

JUDGEMENT

The Plaintiff in this action is the owner and occupier of a farm known as Little Trehudreth in the parish of Blisland together with a tract of Down land comprising 300 acres or thereabouts known as Trehudreth Down or Trehudreth Common, and the Defendant is the owner and occupier of a neighbouring farm now known as Higher Penstroda in the same parish which towards the North abuts upon a portion of Trehudreth Down. The Plaintiff alleges that the Defendant has wrongfully placed cattle and sheep upon and cut turves from Trehudreth Down and asks for an injunction to restrain the repetition of such trespasses and for damages. The Defendant in his defence asserts that he is entitled to rights of pasturage and turbary on Trehudreth Down, with regard to the former as appurtenant or appendant to his farm Higher Penstroda, or by reason of vicinage, for his commonable animals levant and couchant thereon, and with regard to the latter as appurtenant or appendant to a messuage situate on the farm numbered 1736 on the Tithe Map for the parish of Blisland, and justifies the alleged trespasses as exercises of these rights. With regard to the pasturage rights the Defendant's claim is based upon (A) Manorial origin and (B) Prescription – the claim by reason of vicinage not being pursued.

(A) Manorial origin. Divers Deeds and other documents were produced and put in during the trial and I have since had an opportunity of examining these documents more closely. I have not found it possible to trace from them the ancient titles to Trehudreth Down and the Defendant's farm with complete certainty, but much of these titles is tolerably clear. It appears that the Defendant's farm was purchased by his predecessor in title, John Bassett Collins in four portions at four separate times and I will refer to the premises comprised in the four

separate purchases as (1) “the blue land” (2) “the green land” (3) “the pink land” and (4) “the red land” and “the uncoloured land. These premises are by way of identification numbered or shown on the Ordnance Map which was produced before me and put in, as follows: (1) “the blue land” Nos. 1216, 1217, 1240, 1243 (part) 1244 (part) 1247, 1250, 1252, 1253, 1281, 1282, 1285, and 1294, (2) “the green land” Nos. 1241, 1242 (part) 1246, 1249, 1251, 1283, 1284, 1286, 1287, 1292, 1293, 1295, 1296, 1297, 1307, 1308, and 1309, (3) “the pink land” Nos. 1242 (part) 1243 (part) and 1244 (part). (4) “the red land” Nos. 1215 and 1248 and “the uncoloured land” nine out of twelve acres of unenclosed land forming part of what appears on the plan as Trehudreth Downs, being roughly speaking triangular in shape and lying to the North of and having its base upon Nos. 1248, 127, 1216 and part of 1215. Trehudreth Down consists of a stretch of Moor land more or less triangular in shape lying to the North of the Defendant’s farm and having as its apex the stone shown on the map to the South of and some 3 or 4 inches (measured on the map) from the letter “D” in the words “Newton Downs”. It abuts on its northern and eastern sides upon other unenclosed moorland, there being no physical division beyond divers granite stones erected at certain spots.

By a deed dated the 4th July 1809 the reputed Manors of Trehudreth and Barlendew, the farm comprising “the blue land” (therein described as Pentrode otherwise Penstradowe in the parish of Blisland containing 20 a. 3 r.1 p. or thereabouts and as being or being reputed to be a part and parcel of the Manor of Trehudreth, a farm of which “the red land” then formed part (therein described as Rickards Penstrode in the parish of Blisland containing 51 a. 0. r. 38 p. or thereabouts and as being or being reputed to be a part and parcel of the Manor of Barlendew) were (with other hereditaments) conveyed upon the usual limitations to bar dower in

favour of John Wallis in fee simple. The circumstances leading up to this conveyance appear to have been these. Towards the end of the year 1808 sales by auction of several portions of the Morshead family estates derived under the will dated the 29th July 1753 of one of John Treise, were held, and divers of the lots unsold at these auctions were subsequently together with the two Manors of Trehudreth and Barlendew sold by private treaty to John Wallis and were conveyed to him by the deed of the 4th July 1809. In the particulars of sale under which these lots were put up for auction a footnote was appended to certain Lots (including that which comprised “the blue land”) to the effect that the right of common on Trehudreth Common was reserved to the Vendor, but the conveyance of the 4th July 1809 contains no such reservation. The explanation of this, I think, probably is that the sales by auction did not include either the Manor of Trehudreth or Trehudreth Common (at least they are not mentioned in the particulars of sale) and it was, therefore, intended that if “the blue land” had at any time previously enjoyed pasturage rights over the Common there should be no question as to these rights being recreated, and conferred on the purchasers. But when the subsequent sale to Wallis was arranged in which the Manor was included, inasmuch as the Manor with its wastes and the lots in question were going to be conveyed to the same person no reservation to the vendor of pasturage rights would be of any use or indeed of any effect. The parcels in the deed of the 4th July 1809 did not expressly include Trehudreth Common but I think that it must at this date have been waste of the Manor of Trehudreth – it is so described in a Lease dated the 29th September 1828 made between John Wallis of the one part and Richard Harper of the other part – and, if so, it would have passed with the Manor by the general words of the Conveyance. I also think that the 12 acres of unenclosed land of which “the uncoloured land” is part, must at this date

have been included in Trehudreth Common. If the conclusions which I have drawn are correct the effect of the deed of the 4th July 1809 was, inter alia, to vest Trehudreth Manor together with Trehudreth Common, “the blue land”, “the red land”, and “the unenclosed land” in John Wallis in fee simple.

By a Deed dated the 30th December 1840 the farm of which “the red land” then formed part of presumably the 12 acres of unenclosed land of which “the uncoloured land” is part were (with other hereditaments) conveyed upon the usual limitations to bar dower in favour of James Hayward in fee simple.

By a Deed dated the 25th March 1846 “All those commons wastes “or Manors called or known by the name of Trehudreth Common situate “in the said parish of Blisland containing by estimation 300 acres “(be the same more or less)” were (with other hereditaments) conveyed by the surviving trustee of the will of one Davies Gilbert and the beneficiary under that will to Wm. Morshead in fee simple. The intermediate title between John Wallis and Davies Gilbert is not recited, but the covenant to produce documents includes Indentures of Lease and Release dated respectively the 22nd and 23rd September 1833 (the latter of which may have been and I think probably was a conveyance by John Wallis to Davies Gilbert) and the Probate copy of the will of Davies Gilbert (the effect of which is recited in the Deed) and it seems to me, therefore, that it may be fairly inferred that the title to these properties came directly from John Wallis to Davies Gilbert. The deed of the 25th March 1846 was, during the arguments in the case, treated as being a conveyance both of the Manor and the Common, but I am not clear that it was intended to carry the Manor. It was, however, a plain Conveyance of Trehudreth Common and must have severed this from the Manor if the latter was not also conveyed.

By an Indenture dated the 25th December 1847 “the blue land” was conveyed by the then Trustees of the will of Davies Gilbert and the beneficiary under that will to John Bassett Collins in fee simple. This land had since the 4th July 1809 become vested somehow in Davies Gilbert – probably by the Indentures of the 22nd and 23rd September 1833 already referred to which are shortly mentioned in the recitals (but only for the purpose of tracing the assignment of a term of 2000 years to attend the inheritance) and are covenanted to be produced. The Indenture of the 25th December 1847 is expressed to convey all commonable rights generally belonging or reputed to belong to the premises conveyed, but there are no words purporting to recreate any previously existing rights which had become merged: moreover, at the date of the deed Trehudreth Common, either with the Manor or severed from it, was not vested in the Grantors: but presumably in William Morshead. It is true that if the Indentures of Lease and Release of the 22nd and 23rd September 1833 contained a conveyance of “the blue land” by John Wallis to Davies Gilbert together with appropriate words for this purpose, they might have recreated in favour of “the blue land” a right of pasturage over Trehudreth Common on which would have become appurtenant thereto, but these Indentures were not produced at the trial.

By an Indenture dated the 20th July 1853 “the green land”, therein described as a messuage tenement or farm called Penstrode otherwise Penstrowed containing 35 a. 0.r. 22 p. or thereabouts situate in the parish of Blisland was conveyed by Sir Wm Molesworth (the then owner) to John Bassett Collins, the general words contained in the conveyance being sufficient to recreate rights of common which had at any time theretofore been enjoyed with the premises conveyed, if the grantor had power so to do. But I can find no trace of this property ever having been held of the Manor of Trehudreth or that Sir William Molesworth had any

power to grant with the property any rights of common over Trehudreth Common – I am not forgetting Mr. Laskey’s submission, that because in an old settlement of the 18th May 1721 there are mentioned divers parcels said to be within the Manor of Trehudreth amongst which there is a “Penstrase” as well as a “Penstradon”, the former may have referred to “the green land” or his further submission that inasmuch as in the parcels of the deed of the 4th July 1809 there is coupled with Trehudreth Manor a yearly chief rent of 3/- for water course payable by the heirs of Sir William Molesworth it might be inferred that “the green land” was at one time within the Manor of Trehudreth. But these are more guesses and I cannot act upon them – Moreover, the conveyance of the 20th July 1853 includes the redeemed land tax on the hereditaments conveyed and from a statutory declaration of Thomas Woolcombe made on the 22nd July 1853 in support of the title it appears that this property was acquired by the Molesworth family in the year 1799 by exchange from the Rev. Henry Hawkins Tremayne so that it does not appear to have any connection with the Morshead estates.

By an indenture dated the 29th November 1856 “the pink land” therein described as a piece of common or unenclosed land, sometimes known by the name of Penstroda Green containing 3 a. 2r. 20 p. and numbered 1590 (a) on the Tithe Map of the parish of Blisland and as then being part of the common or unenclosed land known by the name of Trehudreth Common in the Manor of Trehudreth, was conveyed by William Morshead to John Bassett calling, the vendor’s title being presumably derived through the conveyance of the 25th March 1846 by which 300 acres of Trehudreth Common were conveyed to him. In the conveyance of the 29th November 1856 there is a proviso and agreement that the Grant therein contained should not give the purchaser any right of pasture turbary or other commonable right upon or over the commons or

unenclosed lands of the Manor of Trehudreth. I assume that this proviso was inserted by the vendor ex abundanti cantela for it is difficult to see how any commonable right could be conferred by a conveyance to a purchaser of a portion of the common or unenclosed lands of the Manor. By an Indenture dated the 1st October 1877 the farm of which “the red land” then formed part and the 12 acres of unenclosed land of which “the uncoloured land” is part conveyed by the Trustees of the will of James Hayward and the beneficiaries there under to John Bassett Collins. This conveyance contains words which might recreate rights of common formerly enjoyed in respect of the property conveyed if the grantor had power to recreate them, but long previously to the date of the deed Trehudreth Common (either with, or severed from the Manor) had been conveyed to the Morsheads with whom I gather it remained until it was lately sold to the Plaintiff.

John Bassett Collins, having thus purchased (1) “the blue land” (2) “the green land” (3) “the pink land” and (4) the farm comprising “the red land” and the 12 acres of unenclosed land of which “the uncoloured land” is part, died on the 5th February 1892 having by his will devised these hereiditaments (subject to a life interest in favour of his wife, who died on the 28th June 1895) to his son Edward Vernon Collins and by an Indenture dated the 23rd March 1908 the latter conveyed the same to the Defendant in fee simple. By an Indenture dated the 24th March 1908 the Defendant conveyed the whole of the farm comprising “the red land” Except “the red land” and 3 of the 12 acres of unenclosed land to Edward John Roose retaining “the red land” consisting of 5 a. 3 r. 29 p. or thereabouts and “the uncoloured land” consisting of 9 of the 12 acres of unenclosed land.

By an Indenture dated the 28th June 1920 Little Trehudreth Farm and Trehudreth Common containing 300 acres or thereabouts were conveyed

by Dame Sarah Elizabeth Morshead the widow of Sir Warwick Charles Morshead (who died on the 17th March 1905 and under whose will dated the 22nd November 1894 she became entitled thereto) unto the Plaintiff in fee simple.

From this statement of the title it appears that no part of the Defendant's farm can have attached to it any common of pasture of manorial origin. "The red land" is described more than once as being, or being reputed to be part of the Manor of Barlendew and cannot therefore have been held of the Manor of Trehudreth. There is no trace of "the green land" ever having been held of the Manor of Trehudreth. "The pink land" until enclosed and sold to John Bassett Collins in 1856 was waste of the Manor of Trehudreth, and in the conveyance to him all commonable rights over the Commons and unenclosed lands of the Manor were expressly excluded. "The blue land" is described in the deed of the 4th July 1809 as being or being reputed to be a part and parcel of the Manor of Trehudreth and may therefore have been at one time a freehold held of the Manor to which a right of pasturage over Trehudreth Down was appendant, but at the date of this deed it was in the same ownership as the Manor and the Down, and any such right must therefore have been merged and extinguished, and there is no evidence of any subsequent recreation of any similar right as appurtenant to the premises. Further, even if the Indentures of the 22nd and 23rd September 1833, already referred to, did in fact effect a recreation so that in 1856 John Bassett Collins became entitled in respect of "the blue land" to such an appurtenant right, the purchase by him in 1856 of a portion of the Common (in the shape of "the pink land") would have extinguished the right over the whole common.

In my opinion therefore the Defendant has failed to establish that his farm or any part of it has any right of pasture of Manorial origin over Trehudreth Down.

(B) Prescription. The chief evidence with regard to the turning of beasts on to Trehudreth Down was given by the Defendant himself by his two brothers Albert and Elijah and by his son, Archibold. The earliest recollections of the elder brother Albert Roose (who is 74 years of age) ran back to Michaelmas 1865 when he was 13 years of age, at which time his father was farming as tenant under John Bassett Collins “the blue land” “the green land” and “the pink land” which had respectively been purchased by him as mentioned above and also another farm at Stokely, lying to the South of these lands and the family went to live at Stokely – According to Albert Roose’s evidence the cattle kept upon “the blue land” and on “the green land” used, from the time he can first recollect, to be regularly turned out on to Trehudreth Common. There is a lane leading from part of “the green land” into a road which runs northwards bounding on the west Nos. 1242, 1243, 1244 and 1215 on the Ordnance Map, and forms an approach to the Common at its South West Corner. The cattle according to this witness were turned out into this lane whence they found their way up the road and into the corner of the Common – This witness further stated that “the pink land”, which when it was purchased by John Bassett Collins in 1856 was unenclosed was in the year 1868 enclosed and thrown into the adjacent fields, his father’s cattle being thereafter turned out from the enlarged fields as they had been previously turned out from the original fields.

Elijah Roose was born in 1860 and remembered the time when the family went to live at Stokely, his father being tenant under John Bassett Collins of that farm and the Penstrode Farm – When he was about 7 years old he began to help his father with the farms and used about twice a week

to go with him to the Penstrode Farm, which then consisted of “the blue land” “the green land” and “the pink land”. He stated that he helped to turn the cattle out into the lane and that they would find their way up the road and on to the Common and this he stated happened almost every day.

The Defendant was born at Stokely in the month of June 1868 and his earliest recollections went back to the time when his father was farming the Penstrode and Stokely Farms and the family were living at Stokely – Shortly after John Bassett Collins in 1877 bought the farm of which “the red land” then formed part, his father became tenant under him of this farm also and the family removed from Stokely to the farmhouse on this holding where they continued to live until shortly after his purchase from Edward Vernon Collins in 1908. At the same time he also became tenant under John Bassett Collins of the 12 acres of unenclosed land of which “the uncoloured land” is part and which was included in the latter’s purchase in 1877. The Defendant stated that he could remember 50 years back and that during this time cattle used to be turned out on to Trehudreth Common from Penstrode, by which I understood him to mean the farm he now owns and occupies though as to “the red land” only since his father became tenant of it in 1877. The cattle were turned out every day in the winter unless the weather was bad and in the summer sheep were also turned out. The practice was to turn the animals into the lane letting them thus find their way to the Common or to turn them out through two gates, one leading from part of “the red land” (No. 1248 on the Ordnance Map) on to the 12 acres of unenclosed land from which they would roam on to the common and the other leading from part of “the blue land” (No. 1253 on the Ordnance Map) to a strip of unenclosed land which is or was part of the Manor of Blisland from which they could and did make their way on to the common – The Defendant

stated that no objection (until that which has given rise to this action) had ever been raised to his turning out his beasts in this manner, and that he had many a time, when he was on the Common seeing to his cattle, met Sir Warwick Morshead the former owner of the Common, and his agent, Mr. John Ford, but neither of them had ever objected to his cattle being there. The Defendant's son Archibold Roose who is 26 years of age and has acted as cattleman to his father for the last 12 years, corroborated his father's evidence as to the practice of turning cattle and sheep on to Trehudreth Common either by the lane or by the two gates and rather emphasised the fact that all that was done was to turn them off the farm by one way or the other, leaving them afterwards to go just where they pleased.

Several other witnesses, namely John Runnalls, Alfred Bate, William Harper, William Greenaway, Thomas Henry Philp, Robert Greenaway, Archie Hosking, and Roger Bunt, were called by the Defendant and deposed to having seen the Defendant's cattle on Trehudreth Common for many years past, John Runnalls recollection on this point going back to 1874 or more than 50 years ago.

In contradiction to this evidence the Plaintiff called, by way of rebutting evidence a witness Charles Wellington by name whose father was tenant of the farm of which "the red land" formerly was part, for the 25 years immediately preceding 1878. This witness stated that they did not claim in respect of this farm any right of pasturage on Trehudreth Common, and stated also that the Defendant's father turned his cattle from Stokely Farm, but not from the Penstroda Farm, on to Trehudreth Common. With regard to the former statement it is to be observed that even if in the case of the farm of which "the red land" formerly was part the turning on to the Common did not begin till the year 1876, this would give a 50 years user;

with regard to the latter I think the witness must be mistaken and I accept on this point the evidence given on behalf of the Defendant.

Accepting this evidence I find that commonable animals have been regularly turned on to Trehudreth Common from “the blue land” and “the green land” for over 60 years, from “the pink land” for nearly 60 years and from “the red land” for nearly 50 years prior to the commencement of this action and for this long continued practice I am bound, if I can, to find a legal origin. Divers points arise with regard to it (1) Was this turning out done as of right? It seems to me that it was. I do not attach much importance to the fact deposed to by the Defendant that, when on the Common attending to his cattle he frequently met the owner of the Common and his agent who never raised any question about the Defendant’s cattle being there, for the common apparently was not kept in hand but was from time to time let to some tenant of the estate, and the owner probably would not have known what arrangements this tenant might have made with neighbouring farmers as to grazing their animals on the Common. But if the practice had not been as of right one would have expected to hear of objections being raised to it by the persons immediately affected by it, but there was no evidence of any such objection until the Plaintiff’s complaint. The nearest approach to it was a somewhat indefinite statement by Charles Wellington that a prior lessee of the Common, Coppin by name, used to drive their cattle off the Common when they had too many there – But according to this witness his father who was tenant of the farm of which “the red land” formerly was part claimed no rights on the Common in respect of this farm, and he apparently gave up the farm in the year 1878. There certainly seems to be at the present time a popular fallacy in the neighbourhood that any person who owns a piece of enclosed land, however small, abutting upon a common is entitled to turn on to the common as many beasts as he

chooses – Several witnesses propounded this view and two (Diggory Langford and Lavinia Margaret Bunt) called by the Plaintiff to give rebutting evidence, put this forward as a reason why steps had not been taken to keep the Defendant's beasts off the common. There was however, no evidence to show how long this fallacy had been in existence. Moreover, even if existing when John Bassett Collins in 1877 purchased the 12 acres of unenclosed land of which "the uncoloured land" forms part, it would not account for the turning out which at this time already had been going on for several years from "the blue land" and "the green land". (2) Has the practice been consistent with the exercise of a levancy and couchancy right? Upon the whole I think it has. The acreage of the holding now and since 1908 owned and farmed by the Defendant – other than "the uncoloured land" – is about 65 acres, and the Defendant stated that this holding without any assistance from the grazing on the Common would support during the winter months 25 beasts; while if the remainder of the farm of which "the red land" formerly was part (comprising a further 50 acres or thereabouts) were added to the holding it would support during the winter months 32 beasts; and he stated that these numbers were substantially larger than the numbers which had from time to time been turned out. The Defendant's figures were challenged by the Plaintiff but not so convincingly as to justify me in saying that the turning out has not been speaking generally, consistent with the exercise of a levancy and couchancy right. If, as has been suggested by the Plaintiff the Defendant has of late been turning out a larger number of animals than he is entitled to do under a levancy and couchancy right he may have been surcharging the Common, but there is no claim in the proceedings under this head.

As I read the Plaintiff's claim in the action relating to the pasturage it is for an injunction restraining the Defendant from turning animals on to the

Common and for damages in respect of those which are alleged to have been turned out. (3) Did the practice deposed to be the Defendant and his witnesses amount to an actual turning of animals on to Trehudreth Common? The practice seems to have been to let the animals loose from the farm, either into the lane or through the two gates, leaving them to go where they pleased. I think, however, that the method pursued was for all practical purposes a turning of the animals on to the Common. When the lane was used the animals apparently found their way from the lane into the road, and from the road to the open Corner of the Common and so on to the Common itself. When the gates were used the animals would go in the first instance either on to the unenclosed 12 acres of which 9 acres belongs to the farm, or on to the strip of unenclosed land now or at one time belonging to Blisland Manor. But in either case, having regard to the numbers turned out the ultimate object was no doubt the broad stretch of Common which lies behind those two pieces of unenclosed land - The evidence is clear that the animals after reaching Trehudreth Common frequently roamed at will over the other adjacent Commons but this does not appear to me to affect the position - The respective owners of this nest of commons could no doubt have placed herdsmen on the borders of each common to keep the animals which had no right upon it from straying on to it, but they probably thought that the expense of adopting this course would outweigh any advantage to be gained from it and that a give and take principle by which the animals of each were allowed to wander where they chose was preferable. Taking the evidence on this point as a whole I am of the opinion that the Defendant has established that he is entitled in respect of the farm now owned and occupied by him to a right of common of pasture over Trehudreth Down or Common for his commonable beasts levant and couchant upon the farm.

I will now deal with the Defendant's claim to a right of turbary on Trehudreth Down. This right is claimed in respect of a messuage numbered 1726 on the Tithe Map which appears to have been formerly the farmhouse attached to "the green land" and as being appurtenant or appendant thereto. It seems to be a matter of some doubt whether such a right can be appendant but I need not discuss that question because, as I have already stated when dealing with "the green land" I find no trace of this land ever having been held of the Manor of Trehudreth, and the right, if existing, must therefore be appurtenant.

Shortly after the Defendant in March 1908 purchased his farm from the Rev. E. V. Collins he determined to build a new house to take the place of the old farm house, and within a year or thereabouts this new house was built a short distance from and standing on higher ground than the old house, and the Defendant moved into it – The Defendant never himself lived in the old house; he and his family had always lived (before moving into the new house) in the house attached to the farm of which "the red land" formerly was part and the old house on "the green land" at the time of the Defendant's purchase was occupied as a double cottage by two farm hands. About the time however that the new house was built, and as nearly as could be ascertained about 15 years ago the Defendant transformed the old house into a cattle shed, removing the partition which divided the house into two, and removing also the staircase and erecting some steps outside for the purpose of reaching the upper part of the building, but leaving in situ the two hearths, one of which was at either end of the premises – Ever since this was done, that is to say for the last 15 years or more, the building has been used as a cattle shed only, but at times when a pig has been killed water for scalding purposes has been boiled in a caldron on one of the hearths, the other one not having been used at all.

The evidence called in support of the claim was not strong William Henry Alfred Cole who is 59 years of age stated that from his earliest recollections his father who lived in one of the cottages cut turf on Trehudreth Downs and used it for fuel in the cottage and that the occupants of the other cottage, of whom he named Cundy and Stevens as two, used to do likewise, and that he had helped his father and Stevens to cut the turf – This witness however left the neighbourhood when he was 14, so that his experience was confined to a period of 7 or 8 years, say from 1874 or 1875 till 1892 – Alfred Bate lived in one of the cottages (I assume the one which the last witness's father did not occupy) for 3 years from 18 to 15 years ago i.e. from 1909 to 1912, and stated that during the whole of the time he used to cut turf from Trehudreth Down and burn it as fuel in his cottage without any objection being raised to his doing so. The Defendant stated that Cole and Bate had taken turf from the Down but I understood him to be speaking from information given to him by these witnesses and not from personal knowledge. He admitted that he had never himself cut any turf until immediately before the commencement of this action. It appears that sometime after the parties had begun the dispute about the right of pasturage the Defendant cut and brought home some turf from the Down for the purpose, as he said, of asserting or protecting his right. The first lawyer's letter, which related only to alleged trespasses by the Defendant's cattle was dated the 1st March 1926 and this cutting did not take place until the following June. The witness Charles Wellington called by the Plaintiff stated that he had known Cole on one occasion cut turf on Trehudreth Common, which he, the witness, helped him to carry in, but he did not recollect any turf cutting by Cole except on this occasion and he did not know anyone to cut turf there except Cole. This evidence in my opinion does not afford sufficient proof of continuous user to

establish a right of this nature; but even if it did, there are other objections to the claim which appear to me to be insuperable. I cannot in the circumstances treat the turf cutting which took place in June 1926 as being a bon fide exercise of an alleged right, and the last cutting therefore on which the Defendant can rely took place 15 years or more ago – The circumstances attending its cessation seem to me to point clearly to an intention at the time on the part of the Defendant to abandon the right (assuming it to have then existed) and if such was the case this would amount to a release of the right, and no change of mind now made by the Defendant could revive it. There is a further difficulty yet in the Defendant's way with regard to this claim. Holding as I do that the cutting in June 1926 was not a bona fide exercise of an alleged right the Prescription Act 1832 is not available to establish the Defendant's case, for by Section 4 of that Act the prescribed periods over which user is to be shown must date back from Action brought – Nor, it seems to me, can the Defendant avail himself of Prescription at Common Law, for to do so he must establish that the old farm house has from time immemorial enjoyed the right of taking turf for fuel from Trehudreth Common – Now, John Bassett Collins became the owner of the house in 1853 and in 1856 he purchased a small unenclosed portion of the Common, and in so doing extinguished the alleged right even if then existing – as regards the whole common – This being so any right now relied on must have had its commencement after that date. I am, therefore of opinion that the Defendant's claim in respect of turbary fails altogether.

The result is that the Defendant succeeds in this claim relating to pasturage and fails in his claim relating to turbary, and I think that the proper order to make in the action is as follows: So far as the claim set out in paragraphs 2 and 4 (a) of the particulars of claim is concerned, judgement for the Defendant, this judgement being prefaced, if the

parties so desire, by a statement that the Court is of opinion that the Defendant is entitled in respect of the farm known as Penstroda now owned and occupied by him to a right of common of pasture to Trehudreth Down belonging to the Plaintiff for his commonable beasts levant and couchant on the said farm. So far as the claim set out in paragraphs 3 and 4 (b) and (c) of the particulars of claim is concerned, judgement for the Plaintiff for a perpetual injunction restraining the Defendant his servants and agents from cutting or removing turves from Trehudreth Down and 5/- damages – With regard to costs, the case is, I think one in which I should apportion the costs between the parties, but I am prepared to hear anything which either party has to say on this point.