



COMMONS REGISTRATION ACT 1965

Reference No. 262/U/587

In the Matter of Coniston Fell,
Dunnerdale Fell and Torver
High Common, South Lakeland
District, Cumbria

DECISION

This reference relates to the question of the ownership of part ("the Referred Part") of land known as Coniston Fell, Dunnerdale Fell, Seathwaite Fell and Torver High Common, South Lake District, Cumbria being the land in the Land Section of Register Unit No. CL29 in the Register of Common Land maintained Cumbria (formerly Lancashire) County Council. The Referred Part is part of the said land of which no person is registered under section 4 of the Commons Registration Act 1965 as the owner.

The land ("the Unit Land") in this Register Unit is (as described in a decision dated 10 July 1978 made by a Commons Commissioner under reference Nos 262/D/8-10 and 13-17) a little more than 9 miles long from south-west to north-east and a variable width being for about half its length (the north-east part) about 3 or 4 miles wide and the other half generally a mile or more wide. The Referred Part the ownership of which is in question under this reference comprises three pieces all within and adjoining the boundary of the Unit Land. First, a piece ("the B1-C1 piece") the north boundary of which is a line about 100 yards long, on the Register Map marked B1-C1; this piece extends southwards for about 60 yards; contains say about $1\frac{1}{2}$ acres and is situated by or near houses or buildings known as Stickle House and Old Hutton about $\frac{1}{4}$ of a mile north-west of Broughton Mills. Secondly, a piece ("the MN piece") the east boundary of which is a line about 150 yards long, on the Register Map marked MN; this piece is approximately triangular extending south-westwards for about 150 yards, contains say about $2\frac{1}{2}$ acres, and includes or is near to water falls situated about $\frac{1}{4}$ a mile east of the road from Ulpha to Wrynose Pass, not far from Troutal with Browside Farm. And thirdly a piece ("the Z-A1 piece") the west boundary of which is a line about 300 yards long on the Register map marked Z-A1 and thereon names White How; this piece extends eastwards for a distance averaging about 150 yards, contains say about 7 acres, and is situated about $\frac{1}{4}$ a mile south-east of the said road a short distance north of the MN piece and a short distance south of Hinning House.

Following upon the public notice of this reference, the National Trust for Places of Historic Interest or Natural Beauty in a letter dated 26 September 1986 from their northwest region office said (in effect):- The National Trust own the freehold of the MN piece and were unaware that it was part of the Common. Half part rights were conveyed to the Trust by virtue of the purchase of Troutal Farm from Mrs E Tyson on 12 November 1958. The remaining share of the rights on the land were acquired through the purchase of Browside Farm from the Reverend H H Simmonds on 26 June 1960.

I held a hearing for the purpose of inquiring into the ownership of the Referred Part at Keswick on 12 May 1987. At the hearing: (1) Mrs Anne Mary Atkinson was represented by Mr H Snow legal executive with Arnold Greenwood and Son, Solicitors of Kendal; and (2) the National Trust were represented by Mr R Palmer, Assistant Land Agent of their northwest region office.



At the hearing Mr Snow claimed that Mrs Atkinson is the owner of the B1-C1 piece and in support of such claim produced the documents specified in the First Schedule hereto. He produced the originals of the documents AMA/2 and the examined abstract, all of which were held by his firm on behalf of Mrs Atkinson. The photocopy of a 1859 manorial document he had found among the other documents, but its origin was to him unknown. The draft statutory declaration AMA/10 was about to be made by Mr T P Genssal to verify certain questions which had arisen out of his 1982 declaration (AMA/4); but such questions were irrelevant to these proceedings. He submitted that I should in my decision say that the area marked "Old Quarry" on the plan AMA/1 was included in the part of the Unit Land owned by Mrs Atkinson.

Mr P R Palmer gave oral evidence on behalf of the National Trust in support of their claim to be owners of the MN piece, in the course of which he said that its east boundary is a physical boundary visible on the ground, explaining that he had not seen the piece but had deduced that such physical boundary existed from the OS English Lake District Outdoor Leisure Map, scale 1/25,000 and from what he had been told in the course of discussion with Mr Edwin Benn (the present tenant of Troutal with Browside Farm owned by the National Trust). He produced a copy of the conveyance of 12 November 1958 mentioned in the said September 1986 letter, and submitted that under it the National Trust became the owner of a half share of "the proceeds of sale" of the land coloured blue on the plan thereto annexed, which said land included the MN piece. He also produced a copy of a deed of gift dated 26 June 1950 by which the Reverend H H Symonds gave to the National Trust various farms; the descriptive words in the deed did not expressly include the MN piece. He relied on the conveyance and deed as showing National Trust ownership of both half shares. Mr Symonds became the owner of his half under a conveyance dated 31 July 1944 (the witness had no available copy); such conveyance is mentioned in the deed of gift. The present tenant of Troutal with Browside Farm (about 367 acres) is Mr Edwin Benn as successor of his father Mr Raymond Benn who had been a tenant for over 20 years. The tenancy agreement of the father (the witness had it in his office) included the MN piece. The new tenancy agreement of Mr Edwin Benn had been or was about to be prepared. He (the witness) had talked with both Mr Raymond Benn and Mr Edwin Benn and they said they were not aware the MN piece was common land; they believed that it was freehold land within their tenancy agreements.

At the conclusion of the oral evidence of Mr Palmer, I said —————→
I could not upon it properly be satisfied that the National Trust owned the MN piece. Following a discussion in the course of which Mr Palmer indicated that any gaps could be filled by his obtaining a statement signed either by Mr Raymond Benn or Mr Edwin Benn as to the present appearance and to the past use of the MN piece and by the London office of the National Trust producing the originals of the documents he had mentioned. —————→ I (Mr Palmer agreeing) adjourned the hearing.

TURN OVER



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At the adjourned hearing held by me at London on 10 November 1987, the National Trust were represented by Mr R S Latham.

Mr Latham who was in 1954 appointed Second Solicitor of the National Trust and in 1964 became and has ever since been Solicitor, in the course of his oral evidence produced the documents (originals) specified in the Second Schedule hereto.

As to the 1958, 1950 and 1944 conveyances and deed (RSL/1, 2 and 3) possibly showing that the MN piece was on 31 December 1925 held in undivided shares so that under Part IV of the First Schedule to the Law of Property Act 1925, the legal estate became vested in the persons in such Part specified, Mr Latham was unable to produce any document showing who these persons were or how the legal estate had from them since 1926 devolved; he said that about both Troutal and Browside Farms the Executive Committee of the National Trust had shortly after the 1958 conveyance and the 1950 deed under section 20(2) of the National Trust Act 1907 resolved them to be inalienable; he suggested that the National Trust having owned both moities for nearly 30 years, it was not under any necessity to take further action to perfect its title.

As to the B1-C1 piece:-

I accept Mr Snow's identification of this piece with OS No. 434 contained 1.195 acres as delineated on the map (AMA/1). To the property "Whineray Ground" as described in the 1970 assent (AMA/2) the title was by the assents and probates specified in the First Schedule hereto regularly deduced from the death of Mrs Mary Anne Whineray on 13 December 1968 through the Reverend John Samuel Whineray to Mrs Anne Mary Atkinson (her daughter and his sister). The two 1982 declarations (AMA/3 and 4) show OS No. 434 to be included in the land owned by Mrs M A Whineray and by her let as Whineray Ground.

On such documents, I am satisfied that Mrs A M Atkinson is the owner of this piece, and I shall accordingly direct Cumbria County Council as registration authority to register Mrs Anne May Atkinson of Whineray Bank, Broughton-in-Furness as the owner of the B1-C1 piece.

The "Old Quarry" marked on the map (AMA/1) there appears as a square having sides about 20 feet long. The maps I have from the County Council as registration authority do not clearly show whether this square area is or is not included in the Referred Part. I have no jurisdiction in these proceedings to determine a proper boundary between the Referred Part and the rest of the Unit Land; if about this any question arises it will if need be have to be determined by the High Court or other Court having jurisdiction. For this reason I shall in my said direction to Cumbria County Council say nothing about the "Old Quarry".

As to the MN piece:-

Mr R Benn in his letter of 15.6.87. (RSL/4) of it says:-

"The particular area in question is a small triangular area of land approximately 3 acres. It is bordered to the west by open ditch and to the south by Tarn beck and waterfalls. The boundary to the east, against 'Foss How' is a well constructed dry stone wall with an interwoven wire fence erected along the top of the wall to stop sheep straying onto the common. The remainder of the boundary directly to the north and south of this piece of land is likewise constructed of dry stone wall with "Jump" fencing. I came to Troutal Farm on the 12th of May 1967, and was unaware that the small section of land had



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been registered as common land. It has always been in my agricultural tenancy agreement and has over the years afforded reasonably good fell grazing for my flock of hill sheep. I find it very strange that this area should be registered as common since there are no stock-proof man-made boundaries to the west or south. Clearly a mistake has been made."

On the 1958, 1950 and 1944 conveyances and deed (RSL/1, 2 and 3) produced by Mr Latham under which the National Trust became owners of Troutal Farm and Browside Farm, the 1966 tenancy agreement and the above quoted statement of Mr Raymond Benn, I am satisfied that the National Trust are the owners of at least the entire beneficial interest in the MN piece.

In section 22 of the Commons Registration Act 1965, ownership is defined as "ownership of a legal estate in fee simple". On the said conveyances and deed it is at least likely that the half shares in the MN piece and in the rest of Troutal Tongue therein expressed to be conveyed or assigned must on 31 December 1925 have been held for some estate in undivided shares with the result that on the following day the legal estate in the entirety became subject to the statutory trust for sale specified in the Law of Property Act 1925 and the legal ownership became vested in the persons specified in Part IV of the First Schedule thereto. The conveyances —→ and deed as expressed could only convey shares in the proceeds of sale to arise under the said trust for sale and in the rents and profits until sale. Nobody at the hearing disputed the claim of the National Trust to be the absolute owner of the MN piece; possession of land is some evidence of ownership of the legal estate in fee simple, the cogency of which increases with the length of possession. On the evidence I have, I consider it practically certain that the possession of the National Trust will not be disturbed by any person making a claim in respect of the outstanding legal estate. —→

→ Tehidy v Norman 1971 2QB 528 shows that 20 years enjoyment of an easement may by a legal fiction be treated as a grant of such easement, that this legal fiction is not to be displaced by direct evidence that no grant was made and that such legal fiction is applicable also to a grant of a profit a prendre, eg a right of common. I consider that I can properly apply this legal fiction to presuming that the National Trust has by an order of the High Court or some other means got in any outstanding legal estate as may have been created by the 1925 Act.

Upon these considerations I am satisfied that the National Trust is the owner of the MN piece, and I shall accordingly direct the Cumbria County Council as registration authority to register the National Trust for Places of Historic Interest or Natural Beauty of 36 Queen Anne's Gate, London, SW1H 9AS as the owner of the MN piece.

As to the Z-A1 piece:-

In the absence of any evidence I am not satisfied that any person is the owner of this piece, and it will therefore remain subject to protection under Section 9 of the 1965 Act.

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.

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FIRST SCHEDULE
(Documents of Mrs Atkinson)

- AMA/1 -- Extract OS map (scale 1/2500) showing edged red OS Nos (including Old Hutton) totalling 11.30 acres marked "CVCE 19 July 1945 Gunson to JSW, showing edged blue OS Nos totalling 12.129 acres marked "20 May 1959 CVCE Dunn to JSW" and showing coloured pink OS No. 434 containing 1.195 acres having just outside its south-east corner Stickle House and having along its north boundary "Old Quarry".
- AMA/2 31 July 1970 Assent by John Samuel Whinery and Anne Mary Atkinson as personal representatives of Mary Anne Whinery (she died 30 December 1968) in favour of the said J S Whinery of "ALL THAT property described in the Will of the Testatrix as "my estate or farm known as Whineray Ground together with the land and buildings known as Hutton and Stickle ..."
- AMA/3 13 May 1982 Statutory declaration by Anne Mary Atkinson:- Mary Anne Whinery was her mother and owned Whinery Ground Farm edged red on the plan attached, the enclosures whereof where listed, by reference to the OS map in Schedule. She made the declaration to amplify the clarify description in the 1970 assent (AMA/2). In the Schedule among the OS numbers listed, under the heading "Stickle Land" appear "434 (OS No.); 1.195 (acreage)".
- AMA/4 11 February 1982 Statutory declaration by Tom Park Glessal:- In 1953 he became tenant of Low Whineray Ground Farm then comprised the land edged red on the plan attached. At the time his landlord the owner of the farm of the late Mrs Mary Anne Whinery (relevantly the same as that in AMA/3 above).
- AMA/5 22 July 1977 Assent by Midland Bank Trust Company Limited and Anne Mary Atkinson as executors of John Samuel Whinery (he died 23 April 1975) in favour of A M Atkinson property described in the Schedule including "4" All that property or farm known as Whineray Ground together with the land and buildings known as Hutton and Stickle ... all which property was vested in the testator by an assent dated 31 July 1970".
- AMA/6 18 November 1975 Probate of will of J S Whinery granted to Midland Bank Trust Company Limited and Anne Mary Atkinson.
- AMA/7 31 July 1970 Original of RMA/2.
- AMA/8 -- Abstract of title of Mary Anne Whinery commencing with her will dated 9 January 1932 and concluding with probate dated 16 June 1969 granted to the Reverend John Samuel Whinery.



AMA/9 1859

Manor of Dunnerdale with Seathwaite George Remington, Steward (he signed) at this court came John Whineray and desired to be admitted tenant to ... Whineray Ground ... Hutton and Stickle ... And the said John Whineray is admitted tenant thereof ...

AMA/10 --

Draft statutory declaration of Tom Parke Glessal "... finally I refer to the point arrowed and marked D on the original plan. This point is marked "Old Quarry" ...

SECOND SCHEDULE
(Documents of the National Trust)

RSL/1 12 November 1958

Conveyance by which Mrs Eleanor Tyson as personal representative of Edward Porter Tyson (he died 20 October 1956) conveyed to the National Trust for Places of Historic Interest or Natural Beauty (paragraph 1) Troutal containing about 23 acres formerly known as "customary messuage and tenement called and known by the name of Troutal situate within and being parcel of the manor of Dunnerdale with Seathwaite and held thereof by payment of the yearly customary rent of twelve shillings and five pence to which premises Edward Tyson was admitted tenant out of court" on 11 January 1895 except for mines and minerals, all of which "delineated ... on the plan annexed hereto and thereon coloured pink"; and (paragraph 2) "the equal half part or other the right title or interest to which the vendor is entitled as the personal representative of the testator of the net proceeds of sale of ALL those pieces or parcels of land situate at Troutal ... as ... delineated ... on the said plan ... coloured blue".

Note:- The land coloured blue on the said plan included the MN piece.

RSL/2 26 June 1950

Deed of gift made by Henry Herbert Symonds to the National Trust for Places of Historic Interest or Natural Beauty of the property described in Parts 1 to 6 of the Schedule thereto. These parts comprised (1) Hazel Head Farm containing 201a.2r.11p, (2) Brighthouse Farm, Ulpha containing 97.385 acres; (3) Pikeside and Beckstones Farm containing 218.274 and 36.311 acres; (4) Browside Farm, Dunnerdale containing about 60 acres; (5) Thrang Farm containing 109.736 acres and (6) three closes of land in Borrowdale containing 186.025 acres. Part 4, Browside Farm, Dunnerdale was therein expressed: "... estate or farm ... called Browside ... containing ... sixty acres .. as ... delineated on the plan Number 2 annexed hereto and thereon edged pink TOGETHER with the ... farmhouse ... TOGETHER ALSO with the right of pasture and taking peat and other rights on the unenclosed fell as hereto for enjoyed and all other (if any) the land now owned by the Donor at BROWSIDE aforesaid SUBJECT ..."



RSL/3 31 July 1944

Conveyance by Francis Gordon Kendal to Henry Herbert Symonds of: (paragraph 1) farm and lands called Browside containing about 60 acres "... delineated on the plan hereto annexed and thereon edged with a red verge line ..." together with the farmhouse etc; and (paragraph 2) "the one equal half share of the Vendor of the proceeds of sale and the net rents and profits until sale of the soil of the common of pastures known as Troutal Tongue ... and 'The Hows' held jointly with the owner or owners for the time being of the adjoining property known as Troutal the whole whereof is edged blue on the said plan ..."

RSL/4 15-6-87

Letter from Raymond Benn of Low Hollin House, Seathwaite.

RSL/5 1 December 1966

Tenancy Agreement by the National Trust to Raymond Benn of Browside and Troutal Farms containing 367 acres with plan and schedule.

Note: The land coloured blue on the plan and in the Schedule described as "The Hows and Troutal Tongue: 128 acres" includes the MN piece.

Dated this 11th

day of December 1987

A. A. Baden Fuller

Commons Commissioner