COMMONS REGISTRATION ACT 1965

Reference No. 268/D/209

In the Matter of Arden Great Moor, Arden with Ardenside, North Yorkshire

DECISION

This dispute relates to the registration at Entry No. 1 in the Land section of Register Unit No. CL 322 in the Register of Common Land maintained by the former North Riding County Council and is occasioned by Objection No. 0319 made by Mr C A Savile, The Viscountess Pollington, and The Countess of Mexborough and noted in the Register on 30 November 1970.

I held a hearing for the purpose of inquiring into the dispute at Malton on 12 October 1977. The hearing was attended by Mr J J Pearlman, solicitor, on behalf of the Ramblers Association, the applicant for the registration, and by Mr J N L Burn, solicitor, on behalf of the Objector.

The land the subject of the reference is an open and uncultivated area of about 2168 acres. This land, together with the whole of the rest of the township of Arden with Ardenside and some land in Hawnby, was conveyed to the Objectors' predecessor in title by an indenture made 8 August 1900 between (1) George Tancred (2) Arthur John Dorman (3) Hon. John Henry Savile. The parcels of the indenture were:-

> "All that the site of the dissolved Priory or Nunnery of Arden ..... And the "Manor or Lordship or reputed Manor or Lordship of Arden ..... and the "Mansion House known as Arden Hall ..... And also all those several farms "closes lands and other hereditaments situate in the Townships of Arden and "Hawnby ..... commonly called or known (with other hereditaments not hereby "conveyed) by the name of the Arden Estate ..... and more particularly "described in the First Schedule underwritten and delineated on the Plan "annexed hereunto and therein coloured Pink".

The land comprised in the Register Unit is included in the land coloured pink in the plan and is described in the First Schedule as "Heath" and under the heading "Tenant's Name" appear the words "In Hand".

The parcels are followed by a long string of general words, my attention being particularly drawn to "courts leet courts baron and other courts view of frank-"pledge and all that to view of frankpledge doth belong ..... to the said "Manor or Lordship appertaining or reputed to appertain".

Strictly speaking, these general words were surplusage, for they would have been deemed to have been included in the conveyance of the manor by virtue of section 6(3) of the Conveyancing and Law of Property Act 1881. Such words, however, do not imply that the rights including them actually existed, the proper way to construe them being as if they were followed by the words "if any".

The First Schedule shows that, with the exception of the land comprised in the Register unit and some comparatively small other areas described as being

"in hand", the remainder of the land conveyed was let to tenants. More recently it has been divided into three farms, each being let together with stray on Arden Moor for a specified number of sheep. Never within living memory has any court been held nor has anyone been regarded as lord of the manor. At the present time one of the farms is in hand. Part of the Moor is named on the Ordnance Survey map as "Bawderis Intake", but although there are a few lengths of broken walls in the vicinity it is impossible to define this area with certainty either on the map or on the ground, and sheep have strayed over it as over the rest of the Moor during the whole memory of Mr D E Bowes, who is now 78 years of age.

The only available earlier history of the manor and the land is the recital in the 1900 indenture of the will of Darcy Tancred, dated 24 December 1819, whereby he devised "All that the scite of the dissolved Priory or Nunnery of Arden otherwise called Nun Arden and a certain Manor and Lordship with divers messuages lands closes and tenements in the Parish of Hawnby", the township of Arden with Ardenside being then in that parish. My attention was also drawn to the tithe apportionment for Arden with Ardenside dated 15 August 1845, but I have been unable to derive any assistance as to the matter in issue in these proceedings from this document.

On these facts Mr Pearlman contended that the land comprised in the Register Unit fell within the definition of "common land" in section 22(1) of the Commons Registration Act 1965 by being waste land of a manor.

In order to fall within the definition of "waste land of a manor" laid down by Watson B. in Att.-Gen. v. Hanmer (1858) 27 L.J. Ch. 837 land must not only be open and uncultivated, as it is agreed that this land is, but also unoccupied and parcel of a manor and not part of the lord's demesne.

I am left in no doubt that the land comprised in the Register Unit was at one time waste land of the manor of Arden. It is, however, clear that by 1900 there were no customary freeholders and no copyhold tenants of the manor, and that the lord had taken the whole of the land comprised in the manor in propriis manibus, as it is put in some of the old authorities. Mr Burn contended that the manor was thereby extinguished, for, as he put it, no one can be his own lord.

While the changes brought about by the Objectors' predecessors in title have fundamentally changed the character of the manor, it would, in my view, be going too far to say that the manor has been thereby extinguished. A manor which has ceased to have any freehold tenants becomes what is known as a reputed manor, but a reputed manor has an existence in law, although not a continuing manor for all purposes: See Soane v. Ireland (1808), 10 East 259. The existence of reputed manors is recognised in section 205 of the Law of Property Act 1925, in which "manor" is defined as including a reputed manor. While the Manor of Arden is clearly now no more than a reputed manor, I know of no authority for saying that is has been deprived of that status because at some stage in its history the lord took the whole of the land in propriis manibus.

A more difficult question is whether the land comprised in the Register Unit has ceased to be waste land of the manor. To satisfy Watson B.'s definition of "waste land of a manor", land has to be parcel of the manor, but not part of the demesne lands of the manor. If this is a reputed manor, the land in

question is parcel of it. Therefore, the question to be determined is whether it is part of the demesne lands of the manor. Demesne lands are lands in the hands of the lord, including those which are let out to tenants for years or from year to year. In my view, the land here in question is demesne land and therefore falls outside Watson B.'s definition.

This, however, is not sufficient to conclude this case, for what has to be determined is whether this land is "waste land of a manor" for the purposes of the definition of "common land" in section 22(1) of the Commons Registration Act 1965.

This is by no means an easy matter to determine. There have been several appeals to the High Court in cases under the Act of 1965 in which waste land of a manor has been severed from the lordship of the manor. This would have resulted under the old law in the loss of the status of waste land of the manor: see The Queen v. Duchess of Buccleugh (1702), 6 Mod. 151. The High Court has rejected this as the test. In the earlier cases the judgments on this point were obiter, but in In re Chewton Common, Christchurch (1977), unrep. the point was the only one which had to be decided. In that case the land in question had been severed from the lordship of the manor as long ago as 1804. In the course of his judgment Slade J. said :-

"In my judgment the phrase "waste land of a manor", used in relation to a "particular piece of land in the context of a statute passed some forty years "after copyhold tenure had been abolished, does not as a matter of legal language "by any means necessarily import that the ownership of the land still rests with "the lord of the relevant manor. The phrase in such a context is equally "consistent with the sense that the land is waste land which, as a matter of history, "was one waste land of a manor, in the days when copyhold tenure still existed. "Though the phrase has a strong retrospective flavour, now that manors in the "pre-1926 sense no longer exist, I can see no sensible reason why the legislature "in 1965 should have chosen to render the registrability or otherwise of waste "land as "common land" dependent on whether immediately before 1st January 1926 "the lordship of the relevant manor and the land itself were still united. "Likewise I can see no good reason why Parliament should have chosen to make " registrability dependent on whether, at the date of registration, the waste "land still happens to be owned by the lord of the manor of which, historically, "it has once formed part".

There was no appearance by the respondent in In re Chewton Common, so the learned judge did not have the benefit of hearing a contrary argument. In considering the decision in such a case one has to bear in mind the observation by Brightman J. in Re Russell's Water Common (1975), unrep. that the decision in such a case is not a binding authority in subsequent cases. Nevertheless, I should be very hesitant to refuse to follow such a categorical exposition of the present law as that of Slade J. in a case in which it was alleged that waste land of a manor had lost that status merely by severance from the lordship of the manor.

This, however, is not such a case. Here there is no severance. Instead the land has remained parcel of the manor, but has become part of the demense. It cannot be said that the decision in In re Chewton Common supra is a direct authority upon the effect of such a change upon the legal status of the waste at the present time. Nevertheless, guidance is to be had from that case, for in his judgment Slade J. accepted the proposition that in order to be "waste land of a manor" within the meaning of the Act of 1965 the land in question

must still constitute "waste land" at the date when the registration is effected. Leaving aside manorial considerations, waste land as defined by Watson B. must be open, uncultivated, and unoccupied. It was accepted by Mr Pearlman and by Mr Burn that this land is open and uncultivated. At all material times the only use which has been made of it has been for the grazing of sheep belonging to the tenants of other land of the owner by virtue of specific provisions in their tenancy agreements. Land which is used for grazing cannot ipso facto be regarded as being occupied in the sense in which Watson B. used that word in his definition of waste land, for the waste land of manors was frequently used for grazing by manorial tenants who had rights of common. Here, however, the grazing is not the exercise of rights of common. It is the exercise of the contractual rights enjoyed by the tenants under their tenancy agreements. Rights held for a term of years or from year to year are specifically excluded from the definition of "rights of common" in section 22(1) of the Act of 1965. Indeed, quite apart from the statutory definition, such rights are fundamentally different from rights of common, which are a burden on the land. Here, to the extent to which the rents paid under the agreements are greater than the rents which could have been obtained for the farms without any right to graze on Arden Moor, the owner is in receipt of money from the Moor and is thereby enjoying a benefit from it. The owner is using the land by taking in the sheep of other people to graze on it, it being immaterial that the owners of the sheep are also tenants of other land belonging to the same owner. In my view, such a use of land is sufficient to make it occupied and thus to take it out of the category of "waste land". It therefore follows from the judgment of Slade, J. in In re Chewton Common, supra that it does not fall within the definition of "common land" in section 22(1) of the Act of 1965.

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 31st day of October 1977

Chief Commons Commissioner