COMMONS REGISTRATION ACT 1965

Reference Nos.59/D/9-10

In the Matter of Chislehurst and
St Pauls's Cray Commons, Bromley,
Greater London.

DECISION

These disputes relate to the registration at Entry No.1 in the Land Section of Register Unit No.CL 98 in the Register of Common Land maintained by the Greater London Council and are occasioned by Objection No.79 made by the London Borough of Bromley and noted in the Register on 19th January 1972 and by Objection No.99 made by the Chislehurst and St Paul's Cray Commons Conservators (hereafter referred to as "the Conservators") and noted in the Register on 26th July 1972.

I held a hearing for the purpose of inquiring into the dispute at Watergate House, Adelphi, WC2N 6LB on 1st May 1974. The hearing was attended by Mr J.S.Bennett, one of the Conservators, who applied for the registration and subsequently objected to it, by Mr Robert Gray, of counsel, on behalf of the Council of the London Borough of Bromley. I also heard Mr H.T.A.Sharpe, the Chairman of the Chislehurst Residents Association, in support of the registration.

The objection of the Borough Council was confined to the inclusion in the Register Unit of certain roads, which were alleged to be highways. Mr Bennett admitted that these roads were highways and therefore did not fall within the definition of "common land" in section 22(1) of the Commons Registration Act 1965. I also heard Mr Gray in support of the registration save in so far as it comprises the highways.

The apparent inconsistency of the Conservators in applying for the registration and then objecting to it calls for some explanation. In 1966 the Conservators applied to have the land in question exempted from the provisions of sections 1 to 10 of the Act of 1965 by an order of the Minister of Land and Natural Resources made under section 11 of that Act. When public notice of this application was given five residents of Chislehurst gave notice of objection on behalf of themselves and on behalf of the Chislehurst Residents Association, alleging that rights of commoners to estovers were being exercised. The Minister refused to make an order, stating that the proper course would be for the registration provisions of the Act to apply to the land in the normal way, so that by resolving the disputes the purpose and intention of the Act might be fulfilled. It appears from a letter from the Ministry which accompanied the formal notice of refusal that if it had been clear that no rights of common had been exercised over the land for at least 30 years, the Minister would have made an exemption order.

After discussing the matter with the Residents Association, the Conservators decided to apply for the registration so that the matter could be resolved. The Conservators adhered to their view that the land should not be registered under the Act of 1965 and gave expression to that view in their objection to the registration. Therefore, although the Conservators did not support the registration for which they had applied, I thought it right to hear evidence and submissions in support of the registration.

The land the subject of this reference is subject to a Scheme for the establishment of local management confirmed by the Metropolitan Commons (Chislehurst and St Paul's Cray) Supplemental Act 1888 (51 & 52 Vict.c.l.). In order to be subject to such a scheme land had to fall within the definition of "common" in section 3 of the Metropolitan Commons Act 1866, as amended by section 2 of the Metropolitan Commons Amendment Act 1869, i.e. it had to be subject at the passing of that Act to a right of common or subject to be inclosed under the provisions of the Inclosure Act 1845, such land being described at considerable length in section 11 of that Act. It is stated in article 35 of the Scheme that rights of common of pasturage and estovers over the Commons were claimed by certain persons there defined, and article 36 provides that the Scheme affects such rights only so far as is absolutely necessary for the purposes of the Scheme. Article 36 also provides for the extinguishment by the Conservators of these and other rights over the Common in certain circumstances on payment of compensation. By an agreement made 31st December 1898 certain rights of the lord of the manor were extinguished, but no other rights have been so extinguished.

Although the rights of common claimed at the time of the making of the Scheme have not been extinguished by the Conservators, the grazing rights have not been exercised for many years, probably because increased traffic on the roads has made it too dangerous to leave valuable animals loose on the Commons. The records of the Conservators contain no mention of the exercise of such rights during the present century. As a result of the non-exercise of the grazing rights a large part of the Commons has become woodland. There was also no evidence of the exercise of the right of estovers during living memory. Indeed, the Keepers appointed by the Conservators have challenged any person whom they have found removing wood from the Common and no person so challenged has ever claimed to be entitled to take the wood. Although there is no evidence of extinguishment or of express abandonment of the rights of common, I have formed the view that upon the evidence of the non-exercise of the rights without any explanation I must draw the inference that the rights have been abandoned.

That excludes the Commons from the first limb of the definition of "common land" in section 22(1) of the Act of 1965, but still leaves open the possibility that they fall within the second limb of the definition by being waste land of a manor not subject to rights of common.

Mr Bennett argued that the Commons did not fall within the well-known definition enunciated by Watson B. in Att.-Gen. v. Hanmer (1858), 27 L.J.Ch. 837 because they can no longer properly be described as "uncultivated". In support

of his argument Mr Bennett relied upon the large amount of work which has to be carried out by the Conservators' employees to prevent the land from becoming completely overgrown and said that this work was cultivation.

It is clear that the Scheme does not require the Conservators to leave the Commons uncultivated in the sense of being untouched by human hand. Article 14 of the Scheme empowers the Conservators to execute works of drainage, levelling, or fencing for the protection and improvement of the Commons, though only so far as may be required for the purposes of the Metropolitan Commons Act 1866 and the Metropolitan Commons Amendment Act 1869. The Conservators are also empowered to do certain other work of an ameliorative nature, but are required to do nothing that may otherwise vary or alter the natural features or aspect of the Commons.

In fact, had the Conservators done nothing, the natural features and aspect of the Commons would have been considerably altered over the years by the natural growth of vegetation and all the more so since the cessation of grazing. As Mr Bennett put it, only the most vigorous action by the Conservators' Keepers has preserved the Commons as open spaces for the enjoyment of the public.

In my view, uncultivated land is land which is left in its natural state, subject only to such restrictions on the growth of vegetaion as necessarily follow from grazing and the exercise of other rights of removing the natural produce of the land. If there is no such restriction, the features and aspect of the land must inevitably change.

Whatever may have been the natural features and aspect of the land at the time of the making of the Scheme, they would have been altered by natural causes since the cessation of the exercise of the rights of common. The work carried out by the Conservators' employees has not had the effect of totally preventing such alteration, for much of the land has become wooded, but the work has had the effect of maintaining the land in such a condition that it is capable of enjoyment by members of the public. The land still retains what could be described as a natural aspect, but it is really an artificial aspect: the measure of the Conservators' success is the extent to which the artificiality has been concealed. Nevertheless, the Commons as they can be seen today are as artificial as one of the landscapes created by "Capability" Brown in the eighteenth century.

In my view, this has taken the Commons out of the category of uncultivated land and has deprived them of their status as waste land of a manor.

I refuse to confirm the registration.

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 December 1974

Chief Commons Commissioner