COMMONS REGISTRATION ACT 1965

Reference No. 273/D/106-10

In the Matter of Twm Barlwm Common, Risca and Rogerstone

DECISION

These disputes relate to the registration at Entry No. 1 in the land section and to Entries Nos. 1 and 2 in the rights section of Register Unit No. CL.29 in the Register of Common Land maintained by the Gwent County Council and are occasioned by Objection No. 63 made by Llanarth Estate Office and noted in the Register on 26 October 1970.

The course of the hearing

The case came on for hearing on 1 May 1986. At that hearing Mr Robert Clive Webster the claimant at Entry No. 2 in the rights section appeared in person, Mrs Brown (secretary) represented the Mynydd Maen Amalgamated Commoners Association and Mr L H Marshall F.R.I.C.S represented the Trustees of the Llanarth Estate the owners of the unit land. Neither the Registration Authority (the Gwent County Council), who had registered the land as common land without application nor the Islwyn Borough Council, within whose area the land lies, were represented but Mr G A Hill told me he was a countryside warden employed by the Gwent County Council and wished to support the registration "in a private capacity".

Mr Webster, on whom the burden of proof lay, gave evidence which made it clear that he could not himself prove the existence of the rights which he claimed but led me to believe that there was at any rate a possibility that he might, if given an adjournment, be able to call witnesses who could. Mr Marshall did not object to an adjournment but asked leave, although he had at that time no case to answer, to call one of his witnesses, Mr William Saunders, who was 73 years old and in frail health. I gave leave. Mr Saunders gave his evidence and I adjourned the hearing. Before I did so, however, I told Mr Hill that I thought it would be helpful if the Gwent County Council, as Registration Authority and registrants, were officially represented.

The result was that at the adjourned hearing on 15 July 1986 not only were the Gwent County Council represented by Mr M. Davies, solicitor, of their legal department but the Islwyn Borough Council were represented by their chief legal officer, Mr T. Fahm, barrister, and the Llanover Trustees were represented by Mr E H Harris solicitor of Messrs. E Harris & Son of Swansea. I am grateful to those three gentleman for their assistance in this case which took a certain amount of unravelling. On that day I was addressed by Mr Davies. Mr Hill and Mr Marshall gave evidence and Mr Webster, still unrepresented, called Mr C L Webster as a witness and wished to call Mr D H Baldwin but most

unfortunately he was ill so the hearing had to be adjourned again. On 3 October 1986 the parties were represented as before. Mr Baldwin gave evidence, I was addressed by Mr Harris and Mr Fahn and the hearing was closed.

The Unit Land

The unit land consists of about 127 acres and is surmounted by a hill fort which is an ancient monument. It is, I think, almost certainly that "Tumberlow" which is mentioned by Daniel Defoe in his "Tour through England and Wales" published in 1725 as being (together with "Blorench", "Skirridan"and others) as being one of the "horrid mountains" of Monmouthshire.

On three sides the land slopes steeply and is fenced in. To the north east, however it levels off and runs into a ridge known as Mynydd Henllys which is separately registered as CL.28 and finally registered as common land. There is no fence between these two units.

Is this common land?

Whether this land is common land within the definition depends on the answers to these questions:-

(1) Is it subject to rights of common?

(2) If not is it (or any of it) waste land of a manor not subject to rights of common?

Is it subject to rights of common?

Three rights of common were provisionally registered. Of these the registration at Entry no. 1 by Mr Edward David Lewis in respect of Maesmawr Farm and that at Entry no.3 by the Forestry Commission in respect of Darren farm have been withdrawn. That leaves Entry no. 2 made by Marion Maud Watts in respect of Criberth Villa, Risca a holding of 22½ acres.

Mr Robert Clive Webster gave evidence that he was 43 years old and had been farming at Criberth Villa Farm for the last 3½ years. The registrant, Marion Maud Watts, was his mother-in-law. He said that sheep and cattle had been turned out from Criberth Villa onto Twm Barlwm. He had first known this to happen 15 years ago.

Clarence Lloyd Webster engineer, of 60 Trafalgar Road, Risca said he was 72 years old and had been born in the house at Criberth Villa in 1914. His parents, apart from Criberth, farmed 40 acres at Maes Mawr and Gelly Pistyll in Risca which had since been built on. They turned out stock on Twm Barlwm mostly sheep sometimes cattle. They gave up the farm in 1923 when he was 9. A Mr Powell then took over Criberth. In Cross-examination he agreed that the stock had been turned out from the 40 acres at Maes Mawr.

Mr Robert Clive Webster produced part of a deed apparently dating from the middle of the nineteenth century in which the following words occurred (the preceeding words are missing):-

> " and coppice and adjoining thereto and occupied therewith by Thomas Jones the tenant thereof and containing by estimation twenty two acres and thirty perches more or less which said hereditaments and premises are called and known by the name of Cribbath and are bounded by mears and bounds well known and distinguised and are situate within about a quarter of a mile of the canal and railways in the parish of Risca in the said County of Monmouth Together with all edifices ..... gardens orchards lands coppice woods underwoods waters watercourses ways paths passages commons mines minerals advantages and appurtenances whatsoever to the said messuage hereditaments and premises belonging..."

This document is, however, no evidence that there are any rights of common appurtenant to Cribarth over Twm Barlwm. Firstly because such general words as these (implied by law in every conveyance made after 31 December 1881-see Law of Property Act 1924 section 62) do not of themselves prove that any such rights existed but secondly because in this case there are in any case rights of grazing appurtenant to Cribarth over the neighbouring common of Mynydd Henllys the registration of which has become final.

Clearly taken at its very highest this evidence, confined as it is to a period of 9 years ending over 60 years ago and a period of about 15 years after registration could not possibly support a claim that at the time of registration there was a prescriptive right of grazing attached to Criberth Villa. It is therefore not necessary to consider the question of whether Mr Clarence Webster's evidence supports a right attached to Criberth or Maes Mawr.

Mr David Henry Baldwin's evidence was that he was born at Craig-Llwarch Farm Henllys in 1938 and has lived there all his life and took over the farm in 1961. Throughout that time sheep had been turned out from that farm on Mynydd Henllys and have sometimes wandered onto the unit land. He never actually turned out any animals onto the unit land though he sometimes collected them from there when they had strayed. This evidence does not seem to me to take the matter any further.

Accordingly there is in my opinion no evidence to support the claim by Mr Webster to a grazing right over the unit land. It follows that the land is not "subject to rights of common".

Is it "waste land of a manor"?

In order to be "waste land of a manor not subject to rights of common" so as to bring it within the definition of common land in Section 22 of the Commons Registration Act 1965 land must be shown to be "waste land" which formed part of a manor, that is to say was owned by the lord of the manor, at the date of registration - see In re Box Hill Common (1980) 1 Ch 109.

Taking the second part first the whole of the unit land at the date of registration was owned by the trustees of the Llanarth estate. They were registered as owners and no objection has been made to that registration. Through their solicitor Mr Harris, they admitted that part of the land, namely O.S Nos 158 (part) and 5 a total of 23.802 acres,("the Rogerstone land") forms part of the manor of Rogerstone and that they, the trustees, were lords of that manor at the date of registration.

This is consistent with the description in a vesting assent dated 1929 and made by the predecessors in title of the Llanarth Trustees which included the unit land and in which these two parcels but no others have against them the words "Rogerstone", and with a tenancy agreement dated 10 June 1949(to which I shall referlater) whereby the whole of unit land was let by the Llanarth Trustees to William Saunders, the two parcels being clearly marked "manor of Rogerstone"

I am not concerned with what manor the remainder of the unit belonged to. The only land which the owners of the unit land admit lies within a manor of which they are the lords is the Rogerstone land. That is all the evidence on the matter before me.

In his evidence for the Registration Authority Mr Hill told me of the investigations he had made in the National Library of Wales and elsewhere since the first day's hearing but was unable to produce any evidence that any other part of the unit land was waste land of a manor within the above definition.

A certified copy of parts of the tithe map and apportionment for the Parish of Risca dated 1843 was produced to me. On the apportionment schedule a parcel numbered there 196, which more or less corresponds with that part of O.S 158 which lies within the manor of Rogerstone is shown as "common" while parcel no.191, which more or less corresponds with the remainder of the unit land is described as "pasture".

This, however, throws no light on the question whether any part was waste land of a manor in 1968.

Was this "waste land"?

The only question which remains, therefore, is whether the Rogerstone land was "waste land".

The definition of "waste land" which has been accepted by the Courts for this purpose is that given by Watson B in Att-Gen v Hanmer (1858) 27 L.J. Ch.837, 840 ie "open, uncultivated and unoccupied lands parcel of the manor"

There is no doubt that this land was "open" and "uncultivated". The question is whether it was "unoccupied".

There is unchallenged evidence that at least since 1926 this land was always let by the owners to a series of tenants who have been permitted to licence others to graze there and have done so. Mr William Saunders of Pant-Yr-Yr.fa, Henllys gave evidence, which I accept, that he is 73 years old and was born at that farm which he now owns. he told me that the whole of the unit land had always been let by the owners, up to 1930 to William Morgan and then after his death, to Mr Saunders' father who also rented at that time adjoining land from the Tredegar Estate. He used to graze the land himself and collected money from one or two neighbours who he permitted to graze it also. The Tredegar land was taken over by the Forestry Commission some time in the 1930's but his father continued to rent the unit land until he died in 1948. In 1949 Mr Saunders was himself granted a written tenancy agreement of this land by reference to a plan which is exactly co-extensive with the register plan of CL.29. He continued to graze the land himself and licenced 3 others to do so regularly collecting money from them. He gave their names as Davies of Cwm Byrr, Owen of Durren and Edward Lewis of Maes Mawr. it is interesting to note that of these only Edward Lewis registered grazing rights over this unit and that he withdrew his claim, no doubt having been advised that he could not claim common rights in respect of grazing for which he had paid. Apart from Mr Saunders and his licensees no one turned out sheep on the unit land. Since the land was open to Mynydd Henllys some sheep turned out on that land did sometimes wander onto the unit land especially at times when Mr Saunders and his licencees had no stock on it. It was not until after registration that Mrs Watt started turning out sheep from Criberth Villa and, when she did so, Edward Lewis drove them back.

Mr Saunders' evidence was corroborated by documents produced by Mr Marshall. These included extracts from rent rolls which showed that in 1926 William Morgan paid rent for "Twyn Barlwm" as did T.J. Saunders in 1940, his executors in 1949 and William Saunders from 1965 to 1986. He also produced the counterpart of an agreement to let "the farm" known as Twm Barlwm from 25 March 1950 from year to year. The agreement is dated 10 June 1949 and containes most of usual clauses of an agricultural tenancy except that the covenant against assigning or subletting or letting grasskeep is struck out.

Mr Marshall at first argued that this was "let land" and so could not be "common land". That, I think, is putting it too high. As Mr Fahm correctly pointed out, the mere fact that land is let does not stop it from being common land. If, for example, it was subject to common rights letting it would not affect those rights.

What I have to decide, however, is whether this land has been shown to be "unoccupied".

In my opinion the fact that it has been let is a relevant consideration but is not conclusive. A tenancy merely gives a right to occupy. If a tenant never goes to the land he has taken it may well remain unoccupied. If he does make use of it the question whether the land is "occupied" is a question of fact. As Mr Harris correctly points out at least in this context the mere fact that land is not fully fenced cannot be conclusive that it is unoccupied for if all land that is "open" is "unoccupied" no meaning can be given to the word "open" in Watson B's definition.

In my view on the facts I have found in this case the land cannot be said to be"unoccupied" and so cannot be waste land of a manor. It is therefore not common land.

Order under section 93 of the Law of Property Act 1925

It was also argued on behalf of the Registration Authority that the fact that the Llanarth Trustees did not object to an application made on behalf of the commoners of adjoining land for an order under section 193 of the Law of Property Act 1925 imposing restrictions on access to land which included the unit land amounted to an admission that the unit land was common land. An order under that section can only be made if the land was subject to rights of common on 1 January 1926. I do not regard this consent as being such an admission. The order applied to thousands of acres of mountain land part of which was owned by the Trustees and as Mr Marshall put it it was obviously sensible to have the order over the whole of the mountains.

Even if I had regarded it as an admission which I should admit as evidence of the land being common land I should, for the reasons given above, have rejected that evidence.

For these reasons I refuse to confirm the registration of this land as common land or any of the registrations in the rights section.

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 15th day of December 1986

Peter Langdon-Davies

Chief Commons Commissioner