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Your reference

Our reference
 CRD2C/VT/4

Date
 31 January 1980

Dear Mr Nicholson

COMMONS REGISTRATION ACT 1965
 BROXHEAD COMMON CLL47

1. I refer to Mr Muchmore's letter of 14 November 1978 in reply to your letter to the then Prime Minister concerning the registration of common rights on Broxhead Common. The additional information mentioned in Mr Muchmore's letter has recently become available and I am now writing to give a more detailed reply.
2. As you are aware the disputes concerning the registration of rights of common on Broxhead Common were settled by the decision of the Commons Commissioner dated 22 November 1974 and this decision was upheld by the High Court following an appeal by the owner Mr Whitfield. You will also be aware that in this decision the Commons Commissioner explained that due to the partitioning of the ownership of the land in 1637, the question of whether rights exist in respect of the common must be considered on the basis of there being two separate parcels of land. The Commissioner considered the claims of those seeking to register rights of common, and on the basis of the evidence presented to him, decided that while 17 rights of common could be substantiated in respect of the land to the east of the Sleaford-hindford road, only 2 such rights could be proven to exist in respect of the land to the west of the road. The Commissioners reasoning was accepted by the High Court in refusing the appeal by Mr S Whitfield.
3. The view is taken that it would be inappropriate for the Department to attempt to comment on the decision reached by the Commissioners and subsequently upheld by the High Court.
4. Your concern about the effects of the decision is understandable but the questions relating to common rights in respect of the land must now be regarded as having been finally settled.
5. The position with regard to common rights however would not affect the applicability of the statutory prohibitions on the inclosure of or encroachment on such land. The land concerned would therefore continue to be protected by section 194 of the Law of Property Act 1925 and section 30 of the Commons Act 1876. You will see from the enclosed copies of these provisions that the construction of any works or the erection of any building or fences which prevents or impedes access to such land would not be lawful unless the consent of the Secretary of State were obtained. Furthermore, even if the soil owner were to buy out the interests of all the commoners the land would continue to be subject to the protections of section 194. This is because the extinguishment of the rights would be by a non-statutory process coming within sub-section (3)(b).

6. It is open to any person with a legal interest in such land (that is the soil owner, holders of common rights or the County or District Council) to take action in the Courts if they believe unlawful enclosure or encroachment has taken place.

7. I hope this information will be of some assistance to you.

Yours faithfully

J Robbins

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Yours faithfully

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SECTION 194, LAW OF PROPERTY ACT 1925

194. (1) The erection of any building or fence, or the construction of any other work, whereby access to land to which this section applies is prevented or impeded, shall not be lawful unless the consent of the Minister thereto is obtained, and in giving or withholding his consent the Minister shall have regard to the same considerations and shall, if necessary, hold the same inquiries as are directed by the Commons Act 1876, to be taken into consideration and held by the Minister before forming an opinion whether an application under the Inclosure Acts 1845 to 1882, shall be acceded to or not.

(2) Where any building or fence is erected, or any other work constructed without such consent as is required by this section, the county court within whose jurisdiction the land is situated, shall, on an application being made by the council of any county or borough or district concerned, or by the Lord of the Manor or any other person interested in the common, have power to make an order for the removal of the work, and the restoration of the land to the condition in which it was before the work was erected or constructed, but any such order shall be subject to the like appeal as an order made under section 30 of the Commons Act 1876.

(3) This section applies to any land which at the commencement of this Act is subject to rights of common:

Provided that this section shall cease to apply -

- (a) to any land over which the rights of common are extinguished under any statutory provision;
- (b) to any land over which the rights of common are otherwise extinguished if the council of the county or county borough in which the land is situated by resolution assent to its inclusion from the operation of this section and the resolution is approved by the Minister.

(4) This section does not apply to any building or fence erected or work constructed if specially authorised by Act of Parliament, or in pursuance of an Act of Parliament or Order having the force of an Act, or if lawfully erected or constructed in connection with the taking or working of minerals in or under any land to which the section is otherwise applicable, or to any telegraphic lines as defined by the Telegraph Act 1878 of the Postmaster-General.

Extract from Commons Act, 1876

Amendment of law on to town and village greens.

29. Whereas by the Inclosure Act, 1857, provision is made for the protection of town and village greens, and recreation grounds, and it is expedient to amend such provision: Be it enacted as follows, that is to say, an encroachment on or inclosure of a town or village green, also any erection thereon or disturbance or interference with or occupation of the soil thereof which is made otherwise than with a view to the better enjoyment of such town or village green or recreation ground, shall be deemed to be a public nuisance, and if any person does any act in respect of which he is liable to pay damages or a penalty under section twelve of the said Inclosure Act, 1857, he may be summarily convicted thereof upon the information of any inhabitant of the parish in which such town or village green or recreation ground is situate, as well as upon the information of such persons as in the said section mentioned.

This section shall apply only in cases where a town or village green or recreation ground has a known and defined boundary.

Jurisdiction of county court in respect of illegal inclosures.

30. A county court within whose jurisdiction any common or part of a common is situate shall have jurisdiction to hear any case relating to any illegal inclosure or encroachment of or upon such common or part of a common respectively made after the passing of this Act, or to any nuisance impeding the exercise of any right of common arising after the passing of this Act, and to grant an injunction against such inclosure, encroachment, or nuisance, or to make an order for the removal or abatement of such inclosure, encroachment, or nuisance.

Any person aggrieved by any injunction granted or order made or refusal to grant an injunction or make an order by a county court in pursuance of this section may, on giving security for costs to the satisfaction of the county court, appeal to the High Court of Justice in a summary manner, or by special case or otherwise, as may be prescribed by rules of court to be made by the Supreme Court of Judicature in manner provided by the seventeenth section of the Supreme Court of Judicature Act, 1875.

The appellate court may on hearing the appeal reverse, modify, or confirm the injunction or order complained of, or remit the case to the county court from which the appeal lay, with instructions to deal with the case according to the directions given by the appellate court.

Where an appeal is lodged against the order of a county court directing the removal or abatement of any inclosure, encroachment, or nuisance, such order shall be suspended during such time as such appeal is pending.

Nothing in this Act contained shall abridge or interfere with any existing right of abating or otherwise preventing any illegal inclosure of or encroachment on any common, or any nuisance interfering with any right of common.

Until rules of court are made for the purposes of this section an appeal may be had from the decision of any county court under this section in the same manner in which an appeal from the decision of a county court may be had in a case within its ordinary jurisdiction.