COMMONS REGISTRATION ACT 1965

Reference No.19/D/11

In the Matter of Ewell Minnis and Scotland Common, Temple Ewell with River, Kent (No.1).

DECISION

This dispute relates to the registration at Entry No.1 in the Land section of Register Unit No.CL 33 in the Register of Common Land maintained by the former Kent County Council and is occasioned by Objection No.8 made by Miss J.M.Loring and Mrs C.M.R.Brown, and noted in the Register on 11th September 1969.

I held a hearing for the purpose of inquiring into the dispute at Canterbury on 16th November 1972 and at Dover on 20th November 1975. The hearing was attended by Mr Ian Romer and Mr T.J.Forbes, of counsel, on behalf of the Temple Ewell with River Parish Council, the applicant for the registration, and by Mr N.Hague, of counsel, on behalf of the Objectors.

The Parish Council's case was that the land in question fell within the definition of "common land" in section 22(1) of the Commons Registration Act 1965 by being subject to the right of common registered at Entry No.1 in the Rights section of the Register Unit. This was a right not attached to any land "(a) to graze 50 oxen and 200 sheep; and (b) a right of estovers, "being a right to cut wood and pea sticks, grass and litter over the whole "of the land comprised in this register unit", registered on the application of the Parish Council "as trustees for parishioners of the Parish of Temple "Ewell with River who are owners of the right".

The documentary evidence relating to the land comprised in the Register Unit begins with an entry in the court roll of the court baron of John Angell, esquire, lord of the manor of Temple Ewell, held on 15th December 1763. The homage presented twelve named persons for turning stock upon Ewell Minnis without having a right to do so "with damage resulting to the Tenants".

Apart from some references in local histories published in 1800 and 1829, the next relevant document is the tithe map of 1842 and the apportionment annexed to it. Both Ewell Minnis and Scotland Common (then known as Cotland Minnis) were stated to be in the ownership of Angell Benedict John Angell, Esquire, as lord of the manor and in the occupation of "Parishioners", and no tithe rent-charge was apportioned to either parcel of land. The area of Cotland Minnis was stated to be 17a.0r.37p. and that of Ewell Minnis to be 58a.1r.7p.

By 1895 Mr Angell had been succeeded as lord of the manor by Mr T.W.Watson, in whose family the lordship of the manor has since descended. A dispute having arisen as to the use of a path across Ewell Minnis, Mr Watson wrote to the Chairman of the Parish Council on 16th February 1895 in the following terms:-

"..... I have no desire to hinder or even 'deny the right' of way "to the Minnis for parishioners of Ewell - What I object to is the "use of it by Alkham and other people as a Public right of way and "in upholding that position I hope to have and think I ought to "have the Help and Co-operation of the Council, as also in maintaining "for the Parishioners of Ewell their rights of Commonage - such as they "are - which at present are enjoyed by Alkham and the Gipsies under "favour of Alkham. The only exception being Mr.Higgs who draws much "valuable Litter with my entire goodwill provided other parishioners "do not want it."

From that time onwards the Parish Council has endeavoured to protect what it believed to be the rights of the parishioners over Ewell Minnis. Thus, on 20th May 1901 a meeting was held to consider the turning of horses onto the Minnis by gypsies, "thereby taking the grazing rights of the "Parishioners".

During World War II Ewell Minnis was requisitioned and put under the plough. By this time the lordship of the manor had passed to Miss Madeline Watson. Miss Watson did not claim any compensation for the requisitioning, but the Parish Council engaged in correspondence with the Kent War Agricultural Executive Committee regarding the release of the land. In a letter of 6th September 1945 the Clerk of the Parish Council stated that he had been instructed to point out that "Ewell Minnis belongs to the general public" and to ask for it to be released as soon as possible. On 24th January 1946 the Clerk wrote a letter in which he stated:-

"I am wondering whether in view of the land being common land some "payment, even a nominal rent, should not be paid to the Parish Council".

In a letter dated 12th April 1946 the Clerk stated that he had been asked to point out that it was only the people of the village of Temple Ewell who previously exercised grazing rights and that the Parish Council exercised a measure of control over the use of the land as a caravan site.

Miss Watson died while Ewell Minnis was under requisition, and on 1st March 1948 the Clerk of the Parish Council wrote a letter to the solicitors acting for her personal representatives in which he stated:-

"My Council have, for some time, been in correspondence with the "Agricultural Committee as to compensation for the use of the land by "the Committee, in order to ensure that the Minnis reverts, as soon as "may be, to common land for use by the public".

To this the solicitors replied that it was intended to be put down to grass on the determination of the requisitioning, so that the graziers, whom they defined as the parishioners of Temple Ewell, should have the benefit of good pasture land.

Following upon Miss Watson's death, the Temple Ewell Estate was put up for sale by auction on 19th September 1948. Before the auction the Clerk of

the Parish Council sent to the auctioneers a letter in which he said:-

> "The Parish Council wish it to be announced at the sale that the "ownership of the Minnis comprising common land of 7½ acres "(O.S.Nos.13, 14 and 7, Temple Ewell Parish) mentioned in the "Conditions of Sale of the late Miss Watson's estate is in dispute "by the Temple Ewell Parish Council".

It is apparent from the terms of the letter that it referred to both Ewell Minnis and what has now become known as Scotland Common. Before the sale there had been some correspondence between the Parish Council and the solicitors acting for the personal representatives of Miss Watson, in which it was stated that Ewell Minnis had been in the possession of Miss Watson and her predecessors in title as land appurtenant to the manor and had been grazed by the parishioners of Temple Ewell, but it is not apparent why Miss Watson's ownership was being disputed by the Parish Council. However, the land was withdrawn from the sale.

On 4th June 1956 Miss Loring and Mrs M.D.Vesey, the then successors in title of Miss Watson, entered into an agreement with the Parish Council. In this document it was recited that the Minnis formed part of the former manorial waste of the manor of Temple Ewell and that disputes had arisen as to the rights of the parishioners of Temple Ewell as former copyholders of the manor over the Minnis and that it had been agreed by the parties to enter into the agreement for the purpose of putting an end to such doubts as might exist as to any such rights. It was then agreed that any rents during the currency of the agreement payable in respect of the Minnis or any part or parts of it or any other profit or income to be derived therefrom should be divided equally between the freeholders and the Parish Council. The Council acknowledged that the Minnis was the absolute property of the freeholders and it was agreed that no other rights existed or should be claimed over it by the Parish Council or any person or corporation claiming through under or in trust for it. The agreement was to be binding on the freeholders and the survivor of them only and not on their successors in title. Finally, it was agreed that nothing in the agreement should in any way invalidate the existing rights of the commoners.

This agreement is a somewhat remarkable document. It is based upon the premise that the parishioners had some rights over the Minnis as former copyholders of the manor. This was a legal impossibility, for it is long-settled law that parishioners or inhabitants cannot as such have any right of common: see Gateward's Case (1607), 6 Co.Rep. 59b. It is, however, possible, and indeed probable, that some parishioners were entitled to rights of common as the successors in title of former copyholders, whose rights would have been preserved when their copyholds were enfranchised. Any such rights were expressly saved by the agreement, and even if there had been no such express saving, an agreement between the freeholders and the Parish Council for the division of any rents and profits accruing from the land could not have had any adverse effect upon persons entitled to rights of common over it.

This agreement was followed by one even more remarkable. On 27th July 1962

the Parish Council and Mr A.F.A.Burnett, acting as agent for the freeholders, entered into an agreement with Mr Burnett and Mr L.G.Dodd, whereby the Council, with the consent of the freeholders, licensed and authorised Mr Burnett and Mr Dodd to enter upon and cultivate Ewell Minnis (but not Scotland Common) upon payment of £1 per acre per annum to be paid to the Council and shared between the Council and the freeholders in accordance with the terms of the 1951 agreement. It seems somewhat strange that the licence was granted by the Council rather than by the freeholders, but what is really remarkable is a recital that the Council as representing the parishioners of the Parish of Temple Ewell was entitled to a right of common of pasture upon Ewell Minnis. If one assumes, as is likely to have been the case, that some of the parishioners were entitled to rights of common as the successors in title of former copyholders, that did not make the Parish Council entitled to any right as representing those parishioners. The parishioners in question were entitled to their rights as against the freeholders, and the Parish Council had no legal interest of any kind in the matter. It would have been open to any person entitled to a right of common, whether a parishioner or not, to complain that the licence to Mr Burnett and Mr Dodd was an infringement of his right.

It has been stated that the agreement of 1962 was supplemented by an oral agreement that Mr Burnett and Mr Dodd would leave a wide piece of the Minnis all around the ploughed area where the rights of the commoners could be exercised and where people could move freely. This was done, and the Clerk of the Parish Council received the licence fees, paying over half to the freeholders.

On 21st September 1967 the Parish Council applied for the registration of both Ewell Minnis and Scotland Common as common land. Having taken the advice of the National Association of Parish Councils, the Parish Council then entered into another remarkable transaction. By a deed made 4th June 1968 between 97 residents of Temple Ewell with River, collectively described as "The Assenting Commoners", and the Parish Council it was recited that the Council in dealing with the freeholders had for many years past acted as the representatives of the persons in the parish entitled to rights of common over Ewell Minnis and Scotland Common; that the Assenting Commoners claimed to be entitled to rights of common enabling them to graze animals and to cut firewood and pea-sticks and grass and bracken for litter for their private use; and that the Assenting Commoners were desirous of transferring their rights of common to the Council with the intent that, firstly, the Council should thereupon as a commoner apply for the registration of its rights under the Act of 1965 and, secondly, should for ever hold and administer the rights thereby transferred in trust for the Assenting Commoners and for those persons who would in due course have succeeded to the rights of the Assenting Commoners if the deed had not been executed and the rights had been registered under the Act of 1965. The operative part of the deed stated that the Assenting Commoners thereby conveyed to the Council their rights of common to be held on trust.

On 21st June 1968 the Parish Council applied for the registration at Entry No.1 in the Rights section of the Register Unit. No other person applied for the registration of any rights over the land in question, so that

by virtue of section 1(2)(b) of the Act of 1965 no right is exercisable over the land by any person other than the Parish Council.

I mention the deed of 4th July 1968 only as a matter of history, for Mr Romer, in my view very properly, did not contend that it had any legal effect. His contention was that the Parish Council previously held the registered rights and still holds those rights as trustees for the parishioners.

This is a solution of this dispute which would be possible as a matter of law. The general principle is that a lawful origin ought, if it is reasonably possible, to be presumed for open and uninterrupted enjoyment as of right from time immemorial: see Goodman v. Mayor of Saltash (1882), 7 App.Cas. 633. It would have been legally possible for the rights claimed to have been granted to trustees for the parishioners and to have become vested in the churchwardens and overseers by virtue of section 17 of the Vestries Act 1819 and then in the Parish Council by virtue of section 6(1)(c)(iii) of the Local Government Act 1894.

Such a presumption could, however, only be justified as an explanation of a state of affairs which would otherwise be inexplicable. In my view, one is not driven back upon such a presumption in this case. Indeed, there seems to be no scope for it, since it is clear from the evidence that well within the period of legal memory there was no question of parishioners, as such, having any rights of common over this land. We know that in 1763 the unlawful turning out of stock was complained of because it resulted in damage to the tenants of the manor and not to the parishioners. It was not until Mr Watson's letter of 16th February 1895 that there was any mention of the parishioners having any rights. As late as 4th June 1956 the rights of the parishioners were being described as their rights as former copyholders of the manor, and the abortive deed of 4th June 1968 was made on the footing that each of the 97 Assenting Commoners was entitled to separate rights of common and not that they, together with any other inhabitants of the parish, were collectively the cestuis que trust of a trust of which the Parish Council was the trustee.

On the balance of probabilities it seems to me far more likely that a large number of owners of former copyhold tenements were entitled to rights of common appurtenant to those tenements than that at sometime after 1763 all the rights of common appurtenant to those tenements were conveyed to trustees for the benefit of the parishioners at large. Subject to the possibility that some of the rights might turn out to have been abandoned, the extensive evidence of user leaves me in little doubt that some or all of the former rights continued to exist after the passing of the Commons Registration Act 1965 and it seems most unfortunate that the possibility of investigating those rights should have been lost by the misguided decision not to register them. I can only deal with what has been registered, and for the reasons which I have stated I am not satisfied that the Parish Council is entitled to the rights which it has registered.

Although Mr Romer relied on the existence of those rights to bring the land comprised in the Register Unit within the first limb of the definition

of "common land" in section 22(1) of the Act of 1965, he relied in the alternative upon the second limb of the definition and invited me to confirm the registration on the ground that the land is waste land of a manor not subject to rights of common. On the evidence, I have no doubt that the whole of the land was at one time waste land of the manor. Mr Hague, while not actually conceding the point, did not seriously argue that Scotland Common is not still waste land of the manor. On the evidence, I am quite satisfied that it is. The position with Ewell Minnis is, however, different. It was ploughed up while under requisition during World War II, and since 1956 the Parish Council and the freeholders have been sharing the rents and profits between themselves. Mr Romer relied on the fact that an unploughed strip has been left around the Minnis. The agreements of 1956 and 1962 relating to the farming of the land do not differentiate between what is to be ploughed and what is to be left unploughed. In my view, the whole area can now properly be classified as farmland and has long since ceased to be manorial waste.

For these reasons I confirm the registration with the following modification :- namely the exclusion of Ewell Minnis.

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 13th day of January 1976

Chief Commons Commissioner