IN THE HIGH COURT OF JUSTICE

1975 W. No. 342

CHANCERY DIVISION

GROUP B

Royal Courts of Justic

Thursday, 24th March, 197

Before:

MR. JUSTICE BRIGHTMAN

IN THE MATTER of Broxhead Common, Whitehill, Hampshire (Register Unit CL.147)

AND IN THE MATTER of The Commons Registration Act 1965

B E T W E E N:

ANTHONY GARY PETER WHITFIELD (Appellant)

and

ERNEST ALEXANDER CONNELL (Respondents)

and

FIONA ROSEMARY DIANA COOK

(Married Woman)

(Transcript of the Shorthand Notes of Walsh & Sons (incorporating Cherer & Co.) 55-57 Clifford's Inn, Fetter Lane, London, EC4A 1I Telephone number: 01-242 7057.)

SIR FREDERICK CORFIELD, Q.C. and MR. R. CARNWATH (instructed by Messrs. Stones, Porter & Co.) appeared on behalf of the Appellant.

MR. JOHN MILLS, Q.C., MR. J. TRENHAIL and MR. J. SIMPKISS (instr by Messrs. [illegible]dly Trimmer & Son, of Alton, Hampshire) appeared on behalf of the Respondents.

J U D G M E N T

(as approved by the Judge)

MR. JUSTICE BRIGHTMAN: This is an appeal by way of Case Stated from a decision of the Chief Commons Commissioner given on 22nd November, 1974, relating to Broxhead Common in Hampshire.

I will begin my judgment with a brief description of the land in question. In rough terms the Common measures one mile from north to south and three-quarters of a mile from east to west. On the north-west side of the Common is the village of Sleaford. There are three roads radiating from the village which have the effect of dividing the Common into four parts. The westerly part of the Common is flanked on its eastern side by a road running from Sleaford southwards to Bordon. I will call this stretch of Common "part A". A road also goes south-east from Sleaford to Lindford. I will call the Common between the Bordon road and the Lindford road "part B". There is a road which runs eastward from Sleaford and is called Trottsford Road. A large stretch of common is bounded on the north by the road, on the west by the Sleaford-Lindford Road and on the east by parkland. This I will call "part C". Lastly, there is a small area of Common to the north of Trottsford Road which I will call "part D". Trottsford Farm is just to the north of and abuts on part D.

Parts A, B, C and D have been provisionally registered in the Land Section of the Register as Common Land under Section 1 (1) (a) of the Commons Registration Act 1965. This appeal relates only to part C. The freehold of part C belongs to Mr. Whitfield of Headley Wood Farm. On 12th June 1968, Mr. Connell, who lives at Lindford Bridge House at the southern point of part C, provisionally registered a right of common of pasture over part

A like right over part C was provisionally registered on 18th Jun 1968 by Mrs. Cooke of Trottsford Farm. On 1st September 1970 Mr. Whitfield lodged a formal objection to the registration of part C in the Land Section and also to the registration of Mr. Connell's and Mrs. Cooke's rights of common of pasture.

I am not concerned with the registration of part C as commo land but only with the claims to rights of common thereover. The hearing of these and other claims occupied many days before the Chief Commons Commissioner. He confirmed the rights of common o pasture claimed by Mr. Connell and Mrs. Cooke over part C except over a small enclosed area known as "Wildman's Plat" which, it was conceded was not subject to rights of common. Mr. Whitfield now appeals by way of Case Stated. An appeal lies only on a point of law.

Broxhead Common forms part of the Manor of Broxhead which has a complicated and obscure history. In the seventeenth century th Manor came to be held in undivided shares by Thomas Brocas and John Fauntleroy. Thomas Brocas had ten undivided twelfth shares and John Fauntleroy had two undivided twelfth shares. In 1636 a survey was made of the manor. In the following year the manor was partitioned between Thomas Brocas and John Fauntleroy. It is not clear whether the legal effect of the partition was to create separate manors and I do not have to decide this. The whole of t Common as it now exists was allotted to the Brocas ten-twelfths, t allotment to the Fauntleroy two-twelfths having been long since enclosed.

The Chief Commons Commissioner found that until 1637 the own of the several undivided parts kept courts and granted copyholds other estates in their respective undivided parts. There does n however, appear to be any indication that courts continued there

after to be held and no Court Rolls after the partition have be traced.

I deal first with Mr. Connell's claim. It is conceded o both sides that the site of Lindford Bridge House was part of t waste of the manor at the time of the partition in 1697 but was subsequently enclosed. In 1678, 41 years after the partition, lease (so it is recited in the document that I mention next) wa granted by William Knight and William Vicary, who owned the Bro ten-twelfths, to Jasper Moorer his executors and assigns. The lease was for 99 years at a yearly rent of 3s.4d. The lessors covenanted on the expiration of the term to grant a new lease t Moorer his executors administrators and assigns for the like te This lease is the starting-point of Mr. Connell's title. It w duly renewed for 99 years on the 23rd December 1778 by an inden expressed to be made between the Hon. Henry Stawell Bilson Legg Esquire, described as Lord of the Manor of Broxhead, of the one part and Richard Newman of the other part, pursuant to the cove in the 1678 lease. The habendum reads as follows: "To have a hold the said Messuage Tenement or Cottage lands and premises before in these presents mentioned to be demised with their a every of their appurtenances unto the said Richard Newman his Executors Administrators and Assigns from the feast day of Sain Michael the Archangel in the year of our Lord one thousand sev hundred and seventy seven for and during and unto the full end and term of four score and nineteen years from thence next ensuing and fully to be compleat and ended". The indenture al contains this covenant: "that the said Richard Newman his Executors Administraters and Assigns Occupiers of the premis shall and will from time to time during the said term upon reas able notice and warning unto him or them given or left at the

demised premises do his and their personal suit and service to the Court Baron of the Manor of Broxhead aforesaid when and as o as any such shall be kept and holden and be there ordered and justified by the Steward and Suitors of the said Court for the ti being in such manner as other the tenants of the said Manor do an have thereto been used and accustomed to do". There is then a further covenant to renew in these terms: "and will at the end and expiration or other sooner determination of this present demi at the request costs and charges of the said Richard Newman his Executors Administrators or Assigns grant unto the said Richard Newman his Executors Administrators or Assigns a new Lease of all and singular the premises to have and to hold the same unto the said Richard Newman his Executors Administrators and Assigns for the like term of fourscore and nineteen years at and upon and with the same yearly covenants and agreements as are hereinbefore mentioned and expressed to be paid performed and kept by the said Richard Newman his Executors Administrators or Assigns he the said Richard Newman his Executors Administrators or Assigns paying unto the said Henry Stawell Bilson Legge his heirs or Assigns three years rent of the premises in the name of a fine or invoice for th granting such a new lease".

On 15th July 1876 a further lease was granted by an indenture expressed to be made between the Hon. John Thomas Dutton of the or part and Edwardsand Walter Fullick of the other part from the 29t September 1876 for 99 years. This lease contained a similar habendum, a like covenant to do suit and service to the Court Bar and a differently worded covenant to renew for a further term of 99 years. Whereas the earlier lease referred to "the same yearly covenants and agreements as are hereinbefore mentioned and expressed to be paid performed and kept by the said Richard Newma

there was substituted "at the like rent and upon and with the like covenants and agreements as are herein contained". It is perfectl clear from the wording of the 1778 lease that it was not expressed as if it were perpetually renewable. However, as a simple matter of language the 1876 covenant could be read as one for a perpetually renewable lease, but on the authorities it is indisputable that it must be read as providing only for a single renewal. See Caerphilly Concrete Ltd. v. Owen ((1972) 1 W.L.R. 372).

The 1876 lease became vested in Henry George Gamblen in 1909. On 30th November 1929 Henry John Dutton, who then owned the reversion to the lease in succession to his father John Thomas Dutton, conveyed the reversion to Gamblen so as to merge the term of 99 years in the reversion and extinguish it. The freehold was conveyed to Mr. Connell in 1958. At the date of the 1929 conveyance Henry John Dutton did not own part C of the Common.

The 1778 and 1876 leases made no mention of the grant of any rights of common over part C or over any other part of the Common. As Henry John Dutton did not own part C of the Common in 1929, th conveyance of that date clearly could not create any new rights over part C. All that H.J. Dutton could do was to transfer to th purchaser any existing rights. It follows that rights of common over part C could only have become vested in Gamblen and later in Mr. Connell if they were appurtenant to the land when the leases were granted.

The Chief Commons Commissioner based his decision in favour of Mr. Connell in this way. He said:

> "A new lease for 99 years was granted on 15th July 1876 by the Hon. John Thomas Dutton to Edward Fullick and Walter Fullick, and on 30th November 1929 Henry John Dutton conveyed the freehold reversion to Henry George Gamblen, the then leaseholder. In my view, this conveyance, by virtue of section 62(1) of the Law of Property Act 1925 passed to Mr. Gamblen the rights over the Common to which he had previousl

"been entitled as tenant: see Crow v. Wood (1971)1 Q.B. 7
Sir Frederick Corfield made the point that in 1929 Mr.
A Dutton did not own any part of the Common and so could no
grant any rights over it. It seems to me, however, that
the dispositions of the Common made by previous lords of
the Brocas ten-twelfths of the manor cannot have affected
the rights of the manorial tenants, and that it is those
rights which were impliedly included in the 1929 conveyanc
by virtue of section 62(1) of the Act of 1925.

B Although Mr. Connell has never grazed animals on the
Common since he purchased his property in 1958, there is
in my view, nothing in the evidence to indicate that
these rights have been extinguished by abandonment or
otherwise".

The Chief Commons Commissioner found as a fact that there
C a right of common of pasture over the whole of the Common atta
to each of the tenements, whether customary, freehold, copyhold
leasehold, mentioned in the survey of the unpartitioned manor
in 1636. He interpreted the 1637 partition as having the effe
D of attaching to each of the tenements in the two-twelfths part
of the manor the like rights of common over such two-twelfths a
so also in respect of each tenement in the ten-twelfths.

The Notice of Appeal attacks these findings as unsupported
E any evidence. The Notice also asserts that there was no eviden
that any rights of common were granted or enjoyed by or under t
1678, 1778 and 1876 leases.

At the time of the partition Lindford Bridge House was was
F of the manor and therefore no rights of common could then have
been appurtenant to it. When the Lord of the Manor enclosed t
piece of waste he could have retained it for himself, or dispos
G of it by an ordinary grant under the Common Law system of
conveyancing, or he could have disposed of it to a tenant to be
held as customary land of the Manor. There is a precedent in
Watkins Treatise on Copyholds, 4th Edition, Volume 2, page 349,
H a lease of waste lands for 99 years, which is quite clearly an
ordinary Common Law lease. It is plain that such a lease wo

not create any rights over the Common without express mentic
The general words in a conveyance do nd create a right of c
see Baring v. Abingdon ((1892) 2 Ch. 374). If the Lord of
Manor chose the third course and granted a customary lease,
customary rights of common (assuming the existing commoners w
not prejudiced) would have passed, without express mention, t
lessee. Under the old law the position was that the Lord of
Manor or other owner of a waste was entitled to enclose a par
it for his own benefit provided that sufficient waste was lef
answer the rights of the commoners. There was also not
infrequently a quite separate customary power for the Lord of
Manor to grant parcels of waste to be held by copy of Court Ro
in which case the parcels so granted were considered in all
respects as copyhold tenements. See Elton & Mackay on Copyhol
2nd Edition, at page 276 et sequentes. Elton & Mackay add thi
(page 284): "In order to prevent an undue diminution of the
Common by an increase of tenants, it is the custom of some man
that the new grantees shall not be entitled to rights of common
on the waste. In the absence of such custom, however, it woul
seem that where the piece of land is inclosed, and granted as a
tenement under a custom, as the custom is from time immemorial,
the tenant would have the same privileges as any of the copyhold
See also Lord Northwick v. Stanway (3 Bosanquet & Puller, page 3
Mr. Mills, for Mr. Connell, founds his case on the proposition
that the lease of 1678 was a grant of the waste of the manor to
be held for a term of years according to the custom of the mano
and having attached thereto the customary rights of common.
There are no sufficient grounds for challenging the finding o
the Chief Commons Commissioner that in ancient days the manorial
tenants enjoyed rights of common, both before and after the part

There is, in my judgment, plenty of documentary evidence to justi
that finding of fact. A few examples will suffice. There are
references to such rights in a translation from the Manor Court
Book of the Manor of Broxhead and other manors based on testimony
said to have been given on the 7th January 1619: [Bundle A, p.2
the survey of the Manor made in 1636 refers to the existence of
rights of common; [Bundle A, p.24]. There are many references to
rights of common in the inquisition of partition between Thomas
Brocas and John Fauntleroy dated 26th July 1637. In 1753 and
1763 tenants claiming rights to the soil and pasturage in and upo
the Manor of Broxhead released their rights in favour of the
owner of the Fauntleroy two-twelfths parts of the manor;
[Bundle A, pages 25, 27, 28 and 29]. There are further referer
in notes compiled by Sir Thomas Gatehouse, the then owner of the
Fauntleroy two-twelfths, in 1779.

If therefore the lease of 1678 was granted by the Lord of th
Manor to be held as customary land according to the custom of th
manor, and the later leases were granted on a like basis, I have
no reason whatever to doubt that the rights of common enjoyed by
the manorial tenants would have ultimately vested in Gamblen.
If, however, the leases were common law leases, it seems to me
impossible to argue that any rights of common attached thereto a
passed by the conveyance of 1929. Mr. Mills admitted as much.

I must therefore examine the leases to see whether they we
grants according to the custom of the manor or were ordinary
leases taking effect under the common law.

It is reasonable to assume that the first lease, that of 1(
of which no copy exists, was in the same form as the 1778 lease
which recites it. As I understand this ancient branch of the
copyhold tenements might be copyholds of inheritance in which t

tenant might have a customary fee or any less estate; or copyhc
for lives; or copyholds for years. The latter were described
in these terms in Elton & Mackay on Copyholds, 2nd Edition, 189?
page 44: "Besides the estates for years already described, whic
may subsist in copyholds of inheritance or copyholds for lives,
there are in several districts copyholds for years, which are
granted for a term renewable or not renewable according to the
usage, but for no greater estate. These are found among customs
freeholds, as well as in copyholds in the restricted sense of th
term. Of this kind appear to have been the Conventionary
Estates in manors belonging to the Duchy of Cornwall (now mostly
enfranchised), which were granted for successive short terms of
years with a tenant-right of renewal descending to the heirs.
And elsewhere there are similar estates without a right of rene
There is an example of a copyhold lease somewhat similar to the
1778 lease mentioned in a case before Lord Nottingham L.C. in
1677, Morgan v. Scudamore (2 Ch. Reports, 134). The lease is r
set out in full but its general purport can be seen from the
opening words of the report: "The Plaintiffs being customary
Tenants of the Manor, in which Manor the tenants hold Estates by
Copy to them and their Heirs, by the words (Sibi & Suis) for
ninety-nine years, yielding a Rent, paying a Heriot, and doing c
Suit and Service et cetera. And by the Custom of the said Manc
the Lords, upon Expiration of every Estate, ought to renew upon
reasonable Fines, and which said Estates, by the Custom of the
Manor do descend from Heir to Heir, and their Estates to be
renewed for reasonable Fines, they being expired, which the Lor
of the Manor refused, demanding more than the Fee for a Fine,
whereas two years value was as much as ever was, or ought to be
given or demanded.