COMMONS REGISTRATION ACT 1965 Reference No. 234/D/65-66-69

In the Matter of Outney Common,

Bungay, Waveney D

DECISION

This dispute relates to the registration at Entry No. 3 in the Land Section and Entry No. 2 in the ownership section of Register Unit No. CL 3 in the Register of Common Land maintained by the former East Suffolk County Council and is occasioned by Objection No. 62 made by C B Warnes, R G Reynolds and J E W Gibbs and noted in the Register on 30 September 1970 and Objection No. 82 made by M J Lusby Taylor noted in the Register on 30 September 1970 and Objection No. 113 made by Bungay U D C noted in the Register on 31 December 1970.

I held a hearing for the purpose of inquiring into the dispute at London on January 15 to 19 and 21, 1979. The hearing was attended by Mr R Campbell, Counsel instructed by Messrs Mills & Reeve on behalf of Bungay Parish Council formerly Bungay Town Council and Mr J P Brookes instructed by Messrs Sparke & Hughes on behalf of C B Warnes, R J Reynolds and J E W Gibbs.

Background

Outney Common was originally about 400 acres lying within a bend of theriver Waveney which adjoins it on the west, north and east, while to the south lies the town of Bungay and today access to the common is from the town. The Common was in the 15th, 16th, 17th and 18th Centuries manorial land subject to common grazing rights. The precise nature and origin of these grazing rights is obscure. Over the years these rights even if they were not originally rights in gross, have been regarded by all the interested parties as rights in gross, they have been conveyed as such not appurtenant to any dominent land. Within living memory there have been 150 such rights known as commonages. These rights were in some cases subdivide into "goings" each owner of a going being entitled to graze 1 beast. By a Deed dated 20 January 1707 the commoners agreed to vary the quantification of their rights limiting the right conferred by each commonage to the grazing of three beasts instead of five and limiting the term during which such beasts might be grazed. At some time, I was not told when, the grazing right was further restricted to two beasts for each commonage and the hearing proceeded on the footing that there were during the period covered by the evidence to which I will refer later in this decision, 150 commonages each entitled to two goings.

The common has at all material times been managed by the Fen Reeves on behalf of the commoners appointed by them and these Fen Reeves did not confine themselves, to managing the grazing in accordance with the rights conferred by the commonages. By an order dated 3 December 1811 charges were payable at the rate of 4/- driftage for each head of stock 6d for every load of gravel to a person not an owner and 4d for owners and 5/- for each asses of poor persons and 20/- for asses of tradesmen. Aslong ago as 1811 the commoners were taking rents and profits from the common to which they were not entitled by virtue of their commonages.

It is relevant to mention that part of the common, that is close to the river which is good grazing, has always been referred to as "The Lows" and the remainder of the common has always been referred to as the "Hards". The inhabitants have always had access to the common and engaged in sport and pastimes on the common. No claim has been made that the common or any part of it is a Town Green, and the only relevance of this use of the common is to explain the Council's anxiety to preserve the common as an amenity for its constituents. Over the years fewer and fewer owners of commonages grazed their own beasts. Annual auctions were held at which the rights to graze during the current year were sold and recently parts of the common have been enclosed, and fields have been leased as units. But quite shortly the commonages are now regarded by their owners as investments who are concerned with capital appreciation and the yield which these investments will provide.

The Issues

Mr Campbell invited me to confirm the registration in the Land Section on one of the two alternative grounds that:

(1) The land was subject to common rights at the date of the Registration and
(2) That it is waste of a manor.

Mr Campbell accepts that it is not open to me to confirm the Registration on the ground that it was subject to common rights at the date of Registration because there are no subsisting registrationsin the Rights Section and I must follow the decision of Goff J as he then was, in C E G B v Clwyd 1976 W L R but he invites me to decide that the common was subject to common rights at the date of registration in order to facilitate a possible appeal on the ground that the Clwyd case was wrongly decided and possibly also for other reasons to which I will refer later.

Any views which I may express on this point will of course be obiter but since it was argued a length on both sides, I will at the end of this decision state my conclusions in the hope that they may be helpful, though not in any way binding on the parties.

Turning now to Mr Campbell's second alternative the onus rests upon him to establish (a) that the land is waste and (b) that if it is waste it is "of a manor". If he fails to establish either of these two limbs of the definition to be found in Section 22 of the Act of 1965, I must refuse to confirm the Registration.

Manorial Land

Since Mr Brookes conceded that the common was at one time manorial land, I consider this question on the footing that the onus is on him to establish that the Lord of the Manor had not at the date of the registration any title to the land. Mr Brookes case is that the title of the Lord of the Manor has been barred by the Limitation Acts from time to time in force.

The first crucial date is 1864 when the Great Eastern Railway Company acquired part of the common in accordance with Sections 99 to 107 of The Lands Clauses Consolidation Act 1845. The transaction was effected by an indenture and a Deed Poll, the former dated 8 July 1864 and the latter dated 11 November 1864. The indenture discharged the land acquired by the Railway Company from all commonable rights and the Deed Poll vested that land in the Railway Company freed and discharged from commonable rights. Each of these documents contained a recital that "the said common is not parcel of or holden of any manor and the right to the soil of the

said commnn belongs to the commoners".

These recitals are in my view evidence that the commoners were in 1864 the owners of the soil. See Jenkin v The Earl of Dunraven 1899 2 Ch. 121. The plans for the construction of the railway had been in progress since 1859 and had been extensively advertised, and the Railway Company was in possession of the land acquired by it prior to 1864. If the Lord of the Manor, believed to be the Duke of Norfolk, had wished to claim compensation for his interest in the soil, he had every opportunity so to do, and in my view the Railway Company must have been satisfied that he would make no such claim. If necessary I would hold that the commoners were the owners of the soil of 1864. However, 1864 is a long time ago and subsequent events disclose that the common owners from 1864 down to the present day have exercised rights of ownership.

The next important event was the hearing of a case stated in the Q B D in 1882, being an appeal against an assessment to rates on the common owners. The common owners contended that they were only exercising their common rights and therefore not rateable. The Court held that they were in occupation of the common and therefore rateable. I accept Mr Campbells submission that this finding by the Court was not a finding that the commoners were owners of the soil but the facts found by the Court were in my view consistant with the commoners having at that time dispossessed the Lord of the Manor. The Court found that "nothing had been heard of the Lord of the Manor since 1707 and that as long as living memory goes the commoners had been in control of the common". It referred to the charges for grazing donkeys, the taking and sale of turf, the taking of gravel to sell to stranger a lease of land to the Railway Company and the compulsory acquisition of land by the Railway Company referred to above.

On 20 February 1888 the Outney Reeves entered into an agreement with the Bungay Racing Committee for the construction of a steeplechase course on the common, and on 27 March 1912 the Common Reeves leased a site to the Steeplechase Committee for the erection of a grandstand and there was a further lease of a site of stands and enclosures dated 18 April 1921. On the 25 October 1923 an agreement was entered into between the common owners, the Bungay and Waveney Valley Golf Club, the Bungay Urban District Council and the Bungay Steeplechase Committee which provided for the closing of part of the common for not more than 12 days in each year. The purpose of this agreement was to enable charges to be made for entrance to race meetings which were to be shared, ½ to the U D C, and ½ to the Steeplechase Committee. It is to be observed that the Bungay U D C was a party to this agreement and that it recites that "the lands are not parcel of or holder of any Manor, and that there were no rights of common or other rights affecting the land other than those of the lessee and tenants of rights for 300 beasts. The hearing before me is an inquiry and there are no pleadings and I do no more than draw attention to the fact that the U D C with a view to assisting the local race meetings and deriving revenue therefore was prepared to accept that the land was not manorial land and that now after a lapse of more than 50 years, it is contending that the land is part of a manor. On 13 December 1952 there is a further lease of the site of the grandstand. My understanding is that racing had now been discontinued and the grandstand has been removed.

On 1 February 1889 the Common Reeves entered into an agreement with the Waveney Valley Golf Club for the construction of a golf links on part of the common. The Golf Club is still operational and has continued under and by vitue of a

succession of leases which have since 1894, provided for a club house and the rents have been paid to the Common Reeves.

On 19 May 1916, the Common Reeves granted the U D C a license at a rent of 10/- per annum to sink a well for the provision of water to troops during the First World War.

In 1922 the Common Reeves granted a lease to the Anglo-American Oil Company for the erection of a store as appears from the minutes of the meetings of the Common Reeves.

In 1922 the U D C advertised its intention to apply for a compulsory purchase order for the acquisition of part of the common for a water works. This advertisement stated that the common belonged to William Carr, Austin Cook Smith, Arthur Nicholls Wright and others.

On 19 March 1926 the Great Eastern Railway Company by a Deed Poll vested in itself a further small part of the common having paid £400 to the persons entitled to commonable rights therein.

On 13 April 1937 more than one half of the common owners appointed trustees to hold the common on the statutory trusts in place of the Public Trustee pursuant to the power conferred upon them by Part IV of the 1st Schedule to the L P A 1925.

Subsequent to this appointment the Trustees for the time being have leased and conveyed land to Richard Clay and Company Ltd, entered into an agreement dated 24 October 1942 for the removal of stone and gravel by Harry Poenter (Norwich) Ltd have lease part of the land to Bungay U D C.

In the instant case, I am not concerned to make a finding as to who is the owner of the common. If it is not part of a manor in the sense that the Lord of the Manor could bring an action to recover the land by virtue of his title to the * Lordship, on the authority of Box Parish Council v Lacey only so far reported in the Times 26 May 1978, the land is not common land as defined in Section 22 of the Act of 1965.

I have no hesitation in reaching the conclusion that the title of the Lord of the Manor has been barred either under the Real Property Limitation Act 1833 or by that Act as amended in 1874 or by the Limitation Act 1939.

The fact of the matter is that the common owners by their agents the Fen Reeves have been in possession of the land since 1864, even if they were not then the owners. They have dispossessed the true owner in that they have taken rents for the golf links and the racecourse, constructed by reason of their permission, they have taken rent from the Railway Company and the Anglo-American Oil Company and the U D C and Richard Clay and Company Ltd, they have taken the proceeds of sale of gravel and turf. In short the common owners and they alone have been in receipt of the rents and profits. In my view the possession of the common ownwers has been more than adequate to bear any claim to ownership by the Lord of the Manor and any title he once had, has been extinguished. The conclusion which I have reached is in my view consistent with the decision in Treloar v Nute 1976 I W L R 1295 Tecbild Ltd v Chanberlain (1969) 20 and C R 633. Mr Campbell argued that the Lord of the Manor would have no use for the land subject to common rights, but in my view this argument is untenable, it was open to him to restrict the commoners use of

* Note. The Box Case is now reported at 1979 2 W L R 177.

the land to grazing anf if racing and golf were to be permitted, he could claim at least a share in the proceeds and also in theother proceeds which have accrued to the commoners.

Mr Campbell further suggested that the decision in the Box Case had no application where the land is severed from the Manor by operation of the Limitation Acts, as distinct from severance by grant. I do not accept this submission which is open to him in the High Court.

Mr Campbell further submitted that the commoners were not in exclusive possession because there were public rights of access. Even if there were public rights of access, which I doubt, as between the commoners and the Lord of the Manor the former were in exclusive possession. They were exercising the rights of ownership which the Lord of the Manor could have exercised if he was able so to do.

Waste

Since I have reached the conclusion that the land is not "of a manor" it is not necessary for me to decide whether or not it is waste.

It is in my view and indeed it was the view of the Divisional Court as long ago as 1882, that the land is occupied, and it does not therefore fulfill all the three requirements of waste laid down in A G Hammer 1858 27 LS Ch 837, that it shall be open uncultivated and unoccupied. The public has access to the land through gates and if the land were unoccupied, I incline to the view that it would be "open". No evidence was led as to whether or not the land is cultivated, the maintenance of the golf course may involve some cultivation.

In my view the land has not been waste for nearly a century.

It follows from what I have said that I must refuse to confirm the Registration in the Land Section and I have therefore no jurisdiction to deal with the question of ownership.

Were there any subsisting rights of common at the date Registration?

If and only if there were subsisting rights of common at the date of registration can an appeal, on the grounds that the Clwyd case was wrongly decided, succeed. Both Mr Campbell and Mr Brookes argued the point and invited me to answer the question not withstanding that this part of my decision is obiter. Both counsel stated that there was no decided case and invited me to answer the question on principle.

Mr Brookes submission was that an owner cannot have a right of common over his own land and that when the owners of commonages became tenants in common of the soil each such tenant in common had all the rights of an owner over the whole of the land and therefore he could no longer have a right of common.

When I pointed out to Mr Brookes that Section 11 of the Inclosure Act 1845 included among the lands subject to be enclosed "all gated and stinted pastures in which the property of the soil or some part there of is in the owners of the cattle gates or other gates or stints or any of them "and Section 116 of the said Act which provided that the property of soil of regulated pastures should be vested in the persons who ..... "shall be the owners of the stints or rights of pasture therein". His submission was that such commons were statutory and in the absence of any statutory authority for the exception the common law rule takes effect.

Mr Brookes could offer no explanation as to why this point was not taken by the Divisional Court in 1882 when the commoners were contending that they were doing no more than exercising their rights of common. Then again Mr Brookes conceded that the common law rule could operate harshly on a commoner and I refer to the sale particulars of a sale in 1881 by the Executors of the late Robert Dybell of inter alia 10 commonages and one going. If Mr Brookes submission is well founded at common law. Mr Dybell had no greater right to pasture animals on the common than the owner of one commonage.

In my view dealing with this point as I am invited to do the answer to this question is to be found in the judgment of Cozens-Hardy L J in capital and Counties Bank Ltd v Rhoches 1903 Ch 10 631 at p 652.

Before citing from this judgment, I express the view that the common law rule on which Mr Brookes relied is one instance of the rule that whenever a greater estate and a smaller meet in the same person without any intermediate estate the smaller estate merges in the greater. Now what Cozens-Hardy L J said was this :
"There was prior to the Judicature Act 1873, a great difference between Courts of Law and the Courts of Equity on the subject of merger. The rule of the former was rigid that whenever a term of years, whether for life or in fee, immediately expectant upon the term vested in the same person in his own right, the term was merged in the freehold whatever may have been the intention of the parties to the transaction, which resulted in the Union. The Courts of Equity, on the other hand, in many cases treated the interest which merged at law as being still subsisting in Equity. They had regard to the intention of the parties and in the absence of any direct evidence of intention they presumed that merger was not intended if it was to the interest of the party or only consistant with the duty of the party, that merger should not take place".

In the instant case all the evidence is in favour of the view that merger was not intended. In or about the year 1918 a practice commenced, whereby commonages were conveyed under the description of x undivided 300 parts of the common formerly described as all these x/2 commonage or rights of depasturing x beasts as now stinted or rated on the common, the conveyance dated 11 September 1918, between J B Swan and A B Bradley and conveyance dated 11 October 1919, between H S Norton and C B Warnes. I refer in particular to a statutory declaration made by A W Cocks on the occasion of the sale by H S Norton.

Mr Cocks declared that he was aged 56, had lived at Bungay for 50 years and was then Clerk to the owners of the common and their Reeves and that for 25 years he had been actively connected with the management of the common. He believed that H S Norton was in possession of 26/ 300 " parts and had exercised the right of depasturing 26 head of stock and that he believed from his active participation in the management that H S Norton was entitled to the said undivided parts and as such owner was absolutely entitled to the rights of depasturage for 26 head of stock. Then again on 28 April 1921 there was a sale of 22 commonages (44 goings) the sale particulars were prepared by Messrs Sprake & Co and stated inter alis -
"Each commonage represented two goings or the right of depasturage for two beasts"
"Each commonage comprises 2/300" equal undivided parts or shares in" the common as described.

Going back in time Mr Dybells executors proceeded on the footing that there was no merger and the commoners themselves in the rating appeal in 1882 were claiming to

exercise rights as commoners.

On 6 November 1941 there was a sale of inter alia 19 goings described in the sale particulars as "rights of depasturing stock on Outney Common.
and "two goings" were described as the right of depasturing two head of stock on Outney Common".

On this evidence my view is that the intention of the commoners was until 1963 that the rights to pasture on the common should not merge in the freehold interests and that such rights were still subsisting in Equity. In my view this case is distinguishable from White v Taylor No. 1 1969 1 Ch. 150 and the line of authority therein referred to. This is not a case in whcih a commoner is seeking to increase the burden on the common to the prejudice of either the owner of the soil or the other commoners. In this case all the commoners have acted together to dispossess the owner of the soil with the intention to preserve the "status quo" as regards their rights inter se and I see no reason why in Equity that intention should not prevail.

In 1963 all the commoners, with one exception signed documents in the following form.

"I the undersigned, being the owner of x goings on Outney Common Bungay, hereby endorse the action of the Common Reeves in the enclosures they have already made on a trial basis and nown formally and irrevocably consent to the whole of the Lows being fenced and enclosed on a permanent basis and to the sole letting thereof in future by the Common Reeves".

In my view each commoner by signing a document in this form abandoned his right to graze his beast on the Lows, or it may be regarded as a release. The release of a right over part of a common operates as a release of the right over the whole common. At the Annual General Meeting of the commoners held on 28 March 1963 "the chairman stressed the importance of all owners signing the form of consent".

The necessity to obtain the consents of all the commoners supports my view that the individuals rights were still subsisting at that date the object of obtaining the consents was to determine these individual rights and in my view had that effect. I was told at the hearing that the one dissentient's goings had been acquired by another commoner, who had signed a consent. The Bungay U D C signed a consent and this no doubt accounts for the fact that it did not apply for registration of a right of common.

For this reason I am of the opinion that all the rights of common were extinguished in 1963 with one exception, I do not know whether that exception was still outstanding at the date of the Registration. The Parish Council may consider that in any event it would be an insecure foundation on which to build an appeal against the decision in the Clwyd case.

Finally I must express my indebtedness to Mr Campbell and Mr Brookes for their invaluable assistance and the Solicitors for having provided two bundles of documents admirably arranged in chronological order. I am also indebted to Mr P J Sparke, Mr S E Grice and Miss Smith who gave evidence before an examiner. In not referring to the transcript of their evidence I intend no disrespect. Their evidence confirms the conclusion I have reached based as they are on the documents.

Lastly Mr Brookes applied for an order for costs and I said I would make an order

not to be enforced until the matter had been finally determined and to be open to review on appeal. On further consideration I have come to the conclusion that I should limit this award to the costs incurred after 26 May 1978, the date of the report of the Box Case.

The practice at hearings is not to award costs against a party if he is acting reasonably in seeking to uphold a Registration. Mr Campbell client council might well have been successful if Re Chewton Common 1977 I W L R 1242, had not been over ruled in the Box case.

For this reason I will award Mr Brookes clients costs on scale 4 with the Registrars discretion limited to costs incurred after 26 May 1978.

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 8 March ~~day of~~ 1979

E. A. Le Ha

Commons Commissioner