COMMONS REGISTRATION ACT 1965 Reference No. 234/D/84

In the Matter of Rush Green,
Harleston, Suffolk

DECISION

This dispute relates to the registration at Entry No. 1 in the Land Section of Register Unit No. CL 170 in the Register of Common Land maintained by the Suffolk County Council and is occasioned by Objection No. 115 made by Mr M F M Phoenix Mr W G Phoenix, Mr A M Phoenix and Mr E M Phoenix and noted in the Register on 26 February 1971.

I held a hearing for the purpose of inquiring into the dispute at Bury St Edmunds on 13 February 1979. The hearing was attended by Mr J N Whitaker, Solicitor, on behalf of the County Council as successor to the former East Suffolk County Council, which made the registration without application as registration authority, and by Mr K Achary, Solicitor, on behalf of the Mid-Suffolk District Council and the Harleston Parish Meeting. There was no appearance by or on behalf of the Objector, but Mr Whitaker put in a written joint submission and asked me to decide the matter after considering the joint submission, which sets out the relevant facts and the respective contentions in a very clear and helpful manner.

There is no entry in the Rights Section of the Register Unit, so the land comprised in it can only fall within the definition of "Common Land" in Section 22(1) of the Commons Registration Act 1965 if it is waste land of a manor.

The earliest evidence relating to the land in question is the Harleston Tithe Award made in 1845, where the roads and lanes are entered with a total area of 17a.2r.10p and no entry in the rent-charge column and no owner or occupier. It therefore appears to be highly likely that the land was then waste, in the sense of being open, unoccupied and uncultivated. It is not, however, possible to draw from this document alone any inference as to whether it was then in the ownership of the Lord of the Manor, though it must have been in the ownership of somebody.

By an indenture made 13 June 1914 between (1) Charles Pettiward, (2) Ernest Terry, Mr Pettiward conveyed to Mr Terry firstly, the manor or lordship of Harleston Hall with the rights, members and appurtenances thereto belonging; secondly, certain messages and lands described in a schedule; thirdly, any interest or rights which the vendor had in or over Rush Green and another piece of land which is not material to these proceeding; and fourthly, the adoowson of Harleston. The plan referred to in the indenture shows Rush Green as being completely surrounded by the other land conveyed with it. The parcels in subsequent conveyances do not differ materially from those set out in this indenture.

It was submitted on behalf of the Objectors that the fact that Rush Green has been conveyed separate and apart from the manor is sufficient evidence to displace such evidence as exists as to Rush Green being formerly manorial waste. If Rush Green was part of the manorial waste in 1914 it would, so it was submitted, be surplusage to refer to it separately, and further the vendor in 1914 did not claim to have the same title to Rush Green as he had to the manor.

I do not see the 1914 indenture in this light. In my view the proper inference to

draw from the rather meagre facts disclosed by the Tithe Award and the indenture is that before the indenture Rush Green had been waste land of the manor of Harleston Hall and, in the absence of any evidence of severance from the lordship of the manor, it was still waste land of the manor in 1914.

It was further submitted on behalf of the Objectors that even if Rush Green was waste land of the manor of Harleston Hall in 1914, it was severed from the manor on 13 June 1914 by being conveyed separately, and that this severance was effective notwithstanding that Rush Green and the manor were conveyed by the same deed to the same person. It was further submitted that in ordinary conveyancing practice this was merely a matter of the convenience of the purchaser and that he was entitled, had he so wished, to have had Rush Green conveyed by a separate deed.

In my view the 1914 indenture did not effect such a severance. By virtue of section 6(3) of the Conveyancing and Law of Property Act 1881 the conveyance of the manor included all wastes appertaining or reputed to appertain to it in so far as a contrary intention is not expressed in the conveyance. There being no such contrary intention expressed in the 1914 indenture, it follows that Rush Green was included in the first part of the parcels and that the specific mention of Rush Green in the third part of the parcels was surplusage.

There being no direct evidence of any severance of Rush Green from the manor and finding myself unable to infer from the evidence that there has been any such severance, it is necessary to consider whether Rush Green is still waste land as defined by Watson B. in Att.-Gen.v.Hanmer (1858), 27 L J Ch 837, at p.840, i.e. open, uncultivated and unoccupied. As to this aspect of the matter the land can conveniently be divided into 3 parts, lettered "A", "B" and "C" on a plan agreed between the parties.

As to "A" there is no difficulty, for the Objectors accept that it is still waste land as so defined.

"B" is not hedged or fenced in any way. It is bounded on the west and north sides by metalled public highways, on the east side by a concrete farmtrack and on the south side by an arable field with no physical separation. Since at least 1932 the Objecotrs and their immediate predecessors in title have caused the grass on "B" to be cut and burnt and have kept the hedgerows therearound trimmed. During every year or in most years they have used "B" for the purposes of clamping and storing sugar-beet in the winter months and clamping and storing manure, as a straw and hay stack-yard, and in the summer months as a corn stack-yard and threshing area and they have caused agricultural implements to be stored on it. In or about 1968 the Objectors caused the hedge and ditch separating "B" from their adjoining field to the south to be respectively grubbed out and filled in, and while carrying out drainage work on their adjoining land caused part of "B" to be drained. In or about 1969 "B" was ploughed by the Objectors and left fallow for 2 years in order to clear the land from weeds. In or about 1973 "B" was again ploughed and subsequently drilled and cropped. Since then "B" has been left rough and uncultivated.

Of these activites, the ploughing, drilling and cropping were the most important. It was, however, submitted on behalf of the County Council that there was no

ploughing before the commencement of the Commons Registration Act 1965 and that even if the land was ploughed before the registration was made on 20 July 1970, the fact that "B" was not actually cropped until the 1974 harvest and thereafter reverted to its present waste condition shows that no effective approvement had taken place by the date of registration.

I find myself unable to accept that the only matter which has to be considered is the state of affairs existing at the date of registration. In Central Electricity Generating Board v Clwyd County Council (1976) 1 WLR 151 at p.161 Goff J (as he then was) held that in considering whether land fell within the first limb of the definition of "Common Land" in Section 22(1) of the Commons Registration Act 1965 as land subject to rights of common no regard could be had to rights of common which had ceased to be exercisable between the date of the registration of the land and the date of the hearing by a Commons Commissioner. It seems to me that the rule there laid down regarding the first limb of the definition is equally applicable to the second limb and that what I have to consider is whether the land is waste land of a manor at the present time.

Looking first at the events which took place before "B" was first ploughed by the Objectors in or about 1969, although the use which was made of any one part of it was not continuous on a day-to-day basis, I have formed the view, looking at the facts as a whole, that this land was in the occupation of the Objectors before 1969 and thereby ceased to be waste land as defined by Watson B.

However, whether this view of the events before 1969 is right or wrong, in or about 1969 the Objectors went into occupation of "B" and it ceased to be unculivated when it was first ploughed and a fortion when it was subsequently cropped. "B" then ceased to satisfy Watson B!s definition of waste land. More difficult is the question of the legal effect of allowing the land to revert to its present condition. It is now waste in the scene of being open and uncultivated and if I am wrong in the view which I take of the pre-1969 events, also unoccupied, so it is necessary to consider whether it has re-acquired its previous status as waste land of the manor.

The effect of ploughing and cropping of "B" was to convert it from waste land into demesne land of the manor, i.e. land which the Lord of the manor has in propriis manibus: See Scriven on Copyholds (7th edn) p.5. Whether demesne land can become waste land of a manor seems to be a matter on which there is no authority. The conversion by the Lord of a manor of waste land into demesne is a process well-known to the law. It is known as approvement, and there is much authority on it, but there is no word to describe the reversal of this process, nor does there appear to be any reported case relating to such reversal. If Watson B!s definition of waste land of a manor were contained in a statute, there would be no difficulty in saying that land which satisfied it was waste land of a manor, irrespective of the time at which it satisfied the definition. But it has to be borne in mind that Watson B. was not applying his mind to the question which arises in this case. Bearing in mid that land which has ceased to be parcel of a manor by severance does not become parcel of the manor again on a subsequent purchase by the Lord of the manor (see The Queen v Duchess of Buccleugh (1702), 6 Mod 151), I incline to the view that waste land of a manor is land which has been waste from time immemorial and does not include land which has gone out of cultivation at a known time.

I have, however, come to the conclusion that it is not necessary for me to base my

decision upon this difficult and obscure point of law. Even if, contrary to the vew which I have tentatively expressed, former waste land of a manor can re-acquire its status as such, it seems to me that it can only do so if the Lord of the manor abandons his rights over it as demesne land which he acquired by the approvement.

Abandonment of a right is a question of fact. There can be express abandonment, though this is unusual, or abandonment can be inferred from non-exercise of the right for a long period, as frequently happens in cases relating to rights of common, where non-exercise for a period of 20 years is usually regarded as evidence of abandonment, if not otherwise explicable. There is no direct evidence of abandonment here and I find myself unable to infer abandonment merely from the fact that the land has been left rough and uncultivated since it was last ploughed and subsequently drilled and cropped in or about 1973. Indeed, an inference of abandonment is negatived by the other use which the Objectors have made of the land. It therefore appears to me that "B" is no longer waste land of the manor of Harleston Hall and so does not fall within the definition of "Common Land" in Section 22(1) of the Act of 1965.

It remains to consider part "C". This part is not hedged or fenced in any way. It is bounded on the north-west side by a metalled public highway, on the south-west side by the concrete farm track previously mentioned and on the east side by a ditch. It is not cultivated, but there is a small planted tree (now dead) in it and in 1967 the Objectors caused a concrete apron to be constructed on a small part of it and have subsequently used this each year as a storage pad for sugar-beet. Since at least 1932 the Objectors and their immediate predecessors in title have caused the grass on "C" to be cut and burnt and have kept the hedgerows therearound trimmed. During every year or in most years they have used "C" for the purpose of clamping and storing sugar-beet in the winter months and clamping and storing manure, as a straw and hay stock-yard and threshing area, and they have caused agricultural implements to be stored on it.

It was accepted by the County Council that the part of "C" on which the beet storage pad has been constructed is no longer waste land. So far as the remainder of "C" is concerned, although the use which has been made of any one part of it had not been continuous on a day-to-day basis, I have formed the view, looking at the facts as a whole, that this land has been in the occupation of the Objectors for many years past and has thereby ceased to be waste land as defined by Watson B.

For these reasons I confirm the registration with the following modifications; namely the exclusion of the areas "B" and "C".

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 <u>in point of law</u> 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 30th day of April 1979

Chief Commons Commissioner