COMMONS REGISTRATION ACT 1965

Reference No. 209/D/102

In the Matter of Spitchwick Commons,
Widecombe-in-the-Moor, Devon (No. 1).

DECISION

This dispute relates to the registrations at Entry Nos 14, 22, 23, 25, 33, 37, 38, 39, 42, 44 and 48 (now 55 and 56) in the Rights section of Register Unit No CL 33 in the Register of Common Land maintained by the Devon County Council and is occasioned by Objection No. 227 made by Mr R J Michelmore and noted in the Register on 16 October 1970.

I held a hearing for the purpose of inquiring into the dispute at Paignton on 25 January 1977. The hearing was attended by Mr C A Wilkinson, one of the applicants for the registrations at Entry Nos 14 and 42, Mr P N Coaker, one of the applicants for the registrations at Entry Nos 37 and 38, Mr D R Pryce, the applicant for the registration at Entry No. 39, Mr T C Richards, solicitor, on behalf of Mrs M W A Giles, the applicant for the registration at Entry No. 44, and Mr J A F Kittow, solicitor, on behalf of the Objector. Mr J Newton and M/s G A Newton, the applicants for the registrations at Entry Nos 22, 23, and 33, did not appear and were not represented. Before the hearing M/s A French and Mr T J French, the applicants for the registration at Entry No. 25, and Messrs W S French, E E French, and H J French, the applicants for the registration at Entry No. 48 (now 55 and 56), stated in writing that they did not wish to pursue their respective applications.

Mrs Giles claims to be entitled to rights of estovers, to take stone, sand, and gravel, and to graze 28 bullocks or ponies and 42 sheep as the owner of certain land known as Foxworthy Farm. At one time Foxworthy Farm comprised a larger area than that now owned by Mrs Giles. The old farmhouse was situate on the part which Mrs Giles does not own, and Mrs Giles has a new house on the part which she owns. Until it was redeemed in the 1930's, a single chief rent of 12/- a year was paid to the lord of the manor of Spitchwick in respect of the whole of the land formerly comprised in Foxworthy Farm.

It was admitted by Mr Kittow that there were rights of common of pasture, estovers, and turbary, and common in the soil attached to the original Foxworthy Farm. Although Mrs Giles has not claimed a right of turbary, it is convenient to mention it here, since the evidence in the court rolls is material in other disputes relating to this Register Unit. The payment of the chief rent indicates that Foxworthy Farm was an ancient manorial freehold, so that the rights were appendant. The general rule of law is that upon a severance of such a freehold property the rights of common appendant to it are apportionable: See Tyrringham's Case (1584), 4 Co. Rep. 36b. Mr Kittow contended, however, that by the custom of the Manor of Spitchwick such rights are not apportionable, but remain appendant to the "ancient hearth".

Mr Michelmore has been the steward of the manor of Spitchwick since 1956. He produced a number of presentments from the records of the court leet relating to the exercize of rights of common. On 1 November 1869 the homage presented that no commoner had a right to remove turf from the Common for other purposes than for fuel for his dwellinghouse. On 19 February 1874 the homage declared that by the ancient custom of the manor the rights of the tenants were strictly limited to the getting of a reasonable quantity of wood for binds and spear sticks or for domestic fuel upon the ancient hearths within the manor. On 7 March 1906 permission was granted to a tenant to take and remove sand from the Common for the purpose of erecting a new house, for which an acknowledgment of 5/- was

paid. On 23 August 1932 it was pointed out that sand and surface stone could only be used within the manor for the repair of existing buildings. On this evidence I am satisfied that by the custom of this manor rights of turbary and estovers and common in the soil are not apportionable upon a division of an ancient tenement, but remain attached to the part of the tenement on which the "ancient hearth" is situate.

Mr Michelmore stated that the rule that rights of common of pasture could not be divided was not set out in the records of the manor "as it was well known to all". He cited in support of this rule entries in the court records of the neighbouring manor of Dunstone in the same parish, of which he is also the steward. These entries are as follows:

> "The Homage certify the same and present that by ancient custom of this Manor the right of pasturage, turbary etc. pertain to the residence within the Manor in respect only of ancient tenements therein and that the erection of new houses or the division of ancient tenements into two or more parts does not confer any new rights on the holders thereof nor extend or increase the rights previously enjoyed by such ancient tenement."

> "We present that by the custom of this Manor each holder of an ancient original house tenement within this Manor and paying Chief rent to the Lord in respect of such house tenement is entitled by the custom of the Manor to cut not exceeding 750 fags in any one year in respect of and for consumption in such house tenement; but has no pasturage rights over the Manor Commons unless he holds farm lands within the Manor capable of supporting sufficient live stock and pays Chief rent for such pasturage rights. And that no division of ancient original house tenements or farm lands into two or more tenements or holdings has heretofore increased or multiplied such rights nor can hereafter do so."

I feel compelled to hold as a matter of law that evidence regarding the customs of one manor is not evidence regarding the customs of another manor, even though the two manors may be adjacent to each other. If I am wrong on this point, it does not appear to me that the custom of the manor of Dunstone with respect to the effect of the division of ancient tenements into two or more parts upon rights of pasture prevents the apportionment of such rights among the parts. The custom only provides that the division of a tenement does not confer any new rights on the holders of the several parts or extend or increase the rights previously enjoyed by the ancient tenement. This would, of course, prevent rights of turbary and estovers and common in the soil attaching to a new house built on one of the parts, but not, in my view, the apportionment of rights of pasture, which would not have the effect of increasing the burden on the servient tenement.

Furthermore, a custom to be enforceable must be reasonable. In my view, a custom that a right of pasture should not be apportionable on a division of a tenement is not reasonable, for it upsets the scheme for the grazing of the common which is based on the number of animals levant and couchant on the totality of the area of the ancient tenements.

Mr Kittow agreed that if the right of pasture is apportionable, the number of animals set out in Mrs Giles's application represents a correct apportionment of the right attached to the original area of Foxworthy Farm.

For these reasons I shall confirm the registration at Entry No. 44 with the following modification, namely, the deletion of the words: "Estovers. To take:- stone, sand, and gravel."

Mr Wilkinson informed me that he did not wish to support the registration at Entry No. 42. The registration at Entry No. 14 is of a right to graze 16 bullocks or ponies and 64 sheep or their equivalent attached to certain land at Lower Aish. This land consists of 25 acres on which Mr Wilkinson has built a house. The former Lower Aish farmhouse now belongs to someone else and is used as a guest-house. This case is therefore on all fours with that of Mrs Giles, and there being no dispute as to the quantum of the right registered if the right is apportionable, I shall confirm this registration.

The land to which the rights registered by Mr Coaker are stated to be attached is not in the manor of Spitchwick. Mr Coaker stated that he was not claiming a right to put his animals on Spitchwick Common, but only to have his animals stray there. The commons on which Mr Coeker is entitled to graze his animals do not adjoin Spitchwick Common, but he stated that his animals stray along the roads. Since the commons are not adjacent to each other, Mr Coaker is not entitled to common pur cause de vicinage, but even if he were, such a right is not, in my view, for the reasons given in my decision in In the Matter of Effingham Common (East Court), Hook and Banks Common, Effingham (No. 1) (1976), Ref Nos 236/D/24-45, capable of registration under the Commons Registration Act 1965. I therefore refuse to confirm this registration.

Mr Pryce claims rights of estovers, turbary, and pannage, and a right to graze 24 sheep and 6 bullocks attached to Higher Hannaford Farm. A chief rent was paid in respect of Mr Pryce's property until it was redeemed on 1 November 1935. The history of the house owned by Mr Pryce is somewhat obscure, but it seems to have been formerly the stables of an earlier house. However, Mr Kittow stated that he did not wish to press the point that the present house is not an ancient hearth, but he relied on the fact that Mr Pryce had not exercised any right of grazing since 1954. Mr Pryce's explanation of this is that he was warned off by Mr Michelmore's predecessor as steward, apparently on the ground that his house was not an ancient hearth. It does not, however, appear that Mr Pryce ever intended to abandon any right of grazing which was attached to his property: he said that he felt that objection would be pointless. In my view, there is a right attached to Mr Pryce's property and he has not abandoned it.

I therefore confirm the registration at Entry Nos 14 and 39 without modification.

I confirm the registration at Entry No. 44 with the following modification, namely, the deletion of the words "Estovers. To take:- stone, sand, and gravel".

I refuse to confirm the registrations at Entry Nos 22, 23, 25, 33, 37, 38, 42 and 48 (now 55 and 56).

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 26th day of March 1977

Chief Commons Commissioner