COMMONS REGISTRATION ACT 1965

Reference No.25/D/21

In the Matter of Upper Pond,

Antingham, Norfolk.

DECISION

This dispute relates to the registration at Entry No.1 in the Land Section of Register Unit No.C.L.16 in the Register of Common Land maintained by the Norfolk County Council and is occasioned by Objection No.265B made by William Alston and noted in the Register on 13th November 1970.

I held a hearing for the purpose of inquiring into the dispute at Norwich on 5th July 1972. The hearing was attended by Mr. A.M. Darroch, solicitor for the Antingham Parish Council, and by Mr. C. Lamb, counsel for Mr. Alston.

The land in question in this dispute forms the western side of the valley of a stream running generally in a southerly direction. It is marshy ground, the natural growth on which down to 1966 consisted of reed, sedge, willow, alder, and nut bushes. In 1966 Mr. Alston cleared the land, since when there has been some natural regeneration.

Mr. Darroch claimed that the land fell within the first limb of the definition of "common land" in section 22(1) of the Commons Registration Act 1965 by being subject to rights of common. The rights of common upon which he relied were rights of estovers in gross belonging to Mr. E.W. Hardingham, Mr. C.J. Daniels, and Mr. E.C. Daniels. These three gentlemen must, so Mr. Darroch argued, be deemed to have acquired their rights by lost modern grants.

I find as a fact that for many years before Mr. Alston cleared the land in 1966 Mr. Hardingham and the two Mr. Daniels collected peasticks without being stopped. In addition, Mr. Hardingham and Mr. C.J. Daniels took wood for burning, Mr. C.J. Daniels took sedges and reeds for thatching, Mr. E.C. Daniels took branches for thatching, and Mr. Hardingham took watercress. All three witnesses said that they thought that they had a right to do this. Mr. Hardingham and Mr. E.C. Daniels thought that the land belonged to the parish. Mr. C.J. Daniel did not know who owned it.

Evidence was given by the Objector and by his father, Mr. James Alston. Mr. James Alston bought the Bradfield Hall estate, of which the land in question forms part, in 1936 and conveyed it to the Objector by deed of gift in 1961. From the time when he bought the property Mr. James Alston employed Mr. W. Bryant to manage it. Mr. Bryant is still the farm manager under the Objector.

The Objector, Mr. James Alston, and Mr. Bryant gave evidence, which I accept, that in 1936 there was a hedge against the road with a gate at the south-western corner. There were two or three notices prohibiting trespassing on the land. From time to time Mr. Bryant gave permission for the cutting of peasticks, but he never gave such permission to any of Mr. Darroch's three witnesses, and neither he nor the Objector nor Mr. James Alston was aware

of what Mr. Darroch's witnesses were doing.

Very properly, the Objector and Mr. James Alston were not asked whether they had in fact made grants to any of Mr. Darroch's witnesses, for a denial would have been inadmissible. What I have to determine is whether on the evidence which I have summarized I ought to presume that a grant, now lost, has been made by the Objector or his father or any of their predecessors in title to Mr. Darroch's three witnesses or any of them. The making of such a grant is, of course, a legal fiction, but it has to be presumed if the circumstances warrant it.

In this case we have evidence of the taking by the three witnesses of part of the produce of the land, particularly peasticks, over a long period. I accept that they thought that they were doing it as of right. However, for long-continued user to be capable of giving rise to a presumption of a lost modern grant it must satisfy the three fundamental requirements of being nec vi, nec clam, nec precario. It is the second of these which is important in this case. I accept the evidence of the Objector and his father and of Mr. Bryant that none of them was aware that Mr. Darroch's three witnesses was in the habit of collecting peasticks and other produce from this land. The fact that they were not aware of it is, however, not conclusive. The test is whether they should have been aware of it if they had been reasonably diligent in the protection of the interests of the owner of the land for the time being. In considering this one has to bear in mind that the land in question was rough uncultivated ground which it would not be necessary to visit frequently in the course of carrying on the owner's farming business. Mr. Bryant said that he visited the land from time to time, but not every week. It does not seem to me that reasonable diligence required more than that. The peasticks would be of little monetary value and would not justify the constant supervision of the land to ensure that they were not taken without the owner's permission. It appears to me to be more than likely that the taking of peasticks by Mr. Darroch's three witnesses would not be observed by an owner exercising the limited degree of supervision which the circumstances justified. I have therefore come to the conclusion that the owners have exercised due diligence in the protection of their interests, and that such diligence did not make them aware of what Mr. Darroch's witnesses were doing. I am accordingly unable to hold that any right of common has been acquired by a lost modern grant.

For these reasons I refuse to 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.

Dated this 25th day of July 1972

Chief Commons Commissioner