COMMONS REGISTRATION ACT 1965 Reference No. 276/D/948-949

In the Matter of Corngafallt Common

DECISION

These disputes relate to the registration at Entry No. 2 in the Land section of Register Unit No. CL.104 in the Register of Common Land maintained by the Powys County Council and are occasioned by the conflicting registration at Entry No.3 in the Rights section of Register Unit No. CL.104 in the Register of Common Land maintained by the Council.

I held a hearing for the purpose of inquiring into the dispute at Brecon on 9 April 1991 and at Llandrindod Wells on 28 November 1991.

At the hearings Mr Jones Powell, solicitor, of Jeffreys and Powell of Brecon represented Isaac Meredith Lewis, Catherine Jane Lewis, Stephen Michael Gareth Lewis and Rice W Lewis the successors in title to the registrant at Entry No. 3 in the Rights section, Mr Robert Anthony, solicitor, of Robert Hanratty, Anthony and Co of Newtown represented the Royal Society for the Protection of Birds (the owners of part of the common) and Mr M Rolt, solicitor, represented the Registration Authority.

The registration of CL.104

The history of this registration is unusual.
On 17 June 1968 the Breconshire County Council as Registration Authority received applications dated 11 June 1968 from the Trustees of the Glanusk Estate who were the Lords of the Lordship or Manor of Builth to register an area of waste land as identified by a map as common land and to register the Trustees as the owners of that land.

On 17 June 1968 the Registration Authority, as they were required to do by regulation 10(2) of the Commons Registration (General) Regulations 1966, provisionally registered the land as common land by entering the particulars of the land on a fresh register sheet in the prescribed form, and forming a new register unit to which they allotted the number CL.104.

Several rights of common were registered over the unit land. The registration at Entry No. 3 was of a right to graze 320 sheep together with a "right of turbary and right to cut fern and estovers" as attached to Frondorddu and Caemelyn Farms. The registrant was Major General R S Lewis then the owner of the farms. The particulars of the land to which the right is attached was indicated in column 5 of the registration by a series of O S Numbers. Since, however, the list includes 'part 80" "part 284" and "part 286", without stating which part, it is impossible to tell exactly to what land the right was claimed to be attached. That being so the Registration Authority should have required the applicant to provide a plan showing the parts of the parcels - see regulation 31 and Note 6(b) to Form 9 (Application for registration of a right of common). No such plan is, however, referred to.

The last date for applications to register land as common land was 2 January 1970. By article 2 of the Commons Registration (Time Limits) (amendment) Order 1970, however, Registration Authorities were allowed until 31 July 1970 to make registrations.

To the north of the Entry No. 1 land there lies a further area of open land in part unfenced from that land but in many places divided from it by a ditch and what appears to be the remains of an old wall. This land was apparently not included in the Glanusk application because it was not considered to form part of the wastes of the Manor of Builth.

On 29 July 1970 after the last date for applications to register land but two days before the expiry of the period within which registration could be made the Registration Authority, as they had power to do under section 4(2) (a) of the 1965 Act, notwithstanding that no application had been made, registered a further area of land to the north of the Entry 1 land. I will call this the "extra land". Instead, however, of entering particulars of the extra land on a new register sheet and giving the new register unit a new number as regulation 10 required them to do, they entered it on the Land Section of the CL.104 register unit as Entry No.2.

The description of the land is given as -

> "Tract of land adjoining CL.104... as edged green on the inside of register map Nos. 96SW and 96NW and bearing the number of this registration viz: CL.104(2). Registered by the Registration Authority without application"

On the register map the land is shown as "CL.104(2)" as if it was a separate register unit.

Finally the Registration Authority made the entry -

> "The Registration at Entry Nos. 1 and 2 above, being undisputed, became final on 1st October 1970"

This is clearly wrong since, on any view, Entry No.2, having been made in the second registration period could not have become final until 31 July 1972.

Thus the registration of the extra land was irregular in more than one way. Furthermore these irregularities might have let to real injustice. Someone interested in the extra land who had inspected the register before the extra land had been added might well have decided there was nothing to object to. There was no reason why he should have inspected it again. Or such a person might have inspected the register after 1 October 1970 and, on reading that the registration of the extra land had become final, have concluded that it was too late to object. In fact no one objected to either registration in the land section.

That being so Mr Jones Powell's first argument (not without encouragement from myself) was that the requirements of the regulations not having been carried out, the registration of the extra land was a nullity and should not be confirmed.

I have no doubt that where the irregularity of a registration has resulted in injustice to any person which cannot be put right the proper course is to refuse to confirm that registration.

Here however, as Mr Powell himself pointed out, in the events which have happened, no injustice has been caused.

This is because, although there was no objection to the extra land, some, if not all, of it was also registered as part of the dominant land to Entry No.3 in the Rights section. Since there is a conflict between the two registrations each is to be treated as an objection to the other - see the Commons Commissioners Regulations 1971 regulation 7 .

As a result the extra land has been referred to me just as if there had been an objection to it.

Since the irregularities of its registration have caused injustice to no one I shall not refuse to confirm it on that ground but shall deal with it on its merits.

The question before me therefore is whether the extra land or any part of it is common land within the meaning of the 1965 Act.

Is the extra land subject to rights of common?

The first question depends on whether the rights provisionally registered extend to the extra land. Since they were all registered well before the extra land was registered it is impossible to hold that they were intended to cover that area. This is confirmed by the fact that the application for registration which was given effect to by the registration at Entry No.3 the land over which the right of common is exercisable is given as "Manor of Builth Wastes (Corngafallt)". I was told that the applications by the other rights registrants were in the same form and that the other registrants, all of whom were given notice of both hearings and before the second hearing received a letter from the Registration Authority explaining the issues, had stated that they had never claimed rights over the extra land.

It follows that the extra land is not "land subject to rights of common" within the definition of common land in section 22(1)(a) of the Act.

Is the extra land waste land of a manor?

The question remains whether it is "waste land of a manor not subject to rights of common" within section 22(1)(b).

Since the decision of the House of Lords in Hampshire County Council v Milburn [1991] 1AC 325 the question is whether the land is waste land of manorial origin.

Among other interesting historical documents Mr Powell produced a copy of the late Professor William Rees's map of Wales in the 14th century. This shows the northern boundary of the Lordship or Manor of Builth as running along the river Elan at this point, that it to say well to the north of the line given by the Glanusk application. According to this map, which Mr Powell accepts as being accurate, the whole of the extra land then lay within that Manor. If it is waste land it is therefore waste land of manorial origin. The question therefore resolves itself into whether the land or any of it is waste land. Part of the land is now fenced off from the open common along the line ABC on the map attached to this Decision and forms part of Frondorddu Farm. That land is clearly not waste land and I shall exclude it from registration. Part of the extra land (Now OS. 5015) is shown on the 1847 tithe map as being then fenced in and planted with conifer trees. There are no trees on it now and nothing is to be seen of the fence except a very few thorn bushes which may or may not have formed part of it. Mr Powell argues that land once fenced in can never again become waste land for the purposes of commons registration. I do not think this is right. The question is whether it is waste land of manorial origin at the date of registration and has not ceased to be waste land at the date of hearing. The definition in Attorney - General v Hanmer (1858) L.J. 27Ch 837 -

> "The true meaning of 'wastes', or 'waste lands', or 'waste grounds of the manor', is the open, uncultivated and unoccupied lands parcel of the manor, or open lands parcel of the manor other than the demesne lands of the manor."

is no longer since Milburn's case (supra) to be taken as a definition of "waste land of a manor" in section 22(1) (b) of the 1965 Act since the land need not be "parcel of the manor". It is enough that it should "be of manorial origin". As a definition of "waste land", however, it remains binding.Mr Powell argued that the mere fact that this land was included in the tenancy of Frondorddu Farm meant that it was "occupied". I do not think that this is so. A tenancy gives the tenant a right to occupy. Whether or not he does occupy is a matter of fact. There is no evidence that this land was occupied at the date of registration. It certainly is not occupied now. O.S.5015 was open, uncultivated and unoccupied at the date of registration and is so now. That being so I must confirm its registration as common land.

The land to the west of the line AB belongs to the Royal Society for the Protection of Birds. On the tithe map most of it is shown as woodland divided from the common by a broken line which normally indicates that it was not fenced. Mr Anthony argued that since it was woodland it must have some time been fenced. I am not convinced that this is so but even if it had been fenced it is not fenced now and for the reasons set out above is waste land.

I shall therefore confirm the registration in Entry No. 2 in the Land section with the modification that the land to the north and east of the line ABC on the map attached to this Decision shall be omitted from registration.

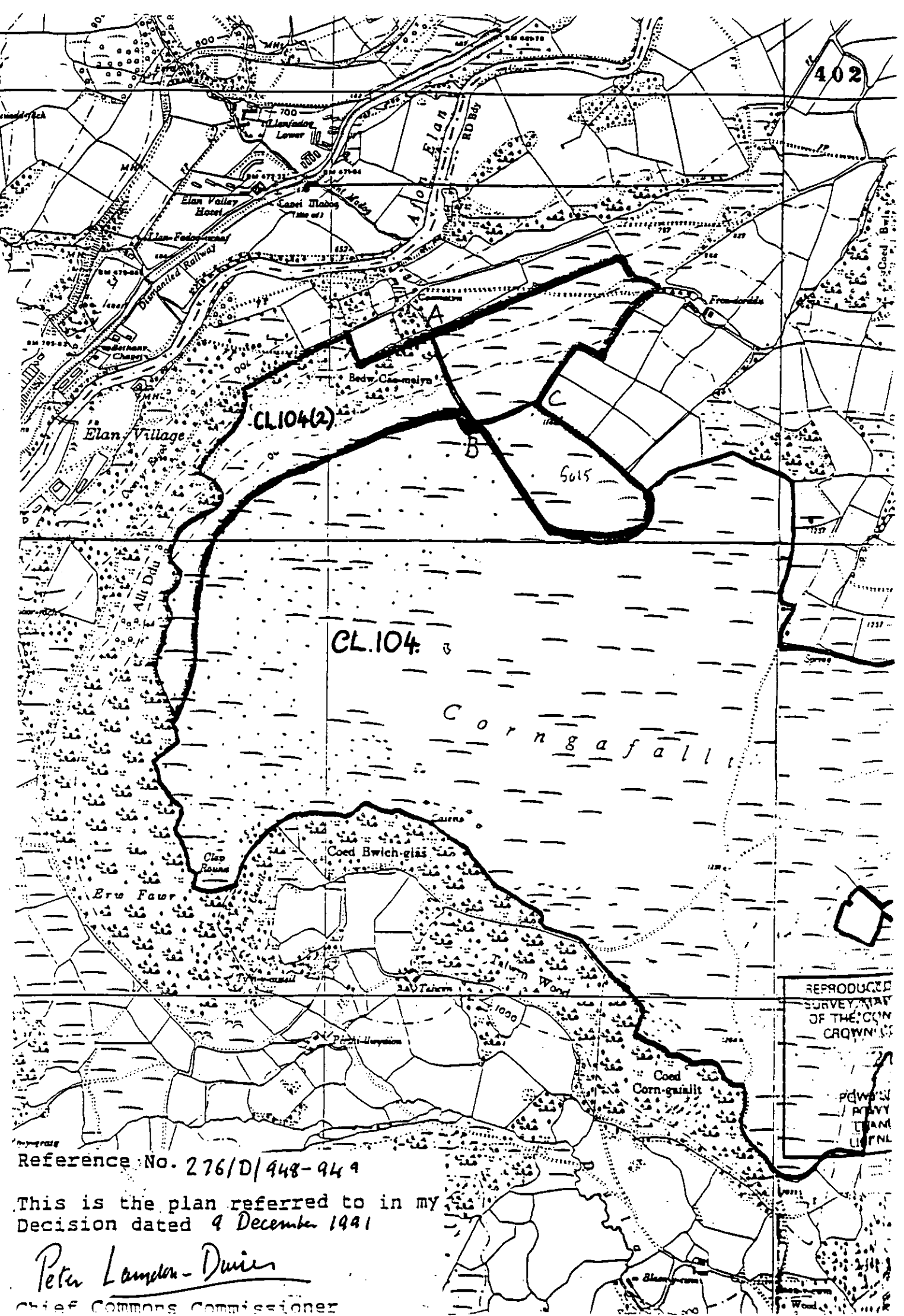
I shall confirm the registration at Entry No. 3 in the Rights Section with the modification that the land to which the right is attached in column 5 shall exclude the land to the south and west of the line ABC. A supplemental map should be prepared to show this land accurately.

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 9th day of December 1991

Peter Lamden-Dauer

Chief Commons Commissioner



Reference No. 276/D/948-949

This is the plan referred to in my Decision dated 9 December 1991

Peter Lamden-Davies

Chief Commons Commissioner