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COMMONS REGISTRATION ACT 1965 Reference No. 236/D/408-414

In the Matter of Merle Common, ~~Oxted and~~ Limpsfield, Tandridge D

DECISION

These disputes relate to the registration at Entry No. 1 in the Land Section and Entries Nos. 1 to 4 in the Rights Section of Register Unit No. CL 419 in the Register of Common Land maintained by the Surrey County Council. They are occasioned by five Objections namely: No. 489 made by Surrey County Council and noted in the Register on 1 August 1972, Nos. 300, 137 and 301 made by Keith D Day and noted in the Register on, respectively, 8 October 1970 11 August 1970 and 8 October 1970, No. 180 made by Mrs Joan White noted in the Register on 4 September 1970.

The applicant for registration in the Land Section is Limpsfield Parish Council: the applicants for registration in the Rights Section are Walter Edwards (Entry No. 1) Mrs A E Edwards (Entry No. 2) and Miss E P Quigley (Entries No. 3 and No. 4).

I held a hearing for the purpose of inquiring into the disputes at Oxted on 6 May 1981. At the hearing Mr B Cotter, Solicitor appeared on behalf of Surrey County Council: Mrs A Williams, Solicitor on behalf of Limpsfield Parish Council: Mr Edwards, Mrs Edwards, Miss Quigley and Mr Day each appeared in person.

(1) As regards the registration in the Land Section, Miss Quigley as part of her submission said that the Unit Land is waste land of a manor, but there was no evidence to substantiate this. Moreover, Mr Day informed me that he purchased the Unit land in 1966 and was not lord of the manor, so that if it had at some time been waste land of a manor, it became severed from the manor and no longer qualifies for registration as waste land of a manor (Re Box Hill Common 1980 1 Ch 109). Accordingly the validity of the registration as Common Land depends on the existence of registered rights of common, and in this case the four registered rights are challenged.

(2) The four rights are registered in a number of other cases concerning commons in Limpsfield on which I held hearings on 6, 7 and 8 May 1981. The evidence given in support of and against these various registrations was essentially the same: in this Decision I shall consider that evidence and its effect, and the outcome will be of general application in the other cases, subject to such further considerations in each of those cases as may affect such general application.

(3) Entry No. 1 (Mr Edwards) and Entry No. 2 (Mrs Edwards), which I will refer to as "the Edwards Rights", are each in the same terms and comprised the right of herbage for rabbits and pets, the right of estovers (wood loppings, gorse, furze, bushes, cones, underwood), the right to cut wild flowers, bracken, rushes,

heath and sticks for peas and beans, and the right to take leaf mould, blackberries, nuts, flowers, herbs and berries for wine making and medicines. Each of the rights is registered as "in gross".

In neither case was it suggested that the rights had been expressly granted by the owner of the Unit land: the evidence related to the acts of Mr and Mrs Edwards in respect of the Unit land over a period of time, and the basis of the claim could only be that the rights were acquired by prescription. Since prescription under the Prescription Act 1836 cannot be claimed for rights in gross (Shuttleworth v Le Fleming 1865 19 CB (NS) 687), the prescription must be at common law or by lost modern grant.

(4) In her evidence Mrs Edwards said that she had exercised the rights since 1916 when she was aged four, though she had herself not taken anything at that age and that subsequently as an adult she took wood and flowers. Mr Edwards said that during the last 50 years he had picked flowers and taken wood whenever he was "down there", but not on a regular basis. Their evidence was not seriously challenged and I accept it: but it fell far short of establishing user to the extend requisite as a basis for the rights they registered. In my view they did no more than any member of the public might have done in walking over the Unit land; what they did was not in assertion of a right but as a normal activity of those with access to the amenities of the land. Prescription is based upon the presumption of a lost grant and the user on which the claim is based must be as of right, not merely as a practical tolerated by the owner of the land. The presumption will not be made where there is some other reasonable explanation and in my view the reasonable explanation of what was done by the Edwards was that the owner tolerated what they did as the normal and unobjectionable activities of persons enjoying the amenities of the common (cf. Beckett v Lyons 1967 Ch 449 at pp.473, 475).

Mr Day gave evidence to the effect that he had lived at High Ridge Farm, which adjoins the Unit land on the east, since 1961, but had never seen the Edwards (or Miss Quigley) on the Unit land. This may be so, but I am satisfied that the Edwards had on occasion been on the land as they said. However, for the reasons mentioned above I do not find that they have established rights to do what they have registered, and I refuse to confirm the registrations.

(5) Entries Nos. 3 and 4 ("the Quigley rights") were registered by Miss Quigley as, in the case of No. 3, attached to a property called Alncote, and in the case of No. 4 as in gross. Entry No. 3 includes the right of grazing for 2 domestic animals: subject to this, the rights are in identical terms, namely the right of common in soil (sand, gravel and stones) and the right of estovers (timber and underwood for fuel and repairs, bracken, cones, furze, gorse, heath, twigs for pea sticks, simples, nuts, blackberries, flora, foliage, grasses, rushes).

As in the case of the Edwards rights, on the evidence given by Miss Quigley the basis of the claim could only be that the rights were acquired by prescription Miss Quigley in evidence said that she had exercised the rights "more or less

continuously" for about 60 years (since she was aged 6), chiefly gorse heather and furze. During the war she and a number of helpers had taken medicinal herbs, Alncote being the centre for collecting the herbs. She had not taken wood back to Alncote and as regards animals the family dog was taken there occasionally. In cross-examination Miss Quigley said that she regarded her rights as rights over all the manorial waste in the district and preferred not to answer questions as to their exercise over each of the pieces of land which had been registered as separate units of common land: she did however, say that she had picked flowers on CL 419 more or less continuously since 1975. She declined to say how long she had owned Alncote.

I accept Miss Quigley's evidence, but as with the Edwards rights it falls short of establishing user to the extent required as a basis for the rights Miss Quigley has registered over the Unit land. Again, in my view, what she did was not in assertion of an individual right but the ordinary activity of a member of the public enjoying the amenities of the land. (This perhaps is not so in the case of the collection of medicinal herbs but that was for a special purpose during the war and not attributable to a claim to such a right for herself). As in the case of the Edwards rights, toleration by the owner and not enjoyment as of right by Miss Quigley, seems to me the true explanation.

I do not find the registered rights established, and I refuse to confirm them.

Mr Cotter told me that Objection No. 689, by Surrey County Council, relates only to strips of land claimed to be highway verge, and both the Edwards and Miss Quigley agreed that those strips (shown on a plan which Mr Cotter produced) should be excluded from the registration. I do not need, however, to deal separately with those strips, since the land being, in my view, neither waste land of a manor nor subject to rights of common does not qualify for registration as common land, and I refuse to confirm the registration at Entry No. 1 in the Land 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 15 June 1981

L. J. Morris Smith

Commons Commissioner