COMMONS REGISTRATION ACT 1965

Reference Nos.8/D/7
8/D/8

In the Matter of land near Hilltop (No.81 on the Ashover Inclosure Award map) and Alton Parish Quarry (north of Alton Lane; No.190 on the said map), Ashover, Chesterfield R.D., Derbyshire

DECISION

These disputes relate to the registration at Entry No.2 in the Land Section and Entry No.1 in the Rights Section of Register Unit No.CL.19 in the Register of Common Land maintained by the Derbyshire County Council and are occasioned by Objection No.14 made by Mr. S. N. Ainsworth and noted in the Register on 5 October 1970.

I held a hearing for the purpose of inquiring into the disputes at Chesterfield on 17 October 1973. At the hearing Ashover Parish Council were represented by Mr. B. S. Shemwell solicitor of Jones Middleton Solicitors of Chesterfield and Derbyshire County Council were represented by Mr. I. D. Ross solicitor of their legal department; Mr. Ainsworth attended in person. On the following day I inspected the land in the presence of Mr. U. E. Bond chairman of the Parish Council and of Mr. Ainsworth.

Entry No.1 in the Land Section relates to land at Hilltop (No.81 on the map annexed to the Ashover Inclosure Award dated 22 January 1783). Entry No.2 in the Land Section relates to land known as Alton Parish Quarry (north of Alton Lane; No.190 on the Award map). Entry No.1 in the Rights Section is as follows:- (column 4) "The right to take stone from the land comprised in this register unit". All the said entries were pursuant to applications dated 15 August 1967 and made by the Parish Council "on behalf of the Parishioners of Ashover". The grounds stated in the Objection are:- "I have rented this land from Derbyshire County Council since 1929. Prior to this it was rented from Chesterfield Rural District Council myself and my Father before me have rented this land for agricultural purposes for the past 50 years. Prior to this my Grandfather was the tenant". In the Ownership Section the Parish Council are registered as owners of all the land comprised in this Register Unit.

It was agreed that these disputes related only to the land ("the Disputed Land") mentioned in the said Entry No.2, and that I should in any event confirm the other Entries at least so far as they related to the remaining land (more than half a mile away) comprised in this Register Unit.

Mr. Ainsworth (he is 59 years old) in the course of his evidence said (in effect):- The Disputed Land had ever since he could remember been in the tenancy of himself and his father as set out in the above quoted grounds of objection. The Disputed Land looks as if it has at some time been used as a quarry, but it has never been

so used in his time. About 40 years ago, he carted soil (about 40 loads) on to the north west part to improve the grass; before then rock showed through. He and his father had cattle on the Disputed Land. He had built a shed to accommodate cattle; although he had used some stone from the Disputed Land to build there, nobody had taken any stone away. There is stone on the Disputed Land, but it cannot be quarried conveniently because it is so lying that any body trying to get it would have to pull it up.

Mr. Shemwell produced the 1783 Award (made under the Ashover Inclosure Act 1779, 19 Geo. 3 cap. lxi) by which 14 pieces of land were allotted for the use of all the proprietors, owners and occupiers of lands and tenements within the Manor of Ashover for the purpose of getting stone, gravel and sand and other materials for the building or repairing of fences, or houses, barns, stables and other buildings within the said Manor but not elsewhere and for building, making, repairing and amending all such bridges, highways and private ways as should thereafter be within the said Manor. The Disputed Land is the greater part of one of these pieces (a rectangular piece numbered 190 on the Award map) so allotted; the remaining part (a small piece on the south east) has not been registered under the 1965 Act.

Mr. Bond (he has been a member of the Parish Council on and off since 1948 and a member of the Rural District Council on and off for about 15 years) gave evidence in the course of which he (with the co-operation of Mr. Ainsworth) described the Disputed Land.

Mr. Shemwell said that it seemed to have been assumed that the Disputed Land was highway authority land which had passed (under the Local Government Act 1929) from the Rural District Council to the County Council; he pointed out that the 1783 Award did not vest (at any rate expressly) the Disputed Land in the overseers of the highways (although it did impose on them a liability to fence). He submitted that neither Mr. Ainsworth as tenant nor the County Council as landlord had by possession acquired any title so as to defeat the right of the inhabitants under the 1783 Award and that the right [redacted] could not properly be considered as abandoned merely because the stone, not being needed, had not been taken or because the right was difficult to exercise.

Mr. Ross said that the Disputed Land had, on the assumption that it before 1929 belonged to the Rural District Council in their capacity as highway authority, been included in the Schedule of Quarries and Depots transferred to the County Council by section 118 of the 1929 Act. He referred me to some County Council correspondence and memoranda arising out of an inquiry made in 1954 as to the possibility of the Disputed Land being disposed of. He submitted that the rights awarded by the 1783 Award as set out above had been abandoned and that the registration should therefore not be confirm

On my inspection I was impressed by two matters:- (1) The Disputed Land is for the most part on two levels: the lower part where the stone has been, and the higher part where it has not been quarried. Some of the high level part has obviously not been quarried because it was too near the boundary of the Disputed Land. As to the rest of the high level part (being between one quarter and one third of the whole of the Disputed Land), I am satisfied that a person entitled to take stone might well conclu that to take it off the high level part would be either too difficult or not worth the trouble and expense; this conclusion can I think be deduced, for the reason given by Mr. Ainsworth at the hearing, from the stratification of the stone where it is on the

Disputed Land uncovered by soil, and the stratification of the stone immediately to the north of the Disputed Land where it is uncovered as a result of the extensive quarrying in the quarries (now disused) there. (2) The Disputed Land, although it has obviously at some time been quarried, has been adapted (apparently sometime ago) for agricultural purposes (grazing and keeping cattle); the buildings only usable for these purposes are substantial. Mr. Ainsworth pointed out to me the better grass now growing on land onto which he had carted soil 40 years ago.

As to abandonment, the test applicable was recently stated by the Court of Appeal as follows:- "Abandonment of ... a profit a prendre can only, we think, be treated as having taken place where the person entitled to it has demonstrated a fixed intention never at any time thereafter to assert the right himself or to attempt to transmit it to any one else"; see Tehidy v Norman 1971 1 W.L.R. 523 at page 553.

I accept Mr. Ainsworth's evidence that the land has been used for agricultural purposes for many years as he said. In my view the proprietors, owners and occupiers mentioned in the 1783 Award allotment have, by not getting any stone from the land for many years and by raising no objection to the land being used and adapted for agricultural purposes on a permanent basis and in a way which would not be reasonably possible if stone was got, ~~have~~ demonstrated for themselves and their successors a fixed intention of treating their rights under the allotment as worthless and no longer exercisable. I conclude therefore that the rights so allotted have been abandoned.

It was not suggested that the registration of the Disputed Land as Common Land could be justified otherwise than under the 1783 Award. Accordingly for the reasons given above, I refuse to confirm the registration at Entry No.2 in the Land Section of the Register Unit, I confirm the registration at Entry No.1 in the said Section and I confirm the registration at Entry No.1 in the Rights Section of the said Register Unit (such last mentioned Entry being henceforth only applicable to the Land described in the said Entry No.1 in the Land Section). I am not concerned with the Entry in the ownership Section; as a result of this decision, the Entry will no longer be applicable to the Disputed Land; in my view I have no jurisdiction to determine any dispute which there may be between the Parish Council and the County Council as to the ownership of the Disputed Land.

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 8th day of January 1974.

a. a. Baden Fuller

Commons Commissioner