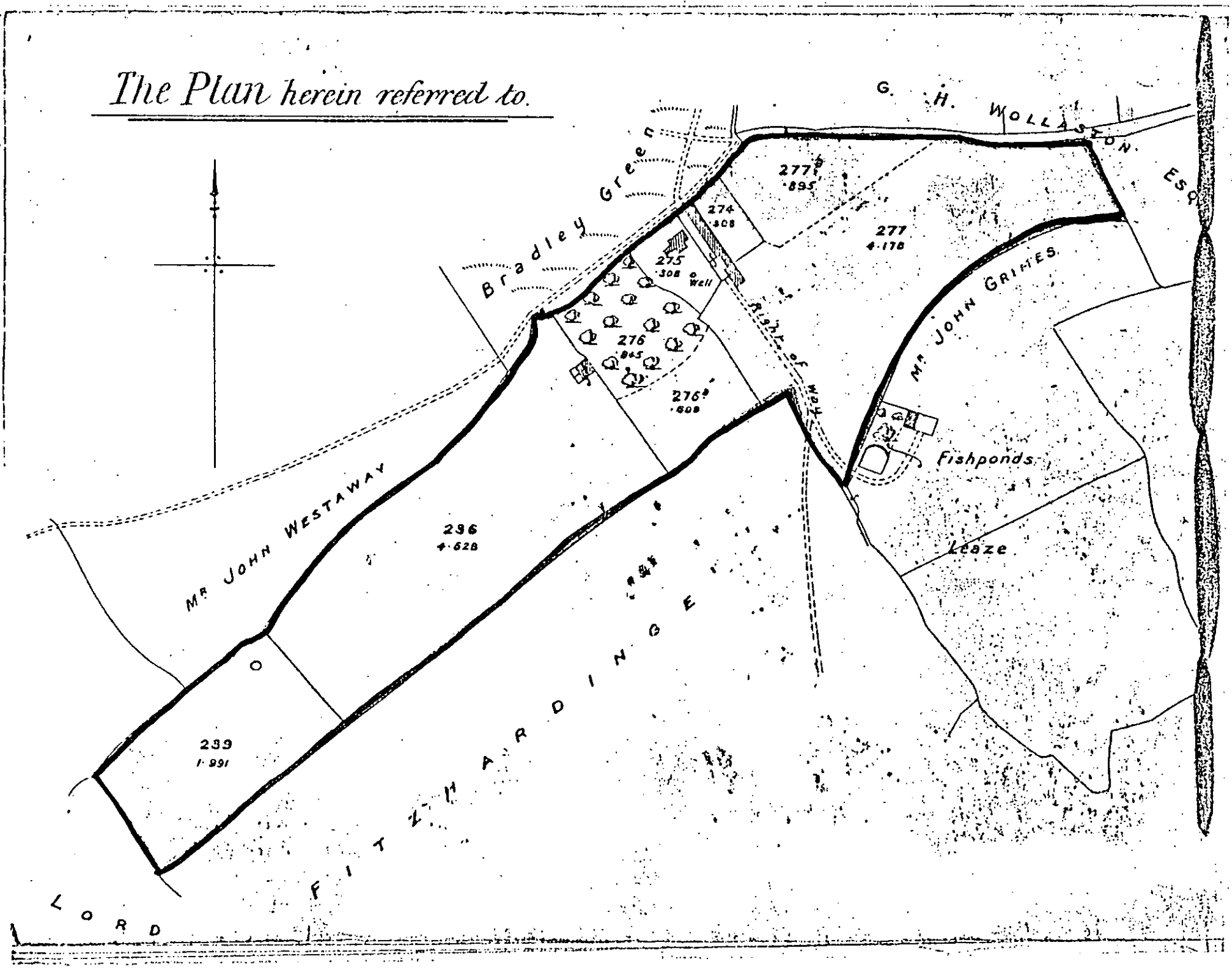
The Plan herein referred to.
G. H. Wollaston Esq.
Bradley Green
277
·895
277
4·178
274
·308
275
·308
Well
276
·845
276a
·608
Right of way
Mr John Grimes
Fishponds
Leaze
Mr John Westaway
236
4·628
239
1·991
Fitzhardinge
Lord