COMMONS REGISTRATION ACT 1965

Reference Nos. 20/U/45
20/U/46
20/U/49
20/U/50
20/U/51
20/U/89
20/U/90

In the Matters of (1) Ash Bank, (2) Holling House Tongue, (3) High Tongue, (4) Sunny Pike, (5) Long House Close,(small part), (6) The Cove, and (7) Long House Close(remaining larger part), Dunnerdale-with-Seathwaite, South Lakeland D., Cumbria

DECISION

These references relate to the question of the ownership of lands known as (1) Ash Bank containing about 18.078 hectares (44.67 acres), (2) Holling House Tongue containing about 25.568 hectares (53.29 acres), (3) High Tongue containing about 28.827 hectares (71.23 acres), (4) Sunny Pike containing about 9.595 hectares (23.7 acres), (5) Long House Close (small part) containing about 2.428 hectares (6 acres), (6) The Cove containing about 42.41 hectares (104.77 acres) and (7) Long House Close (remaining larger part) containing about 93.4 hectares (230.79 acres all in Dunnerdale-with-Seathwaite, South Lakeland District (formerly North Lonsdale Rural District), being the lands comprised in the Land Section of Register Units (1) No. CL.142, (2) No. CL.144, (3) No. CL.190, (4) No. CL.191, (5) No. CL.192, (6) No. CL.143, and (7) No. CL.145 respectively in the Register of Common Land maintained by the Cumbria County Council of which no person is registered under section 4 of the Commons Registration Act 1965 as the owner.

Following upon the public notice of these references: (1) Mr. C.H. Cheetham and Miss E.J. Cheetham claimed to be the freehold owners of all the lands in question; and (2) Mr. T. Hartley claimed that Ash Bank (CL.142), The Cove (CL.143) and Holling House Tongue (CL.144) were included in a deed of gift to him in April 1968 subject to certain stints which belonged to Long House Farm and Nettle Slack Farm believed to be owned by Mr. Wade and the National Trust. No other person claimed to be the freehold owner of the lands or to have information as to their ownership.

I held hearings for the purpose of inquiring into the ownership of the lands at Kendal on 6 March 1975. At all the hearings, (1) Mr. and Miss Cheetham were represented by Mr.G. Norris, solicitor of Gatey, Heelis & Co. Solicitors of Windermere; (2) Mr. T. Hartley was represented by Mr. E. Satterthwaite, solicitor of Thomas Butler & Son, Solicitors of Broughton in Furness and (3) The National Trust for Places of Historic Interest or Natural Beauty were represented by Mr. A.J. Lord their Regional Agent for Cumbria and Lancashire.

Rights of common over all these lands have been registered, and being undisputed have become final, as follows:- On the application of Mr. Hartley attached to

Turner Hall and Undercrag Farms (a) to graze 405 sheep or 40 cows over Ash Bank (CL.142) and The Cove (CL.143), (b) to graze 170 sheep or 17 cows over Holling House Tongue (CL.144), and (c) to graze 40 sheep or 4 cows over Long House Close (larger part: CL.145). On the application of the National Trust, all in gross (a) to graze 30 sheep or 3 cattle over Ash Bank, (CL.142), (b) to graze 95 sheep or 9 cattle over The Cove (CL.143), (c) to graze 30 sheep or 3 cattle over Holling House Tongue (CL.144) and (d) to graze 53 sheep or 5 cattle and 3 sheep over High Tongue (CL.190). On the application of Mr. R.H. Wade attached to Longhouse Farm to graze varying numbers of sheep and cattle and of common of turbary over all the lands, (a) 10 sheep or 1 cattle over CL.142, (b) 30 sheep or 3 cattle over CL.143, (c) 10 sheep or 1 cattle over CL.144, (d) 440 sheep or 44 cattle over CL.145, (e) 220 sheep or 22 cattle over CL.190, (f) 140 sheep or 14 cattle over CL.191, and (g) 440 sheep or 44 cattle over CL.192. And also on the application of Mr. Wade attached to Tongue House Farm a right to graze 20 sheep or 2 cattle and of common of turbary over High Tongue (CL.190), and an identical right over Sunny Pike (CL.191).

Before the hearing letters dated 3 March 1975 and signed by Mr. Wade for himself, by Mr. Lord on behalf of the National Trust and by Thomas Butler & Son on behalf of Mr. Hartley were handed to my clerk in effect stating that the registrations were as regards CL.142, CL.143, CL.144 and CL.190 all wrongly made because Mr. Wade, the National Trust and Mr. Hartley are owners holding their title in undivided freehold shares and requesting that the registrations be withdrawn under regulation 31.

By agreement I first held the hearings relating to Ash Bank (CL.142) Holling House Tongue (CL.144) and High Tongue (CL.190) together. At the next hearing relating to The Cove (CL.143), it was agreed that all the evidence at the earlier hearing should be treated as repeated. At the following hearings relating to Sunny Pike (CL.191), Long House Close (small part: CL.192) and Long House Close (larger part: CL.145), Mr. Satterthwaite said that Mr. Hartley did not claim ownership, his interest in the lands being limited to the right of common registered on his application over Long House Close (larger part: CL.145) and Mr. Lord indicated that the National Trust were not interested in these lands.

Mr. Cheetham in the course of his evidence produced (i) an indenture dated 11 December 1903 by which the Duddon Hall Estate comprising 1474 acres in Ulpha, Millom and Dunnerdale-with-Seathwaite was conveyed to his father Mr. G.H. Cheetham, (ii) the probate dated 7 January 1944 of his will (he died 7 February 1943) (iii) an assent dated 14 March 1947 by which the lands comprised in the 1903 conveyance were vested in Miss E.J. Cheetham and (the witness) Mr. Cheetham in fee simple upon trust for sale and for themselves in equal shares, (iv) the Minute Book of the Court Baron of the Manor and Custom of Dunnerdale-with-Seathwaite and (v) the Barrow-in-Furness Corporation Act 1901 (1.Ed.7.c.ccxviii). The 1903 conveyance included "ALL THAT the Manor or Lordship of Dunnerdale with Seathwaite ... containing Ten thousand two hundred and fifty seven acres or thereabouts bounded on the extreme north by the Three Shire Stone at Wrynose on the west by the River Duddon for upwards of Ten miles ..."

The Minute Book began with Entries apparently made in or before 1754 and appeared

to have been regularly kept up to and including an Entry of a compensation agreement made in 1931. Section 12 of the 1901 Act recited that the Duddon Estate was vested in Mr. William Sawtrey Rawlinson and it may be supposed that Miss Elizabeth Mary Rawlinson who made the 1903 indenture was his successor in title.

Mr. Lord in the course of his evidence produced (i) a copy conveyance dated 15 January 1942 by which the stints therein described were conveyed by the Rev. J. Casson and others to the National Trust, (ii) a copy of a deed of gift dated 26 June 1950 by which six farms including Browside Farm and Thrang Farm were conveyed by Rev. H.H. Symonds to the National Trust, (iii) a copy of a conveyance dated 31 June 1944 by which Mr. F.G. Kendal conveyed (on sale) Browside Farm to Rev. H.H. Symonds, (iv) a copy of a conveyance dated 12 November 1958 by which Troutal Farm was conveyed to the National Trust and (v) an original tenancy agreement dated 1 December 1966 by which the National Trust let Browside Farm and Troutal Farm "together with the flock of heaf going sheep as specified in the viewing papers hereto attached" on a yearly tenancy.

Mr. Satterthwaite in the course of his evidence produced a draft of a deed of gift which was subsequently engrossed and dated 24 April 1968 by which Mr. G.T. Hartley conveyed estates and farms known as Turner Hall and Undercragg to Mr. T. Hartley; the First Schedule describing Turner Hall by reference to the O.S. map 1913 edition and acreage, after specifying 27 plots containing altogether over 250 acres, concluded "707 Ashbank Hollinghouse Tongue The Cove: 39.911 subject to such stints therein as Long House Farm & Nettleslack may enjoy".

In my opinion this reference is not "the hearing of a dispute" within regulation 31 of the Commons Commissioners Regulations 1971, and I have no power to dispose of these matters by agreement as contemplated by the letters of 3 March 1975. The registrations in the Land Section and in the Rights Section being undisputed, have become final, and in my opinion I have no power on this reference or on any other reference which could be made to me to give effect to the requests made in these letters.

The ownership claim made by Mr. Lord on behalf of the National Trust was to the effect that I should from the documents he produced conclude that Ash Bank (CL.142), The Cove (CL.143), Holling House Tongue (CL.144) and High Tongue (CL.190) are held in undivided freehold shares, and that the National Trust owned a share represented by the stints it held over these lands.

I have in my decisions dated 15 July 1974 re Longton Out Marsh, reference 20/U/81 and dated 10 October 1974 re Ireshope Moor reference 11/U/19 set out the legal considerations which I think applicable to such a claim. By reason of the provisions of the Law of Property Act 1925, which in effect prohibit ownership in undivided shares of a legal estate in land, I cannot direct that the National Trust be registered under the 1965 Act as owner of a share of freehold, but I can if I am satisfied that they would but for the 1925 Act be entitled to an undivided share by virtue of their ownership of stints, direct the registration of the Public Trustee or some other person (as may be appropriate) as owner who would then hold

the land on the statutory trusts for the benefit of the National Trust and whoever else maybe entitled to the other shares. I need not in this case go into these technicalities; they would not I think in this case cause any insuperable difficulty if I concluded that the National Trust would but for the 1925 Act be entitled to a share in these lands as claimed by Mr. Lord.

I proceed on the basis that the registration by the National Trust of a right of grazing does not preclude them from claiming that they are also entitled to a share of the freehold and that a "combined soil and grazing ownership" as described in my said two decisions is recognised by law.

In my opinion there is no presumption that a person who over a stinted pasture is entitled to a stint is also entitled to a share in the soil of the land, see Lonsdale v Rigg (1856) 11 Ex. (H and G.) 654 and on appeal Rigg v Lonsdale (1857) 1H. & N. 923. In many cases grazing, which is not referable to a grant of a right of pasture, may be regarded as an act of ownership, and therefore evidence of ownership in fee simple. But grazing on or any other act for the better enjoyment of the pasture by the grantee of a right of pasture cannot be relied on as supporting a claim of ownership, see Rigg v Lonsdale (1857) supra at page 936.

The 1942 conveyance is of "stints or rights of pasturage", and of nothing else; although such conveyance would I think pass any share of the soil if the land was then held in combined soil and grazing ownership, the conveyance provides no evidence that the land was then so held.

In the 1950 deed of gift, the parcels of "Browside Farm" include the words "TOGETHER also with the right of pasture and taking peat and other rights on the unenclosed Fell as heretofore enjoyed and all other (if any) the land now owned by the donor at Browside.". The effect of these words may be enlarged by reference to the 1944 conveyance which included an express conveyance of "... the one equal half share ... of the soil of the common pastures known as Troutal Tongue or Tongue and the Hows ..."; however the plan annexed makes it clear that Troutal Tongue referred to does not include, but is north of High Tongue (CL.190) and that the Hows is further north still than any of the lands now in question; these two conveyances also I think provide no evidence that the land was then held in combined soil and grazing ownership.

In the 1950 deed of gift the parcels of Thrang Farm include "5 and one third stints in ... High Tongue ... 3 stints in ... Hollinghouse Tongue and 9 and a half stints in ... The Cove ..."; for the same reasons as I stated above in respect of the 1954 conveyance these words provide no evidence that the land was then held in combined soil and grazing ownership.

The First Schedule to the 1966 agreement includes in the 367 acres described as being then let, "High Tongue (coloured yellow) 71 acres" which I identified with High Tongue (CL.190). The agreement is therefore some (not I think cogent) evidence that the National Trust then owned High Tongue (CL.190) in severalty, but it does not I think support the claim the National Trust is now making that they then owned a share. I infer that when the agreement was made those responsible overlooked that under the 1950 deed the National Trust were only entitled to 5 and one third stints and possibly overlooked that others might have (as Mr. Wade has) a right to graze 242 sheep over the same land; I decline on this agreement alone to find in favour of the claim now under consideration.

Mr. Lord referred me to the Report on the Geographical Distribution of Common Land by Professor L. Dudley Stamp set out in Appendix IV of the 1958 Report of the Royal Commission on Common Land which he says at page 238, referring to "the High Tongue area (550 acres)" that "the High Tongue area is a walled pasture owned by the commoners". As Mr. Lord pointed out, the total area of the four lands I am now considering is only about a half of 550 acres. I doubt whether Ash Bank and The Cove can be regarded as in the "High Tongue Area". It may be that Professor Stamp had in mind the high grazing between Tarn Beck and the River Duddon and possibly also Tongue House Closes. However this may be, when balancing the conclusion I would reach on the documents produced by Mr. Lord and his oral evidence against that set out in the Report, I prefer my own.

For the above reasons I find that the National Trust have in respect of these four lands no share either at law or in equity in the soil and no rights other than the rights of common registered.

Mr. Satterthwaite said (in effect) :- The lands now owned by Mr. Hartley (meaning, I think, Turner Hall and Undercrag Farm, and other land nearby) had been in the Hartley family for generations, so that there were no recent conveyances on sale before which the title might have been examined. He could not produce the original of the 1968 deed of gift because it was with the Agricultural Mortgage Corporation; the draft he produced was in his hand writing but he could say the original deed was in accordance with the draft. He understood that Ash Bank (CL.142) Holling House Tongue (CL.190) and The Cove (CL.143) were part of the land owned by the Hartley family. On this evidence he claims Mr. Hartley is the owner.

I accept that the 1968 deed of gift may be some evidence that Mr. G.T. Hartley who made the gift, was when he madeit owner of the lands expressed to be hereby given. But it is not conclusive evidence, and I must balance it against the circumstance that on 23 August 1968 (4 months after the deed of gift) Mr. Hartley (the donee) applied to register rights of common which are inconsistent with the deed and that in a letter dated 3 March 1975 his solicitor said that the lands were owned in undivided shares by Mr. Hartley, Mr. Wade and the National Trust, a statement which is also inconsistent with the deed. When the deed was made there were three possibilities : Mr. G.T. Hartley was either (a) owner of the entirety subject to rights of common owned by others, or (b) owned an undivided share (one third), or (c) owned a right of common. As the deed was drafted, it passed all his interest whatever it might be, so none of the parties would need to consider these possibilities. I have no evidence that the parties or their advisers had when the deed was made or subsequently any information leading particularly to any one of these possibilities, and I infer that they had none, and that the deed is therefore of no weight on the point I have to determine. Accordingly I find that Mr. Hartley had no interest in these lands other that the rights of common registered on his application.

Mr. Cheetham said (in effect) :- Under the documents he produced, he and his sister were lords of the Manor of Dunnerdale-with-Seathwaite and he believed that as such they owned all the waste lands in the Manor (the 10,257 acres mentioned in the 1903 conveyance). They were the accepted owners of Dunnerdale Fell, a very large area, in the Manor, being practically all the high waste land west of the watershed between the River Duddon and Coniston Water and extending from the Three Shire Stone

which is about 3 miles north of the lands now in question to some distance further south. All other waste and common land between Dunnerdale Fell and the River was (so he contended) waste land of the Manor owned by him and his sister unless the contrary was proved. The lands in question were in appearance much the same as Dunnerdale Fell. He rejected the suggestion because there were walls between these lands and the adjoining lands, they could not be waste land; the walls separated inclosed lands which were not waste from the lands which were waste.

The Cove (CL.143) adjoins Dunnerdale Fell, and Ash Bank (CL.142) adjoins The Cove; they are lands subject to rights of common much as Dunnerdale Fell and I conclude that they are in the same ownership.

High Tongue (CL.190) and Holling House Tongue (CL.144) are on the tongue of high ground between the Tarn Beck and the River Duddon, being crag hills of bracken much like Dunnerdale Fell. In my view the parts of this tongue which are subject to rights of common, are essentially similar to, although very much smaller than, Dunnerdale Fell and I infer that they are part of the waste of the Manor in the same way as Dunnerdale Fell, and accordingly in the same ownership.

As regards the remaining lands, Long House Close (larger part: CL.145), Sunny Pike (CL.191) and Long House Close (small part: CL.192) Mr. Cheetham said that until he had heard that Mr. Wade claimed only a right of common over these lands, he had always assumed that Mr. Wade as owner of Long House Farm owned these lands too, but in the absence of any claim by him, he considered that they too are waste lands of the Manor.

Long House Close (larger part: CL.145) adjoins Dunnerdale Fell, and the two other pieces (CL.191 & CL.192) adjoin CL.145. In the absence of any claim by Mr. Hartley and Mr. Wade (the only persons who have registered rights of common over these lands), I conclude that these lands are part of the waste of the Manor and as such are owned by Mr. and Miss Cheetham.

On the considerations outlined above, I am satisfied that Mr. and Miss Cheetham are the owners of all the lands and I shall accordingly direct the Cumbria County Council as registration authority, to register Mr. Christopher Heath Cheetham of Low House Windermere and Miss Elizabeth Jane Cheetham of Bay View Nursing Home, Grange-over-Sands, as the owners of the land under section 8(2) of the Act of 1965.

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.

Dated this 11th day of April 1975

A. A. Baden Fuller

Commons Commissioner