COMMONS REGISTRATION ACT 1965 Reference No 220/D/69

In the Matter of the Salt Marsh,
Thurnham, Lancaster City,
Lancashire

DECISION

This dispute relates to the registration at Entry No 1 in the Rights Section of Register Unit No CL. 135 in the Register of Common Land maintained by the Lancashire County Council and is occasioned by Objection No 408 made by Mr Richard Galliene Swainson and noted in the Register on 20 July 1972.

I held a hearing for the purpose of inquiring into the dispute at Lancaster on 23 November 1976. At this hearing Mr Swainson was represented by Mr M Gillibrand, solicitor of Oglethorpe Sturton & Gillibrand, Solicitors of Lancaster. He asked for an adjournment and produced an agreeing letter dated 22 November 1976 and written by Oakley, Charnley & Thurnhill, Solicitors of Preston on behlaf of Mr A Armer on whose application the said Entry No 1 in the Rights Section was made.

I held the adjourned hearing on 3 May 1977. At this hearing Mr Swainson was represented by Mr Gillibrand as before, and Mr Armer was represented by Mr J M May then a clerk and now a solicitor with Oakley Charnley & Thurnhill.

The land ("the Unit Land") comprised in this Register Unit is in two pieces. One ("the Luneside Piece") is a strip on the north bounded by and open to the River Lune and on the south bounded by the fence along the north side of the track formerly the railway (now disused) between Lancaster via Conder Green to Glasson and now a footpath; this strip is about ¼ a mile long and extends from a point (its east end) not far from the bridge over the River Conder (formerly used by the railway, now used as a footbridge) to a point (its west end) not far from the quay at Glasson fronting on the River Lune. The other piece ("the Roadside Piece") is an irregularly shaped piece on the north bounded for about 200 or 250 yards by the fence along the south side of the said track, on the east bounded by and open to the River Conder from the said footpath bridge to the road bridge which carries the A588, and on the west and south bounded by and open to the public road from the said road bridge to Glasson.

The right registered in the Rights Section is attached to Thornbank (as shown in the supplemental Register map) and is (1) to graze 200 sheep including 60 ewes, 110 lambs and 30 hogs, and (2) to cut and take turf. In the Ownership Section Mr Swainson was on 6 March 1970 registered as owner as administrator of Mr W A Dalton deceased. The Land Section and Ownership Section Entries being undisputed have become final. The grounds of Objection to the Rights Section Entry are:- "The right of Mr Armer is not admitted, but if in fact it does exist it would not extend to more than 13 sheep".

For the purpose of exposition it is convenient to divide the attached land (ie Thornbank as shown on the supplemental Register map) into two parts: one part ("the Two Acre Part") being land containing approximately two acres and being the west part of the northwesterly of the two pieces which according to the supplemental Register map form the attached land; and the other part ("the Brickworks part") being the remainder of such northwesterly piece and the whole of the southeasterly piece which together form the attached land. In Mr Armer's application (form 9) the attached land is described as "Stock Rearing farm extending to an area of 9 acres".

At the hearing oral evidence was given: (1) by Mr Armer who is 64 years of age, who was born and bred in Thurnham (a village about one mile from the Unit Land), who worked for 2 years from 1927 at Brows Farm (a short distance southwest of the Unit Land) and who has lived at Thornbank (the dwelling house) ever since 1948; (2) by Mr D M Brownsword who is senior partner of Procter Birkbeck Batty, Chartered Surveyors of Lancaster, who has practised in the area since 1960 and whose firm has managed the Dalton Settled Estates for some years (he having conducted their affairs personally since 1973); and (3) by Mr R G Swainson.

In the course of their evidence documents were produced: (a) by Mr Armer (i) a conveyance dated 20 December 1954 by Mr G Dallas to him (Mr Armer), and (ii) an abstract dated 1954 of Mr Dallas' title, commencing with a conveyance dated 9 July 1924 of an undivided fifth share and including an examined copy of a plan endorsed on a conveyance of 27 February 1863 between Sir J G D Fitzgerald and others and Mr Bannerman (such plan being referred to in the 1924 conveyance); and (b) by Mr Swainson (i) a settlement dated 15 April 1899 made by Mr W H Dalton, (ii) a vesting deed dated 1 December 1927 made in favour of Mr T H Dalton (he died 19 March 1937), and (iii) a vesting assent dated 22 November 1939 in favour of Mr W A Dalton (he died 29 March 1965 and Mr Swainson is his personal representative limited to settled land).

As to ownership, Mr Armer said that in 1951 he bought the Two Acre Part off the Dalton Estate. On the 1927 vesting deed there is a memorandum of a conveyance dated 16 May 1951 of part of Brows Farm to Mr Armer. Although Mr Armer did not produced this conveyance (I suppose he no longer has it having sold the Two Acre Part and part of the Brickfield Part in 1973 to Mr Halhead); it was not disputed that Mr Armer under it became the owner of the Two Acre Part, and accordingly I proceed on the basis that this 1951 conveyance was made. My findings as to ownership (for the most part based on the documents produced) are as follows:- The Unit Land has for many years been part of the Dalton Settled Estates (Mr Brownsword said they are about 2000 acres); from 1926 it was vested in Mr J A Dalton until his death in 1937; after him it was vested in Mr W A Dalton until his death in 1965, and after him in Mr Swainson as his administrator. The Two Acre Part was part of the Dalton Settled Estates (being part of Brows Farm) until the 1951 conveyance when Mr Armer became the owner. The Brickfield Part under a 1924 conveyance was vested in various persons all of whom were named either Robinson or Fisher as trustees for themselves in undivided shares until a conveyance dated 16 March 1944; after and under this conveyance it was vested in Messrs J, T K, and R T Pye as trustees for themselves as partners until a conveyance dated 25 August 1946; under and after this conveyance it was vested in Mr Robert Gardner until a conveyance dated 23 March 1950; under and after this conveyance it was vested in Mr G Dallas until the said 1954 conveyance to Mr Armer.

Mr Armer in the course of his evidence said (in effect):- In 1948 the Two Acre Part and Brickfield Part were tenanted by Mr John Gardner (he thought no relation of Mr Robert Gardner the owner). In 1951 he (Mr Armer), having become the owner of the Two Acre Part under the said 1951 conveyance, agreed with Mr Dallas (verbally) to become the tenant of Brickfield Part in succession to Mr John Gardner. As the result of a 1954 conveyance he became owner and occupier of both parts. From 1951 to 1973 he had grazed the Unit Land with 60 lambing ewes and their followers (lambs being clearly enough double the number of ewes), in winter time he had grazed 40 to 50 hogs (more correctly hoggets) but not all these animals altogether. He was cross-examined in some detail.

Mr Brownsword said (in effect:- Since 1973 he had driven along the road by the Unit Land once a fortnight or two or three times a week to inspect properties (part of the Estates) down the road: he had not seen any animals on the Unit Land. The capacity of the byland (the 9 acres of attached land) in his opinion depended to some extent on the breed of sheep; he would not expect a greater density than $1\frac{1}{2}$ to the acre of half bred ewes; 14 or 15 animals for the 9 acres of the attached land would be his calculation, and so in proportion for any less area down to about 5 acres.

Feeling doubtful whether it would be contended that because Mr Brownsword having not seen any animals on the Unit Land, I should treat the evidence of Mr Armer about grazing as unreliable, Mr Armer was recalled. He agreed that Mr Brownsword may not have seen animals, but he (Mr Armer) had never meant to suggest that he had 200 sheep on the Unit Land all the time; there were times when he had had as many as 211 sheep (ewes and followers) on the Unit Land.

Mr Swainson in the course of his evidence drew attention to the various descriptions of Brows Farm in the 1899 settlement, the 1927 and 1930 assent and the 1939 assent, but he did not claim to have any personal knowledge of the land.

On the day after the hearing I inspected the Unit Land, for the most part by walking the length of the disused railway track by which it is bounded. When I first saw it it was high tide, and all the Unit Land except very narrow strips by the railway track fences was covered with water; after a few hours, the water receded, and grass land (the Luneside Piece was being grazed by sheep) appeared.

The claim made by Mr Kay on behalf of Mr Armer was that I should presume that he had right of grazing the Unit Land under a grant now lost. Although for a claim under Section 1 of the Prescription Act 1832, 30 years actual enjoyment of any right of common or other profit or benefit is requisite, for presumed lost grant 20 years enjoyment as of right is enough, see Tehidy v Norman 1971 2 B 528.

Mr Gillibrand contended that in respect of the Two Acre Part, there could be no such presumed lost grant because up to 16 May 1951 such part and the Unit Land were in common ownership and the registration (made on an application made by Mr Armer dated 25 July 1968) was made on 19 August 1969, less than 20 years after 1951. Section 16 of the 1965 Act provides that for the purposes of the Prescription Act 1832 an objection should be deemed to be an action within the meaning of such Act, so that the 30 year period of the 1832 Act runs back from the date of the objection (in this case 14 July 1972). Although the section says nothing about the 20 year period recognised in Tehidy v Norman supra, I conclude that I should take this also back from the date of the objection. Accordingly I reject Mr Gillibrand's contention based on the date of registration.

I record that even if I had accepted the contention (it relates only to the Two Acre Part), I would find that any before 1951 grazing by Mr John Gardner should be referred to the Brickfield Part, because in relation to the Unit Land this, of all the land from which it was said Mr John Gardner might have taken animals on to the Unit Land, is (as appeared obvious on my inspection) the most convenient; the Roadside Piece is next to the Brickfield Part and the Luneside Piece is only easily approachable by an occupation track which passes under a bridge which formerly carried the railway and which is situate at the northwest corner of the Roadside Piece.

Mr Brownsword in the course of his evidence said:- "By not seeing animals I mean they have never run across the path of my car...I am not disputing that he (Mr Armer) had sheep on theland. I have not since 1962 seen any sheep grazing on the Unit Land. I do not suggest there were no sheep...it is coarse grass that may well have been grazed. You can tell whether grass has been grazed by getting down close to and looking at it, this I never did. I have never got out of my car to examine whether there has been grazing..." On my inspection I concluded that although a person driving a motor car along the road might well notice sheep grazing on the Roadside Piece, particularly if they were near to or strayed onto the road, he might easily not see sheep on the Luneside Piece; from the road sheep grazing on the Luneside Piece would not have been easily visible because the railway embankment is in between. The Luneside Piece would be more convenient to graze because animals there with a small fence across the above-mentioned occupation road (where it goes under the bridge) could be prevented from going on to the Roadside Piece; I should expect anybody grazing sheep to find it more convenient (particularly if motor traffic along the road was to be expected) to put sheep on the Luneside Piece in preference to the Roadside Piece, because he would thus reduce the risk of being troubled by sheep straying either towar Glasson or on to the A594 road. My conclusion is that no part of the evidence of Mr Brownsword provides any reason for my doubting the reliability of the evidence of Mr Armer relating to the grazing described by him and I record for the benefit of Mr Brownsword, that this conclusion in no way reflects on him personally. I accept the evidence of Mr Armer and I find that the Unit Land was grazed as he described.

In my opinion when he took over from Mr Dallas in 1951, there was as Mr Armer said a conversation between them during which both understood that sheep would be goind onto the Unit Land from the land owned by Mr Dallas of which Mr Armer was to become the tenant, so that he could and would graze accordingly. Mr Armer's failure to inform his solicitor when in 1954 he purchased the land which he then tenanted that he expected to get a right of grazing over the Unit Land is I think of no decisive significance. Although at one point, in his evidence, Mr Armer spoke of having grazed the Unit Land from 1954 (the date of his purchase) to 1973, from the whole tenor of his evidence (particularly his references to grazing he saw done (before he became a tenant) by Mr John Gardner and his belief as to what had been done by the Robinsons and Fishers, I conclude that to the personal knowledge of Mr Armer the Unit Land was grazed continuously as he described from 1951 to 1973 (when he sold the Two Acre Part and all except about 1.88 acres of the Brickfield Part to Mr Halhead) and since 1973 to a lesser extent.

In view of the above conclusion the grazing done by Mr John Gardner may not be significant. However in case my conclusion is mistaken, I record that I accept Mr Armer's evidence that he saw such grazing on the Unit Land. Whether or not

Mr Gardner was in occupation of Brows Farm and of Websters Farm or whether or not he grazed other marshes in addition to the Unit Land, the Brickfield Part is in relation to the Unit Land the most convenient; I record that I consider any grazing he did on the Unit Land can properly be regarded as done by virtue of his occupation of the Brickfield Part.

Having reached the above conclusions as to fact, in accordance with the law set out in Tehidy v Norman supra, I presume that Mr Swainson or his predecessors in tit did make a grant of a grazing right of some kind to Mr Armer and that this grant has been lost.

Having made this presumption, I now consider the question: what is the nature of the grazing right which I ought to presume has been granted.

Mr Gillibrand contended (in effect) that any right must be limited in some way and that the only limitation possible here was in accordance with the rules of levancy and couchancy. That a right of common must be limited in some way is stated generally in paragraph 559 of Halsbury Laws of England Volumn 6 (4th edition 1974) where the following words from Cook on Inclosures (4th edition 1864) at page 23 are quoted:- "Any user of common of pasture claimed as appurtenant not limited in number and not capable of being limited by levancy and couchancy is not the exercise of a right, but the doing of something which cannot possibly be other than a wrong". In Morley v Clifford (1882) 20 ChD 753, Fry J quoting from and following Rolles Abridgement (1668) said: "Therefore if a person claims common by prescription on the land of another for all manner of commonable cattle as belonging to a tenement that is void prescription, because he does not say it is for cattle levant and couchant". In my opinion, the above quoted paragraph of Halsbury must be read in conjunction with paragraph 570 dealing with the rights not strictly rights of common, eg a right of sole herbage, a right under which the owner may by the mouths of his animals take all the grass. Such a right although not strictly a right of common apart from the 1965 Act, is for the purposes of such Act included, see Section 22(1).

As regards a right of sole herbage being established by prescription:- In Hoskins v Robinson (1671) 2 Saunders 323, it was argued: "True it is a man who claims only common appurtenant to his land, ought to say for his cattle levant and couchant, or otherwise the prescription is not good; because in that case he claims but part of the herbage, and the rest the Lord is to have, therefore the commoner ought to say for his cattle levant and couchant for that is the standard or meteward of the profit he is to have; that is to say grass for all his cattle levant and couchant on his land and no others...But it is otherwise here, for the copyholders here claim all the herbage and wholly exclude the Lord; therefore it is not material whether all the grass is depastured by cattle levant and couchant, or any others, or there is no mischief or wrong to the lord in one case than the other. And he (Mr Saunders for the plaintiff) said further it will be absurd to claim all the herbage and yet limit it to be taken by the mouths of cattle levant only; for perhaps in some fertile years which are levant and couchant will not be sufficient to depasture all the grass, and then the rest would be wasted and spoiled, for the lord is to have no part of it; and therefore he concluded it is not necessarily to say for cattle levant and couchant, but was better as it was now". The report shows that the Court acceded to this argument, and in Welcome v Upton (1840) 6M & W536 it was said that the case establishes that a party may prescribe for a sole herbage, see page 543. See also the detailed discussion of these cases in Williams 1877 Lectures on Commons (1880) at pages 21 et seq.

I can see no relevant difference between a prescription such as was treated valid in the cases above cited and a presumption of a lost modern grant such as was allowed in Tehidy v Norman supra. Cook in his 1864 book gives no authority for the words above quoted from it, and later treats Hoskins v Robinson and Welcome v Upton in much the same way as Williams supra. In my opinion, the words "could not possibly be anything else but a wrong" used by Cook, if lifted out of their context are an exagerration, and are not without some qualification applicable to all rights of common within the meaning of the 1965 Act. I conclude therefore that there is no rule of law requiring me to reject Mr Armer's claim for a number of sheep in excess for the levancy and couchancy number. The only question is I think whether on the evidence before me I should presume grant of a right of common appurtenant to the Brickfield Part with (or without) the Two Acre Part for sheep levant and couchant on such Part(s), or should presume a grant for a right of sole herbage.

Mr Brownsword (as I understood him) said in effect that the levancy and couchancy number was 14 or 15 animals in respect of 9 acres and put the number of sheep which could be grazed on the Unit Land at 20 or 30 at most; he estimated the Unit Land as containing about 33 acres. Mr Armer did not answer questions apparently directed to obtaining his views as to the levancy and couchancy number, not because I think he was trying to be unhelpful, but because having to his knowledge of the land, the question appeared to him incomprehensible; with his lack of comprehension I sympathise because the idea of sheep grazed on the Unit Land being exclusively fed from the produce of 9 acres during the winter would I think in the circumstances of this case be beyond the comprehension of nearly everyone who was neither a lawyer nor a surveyor. As regards the capacity of the Unit Land itself Mr Armer was positive that it would take more than 20 or 30 sheep, if these figures were taken (as I think Mr Brownsword intended them to be) exclusive of followers. It is not necessary for me to express an opinion between these alternative calculations, because I am clear that the grazing capacity of the Unit Land as a sole herbage is much higher than the grazing capacity which would be allowable if limited to sheep levant and couchant on the Brickfield Part and the Two Acre Part.

There was no evidence that Mr Swainson or any of his predecessors in title or his or their tenants had ever grazed the Unit Land in any way. Mr Armer had never seen anyone else graze there although he mentioned that occasionally at low tide cattle strayed over the River Lune. During my inspection it seemed to be that the relative situation of the Unit Land in relation to any of the lands nearby unlikely that there ever was any grazing on it otherwise than from Brickfield Part and Two Acre Part. Mr Swainson drew my attention to the description of Brows Farm in the deeds he produced: the reference to this farm in the 1889 settlement is consistent with the Unit Land or at least the west part of it having been then considered to be part of the farm; but the wording is not clear; as evidence of what was being done from Brows Farm I regard the settlement as inconclusive. The other deeds produced by Mr Swainson in my opinion do not support the view that the Unit Land when they were made was part of Brows Farm or was being grazed from Brows Farm. These deeds provide some evidence (apparently the Ownership Section registration was applied for on this basis) that Mr Swainson and his predecessors had been successive owners of the Unit Land. Mr Armer said there had been no such grazing when he was employed at Brows Farm; in my opinion at all relevant times the Unit Land has been solely grazed by Mr Armer's predecessors in title the same way as it has been solely grazed by him during his ownership.

The circumstances that the right registered by Mr Armer is expressed to be "attached" to his stock rearing farm does not I think oblige me to treat him as claiming only a right "appurtenant" to such land within the technical meaning of the word "appurtenant". In my opinion, the words "attached" as used in the printed part of the Rights Section Register is sufficiently satisfied if the right is at the time of the registration reputed to belong to and to be exercisable by the owner of the attached land.

Summing up the above considerations, having regard to the evidence and to what I saw on my inspection, I conclude that the above quoted argument put forward by Mr Saunders more than 300 years ago in Hoskins v Robinson and then accepted by the Court, is applicable to this case; if any grant I presume to have been made is limited to sheep levant and couchant, some of the grass would be "wasted and spoiled"; there has been "no mischief" to Mr Swainson and his predecessors in title by Mr Armer taking all the grass. For these reasons my decision is that a right of sole herbage has been established and the objection so far as it is dependent on the possible application of the rules relating to levancy and couchancy fails.

Mr Gillibrand contended that because Two Acre Part and about 5 acres of the Brickfield Part were in 1973 sold by Mr Armer to Halhead, that I must presume that on such sale any rights Mr Armer had are apportioned and that accordingly whatever Mr Armer's rights were when he made the registration, the Register should now be altered so as to accord with his rights at the date of the hearing; he referred me to Halsbury supra paragraph 563.

Section 30 of the 1965 Act and paragraph 29 of the Commons Registration (General) Regulations 1966, as amended in 1968, expressly provide for the amendment of the Register should it be necessary to apportion a right of common. The case cited the said paragraph 563, namely White v Taylor (No 2) 1969 1 Ch 160 only establishes that a right is to be apportioned "in the absence of any peculiar circumstances". In this case, the land sold by Mr Armer is now being as a caravan park might be a "peculiar circumstance". The contention cannot benefit Mr Swainson (except possibly adventitiously because he and Mr Halhead may be agreeable), because no severance of the right of Mr Armer on his sale to Mr Halhead could diminish the right. The contention is not raised in the grounds of objection nor was any advance notice of it given either to Mr Armer or to Mr Halhead. Whether or not I can modify a registration to give effect to events which have happened after it was made, I refuse to do so in this case.

By section 15 of the 1965 Act where a right of common consists of a right not limited by number to graze animals (the right claimed by Mr Armer is such a right), it must for the purposes of registration be treated as exercisable in relation to no more than a definite number. The Act gives no guidance as to how the number is to be determined, although in note 7 on form 9 (application for registration of a right of common) appended to the said 1966 Regulations, it is said that an applicant ought to apply for the number of animals "which he believes himself entitled to". It is difficult to give effect to this section and to this note in the case of a sole herbage, because an applicant entitled to a sole herbage can graze as many animals as he pleases. The wording of this registration: "200 sheep including 60 ewes, 110 lambs and 30 hogs" is lacking in clarity; because as Mr Armer said he never contemplated that the lambs would be other than followers of the ewes or that the hogs would be grazed with the ewes; further the registration appears to contemplate a grazing which in relation to the Unit Land would be unrealistic; Mr Kay on behalf of Mr Armer at the conclusion of the hearing said that the words "60 sheep and their followers" would be agreeable. In accordance with my decision set out above that Mr Swainson is not concerned with the grazing, and being of the opinion that the wording proposed by Mr Kay is clearer and more realistic, I shall modify the registration accordingly.

As to "cutting and taking turf", Mr Armer in the course of his evidence said: "I am not interested in cutting the turf...I only knew about it yesterday..." I suppose when he signed the application he could not have noticed these words; however this may be, there was no evidence to support this right, and accordingly my decision as regards the right to cut and take turf, to this extent and no more is that the Objection succeeds.

For the reasons set out above I confirm the registration with the modification that for the words in column 4 of the Rights Section there be substituted the words: "To graze 60 sheep including their followers over the whole of the land comprised in this register unit". At the conclusion of the hearing it was agreed that I should make no order as to costs.

I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggreived 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 July 1977

a. a. Baden Fuller

Commons Commissioner