COMMONS REGISTRATION ACT 1965

Reference Nos. 273/D/116 to 273/D/123

In the Matter of Bryn Arw Common, Crucorney Fawr and Llantilio Pertholey Communities, Monmouth District, Gwent

DECISION

These disputes relate to the registrations at Entry No. 2 (replacing Entry No. 1) in the Land Section and at Entry Nos. 1 to 12 inclusive in the Rights Section of Register Unit No. CL3 in the Register of Common Land maintained by the Gwent (formerly Monmouthshire) County Council and are occasioned by Objections No. 105 made by Denver John Green, No. 106 made by Melvyn David Powell and Kathleen Ann Powell, No. 107 made by David Lemuel Powell, No. 108 made by Philis Morgan, Nos. 109 and 110 made by Pamela Frances Newton and Nos. 111 and 112 made by Francis John Bevan, and all noted in the Register on 10 November 1970.

The land ("the Unit Land") comprised in this Register Unit is a tract of about 296 acres having a length from north to south of about 1½ miles. It is within the triangular area formed by the old (from Abergavenny) Hereford road on the east, the road off it to Forest Coal Pit on the southwest and the road along Cwm Coedycerrig on the north. In the Rights Section there are 12 registrations all of rights to graze sheep. Nos. 2, 7 and 8 include other animals; Nos. 5, 6, 7, 9, 10, 11 and 12 include the right to cut and take bracken. In the Ownership Section at Entry No. 2, Pamela F Newton and R G Jellard are registered as owners of all the Unit Land; on 1 August 1972 such registration became final (due to the cancellation of Entry No. 1). The grounds of Objections Nos. 105, 106, 107 and 108 are all to the same effect that no rights exist to graze any animals other than sheep; applicable only to Entry Nos. 2, 7 and 8. The grounds of Objections Nos. 109 and 111 and Nos. 110 and 112 are to the same effect: that two parts of the Unit Land near its northeast corner containing respectively about 5 acres and about 9 acres were not common land at the date of registration and formed part of Stanton Manor Farm.

I held a hearing for the purpose of inquiring into the disputes at Abergavenny on 23 June 1987. At the hearing: (1) Mr Denver John Green who made Objection No. 105 and who applied for the Rights Section registration at Entry No. 1 was represented for the first part of the hearing by Mr Emlyn Thomas secretary of the Farmers' Union of Wales (Monmouth County Branch); (2) Mr Melvyn David Powell of Great Bettwys Farm who made Objection No. 106 and is an executor of his father Mr David Lemuel Powell (he died in 1982 having made Objection No. 107 and applied for the Rights Section registration at Entry No. 5) attended in person on his own behalf and as representing his wife Mrs Kathleen Ann Powell who joined with him in making the said Objection No. 106; (3) Mr Austin John Powell of Dower House, Partrishow who is the other executor of David Lemuel Powell attended in person; (4) Mr Bryan William Morgan of Upper Bettwys Farm who is the son and as tenant successor of Mrs Philis Morgan who made Objection No. 108 attended in person; (5) Mrs Pamela Frances Newton who made Objections Nos. 109 and 110 and who applied for the Rights

Section registration at Entry No. 6 as owner and for the Ownership Section registration at Entry No. 2, was represented by Mr G Maddocks, solicitor with Gabb & Co, Solicitors of Abergavenny and of Crickhowell; (6) Mr Francis John Bevan who made Objections Nos. 111 and 112 and who as tenant applied for the Rights Section registration at Entry No. 6 was for the first part of the hearing also represented by Mr G Maddocks; (7) Mr Robert Husbands who applied for the Rights Section registration at Entry Nos. 2 and 3 was also for the first part of the hearing represented by Mr Emlyn Thomas; and (8) Gwent County Council as registration authority were represented by Mrs Jill Clarke.

At the beginning of the hearing I had a copy of a letter dated 3 December 1986 from Gabb & Co to the County Council saying that Mr Richard Geddes Jellard and Mrs Sarah Eveline Rowe Jones of The Brook House, Aldermaston, Reading, Berkshire had then become the owners of the Unit Land. Mr Maddocks said she was the daughter of Mrs P F Newton.

Next, Mr Emlyn Thomas outlined the case which on behalf of Mr R Husbands and Mr D J Green he would make against Objections Nos. 109, 110, 111 and 112 saying (in effect):- The two parts of the Unit Land therein specified were fenced off from the rest of the Common immediately before the introduction of the Commons Registration Act 1965 for planting with conifers or for reclamation as agricultural land. He would submit both parts remained "common land" and should continue to be registered as such. No consent of a Secretary of State to such enclosure had been given (in accordance with Law of Property Act 1925 section 194). However the Ownership Section registration was not disputed.

Next Mr Maddocks explained that the fencing was intended for the convenience of the Commoners and while not accepting the position was in all respects as stated by Mr Emlyn Thomas, conceded on behalf of Mrs P F Newton and Mr F J Bevan that I should confirm the Land Section registration without any modification.

Mr Thomas and Mr Maddocks were agreed that I need not do anything about the Ownership Section; for this reason Mr Maddocks offered no evidence.

Next for the said two parts of the Unit Land having been properly registered, oral evidence was given by Mr Robert Husbands of Middle Bettwys Farm who is 58 years old and had known the two parts all his life. He said (in effect):- Both parts were most definitely common; his rights extended over them. In 1970 he asked the Farmers' Union of Wales on his behalf to consider action against these enclosures and was advised (letter of 9 October 1970 from them produced; RH/3) advising him that the matter "will eventually be settled by the Commons Commissioner and there is nothing further to be done at this stage".

Next Mr Maddocks retired from the proceedings. After a short adjournment I started to consider Objections Nos. 105, 106, 107, 108 and 109; Mr Emlyn Thomas said he would take no further part in the proceedings because Mr R Husbands and Mr D J Green who he represented, about these Objections differed. So for the remainder of the hearing they appeared in person.

Next Mr R Husbands against the Objections and in support of the registration at Rights Section Entry No. 2 of a right attached to Bryn Arw Farm to graze "sheep, ponies" continued his oral evidence saying (in effect):- He thought he had a right to graze ponies from Bryn Arw Farm, because in 1941 he was taken to hospital by Mr Bevan's father and when he came out in the spring of the same year he had a pony and this pony foaled in May and she and her foal ran over the Unit Land; eventually she had another foal and that went out too; both colts; one lived 25 years the other 27 years, the younger died first.

Questioned by Mr D J Green, Mr Husbands said (in effect):- As to it being a right or his being just allowed to do it, "I had a right; because nobody stopped me: I am claiming a right now". Questioned by Mr M D Powell, Mr Husbands said Mr W G Lewis of Great Llwyngwyn Farm kept ponies; "I do not think he had a right to have ponies; to be honest I don't think I have a right; I am only claiming it because I used it: for 27 years plus. I do agree with Mr Powell that it is traditional there are no ponies there; but they have been there so many years I don't see why they should be stopped. I reckon I claimed the right all the time I used it; I don't think anybody can say I have no right. Mr Davies, tenant of Penyclawdd Farm knew I turned out ponies and never said anything".

Mr D J Green (supporting the Objections) in the course of his oral evidence said (in effect):- His grandparents came to Ty-Pwll Farm, Forest Coalpit in 1923; he and she died in 1955 and 1957, and were succeeded by his mother's sister, who farmed herself. He (the witness) was born in 1943 and now is her tenant (he applied for the registration at Entry No. 1 in 1968 as tenant). They had a right to graze sheep on the mountain (meaning the Unit Land) "because they believed only sheep (were allowed) on the mountain; any horse or cattle has been by consent or agreement".

Questioned by Mr Husbands, Mr Green said (in effect):- As to who do you get consent of "they did consent by not objecting". As to Mr Husbands never having had any objection, "I would accept that to be the case, they did not object".

Next, Mr M D Powell (in support of the Objections) in the course of his oral evidence said (in effect):- He is the third generation of his family who has farmed Great Bettwys Farm; he bought it from his father in 1969. He now lives on the same side (the west side) of the Hill (the Unit Land) as Mr Husbands (he in September 1958 bought Middle Bettwys Farm on the east side as an addition to his Bryn Arw Farm on the west side). "I have always understood traditionally there are no rights to graze horses on Bryn Arw Hill; I have a vague recollection of Mr Husbands grazing ponies on the Hill, but how many and for how long I have no idea".

Questioned by Mr Husbands, Mr Powell said (in effect):- As to his vague idea, he would not know about the ponies because they would be on the opposite side of the Hill. As to other ponies on the Hill, there were none until Mr William Gordon Lewis turned out quite a lot; that caused a state of objection to ponies being on the Hill; he died about 4 years ago and he had ponies about 7 years before that; the objection at that time was the pressure put on the fences by large numbers of horses. When Mr Lewis died his son sold the horses off. "I have no objection to horses, if we all had a right for horses to graze: but it is unjust that we should have to put up with pressure on the fences without having any rights ourselves".

Next Mr Husbands intervened to say that he was claiming a right for ponies because he had used it.

Next Mr F J Bevan of Stanton Manor Farm who is 68 years of age (supporting the Objections) gave oral evidence saying (in effect):- He is the fourth generation of his family to have the Farm, starting with his great-grandfather who came in 1851. His grandfather was always given to understand that Bryn Arw was a sheep only mountain. "I am told that Mr Lewis turned horses out and Mr Husbands had the odd couple, but not to my knowledge had anybody else".

Questioned by Mr Husbands, Mr Bevan said (in effect):- It (being a sheep only mountain) was "handed down ... Mrs Newton the owner always agreed it was a sheep only mountain ... (As to why he did not object to Mr Husbands' ponies), "well he only had the odd couple, so nobody took too much notice. We are objecting to big numbers of ponies being put there".

By subection (7) of section 5 of the 1965 Act, Objections Nos. 109, 110, 111 and 112 although expressly directed to the Land Section, are to be treated as objections to all the registrations in the Rights Section; so the possible differences about rights of common over the Unit Land are very numerous. As hereinbefore appears, the only difference about which at the hearing there was any contest was as to Rights Section registration at Entry No. 2 made on the application of Mr Husbands, of which the only relevant words are: "150 sheep, ponies". Having regard to section 15 of the Act which requires the animals specified in any registration to be therein quantified by "a definite number", I read this registration as claiming a right for any combination of sheep and ponies not exceeding a total number of 150; that is the right registered contemplates ponies and sheep as one for one alternatives.

Very many commons are grazed on the basis that ponies (or horses) and cattle are interchangeable with sheep on a proportionate basis (usually 1 for 5 or some such fraction); often such interchangeability by witnesses giving evidence is assumed. But proof of a right to graze sheep without more, does not in law establish a right to graze ponies as an alternative. The evidence of Messrs Green, Powell and Bevan as I understood them, and which I accept, was clear:- the Unit Land is and always has been a "sheep only common", meaning that it was the general understanding among its graziers that ponies (and/or cattle) are not interchangeable with sheep and that over the years they have known the Unit Land ponies (and/or cattle) have not been grazed on the Unit Land save exceptionally as mentioned in the evidence

above summarised. Mr Husbands did not I think, seriously contest that there was this understanding against interchangeability; but if I mistook his meaning on this point, I find the evidence of Mr Green, Mr Powell and Mr Bevan more convincing than his. The understanding is supported by the other registrations in the Rights Section, for only Nos. 7 and 8 include cattle or ponies/horses, and apart from the 7 years grazing of ponies by Mr Lewis above mentioned, there was no evidence in support of them; if Entry No. 2 rightly includes ponies it is unique: I reject the suggestion that the applicants for the registrations at Entry Nos. 1, 3 to 6, and 9 to 12 could have included, but misunderstanding their rights mistakenly failed to include, ponies in their applications.

The general understanding does not preclude Mr Husbands claiming that by his actual grazing for him establishes a right to graze ponies as attached to Bry Arw Farm under the Prescription Act 1832 or by a presumed grant such as was recognised in Tehidy v Norman 1971 2QB 528. Usage for the purposes of any such prescription or presumed grant, must be "as of right" within the special legal meaning of these words. I discuss below whether the grazing (for 27 years of two or three ponies) described by Mr Husbands could be in any context "as of right". As regards this paragraph of my decision, grazing by ponies as described by Mr Husbands was in my opinion much too small to support the right registered to graze "150 sheep, ponies", meaning ponies one for one alternatively to sheep. Mr Husbands did not suggest any modification of the registration which would bring it nearer to the grazing by ponies as he described. So my decision is that as regards the Rights Section registration at Entry No. 2, Objections Nos. 105, 106, 107 and 108 all succeed.

The relevant words in the Rights Section registration at Entry No. 7 are "250 sheep, or 20 ponies or 20 cattle or any combination of such stock pro rata". Messrs Husbands, Powell and Bevan mentioned grazing by Mr W Lewis from Great Llwyngwyn Farm but I have no details as to the numbers or the circumstances. I accept the evidence of Mr Powell and Mr Bevan that such grazing was locally considered irregular. In the absence of any evidence in support of this Entry No. 7 from anybody now concerned with this Farm and upon some of the considerations mentioned above in relation to Bryn Arw Farm, my decision is that in respect of this registration too, Objections Nos. 105, 106, 107 and 108 succeed.

The relevant words in the Rights Section registration at Entry No. 8 are "150 sheep (or cattle and/or horses at rate 1 to 5 sheep)". No evidence was offered about the grazing from Cwm Coedycerrig Farm. Upon considerations essentially the same as those above stated, my decision is that in respect of this registration too Objections Nos. 105, 106, 107 and 108 succeed.

In case I am mistaken in treating the words "150 sheep, ponies" as being the only claim of Mr Husbands, I will now consider what my decision would have been if his registration had been or could be modified so as to be "150 sheep and 2 ponies" or otherwise expressed, as regards ponies to be limited to the use he described. The usage needed to establish such a right must be "as of right" within the legal meaning of these words. His grazing of ponies as described by him was not necessarily "as of right" merely because it was never to him by anyone said to be objectionable and was not said to him by anyone to be with. their agreement or permission; see Beckett v Lyons 1967 1Ch 449; in that case the Court of Appeal contrasted something done by a person who "believes himself to be exercising a right" with "merely doing something which he felt confident that the owner would not stop but tolerate because it did no harm"; and spoke of acts "being merely a de facto practice which ... (the doers) thought no one would find objectionable and which the owner in fact tolerated as unobjectionable; and decided that the latter things were not done "as of right", see pages 469 and 475. On the evidence given at the hearing generally in the context of the registrations and the locality of the Unit Land I find that the grazing of sheep on it was generally on a commercial basis. The grazing of ponies described by Mr Husbands was on a domestic basis, such as would be tolerated as unobjectionable. So following the words of the Court of Appeal above quoted, I conclude that his grazing of ponies was not "as of right" and does not therefore provide any basis for the acquisition of any registrable right by prescription, by presumed grant or otherwise.

As to the Land Section:- Upon the evidence and statements of Mr Husbands, Mr Maddocks and Mr Thomas, my decision is that Objections Nos. 109, 110, 111 and 112 fail. On my copy of the Register, column 3 of Rights Section Entry No. 5 (D L Powell) was overwritten in manuscript "application amended to exclude land objected to by Mrs P F Newton & Mr F J Bevan" but the words "over the whole of the land described in this register unit" in column 4 have not been altered; my decision is on the basis that the manuscript overwriting is irregular and may be disregarded; but in case I am wrong about this I modify this Entry by deleting the manuscript addition. I have no reason to doubt the propriety of the Land Section registration in all respects and my decision is therefore that it was properly made and requires no modification.

As to the Rights Section registrations generally:- Subject to giving effect to the grounds of Objections Nos. 105, 106, 107 and 108, I have no reason to doubt their propriety; so save as next mentioned my decision is that they were all properly made. When preparing this decision I noticed that Entry Nos. 5, 7, 9, 10 and 11 after the word "sheep" contained words to the effect "to include their progeny until weaning time" and the other Entry Nos. contained no such words; nobody at the hearing mentioned this diversity and if unaltered may cause confusion, so I shall modify the other registrations by including these words. But because such a modification was not mentioned at the hearing and the non-inclusion of these words in some of the registrations could perhaps be justified for reasons to me not now

apparent I give any person concerned with any Rights Section registration liberty to apply to vary this decision so far as it relates to this last mentioned modification; any such application should in the first instance be made by letter to the Clerk of the Commons Commissioners within THREE MONTHS of the day on which this decision is sent out.

The effect of the decisions hereinbefore set out is as follows:-

(A) I CONFIRM the registration at Entry No. 2 (which on 2 January 1970 replaced No. 1) in the Land Section without any modification.

(B) I CONFIRM the registration at Entry No. 2 in the Rights Section with the MODIFICATION in column 4 delete "ponies" and after the word "sheep" insert "including their progeny until weaning time".

(C) I CONFIRM the registration at Entry No. 7 in the Rights Section with the MODIFICATION in column 4 delete "or 20 ponies or 20 cattle or any combination of such stock pro rata" and "pony or cow".

(D) I CONFIRM the registration at Entry No. 8 in the Rights Section with the MODIFICATION in column 4 delete "(or cattle and/or horses at rate of 1 to 5 sheep)", and after the word "sheep" insert "including their progeny until weaning time".

(E) I CONFIRM registrations at Entry Nos. 1, 3, 4, 6 and 12 with the MODIFICATION in column 4 after the word "sheep" insert "including their progeny until weaning time".

(F) I CONFIRM the registration at Entry No. 5, with the MODIFICATION delete the following words in column 3 (if there be such words in this column), that is to say "application amended to exclude land objected to by Mrs P F Newton & Mr F J Bevan".

(G) I CONFIRM the registrations at Entry Nos. 9, 10 and 11 without any modification.

Note: paragraphs (D) and (E) are as regards "progeny until weaning time" subject to the liberty to apply → in the preceding paragraph contained.

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 February 1988

A. A. Baden Fuller

Commons Commissioner