



In the Matter of Land at Berwyn Mountain  
Corwen Clwyd

DECISION.

This reference relates to the question of the ownership of land described above being the land comprised in the Land Section of Register Unit No. CL.176 in the Register of Common Land maintained by the Clwyd 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 this reference Lord Newborough claimed to be the freehold owner of the land in question, (the unit land).

I held a hearing for the purpose of inquiring into the question of the ownership of the unit land at Mold on 27 March 1985. At the hearing Lord Newborough was represented by Mr D R Crawford, Solicitor: Mr E B Jones of Counsel appeared on behalf of Mr T C Davies, who claimed ownership of part of the unit land.

(1) Lord Newborough's claim. This claim was supported by title deeds relating to the Rhug Estate, including the Unit Land. The documentation starts with an Inclosure Award made pursuant to an Act of 1810, whereby there was an allotment of land, which included the unit land to G H Vaughan. Following his death, intestate and unmarried in 1843, Robert William Vaughan succeeded to the land: he died in 1859 and the land passed to Charles Henry Wynn. The latter died in 1911 having by his will settled his real estate on his sons in tail male: in 1929 there was a vesting deed in favour of his elder son Robert Vaughan Wynn who in 1938 surrendered his life interest, and this was followed by a disentailing deed by R V Wynn's elder son (the present Lord Newborough). By a deed of Discharge dated 9 March 1968 made pursuant to the Settled Land Act 1925 between the Settled Land Act trustees and Lord Newborough, the unit land, inter alia, was vested in Lord Newborough absolutely.

After the evidence in support of Lord Newborough's claim had been produced, Mr Jones accepted Lord Newborough's paper title to the unit land, and in my opinion such title was established.

(2) Mr Davies's claim, to have acquired a possessory title to the south-eastern part of the unit land (the S E part). Before considering the evidence adduced in support of the claim, I should mention that there are two grazing rights registered, both by Mr J I Williams in respect of two farms and over the whole of the unit land. These rights were the subject of Objections by Mr Davies and by Lord Newborough and the resulting disputes came before a Commons Commissioner, Mr C A Settle, in 1977. As appears from his Decision (Ref:271/D/57-61), the parties reached agreement whereby Mr Davies was to be entitled to graze 300 sheep: since this could not be effected at this late stage by entering this as a right on the register, the procedure adopted and embodied in the Commissioner's Decision was to modify the two rights registered by Mr Williams by adding 150 sheep to each of the numbers he had registered, leaving it to the parties to arrange for Mr Davies to graze 300 of the sheep now included in Mr William's registered rights. It appears that no



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documentation was completed between the parties to provide for Mr Davies' right to graze 300 sheep, though I was shown a copy of a draft Assignment apparently prepared to give effect to the arrangement, to which I shall refer again in this decision.

(2) The first witness called by Mr Jones was Mr I T Davies, the claimant's son. He was born in 1949 and has lived in the area all his life. As far as he remembered the SE part was ploughed by his father - it was always farmed with Cwm Canol (which is near the south-eastern boundary of the unit land) and was known as part of that farm: in his time the SE part was fenced round and has remained so. As a small boy he accompanied the ploughing, and collected stones which were thrown up. The SE was used for grazing, which was improved by the ploughing as there was a certain amount of bracken; the ploughing was of parts of the SE part - in the northern area and at the southern edge. It was not done every year. His father farmed from Cwm Canol though not living there at all times, but he used the farm until he removed from the area about a year ago. The grazing was of sheep - some 200 to 300 - which ran on to the SE part from the fields to the east which were farmed with Cwm Canol. He himself now farmed Cwm Canol and the fields and had restored the fence along a section of the northern boundary of the SE part. Mr Williams restored the rest of that fence where his sheep grazed on the remainder of the unit land. He himself had also taken shale from a pit at the eastern end of the SE part.

In cross-examination, the witness said that the purpose of the fencing was "to keep our sheep in and others out." the part of the fencing done by Mr Williams was probably agreed between them and him. The ploughing was on the eastern half of the SE part - in the witness' time it was only of small patches as and when needed to cut away bracken. There is a water pipe along the southern edge of, and inside, the southern boundary of the SE part which he believed was put in by his father; it extends beyond the boundary of the SE part and it also supplies water for sheep there on fields farmed by the Davies.

No one other than they took shale, which they dug out of the ground when needed for sheep pens on their own farm land.

(b) Mr T C Davies then gave evidence. He was born in 1912 and lived at Cwm Canol with his parents and uncle. The farm was carried on by his uncle Evan Lloyd with the help of the witness's parents. Evan Lloyd died in 1951 and by his will left Cwm Canol to his sister Hannah Davies for life and then to her son (T C Davies) absolutely; Hannah Davies died in 1959. Before and after his uncle's death he had carried on the farm although in 1945-60 he had not continued to live at Cwm Canol. As far back as about 1920 he remembered their sheep being grazed on the Mountain - there were no fences then, but Mr Williams put them up about 1948. Mr Williams looked after the fences on the eastern stretch of the northern boundary of the SE part and the Davies, the fences on the rest of the boundary on the north and to the west; the Williams's sheep did not graze on the SE part and kept to the northern part of the unit land.



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In 1949 there was a fire over the SE part - the fence survived but after the fire there was no grass left for the sheep. In 1954 - 1955 the Davies ploughed pieces of the SE part on its eastern side and later a part to the west. They sowed some rape and their sheep were taken off for the seed to grow, and later on some seed was sown on perhaps 6 or 8 occasions and on something like 4 acres at a time. In the 1930's and onwards trees were planted by the Davies by the gate that gave access to the unit land - this was to give some shelter to the sheep. The sheep got to the SE part by a track leading from Nant Farm (also owned by the Davies). There was a gate on the southern boundary of the SE part from the main road, which was kept locked - it has been shut for many years.

There is a water trough near the eastern boundary of the SE part feed by a pipe which continues beyond the SE part to supply water for sheep on other pastures; he put in the pipe and trough some 30 years ago. They took shale from a rock at the eastern end of the SE part - in his uncle's time the council took the shale and paid for it. Wood was taken from the SE part to make posts and poles for use on the Cwm Canol Farm.

The witness also said that his uncle let the shooting to a Mr Tottenham, who owned land in the neighbourhood, at a yearly rent of £2. 10s. He produced letters from Mr Tottenham or his Solicitors of 1895 1900 1921 1925 and 1944 confirming the payment of the rent but referring to shooting over "Cwm Canol and Nant Farms", "your land" or "Cwm Canol". The 1944 letter was written after Mr Tottenham's death and indicated that the rights were no longer required.

In cross-examination by Mr Crawford the witness agreed that the trees they planted were to shelter the sheep but the fence was not just to keep the sheep in but to fence the mountain that belonged to them. The letters from Mr Tottenham related to rent for shooting both over the mountain and over the farm land. The water pipe began on land outside the SE part and then went under the SE part and out beyond it to supply other land and sheep on other land.

Mr Crawford put to the witness the draft Assignment referred to in para (2) above. The draft, which is typewritten with some manuscript amendments, is on the face of it a professional composition and Mr Davies agreed that the Solicitors were acting at the time. The parties to it are (1) <sup>the</sup> Williamses who registered grazing rights over the unit land and (2) Mr Davies. After reciting (inter alia) agreement to enter into the Assignment for the purpose of regularising and confirming the position in relation to the unit land, its operative clause was an assignment to Mr Davies of the right to graze 250 ewes on the SE part; and there is a further clause providing for the maintenance of the fences by the Williamses along the northern boundary to the east and by Mr Davies along the rest of the northern boundary and the western boundary. The draft was signed by Mr Davies in the presence of a witness but otherwise it appears that no steps were taken to complete the Assignment or to carry out what it appears was agreed at the hearing before Mr Settle in 1977. Mr Davies said that there was



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a consultation with the Williamses at the time but he cannot remember exactly what happened, though he agreed he did sign the draft. When asked by Mr Crawford why he should have agreed to the assignment to him of grazing rights if he was the owner of the SE area, he replied that he didn't know - the agreement was done by mistake.

(3) Mr Jones produced three Statutory Declarations. One dated 10 September 1984, was by Henry Williams, aged 77, who in 1934 was gamekeeper with the Plas Bevisyn Estate, owned by Mr Tottenham. Mr Tottenham informed him that he rented the shooting rights on Cwm Canol Mountain and Cwm Canol and Nant Farms from Evan Lloyd. Mr Tottenham did not himself shoot on the Mountain but let off the shooting rights to Lord Howard De Walden. The Mountain was known as Evan Lloyd's Mountain.

Mr R E Avon aged 84, in a Statutory Declaration dated 3 January 1984, said that he was from 1940 onwards a partner in a firm of Chartered Surveyors who managed the Tottenham Estate, and that for a number of years around 1947 he and his partner rented shooting rights on the SE part and paid the rent to Evan Lloyd.

Mrs E M Barnett, aged 75, in a Statutory Declaration dated 18 September 1984, stated that she could recall about 1922 Evan Lloyd carried chippings from Cwm Canol Mountain to be used for council road works; She also recalled that in 1949 the mountain had been fenced off from the remainder of the moorland.

None of these three deponents was available for cross-examination, and this concluded the evidence.

(4) Mr Davies's claim is to ownership constituted by adverse possession; whether adverse possession for the purposes of the Limitation Act is established is a question the answer to which depends on the facts and circumstances of each case. Mr Jones submitted that the evidence adduced in regard to the activities of Mr Davies and his predecessor in title, Evan Lloyd, (viz: grazing of animals on the SE part, fencing ploughing, seeding, removal of wood, planting of trees, the letting of the shooting rights and the laying of a water supply), established a case of adverse possession to the exclusion of the owner, Lord Newborough.

As regards the letting of the shooting rights, the letters from Mr Tottenham and his Solicitors refer to shooting over the Davies' farms and there is no specific reference to the unit land or the SE part; Mr Henry Williams in his Statutory Declaration refers only to information given him in 1930 by Mr Tottenham of shooting rights on the mountain and the farms, whilst Mr Owens's Statutory Declaration deposed to the renting of shooting rights on the SE for a number of years around 1947. In neither case was the deponent available for cross-examination, and on this evidence I am not satisfied that rents for shooting over the SE part were paid to Mr Evan Lloyd.



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The evidence as to grazing of sheep on the SE part by Mr Lloyd and Mr Davies was not seriously challenged by Mr Crawford and in my view (though for the purposes of this Decision it is not necessary for me to decide) a right to such grazing had been acquired attached to Nant Farm. Registration of this right was not made, but it seem clear from the decision of Mr Settle in 1977 and the draft of the Assignment that Mr Davies's was at that time concerned with the question of his grazing rights over the SE part; there is nothing to suggest that at that time he claimed to own the SE part, nor indeed had he then owned, or believed that he owned it, would he have been concerned to come to some arrangement enabling him to graze his animals on his own land.

As regards the fencing around the boundary of the SE part, whilst the erection of fencing by a stranger to the land may well be prima facie evidence of adverse possession to the exclusion of the owner, the fence according to Mr T C Davies's evidence was erected about 1948 not by him but by Mr Williams; its maintenance was subsequently shared between him and the Davies; and though Mr T C Davies said that the fencing was not just to keep the sheep in but to fence what belonged to him, his son Mr I T Davies said, without qualification, that the fence was to keep their sheep in and others out.

As regards the other activities which, it should be observed, all took place only on the eastern section of the SE part, adjacent to Nant Farm, these - the spasmodic and limited ploughing and seeding, the planting of trees and the removal of wood, and the water supply - were, in my opinion, all directed to the maintenance or restoration of the grazing or the welfare and protection of the grazing animals. As regards the removal of the shale Mr I T Davies said that this was for sheep pens - there was some evidence that Mr Lloyd sold shale to the Council but this in itself seems to me insignificant in relation to the claim to ownership by adverse possession.

My conclusion is that the relevant activities of Mr Lloyd and of the Davies are attributable to the grazing of their sheep on the SE part and to the use of and improvement of facilities on that part for the maintenance of that grazing and welfare of the sheep; they do not establish the element, necessary for adverse possession, of *an animus possidendi* - occupation of the land with the intention of excluding the owner; see *Littledale v Liverpool College* 1899, *Ch.19* at p.23, *Geo. Wimpey v John* 1966, *AC.ER* 232. It is true, as Mr Jones pointed out, that there was no evidence throughout the period of possession by Lord Newborough, but possession by the owner of the land of this nature which is subject to grazing rights is not often the subject of overt activity and as was said by ~~the~~ Cockburn in *Leigh v Jack* 1879 5 *EXD* 264 at p.271, "if a man does not use his land... he does not necessarily discontinue possession of it".



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In the result,,I do not think that Mr Davis's claim to ownership is established, and I shall direct the Clwyd County Council, as registration authority, to register Lord Newborough as the owner of the unit 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

17 June

1985

*L. J. Morris Smith*

Commons Commissioner