COMMONS REGISTRATION ACT 1965

Reference Nos.24/D/17-31

In the Matter of Crowle Waste or
Crowle Moors, Crowle, Humberside (No.1)

DECISION

These disputes relate to the registration at Entry No.1 in the Land Section of Register Unit No.CL 83 in the Register of Common Land maintained by the former Lincoln, Parts of Lindsey County Council and are occasioned by Objection No.OB/29 made by Fisons Horticulture Ltd and noted in the Register on 18th July 1972; by Objection No.OB/36 made by M/s Nellie Foster, Objection No.OB/37 made by M/s Alice Emma West, Objection No.OB/38 made by Mr Charles Mason, Objection No.OB/39 made by Mr John Mason, Objection No.OB/40 made by M/s Dorothy Mason, Objection No.OB/41 made by Mr William Mason, Objection No.OB/42 made by M/s Winifred Primrose Pidd, Objection No.OB/43 made by M/s Sarah Mason, Objection No.OB/44 made by Mr Herbert Mason, Objection No.OB/45 made by Mr Sidney Pickett, Objection No.OB/46 made by Mr Kenneth Crowe, Objection No.OB/47 made by Mr Herbert Hunsley, and Objection No.OB/48 made by Mr Ernest Stringwell, and all noted in the Register on 26th July 1972; and by Objection No.OB/49 made by M/s Margory Letitia Lovell and noted in the Register on 14th August 1972.

I held a hearing for the purpose of inquiring into the disputes at Lincoln on 13th and 14th March 1974 and at Doncaster on 3rd, 4th, 5th and 6th December 1974. The hearing was attended by Mr William Bunting, the applicant for the registration, and by Mr Ian McCulloch, of counsel, on behalf of all the Objectors.

The land the subject of this reference consists of not quite 600 ac. of peat bog. On the modern Ordnance Maps it is named "Crowle Waste or Moors", but it has not always been so named. It is bounded on the west by the former boundary between the former county of Lincoln, Parts of Lindsey and the West Riding of Yorkshire (since 1st April 1974 the boundary between the counties of Humberside and South Yorkshire) and on the east by an area of about 400 ac. of former turf moor. The former turf moor is bounded on the east by an area of about 250 ac. of ancient pasture. The ancient pasture in its turn is bounded on the east by the Old River Don. The general situation of the former turf moor is indicated on the Ordnance Maps as "The Warpings" and that of the ancient pasture as "Crowle Common", but it is not necessary for the purpose of these proceedings to determine the situation of the former boundary between these areas with any further degree of precision. Since it will be necessary to refer to documents in which each of these three areas is described differently at different periods, it will make for clarity and avoid anachronisms to refer to the areas respectively from west to east as "the 600 ac.", "the 400 ac.", and "the 250 ac." Beyond the county boundary to the west of the 600 ac. is a much larger tract of similar land named on the Ordnance Maps as "Thorne Waste or Moors". There is no noticeable demarcation between the 600 ac. and Thorne Waste or Moors, and it is possible to go from the west side of the former to

the east side of the latter, and vice versa, without being aware of having passed from one to the other.

The Objectors admit that until 17th June 1822 the 600 ac. fell within the definition of "common land" in section 22(1) of the Commons Registration Act 1965 by being land subject to rights of common, but contend that the former rights of common were then extinguished by the inclosure award made under the Crowle Inclosure Act of 1813 (53 Geo.III, c.clxxvii). Mr Bunting contends that the award was either wholly invalid or invalid in so far as it affected the 600 ac. Mr McCulloch said that if the rights of common were not extinguished by the award, he could not contend that the rights had subsequently been lost by abandonment. If, on the other hand, the rights were extinguished by the award, it would still be possible for the registration to be confirmed if the disputes (Nos.24/D/32-47) as to the registration of rights of common in the Rights Section of the Register Unit made on the application of Mr Bunting and his wife and son were to be decided in favour of the applicants, but it was agreed that it would be more convenient if I were in the first instance to deal with the effect of the award on the admittedly pre-existing rights.

Before considering the effect of the Act of 1813 and the award of 1822 it is necessary to consider in some detail the history of the 600 ac., the 400 ac., and the 250 ac. over several centuries in order to understand the circumstances in which the Act of 1813 came to be passed.

For many centuries the 400 ac. and the 600 ac. together formed an undifferentiated portion of a large area of turf moor lying between Crowle on the east and Thorne on the west. This large area is clearly shown and named "Inclemore" on a fifteenth century map in the Public Record Office. On this map the 250 ac. is marked "Pastura". All the land was waste of the large Crown manor of Hatfield. Crowle, which lies in the Isle of Axholme on the eastern side of the Old River Don, was also a Crown manor and was made part of Hatfield Chase by a Royal Proclamation under the Great Seal dated 3rd November 1541, which had the effect of an Act of Parliament by virtue of the Act 31 Hen.VIII,c.8. Crowle was thus an inferior manor of Hatfield, as also was Thorne.

Mr Bunting drew my attention to a number of interesting early records relating to Hatfield Chase and its constituent manors, but having regard to the fact that it was admitted on behalf of the Objectors that rights of common over the 600 ac. continued to exist until 1822, it is not necessary for the purposes of this case to go back further than a decree of the Court of Exchequer made 4th July 7 James I. This has been dated 4th July 1610 on the copy handed to me, but 4th July in the seventh year of the reign of James I was in 1609. It seems that 1610 was arrived at by adding 7 to 1603, the year in which James became King of England, but that is not the correct way to translate regnal years into calendar years, since it takes no account of the time of the year at which the reign began, and so can give rise to inaccuracies. The occasion of the making of this decree was a dispute between the customary tenants of the manor of Hatfield and the King as to the fines payable on admission to copyholds, but after dealing with this matter the Court also ordered that the tenants should "have hold and enjoy all other their ancient customs uses and privileges as in

times past they have done to them their heirs and assigns for ever." By virtue of the Act 7 Jac.I, c.21 this decree, and the other decrees of the Court of Exchequer to be hereafter mentioned which amended it, were given the force of Acts of Parliament. The Act 7. Jac.I, c.21 was repealed by the Statute Law Revision Act 1948, but the validity of the decrees was preserved by section 1 of the latter Act.

The next material document is an agreement made 24th May 1626 between King Charles I and Cornelius Vermuyden (later knighted) for the drainage of about 60,000 ac. of land in (among other places) Hatfield Chase and the Isle of Axholme. In return for this work Vermuyden was to receive one-third of the drained land. Provision was made for the maintenance of the drainage works by a corporation, which was the predecessor of the modern statutory land drainage authorities. It was recited in the agreement that common of pasture was claimed in some parts of the land to be drained and provision was made for the appointment of Commissioners to settle with the persons claiming rights of common.

The Commissioners held a Court of Survey at Hatfield on 14th March 1628. The tenants and inhabitants of the manor produced a decree of the Court of Exchequer made in the reign of James I (presumably the decree of 1609), which confirmed their rights in the waste lands of the manor, whereupon the Commissioners allotted to the tenants, inhabitants and commoners in lieu of their rights of common certain areas of waste land together with "convenient customable use of turbary" out of the turf moors within the lordship.

It is recited in a decree of the Court of Exchequer made 30th November 1629 that the tenants and inhabitants of Crowle claimed free common of pasture and turbary and liberty of fishing and other profits in the wastes in the manor of Hatfield which were the subject of the 1626 agreement between the King and Vermuyden, and that Commissioners were appointed to inquire into these rights and as to what compensation should be provided for them. The Commissioners proposed that the Crowle copyholders and tenants should have the freehold of 650 ac. of land, consisting of the 250 ac., said to be worth 6s. an acre a year, and the 400 ac., said to be worth 4d. an acre a year, and that the lords of the manor of Hatfield should be discharged from the rights of common held by the tenants and inhabitants of the manor of Crowle. This proposal was accepted and put into effect by the decree.

Shortly after the decree of 1629 the King in pursuance of the agreement of 1626 granted to Vermuyden (now Sir Cornelius) the manors of Hatfield and Thorne and his share of the drained lands. This was effected by letters patent dated 5th February 1630. The grant included all the common land and moors, but required Vermuyden to convey to the tenants of the manor of Hatfield all the land to which they were entitled by virtue of any commission.

Shortly after this grant Vermuyden ran into trouble, there being "divers controversies and differences" between him and the tenants of his newly-acquired estate. The matter came before the Privy Council, which referred the matter to Viscount Wentworth, Lord Darcy, and Mr Justice Hutton, or any two of them.

Wentworth and Darcy alone heard the allegations on both sides, and they alone made an award on 26th August 1630. I mention this because for a reason to be mentioned later, Mr Bunting attached some importance to the fact that Mr Justice Hutton was named as one of the referees. Vermuyden refused to accept the award, but in the following November he and the tenants came to an agreement as to the parts of the award to be performed and as to certain other matters. Effect was given to this agreement by a decree of the Court of Exchequer dated 30th November 1630.

The terms of this decree are important, but before dealing with them it is necessary to deal at some length with a textual point raised by Mr Bunting.

In addressing me on this decree Mr Bunting drew particular attention to the following passage in a document among the Temple Newsam archives, now deposited in the Leeds City Library:-

> "Item that the sayd Tenants and Inhabitants shall have all landes wayes "and passages to Contynewe to them their heires and assigns in Common "as formerly they had".

Mr Bunting very fairly drew my attention to the fact that there are other versions of this passage in which the word "lanes" appears in place of "landes", but he contended that the form quoted above was the authoritative text, since the document in which it appeared was an exemplification of the decree.

The original of the document was not produced, but I saw a photograph of it. Mr Bunting drew my attention to the fact that it is described in a list of documents prepared by the staff of the Leeds Archives as: "Exemplification of Exchequer Decree (original, formerly sealed) 30 Nov. 6 Car.1 (1630)". The text of the document shown in the photograph is in the form of an exemplification under the seal of the Court of Exchequer of the decree of 30th November 1630, but its physical characteristics show quite clearly that it is but a copy of an exemplification. It appears from the photograph that it is written on paper, and Mr Bunting, who had seen it, confirmed that this was so. An original exemplification of this period would be written on parchment, using that word to mean sheep-skin and not the modern law stationer's "parchment", which is but a special kind of paper. Lest this should seem too much like acting as my own expert witness, I refer to the table of fees payable to the King's Remembrancer in the Court of Exchequer, where the following items appear:-

> "For every exemplification containing a skin . 6s. 8d.
>
> "For every exemplification containing more "than a skin, for each skin 6s. 8d."

(Report of the Commissioners for examining into the Duties, Salaries and Emoluments of the Officers, Clerks and Ministers of the ..... Courts of Exchequer and Exchequer Chamber (Parliamentary Papers, 1822, No.125,p.15).

The document in the photograph has each page numbered at the bottom with no trace of its having been pierced for the tongue to carry the seal. At the

end are some initials, which appear to include the letter "H". This, Mr Bunting said, showed that the document had been authenticated by Mr Justice Hutton. While I am not prepared in the absence of examples of writing known to be that of Mr Justice Hutton to find as a fact that the initialling was not done by him, it seems highly unlikely that it was, since although named as one of the referees appointed by the Privy Council, he took no part in the making of the award, and furthermore he was not a judge of the Court of Exchequer, but of the Court of Common Pleas. I take the initials to be those either of the clerk who made the copy or of someone who examined the copy with the original.

The copy, or possibly even the original exemplification, appears to have been produced by one clerk dictating to another, for in the short passage in question, in addition to the variation between "lanes" and "landes", there are variations in the spellings of three other words. Variations in spelling would be liable to occur when English orthography was not as standardized as it has since become, and in the secretary hand in use in the early part of the seventeenth century the letter "d" was formed in the same way as "e", being distinguishable from "e" only by being taller. Thus a clerk dictating could mis-read "lanes" as "lands", and the clerk taking it down would be as likely to write "landes" as "lands".

My conclusion that the photograph is of a copy of an exemplification of the decree does not, of course, necessarily involve the rejection of the reading "landes", which could have been that of the original exemplification. I therefore turn to consider the other versions of the passage in the other documents to which I was referred. These were

1. The award of 26th August 1630 (TN (i.e. Temple Newsam)/HC/B4/1), which has "lands". The photocopy clearly shows that this is not the original award, but a paper copy, which lacks the page or pages following page 3. The copyist was somewhat careless, for in one place he wrote "Sir Thomas Fanshawe knight knight".

2. A copy made on 7th July 1755 from the decree book of the Court of Exchequer (TN/B/4/4), which has "lanes". The decree is dated 28th November 1630 and recites the award of 26th August 1630 (which it mis-dates 27th August), but it relates to Fishlake and Sikehouse and so is not directly relevant to this case.

3. The decree book of the Court of Exchequer of 30th November 1630 (Public Record Office E 125/9), which has "lanes". This is the decree which was copied in the exemplification.

4. A copy of the decree of 30th November 1630 (TN/HC/B4/2), which has "lanes". This copy is not dated, but it appears from the writing to be of the same period as the decree book (No.3).

Document No.2 and Document No.4 are copies of Document No.3 and therefore do not assist in the textual problem. Document No.1 is but a copy of the award and even if the original award contained the word "lands", I would regard it

as superseded by the later decree, which is the only document given statutory force by the Act 7 Jac.I, c.21. I am therefore left with "lanes" in the decree book and "landes" in the copy of the exemplification. Mr Bunting contended that the latter must be regarded as the correct version. I cannot accept this contention. Not only is the document on which he relies not an original exemplification (despite its description in the Leeds Archives list), but even if the original exemplification contained the word "landes", I would have to prefer the word "lanes" in the decree book, of which it purports to be an inspeximus.

Having come to the conclusion that the correct rendering of the word in question is "lanes" (which accords with the sense of the words which follow it), it is not necessary for me further to consider the passage in which it occurs, for it can have no relevance to these proceedings.

Turning now to the relevant parts of the decree of 30th November 1630, there are two passages relating to the turf moors, which in so far as this case is concerned comprise the 600 ac. and the much larger area of similar land lying to the west.

The first of these passages provides that the tenants of Hatfield, Thorne and other manors are to have their turf moors with all the profits thereunto belonging throughout the waste of turbary in such manner and form as they usually theretofore had, but those who come to build or dwell on Vermuyden's land are only to have liberty to cut turf on 1000 ac. of turf moors towards Crowle and other named places, and Vermuyden and the new inhabitants are to take turf in such places only for their own burning and not for sale.

The generality of the award of the turf moors to the tenants is limited by the second passage, which consists of a provision that the tenants and inhabitants of the manor of Crowle are to have and enjoy 400 ac. of the turf moors for their turbary, in which 400 ac. the tenants and inhabitants of Hatfield and Thorne are not to cut or grave any turfs. Both Mr Bunting and Mr McCulloch identified this land as the land comprised in the Register Unit, but the discrepancy between the area stated in the decree and the area of about 600 ac. obtained by adding up the areas of the various parcels shown on the large-scale Ordnance Map may indicate that what is described in the decree as 400 ac. may only be the eastern two-thirds of the 600 ac. This, however, is not a factor which will affect my decision.

Vermuyden and one John Gibbon, who had an interest under Vermuyden, complied with the requirement of the letters patent of 5th February 1630 by an indenture of feoffment made 15th July 1633, which was enrolled amongst the records of the Court of Exchequer by a decree made the following 17th December. This conveyance was made to the tenants and inhabitants of Hatfield, Thorne and other named sub-manors, but not to those of Crowle.

A map of the Level of Hatfield Chase made in 1639 by Josias Arelebcut, now in the archives of the Trent River Authority, shows the 250 ac. as

"Crowle Common Yorkshire", but shows no boundaries between the 400 ac. and the 600 ac. and the rest of the land to the west, all of which is shown as "Thorne Moore".

In the eighteenth century there were disputes between Lord Irwin, who had purchased the manor of Hatfield, and the tenants and inhabitants of the manors. These disputes resulted in litigation which began in the Court of Exchequer in 1731 and dragged on until 1758, when Lord Irwin appealed to the House of Lords. The decree of 30th November 1630 and the feoffment of 15th July 1633 were upheld, but save in so far as the decree was affirmed, this litigation did not affect the land the subject of these proceedings.

Mr Bunting next referred me to Chapman v. Cowlan (1810), 13 East 10. This was an action upon the case by a copyholder against a freeholder of the manor of Crowle for the disturbance of the plaintiff's right of common, by the defendant's surcharging the common. The case related solely to the plaintiff's right of common of pasture, and since the tenants of the manor of Crowle had at that time only a right of turbary in the 600 ac., I can derive no assistance from it in these proceedings. Cowlam v. Slack (1812), 15 East 108 also related to rights of common of pasture in the manor of Crowle and is therefore equally unhelpful.

To sum up the position at the beginning of the nineteenth century, the 250 ac. and the 400 ac. remained open and uninclosed. Of the land to the west, the first 400 ac., or possibly the 600 ac., was subject to the right of turbary awarded to the tenants and inhabitants of the manor of Crowle by the decree of 30th November 1630, and the rest consisted of the turf moors to which the tenants of the manors of Hatfield and Thorne were entitled under that decree. A plan of the township of Thorne made by Pilkington and Moore, surveyors, in 1811 shows the 250 ac. as "Yorkshire Common" and the whole of the land to the west as "Thorne Waste" without any internal boundaries. C.Greenwood's map of Yorkshire, published in 1817, agrees on this matter with the plan made by Pilkington and Moore.

This was the state of affairs at the passing of the Hatfield, Thorne and Fishlake Inclosure Act of 1811 (41 Geo.III,c.xxx). The preamble to the Act described the land to be inclosed in general terms, but by section 41 of the Act "the Peat Moors, known by the name of Thorne Waste, and which have Time immemorially been considered, used, and enjoyed as the Estate, Right, and Property of the Person or Persons whose Estate abuts or adjoins the same" were excluded from inclosure. Section 41 then went on also to exclude from inclosure "the Common or Waste lying near Crowle within the Parish of Hatfield ..... known by the name of the Yorkshire Common, otherwise the Crowle Yorkshire Common, containing Two hundred and fifty Acres, and the Turf Moors near thereto adjoining, containing Four hundred Acres, which were ..... decreed by the Barons of His Majesty's Court of Exchequer in Michaelmas Term, in the Fifth Year of the Reign of His said MajestyKing Charles the First, to the Tenants, Commoners, and Inhabitants of Crowle". Thus the status and relevant history of the whole of the land which is in any way relevant to these

proceedings was well known in 1811 and the whole of it was excluded from the provisions of the Act.

Two years later came the Crowle Inclosure Act of 1813 on which the Objectors base their case. The major part of the land the subject of this Act lay in Lincolnshire to the east of the Old River Don and has no relevance to these proceedings, but it is stated in the preamble that "there are certain Commons and Moors in the West Riding of the County of York, called Crowle Yorkshire Common, and Yorkshire Moors, appurtenant to or belonging to Estates, within the said Parish of Crowle, or the Owners thereof". By section 1 of the Act Commissioners were appointed for dividing, allotting, inclosing, draining, warping, and embanking the land in Lincolnshire and the West Riding to which the Act applied.

The Act of 1813 was amended in 1816 by the Act 56 Geo.III,c.lviii, but the latter was concerned with the Commissioners' powers as to land drainage and did not affect the powers as to inclosure conferred on them by the former Act.

In their inclosure award dated 17th June 1822 the Commissioners included the 250 ac., the 400 ac., and the 600 ac. The Objectors, who all derive title under the persons to whom allotments out of the 600 ac. were made by the award, contend that all rights of common over the land included in the award were extinguished by virtue of section 14 of the Inclosure Clauses Act of 1801 (41 Geo.III, c.109), which was incorporated in the Act of 1813.

Before considering Mr Bunting's first ground for questioning the validity of this award it is necessary to have in mind the situation of the parish and county boundaries in the immediate vicinity of the 250 ac., the 400 ac., and the 600 ac.

In section 41 of the Act of 1811 the Crowle Yorkshire Common (i.e. the 250 ac.) is expressly stated to be in the parish of Hatfield, and by implication the "Turf Moors near thereto adjoining" (i.e. the 400 ac.) were also in that parish. There was produced to me a map of the Thorne Union, dated 1888, which shows the 250 ac. and the 400 ac. as being in the parish of Crowle and the 600 ac. as being in the parish of Thorne. There was no evidence as to when or how these changes came about, but it is sufficient for the present purpose to observe that neither in 1811 nor in 1888 was the 600 ac. regarded as falling within the parish of Crowle.

There are many references in the documents adduced in evidence to the Old River Don as the county boundary, and the boundary is shown on this line on the 1888 map. Before 1888 the area of the parish of Crowle was also an urban sanitary district for the purposes of the Public Health Act 1875. This explains how the county boundary came to be moved to the west, for section 50(1)(b) of the Local Government Act 1888 provided that where any urban sanitary district was situated partly within and partly without the boundary of a county, the district should be deemed to be within the county

which contained the largest portion of the population of the district according to the Census of 1881, though it is not clear why the new boundary did not follow the parish boundary shown on the 1888 map (which shows the position in that year before the coming into operation of the Act of 1888), but included in Lincolnshire the 600 ac. as well as the 400 ac. and the 250 ac.

For his first point Mr Bunting relied on the provisions of section 35 of the Act of 1801. This required the Commissioners to draw up their award and to read it and execute it at a special general meeting of the proprietors. Then the execution of the award had to be proclaimed the next Sunday in the church of the parish in which the lands divided and allotted by the award should be, from the time of which proclamation only and not before, such award should be considered as complete. The award had also within twelve months after its signing and sealing, or so soon as conveniently might be, to be inrolled in one of the Courts of Record at Westminster or with the Clerk of the Peace of the county in which the lands were situated. It was also provided by section 59 of the Act of 1813 that the award, when executed and inrolled in the manner directed by the Act of 1801, should be inrolled by the Steward of the courts of the manor of Crowle, and that the award with a plan of the lands directed to be allotted and inclosed should within one month afterwards be deposited in a tin box in the parish church of Crowle. It was also provided by section 35 of the Act of 1801 that the award should at all times be admitted and allowed in all courts whatever as legal evidence.

What Mr Bunting described as the "purported award" was produced from the custody of the Vicar of Crowle. It is dated 17th June 1822. It has on the last page a certificate that it was read in Crowle church on 23rd June 1822 and a certificate that it was inrolled with the Clerk of the Peace of the County of Lincoln, Parts of Lindsey, on 22nd September 1822. There is also a certificate of inrolment by the Steward of the manor of Crowle. There is no certificate that the award was read in any other church, or that it was inrolled with the Clerk of the Peace for the West Riding, or that it was inrolled in one of the Courts of Record at Westminster. Furthermore, there is no record of an inrolment among the records of the former Clerk of the Peace in the County Record Office at Wakefield.

Thus there is no evidence that the statutory provisions were complied with in relation to the 600 ac. and the evidence that those provisions were strictly complied with in relation to the land in the parish of Crowle indicates non-compliance in relation to the land not in that parish. Whether non-compliance with those provisions has the effect of invalidating the award, at least in so far as it relates to the 600 ac., depends on whether the provisions are to be regarded as imperative or merely directory.

The authorities on this topic are not very helpful. The locus classicus is in the judgment of the Privy Council delivered by Sir Arthur Channell in Montreal Street Railway Co. v. Normandin, [1917] A.C.170, at pp.174, 175, where he said:-

"The question whether provisions in a statute are directory or imperative "has very frequently arisen in this country, but it has been said that

"no general rule can be laid down, and that in every case the object of "the statute must be looked at ..... When the provisions of a statute "relate to the performance of a public duty and the case is such that "to hold null and void acts done in neglect of this duty would work "serious general inconvenience, or injustice to persons who have no "control over those entrusted with the duty, and at the time would not "promote the main object of the Legislature, it has been the practice "to hold such provisions to be directory only, the neglect of them, "though punishable, not affecting that validity of the acts done".

It seems to me that it would work serious general inconvenience, or even injustice to the Objectors, whose titles depend on the award, to hold that the award is null and void, and if the provisions of the Acts of 1801 and 1813 merely provided that after the award was made it should be published and inrolled in the manner directed, I should have no hesitation in holding such a provision to be merely directory, following Jervis, C.J. in Doe d.Roberts v. Mostyn (1852), 12 C.B. 268, 272, where he said of a provision in an inclosure Act:-

"Unless the words of the act were so manifestly clear to the contrary, "the court would always incline to hold them to be directory, in order "to avoid the absurdity and injustice that would result from any other "construction".

The important words in this case are those in section 35 of the Act of 1801, which after requiring the proclamation in the church of the parish where the lands are situate, expressly state that "from the time of which proclamation only and not before, such award shall be considered as complete". This is in marked contrast to the requirement as to inrolment, which does not become effective until the award has become complete by virtue of the proclamation in the parish church. While it might be correct to regard the requirement as to proclamation in Hatfield or Thorne church to be merely directory as to land in the parish of Crowle, a matter upon which it is not necessary for me to express any view, I feel driven to the conclusion that so far as the land in the parish of Hatfield or Thorne is concerned, the words requiring proclamation in Hatfield or Thorne church are manifestly clear, and that the award never became complete and so never extinguished the pre-existing rights of common over the 600 ac.

Lacking in merits though the point may be, that is sufficient to dispose of these disputes, but it is my duty to deal also with Mr Bunting's other point, which is substantive and not merely procedural. This is that the Commissioners were not empowered by the Act of 1813 to inclose any part of the 600 ac.

At the hearing the argument was concentrated on the words "Crowle Yorkshire Common, and Yorkshire Moors" in the preamble to the Act of 1813. The words "Crowle Yorkshire Common" present no difficulty. Mr McCulloch agreed that they referred to the 250 ac. Mr Bunting contended that the words "Yorkshire Moors" meant "Crowle Yorkshire Moors" and referred to the 400 ac. Mr McCulloch contended that it would be wrong to introduce "Crowle" before "Yorkshire Moors" and that "Yorkshire Moors" referred not only to the 400 ac., but also to an undefined area to the west of the 400 ac. It was for the Commissioners, so

Mr McCulloch argued, to define the extent of this area to the west in the exercise of their powers under section 15 of the Act of 1813, and they had carte blanche to fix its western boundary where they would.

Section 15 of the Act of 1813 begins by reciting that disputes or doubts might arise concerning the boundaries of the lands and grounds directed by the Act to be inclosed where they adjoined on and lay open to other lands and grounds and goes on to authorise the Commissioners to ascertain and fix the boundaries. This section is similar to section 3 of the Act of 1801, under which the boundaries of parishes, manors, hamlets, and districts could be ascertained, but it was necessary partly because the area to be inclosed by the Act of 1813 did not wholly fall within any of the categories mentioned in section 3 of the Act of 1801, and partly because parts of the area to be inclosed adjoined on and lay open to other lands and grounds. In my view, however, the disputes or doubts concerning boundaries referred to in those sections were disputes or doubts of a purely cartographic nature. The area to be inclosed would be described in the enabling provisions, and the function of the Commissioners would be to discover where the boundaries of the area so described lay. It would be wrong to regard the Commissioners' powers as extending to the choice of the area to be inclosed. They could do no more under section 15 of the Act of 1813 than define an undefined boundary where the lands and grounds to be inclosed adjoined on and lay open to other lands and grounds.

In my view Mr Bunting approached the matter in the correct way by endeavouring to find a definite meaning for the words "Yorkshire Moors". If one looks at the phrase "Crowle Yorkshire Common, and Yorkshire Moors" in isolation a possible meaning would be "Crowle Yorkshire Common and Crowle Yorkshire Moors", for commas should be ignored in construing Acts of Parliament passed before 1850: see per Lord Reid in Inland Revenue Commissioners v. Hinchy, /1960/ A.C.748, 765. It seems to me, however, that to endeavour to construe these words in isolation is to take too narrow a view of the matter. The complete expression in the preamble to the Act of 1813 is "certain Commons and Moors in the West Riding of the County of York, called Crowle Yorkshire Common, and Yorkshire Moors, appurtenant to or belonging to Estates, within the said Parish of Crowle, or the Owners thereof". In section 1 of the Act the same area is described as "all such Commons and Moors within the said West Riding of the said County of York, (which said Commons and Moors are situate within the said Parish of Crowle, and the several parishes of Hatfield, Adlingfleet, Thorne and Fishlake, in the County of York, some or one of them) as are appurtenant to or belonging to Estates within the said Parish of Crowle, or the Owners thereof". The preamble also contains the further information that Charles, Earl Manvers, the lord of the manor of Crowle, eleven other named persons, and "several other persons" were the owners and proprietors of all such commons and moors in the West Riding as were appurtenant or belonging to estates within the parish of Crowle, or the owners thereof.

The number of parishes in "some or one" of which the commons and moors were situate seems to indicate some uncertainty as to parish boundaries, and it might not be an easy task to identify the commons or moors in question by reference to their parochial situation. Fortunately that is not necessary for the purposes of this case. All that is required is to determine which of

the land lying to the west of the Old River Don could properly be described as "appurtenant to or belonging to Estates within the said Parish of Crowle, or the Owners thereof". Clearly the 250 ac. and the 400 ac. fell within this category by virtue of the decree of 30th November 1629. The 600 ac. is part of the land described in section 41 of the Hatfield Inclosure Act of 1811 as "the Peat Moors, known by the name of Thorne Waste, and which have Time immemorially been considered, used, and enjoyed as the Estate, Right, and Property of the Person or Persons whose Estate abuts or adjoins the same". The only connection between Crowle and the land so described in the Act of 1811 was that under the decree of 30th November 1630 the tenants and inhabitants of the manor of Crowle were entitled to have and enjoy 400 ac. of it for their turbary. The existence of a right of turbary or any other right of common does not affect the title to the soil, so that the turbary awarded by the decree of 1630 was in no way inconsistent with the description of the land in the Act of 1811 as "the Estate, Right, and Property of the Person or Persons whose Estate abuts or adjoins the same". Conversely, the existence of the turbary awarded to the tenants and inhabitants of the manor of Crowle did not, in my view, make the land over which it was exercisable "appurtenant to or belonging to" estates within the parish of Crowle, or the owners of such estates. It is perhaps unfortunate that the wording of the two Acts was not identical, but if the variation in the wording can be said to give rise to ambiguity as to the meaning of the words used in the Act of 1813, a construction of those words in harmony with the Act of 1811 is to be preferred to one in conflict with that Act. I have therefore come to the conclusion that so far as this case is concerned the only land to the west of the Old River Don included in the Act of 1813 consisted of the 250 ac. and the 400 ac. and that the 600 ac. was impliedly excluded from that Act as it had been expressly excluded from the Act of 1811.

After Mr Bunting had finished his reply to Mr McCulloch's submission of law regarding the ambit of the Act of 1813, Mr McCulloch drew my attention to the decision of the Court of Appeal in Micklethwait v. Vincent (1893), 69 L.T.57. The case related to an inclosure award made in 1808, and the concluding paragraph of the headnote reads:-

> "Held, that after the lapse of so many years without any dispute "as to the propriety of the award, the court would not now consider "whether the award was ultra vires or not".

Mr McCulloch read the report, but since Mr Bunting had had no previous opportunity of considering the case, he was not able to deal with it very adequately. It is necessary, therefore, that I should examine this potential bomb-shell in some detail.

The action was for an injunction to restrain the defendant from searching for or shooting or disturbing any wild fowl or other birds, and from fishing on the portion of Hickling Broad of which the plaintiff claimed to be the owner. By the award the land in question had been allotted to the plaintiff's predecessors in title, and they had ever since been treated as the owners thereof.

The defendant contested the plaintiff's claim to be the owner of the Broad or any part of it. It was argued on the defendant's behalf that so far as it was allotted to the plaintiff's predecessors in title by the award of 1808 that award was ultra vires, because the local Inclosure Act gave the commissioners no power to allot the Broad itself or any part of it, neither the word "fens", nor any other of the words used in the Act with respect to the subject-matter of the allotments, being an apt description of the Broad, or capable of describing it.

Lindley, L.J. began his judgment by saying: "This is a most hopeless appeal", and he concluded by saying:-

> "It is an unheard-of thing to treat as null and void an award made "eighty or ninety years ago, and awarding a piece of land which has "been enjoyed without question for the whole of that period by the "plaintiff or his predecessors. That being so, it is unnecessary to "say whether there was any mistake on the part of the Commissioners as "to the exercise of their authority in making the award. I do not "think that there was, though there is perhaps some little doubt as to "that; but assuming that there was, it is utterly hopeless to expect "us to put that right now".

All this made Mr Bunting's case look somewhat fragile. His answer was that the decision in Micklethwait v. Vincent had no application to the present case, because here the land in question had never been inclosed, in the sense of never having been fenced. This seems to me to be no answer at all, because the legal process of inclosure does not involve the making of fences or the planting of hedges, this being something which can be done subsequently by the owners of the allotted lands for their own purposes. As I see it, the true distinction between Micklethwait v. Vincent and the present case lies in the fact that in that case the matter in issue was the title of the plaintiff to the land allotted to his predecessors. I gathered from some of the many obiter dicta which fell from Mr Bunting during the course of the hearing that he does not accept that the Objectors have valid titles to their respective portions of the 600 ac., but that is not a matter which is in issue in these proceedings. Indeed, it is wholly immaterial. At the moment the Ownership Section of the Register Unit contains no entries, and should this registration become final, the question of ownership will have to be the subject of a reference under section 8 of the Act of 1965. The only matter now in issue is whether the rights of common admitted to have existed before the award of 1822 were extinguished by that award.

In Micklethwait v. Vincent the defendant made no claim to a right of common. This was pointed out by Kay, L.J., at p.59, where he said:

> "The defence is the most extraordinary I have ever heard. The defendant "does not say, 'I have a right to shoot over the Broad', but he says, "'You are not the owner'; he does not say, "You are not in possession', "and that alone would be conclusive against him in an action of trespass, "but he says, 'You have a bad title'".

The reason why the Court of Appeal held that the plaintiff's title could not be impugned was the impossibility of putting the parties back into the pre-award position. Lopes L.J. cited the judgment of Turner, L.J. in Bateman v. Boynton (1866), L.R. 1 Ch.App 359, at p.367, where he said: "In ordinary cases, where a transaction is undone for mistake, the parties are to be restored to their original rights; but this could not be done in the present case". Kay, L.J. said:

> "An award by way of allotment is an award which authorises a number of "allotments to be apportioned among various claimants, and you cannot "say, if you take away from one of the persons affected what has been "allotted to him, that the award shall stand as to the other portions "which have been allotted, because by taking away one portion you alter "the whole operation of the award. Consequently you must begin de novo. "That reason again would make it impossible to make any alteration in "the award, even if the Commissioners had exceeded their authority".

In the present case the registration in the Land Section of the Register Unit is in no way inconsistent with the pattern of ownership now existing as a result of the allotments made under the award of 1822 and subsequent transfers of ownership. It does not involve any attempt to put the clock back and restore the proprietary position which existed before the award. Micklethwait v. Vincent is, as I read it, an authority only for the proposition that what may have initially been invalid titles to land uuder an award become perfected after the passage of many years on account of the practical impossibility of remedying the position by beginning de novo. I cannot regard it as authority for the proposition that rights which are capable of being exercised without interfering with the existing pattern of land ownership must be regarded as having been extinguished by an invalid award, albeit one made many years ago. It might be otherwise if the land had been developed by the erection of houses or factories or by being put to some other use inconsistent with the exercise of rights of common over it. But that is not this case. Here there is, to use a homely metaphor, no omelette to unscramble. Apart from a few small buildings, shown on the Ordnance Map, on its eastern borders which can be regarded as the minima concerning which non curat lex, the 600 ac. is still in its virgin state, so much so that in 1970 it was notified by the Nature Conservancy under section 23 of the National Parks and Access to the Countryside Act 1949 as being of special interest by reason of its flora, fauna, or geological or physiographical features, and on 29th October 1971 nearly half of it (292 ac.) became the subject of an agreement between the Objectors Fisons Horticulture Ltd. and the Linconshire Trust for Nature Conservancy Ltd for its management as a nature reserve under section 16 of the Act of 1949. Under clause 1 of the agreement this part of the land is to be managed so as to maintain and enhance its natural beauty and interest. I have therefore come to the conclusion that the decision in Micklethwait v. Vincent does not debar me from holding that the award of 1822 did not operate to extinguish the rights of common over the 600 ac.

For these reasons I confirm the registration.

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. Should this decision be reversed on appeal, it will become necessary to consider whether the registration can be supported by the registration in the Rights Section of the Register Unit for which Mr Bunting and his wife and son applied.

Dated this 24th day of January 1975

Chief Commons Commissioner