

COMMONS REGISTRATION ACT 1965

Reference Nos. 262/U/306 262/U/307

In the Matter of (1) Old Refuse Tip, Glendowling Lane and (2) Glendowling Quarry, both in Yanwath and Eamont Bridge, Eden District, Cumbria

DEICISION

These references relate to the question of the ownership of land called (1) the Old Refuse Tip, Glendowling Lane being OS Plot No. 147 and (2) Glendowling Quarry being part of OS Plot No. 156, both in Yanwath and Eamont Bridge, Eden District and being the land comprised in the Land Section of Register Unit No. CL 128 and No. CL 129 in the Register of Common Land maintained by the Cumbria (formerly Westmorland) 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 Yanwath and Eamont Bridge Parish Council claimed (letter of 24 September 1979) that both these lands in question belonged to them; and the Earl of Lonsdale claimed (his Solicitors' letter of 10 October 1979) that the CL 128 Tip land belonged to him. No other person claimed to be the freehold owner of the lands in question or to have information as to its ownership.

I held a hearing for the purpose of inquiring into the question of the ownership of the lands at Penrith on 23 and 24 October 1980. At the hearing the Rt Hon James Hugh William (7th) Earl of Lonsdale was represented by Mr Fryer Spedding of counsel instructed by Dickinson Dees, Solicitors of Newcastle upon Tyne.

Mr Fryer Spedding claimed that the Earl of Lonsdale owned both these lands.

Mr D A Pattinson who is now and has been for the last 30 years the Chief Land Agent of the Earl of Lonsdale and his predecessors, and has been associated with the Estate for the last 44 years, in the course of his evidence produced a map which was marked as having been exhibited to an affidavit sworn on 8 August 1928 by Mr William Little in High Court proceedings relating to the Lonsdale Estate reference No: 1928 L 1538, and which aithough undated I shall hereinafter call the 1928 map; and produced also a vesting deed dated 17 January 1961 which was expressed to be supplemental to a vesting assent dated 5 January 1953 and made between the Hon A J B Lowther ("Captain Lowther") and the (7th) Earl of Lonsdale and by which Mr J L Wickham and the Hon A G Gordon ("Lord Adam Gordon") declared that about 18 Manors in Cumberland (including the Barony of Burgh conprising 7 other Manors) and about 41 Manors in Westmorland (including Yanwath and Eamont Bridge and including also the Barony of Kendal comprising 10 other Manors) were then vested in the Earl of Lonsdale upon the trusts of the compound settlement referred to in the 1953 vesting assent.

Mr Pattinson said (in effect):- The 1928 map was kept in the Estate Office and he had known it for at least 30 years. He understood it to be a record of the lands in which the Earl of Lonsdale and his predecessors were interested. Land on it coloured brown were the freeholds of the Estate; the land surrounded by thin red lines (apparently intended as boundaries) were lands in which the Earl or his predecessors were or had been in some way interested. He had kept the map up to date, colouring on it the lands disposed of in green.

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The CL 128 Tip land is according to the Register map approximately rectangular, being on the east side of the public road (a lane leading only to the Glendowlin Farm House and other buildings nearby: a rough track beyond), and having a length of about 70 yards from the edge of the road and an average width of about 40 yards. Of this land Mr Pattinson said (in effect):- When he first went there about 30 years ago, it was a hole: it had been quarried he supposed; then it had very little refuse in it. Since then it had been used by local parishioners as a refuse tip and ultimately became filled up. Recently the Parish Council had restored the land and planted some trees on it. The Estate owns the farm lands on the opposite side of the road: up to about 6 years ago they owned the lands adjoining on the north which were then sold off.

The CL 129 Glendowling land is (according to the Register map) irregularly shaped, being on the west side of the said public road (or the continuation of it by the Glendowlin Farm buildings); it is a little larger than the CL 128 Tip land. Of this land Mr Pattinson said (in effect):— When he first went there about 30 years ago, it appeared to have been quarried in part although the majority was grass land open to the road; it was fenced from the adjoining farm land, and along its west boundary (according to the map about 90 yards) there was a bank (a low quarry face). Recently within the last 12 months it had been enclosed from the road (along its east boundary) by a fence; grazed by (he supposed) the farmer of Glendowlin Farm. This farm is not owned by the Estate.

After some discussion as to whether the evidence summarised above established the ownership of any person, I adjourned the proceedings to the following day. At the adjourned hearing, Miss S J Macpherson of Cumbria County Council Record Office at Kendal produced the Sockbridge, Yanwath and Eamont Bridge Inclosure Award made under the Sockbridge, Yanwath and Eamont Bridge Inclosure Act 1913 (53 Geo.3 c.14) which contains an allotment "as and for public watering places" of three pieces of land (shown on the Award map) and an award or direction: "that the aforesaid plots or parcels of land shall for ever hereafter continue open as and for common public watering places".

There was also then produced a conveyance dated 29 July 1929 by which Hugh Cecil 5th Earl of Lonsdale conveyed the greater part of what was then (and still is) the Lowther Estate to The Lowther Estates Limited. The land thereby conveyed was defined by reference to a separate bound up bundle of maps (also produced) which is now somewhat dilapidated, although legible enough for the purposes of this case; from the land thereby conveyed was expressly excepted land defined by reference to a map bound up in the conveyance. I did not study this conveyance in detail because Mr Fryer Spedding conceded that although the greater part of the Estate including some 45,000 acres of common land was delineated on one or other of the maps in the said bundle, neither the CL 128 Tip land nor the CL 129 Glendowling land was included in any of the maps in the boundle or in the bound up map. Extensive areas near to these lands were included in the bound up map and the Manors mentioned in the 1961 vesting deed were listed in the First Schedule.

After the hearing I inspected the CL 128 Tip land and the CL 129 Glendowling land. As to the Tip land, I had no difficulty in identifying it with one of the lands by the Award allotted as a public watering place; for the most part the land has been levelled so as to be a little above the level of the adjoining land, covered with some top soil and planted with trees as described by Mr Pattinson; but at its east end it dips down to a place where from the appearance of the surrounding land I infer



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here must at one time have been (and may be still is) water. As to the CL 129 lendowling land: - One of the lands allotted by the Award as a public watering lace is near the area of Glendowling Farm but is on the Award map shown as being on he east side of the Lane; the CL 129 Glendowling land is on the west side of the ane. At the hearing it was suggested that perhaps since the Act there has been ome road improvement with the result that the allotted watering place is now on he other side of the road. On my inspection I found nothing to support this suggestion; on the west side of the road the land is at a lower level and may well at one time have been a watering place; on the Register map a pond is marked. The L 129 Glendowling land is higher and its present appearance is quite inconsistent with it ever having been a public watering place. From the circumstance that the vatering place allotted by the Award has not (as far as I know) been registered under the 1965 Act, I decline to infer that there has been some sort of substitution so that CL 129 Glendowling land can now be treated as if it had been allotted by the Award. For these reasons my decision will be on the basis that the Award has no relevance to the question now under consideration as to the present ownership of the CL 129 Glendowling land.

On the first day of the hearing the claims were based on the 1928 map and the 1961 vesting deed and (as I understood Mr Fryer Spedding) nothing else, it being then said the map somehow showed that these lands now in question are waste land of a Manor of Yanwath and Eamont Bridge because they are in the area delineated on the map by a thin red line within which there appears in red "YANMATH AND EAMONT BRIDGE". However the 1928 map has nothing on it to indicate that the maker of it thought that the red lines on it are the boundaries of this or any other Manor; nor does it (as most manorial maps do) distinguish the different kinds of manorial lands, eg demesne, customary freeholds, copyholds and waste lands; I understood from Mr Pattinson that by far the greater part of the land which was uncoloured on the 1928 map and thereon within the Yanwath and Eamont Bridge red line area was certainly not waste land and that much of it had never, at any rate during his period, been part of the Estate. The 1928 map cannot be regarded as a statement by a deceased person and as such admissible because I do not know what Mr Little was by exhibiting it intending to say: and it is not an "exercise of ownership" so as to be admissible in evidence in accordance with the principles of law below mentioned. Mr Pattinson made it plain that apart from the 1928 map he knew nothing of the boundaries of the Manors and apart from it he had no knowledge of any manorial activities which could have any relevance to the ownership of these lands. In my opinion the 1928 map does not support the claims put forward either considered by itself or in conjunction with the 1951 vesting deed or anything else said at the hearing.

The 1929 conveyance purports upon the face of it show exercise of ownership and as such is by itself some evidence that the persons who are therein treated as being or becoming owners were or became owners accordingly, see statement of the law applicable set out in Blandy-Jenkins v Dunraven 1899 2 Ch. 121 at page 126, and also the House of Lords case there cited. But on none of the plans in the bundle referred to in or bound up with this conveyance are the CL 128 Tip land or the CL 129 Glendowling land delineated. So far as I am concerned on this reference the conveyance is ambiguous: either the 5th Earl was in 1929 the owner of these lands and he or his advisers forgot to delineate them on one of these plans; or these lands were not so delineated because the 5th Earl was not then the owner. It seems likely that the 1929 conveyance was made as a direct result of the proceedings in which the 1928 map was put in evidence, and that it was prepared in accordance with the best information then available; bearing in mind the maps did include some 45,000 acres of common land which was probably then also waste land of some manor, upon a consideration of the conveyance I would



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incline against the 5th Earl then being the owner of either the Tip Land or the Glendowling Quarry land, particularly as Mr Pattinson was unable to say that in his time the Estate had done anything on them and did say that the things which he knew had been done on them had been done by others. But it was contended that the practice below mentioned is evidence enough that these lands should be treated as coming within the general words expressly or impliedly included in the 1929 conveyance and the 1961 vesting deed.

The practice was as follows:- The Estate is very extensive. By far the greater part of it, including all that is of obvious value or importance, is delineated in one or other of the before mentioned maps referred to or bound up in the 1929 conveyance; nevertheless there are thousands of small pieces of waste land in or around the lands so delineated which Mr Pattinson said were in the reputed ownership of the Estate for the following reasons:- many of these waste lands are from time to time required for road widening, for water pipes, for sewage pipes, for electric pylons and other like public works; the undertakers refer their requirements to the Lord of the Manor, particularly Mr Pattinson or others working under him in the Estate Office; in the result, no other person coming forward as owner, the undertakers accept a conveyance or a way-leave agreement or the like from the Earl of Lonsdale and the road is widened or the pipes laid accordingly, without and objection or protest by anyone.

In my opinion it does not follow from this practice that the Earl of Lonsdale is the owner of the remainder of these thousands of pieces of land in which no undertaker has yet expressed any interest. The undertakers who have taken a grant from the Earl of Lonsdale must I think be taken to have known that they were dealing with a person with a defective title and have concluded that for practical purposes this was the best they could in the circumstances get; as soon as they took such a grant and entered into possession under it and remained there without protest from anyone the defect began to be cured it being day by day becoming more and more likely that the possession of those concerned would make the one time defective title indefeasible. But in my opinion the requirement of Section 8 of the 1965 Act that the Commons Commissioner shall be "satisfied" as to ownership does not equate him to an undertaker such as above mentioned; although the Earl of Lonsdale may by reason of his ownership of this very large Estate be in a position to perfect his title to some of these thousands of pieces of land by persuading an undertaker or someone else to take possession of them under a grant made by himself; unless and until this happens his title is defective and my decision is therefore that I am not satisfied with it. It may be by taking this view I shall be making it more difficult for the practice to be continued as regards any land which is registered under the 1965 Act; but as I read the judgement of Stamp LJ in re Box 1980 1Ch. 109, it may have been the intention of Parliament that undertakers should as regards land registered under the 1965 Act have an easier and more certain way of acquiring a good title to what they need, see page 117.

From the considerations set out above, I am not satisfied that the Earl of Lonsdale is the owner of the CL 129 Glendowling land. I do not know why the Yanwath and Eamont Bridge Parish Council made this registration or why they claimed ownership of this land. In the absence of any evidence that anybody else could be the owner, I am not satisfied that any person is the owner of CL 129 Glendowling land and it will therefore remain subject to protection under Section 9 of the 1965 Act.



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As to the CL 128 Tip land: — It was allotted set out above under the Award apparently in exercise of the power conferred by the 1813 Act, the relevant words being set out in the Schedule hereto. Mr Fryer Spedding at the hearing desiring time to consider the 1813 Act under which the Award produced by Miss Macpherson had apparently been made, I have since received written submissions as set out in a letter dated 11 December 1980 from Dickenson Dees.

The first submission is (in effect) that although a printed copy of the 1813 Act had been obtained from the Law Society Library, and found to accord with the handwritten scroll in the House of Lords Library, no copy of the Act was available in the Libraries of Lincolns Inn or Grays Inn, and the Act 53 George III (xiv) relates (as appears at page 421 in volume 5 of the Statutes of the United Kingdom) to land in Norfolk; so it is felt "that the Sockbridge, Yanwath and Eamont Bridge Act never did receive the Royal Assent". I do not share this feeling. From the various indexes being the first 72 pages of the said volume 5 of the Statutes, it appears that Acts of Parliament were then grouped under 3 headings: (1) "Public General Acts", (2) "Local and Personal Acts: to be judicially noticed and printed copies of which are declared to be evidence"; and (3) "Local and Personal Acts: not printed"; under heading (3) the Yanwath and Eamont Bridge Inclosure Act is indexed at page xiii of the said volume 5 and therein numbered 14 (not xiv). In the Return made to the House of Commons by the Board of Agriculture of all Acts passed for the inclosure of commons and waste land and by that House in 1914 ordered to be printed, is included "1813: 53 Geo III c.14: Barton (Manors of Sockbridge, Eamont Bridge and Yanwath); 285 acres"; the compiler of this return seems to have used Arabic numerals for the chapters of the Act coming under heading (1) and (3) above mentioned and Roman numerals for those coming under heading (2). Further there is in Lincolns Inn Library a copy of 1813 53 Geo III c.14 bound up with 26 other Acts being those numbered 1 to 27 at pages xiii and xiv of the said volume 5 of the Statutes. I conclude therefore that the 1813 Act in accordance with the Law Society and Lincolns Inn Library copies were regularly enacted by Parliament with the Royal Assent duly obtained.

The other submission in the December 1980 letter is (in effect), that having regard to the absence of any such words as "award" or "grant" in the relevant part of the 1813 Act (set out in the Schedule hereto) and to the context generally, the ownership of the soil which was before the Act (as therein appears) in William Earl of Lonsdale remained in him after the Act and the Award had been made.

The ownership of the soil of land allotted by an inclosure award for a public purpose was considered in Reg.v Inclosure Commissioners (1871) 23 LT 778, in re Christchurch (1888) 38 Ch D 520, and on appeal sub nom A-G v Merick 1892 AC 1 and in Simcoe v Pethick 1898 2QB 555. In the first two (but not the third) of these decisions some residuary ownership in the Lord of the Manor was recognised having regard to the particular words used in the Awards under consideration; but there is I think no general rule to be extracted from these cases, see the observation of Pennycuick J in Booker v James (1968) 19 P & CR 525 at page 529. Each case must be considered having regard to the wording of the Award. But I have the guidance of the observation of Lindley LJ in re Christchurch supra at page 530 that an award is not to be construed as creating new rights not previously known; accordingly the 1813 Act by permitting the valuer to "assign set out and appoint



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land as a public watering place for cattle was in effect authorising land to be held thereafter for a public charitable purpose such as was then recognised as compassibly existing under a use for charitable purposes under the Charitable Uses Act 1601 or upon a trust for charitable purposes under the Trust Law then applicable; a grant to such a use could be effected to grant the full ownership of the legal estate to charitable purposes without leaving any legal estate in the grantor to be held on trust or leaving any estate legal or equitable under which grantor would take some benefit either to the extent which the declared charitable purpose did not exhaust the possible uses of the land or when if ever the charitable purpose failed by becoming impossible or impracticable. It is I think a question of construction of the Award whether any such absolute and indefeasible grant for charitable purposes was made or alternatively the grant as regards charity was limited or defeasible.

Clearly under the 1813 Act and the Award made under it, the Lord of the Manor retains some interest, because the Act expressly provides (the penultimate section) that his title to coal etc and to royalties etc incidental to the Manor shall not be prejudiced. On this reference I am not concerned to record the interest of the Earl of Lonsdale in the coal etc mentioned in this section because the ownership of mines and minerals are under the Commons Registration (General) Regulations 1966 as amended dealt with specially, see Regulation 24(2)(e), and because royalties etc incidental to a Manor have now being extinguished. So in substance ownership of the soil is only relevant in the sense of ownership of the surface soil.

As to this at the date of the Award land under the Charitable Uses Act 1601 could be conveyed for the entire legal estate to charity; it was not then necessary to constitute trustees for the conveyance to be effective; there being no obvious need for trustees in the case of the conveyance for a public watering place and no mention in this Award of any trust or trustee, I am of the opinion that the Lord of the Manor did not in any way become a trustee. On the question whether apart from the expressed reservations for the Lord of the Manor under the Section of the 1813 Act above mentioned, the allotment showed a general charitable intention which could not fail for the benefit of the Lord of the Manor or showed a particular charitable intention which if it failed resulted in the Lord of the Manor becoming the owner, in my opinion the allotment shows a general charitable intention; having regard to the nature of the land I cannot conceive how in 1813 anybody would have thought that as long as it was used as a public watering place it could be put to any other useful purpose; the use of the words in the Award "for ever" shows that it was not then contemplated that this purpose could ever fail. Accordingly my decision is that after the Award no estate or interest in this land remained in the Lord of the Manor. So quite apart from any difficulty there may be in inferring that any estate or interest remaining under the Award in the Lord of the Manor is now vested in the 7th Earl of Lonsdale under any of the documents of title produced at the hearing, I am not satisfied that he is the owner of the CL 198 Land.

As to any uncertainty there may be as to the ownership of any other person under the Award, this is I think removed by Section 17 of the Poor Act 1819 (59 Geo 3 c. 12) and the decisions of the Court as to the effect of such section. By the section the churchwardens and overseers of a parish were empowered to "accept to take and hold in the nature of a body corporate for and on behalf of the parish all land belonging to the parish". In Doe v Hiley (1830) 10 B & C 885, Lord Tenterden CJ held that this section had the effect of vesting in the church



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wardens and overseers all the land belonging to the parish notwithstanding that the land was not acquired for purposes relating to the poor. This decision has since been treated as applicable to all land "belonging" to a parish in the "popular sense of that expression", see Doe v Terry (1835) 4 A & E 274 at page 281 and Haigh v West (1893) 2 QB 19 page 31; this last case though distinguished on the facts was recognised as stating law still applicable in Wilde v Silver (1963) 1 Ch 243 at page 271. The Award by which this land is allotted for public charitable purposes are such I think to show that it was to belong to the parish in "the popular sense of that expression". I conclude therefore that it is now vested in the Parish Council as successors of the churchwardens poverseers.

As a general rule I would not at a hearing vest land in a person on whose behalf no ownership claim was then made. This is exceptional in that I deduce from the evidence of Mr Pattinson that this land has for many years been used for parish purposes and that the Parish Council are in possession by having levelled it and planted trees which I saw on my inspection; further in their letter of September 1979 they claim ownership.

For the above reasons I am satisfied that the Parish Council are the owners of the CL 128 Tip land and I shall accordingly direct the Cumbria County Council's registration authority register Yanwath and Eamont Bridge Parish Council as the owners of the land under Section 8(2) of the Act of 1965.

I thank Mr Pattinson and Mr Fryer Spedding for the trouble they have taken in investigating and presenting to me the matters relevant to the ownership of these lands, particularly as I suppose their ownership cannot be of any great consequence to the 7th Earl of Lonsdale, and I expressed my regret to them that I fert unable to give effect to their contentions.

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.

SCHEDULE

And be it further enacted That the said Commissioner shall and they are hereby authorised and required to assign set out and appoint such Part or Parts of the said Commons and Waste Grounds as they shall think fit and necessary for Public Watering Places for Cattle, and for getting Gravel for making and repairing the Roads to be made over the said Commons and Waste Grounds, and also for a common Stone Quarry or Stone Quarries; and the said Part or Parts so set out shall for ever thereafter be used by the Surveyor of the Highways for the Time being of the Townships of Yanwath and Eamont Bridge Sockbridge Tirril and Thorp in the said Parish of Barton, and by the Owners and Proprietors of Messuages, Lands and Tenements within the said Manors respectively; and the said Owners and Proprietors shall have free liberty of getting stone there in for their own Use



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and Benefit, but not to sell and dispose thereof; and that it shall be lawful for the said Commissioners to set out Road to and from the said Stone Quarries for Public Use and Benefit.

Dated this 6k _

day of February

1980

a a. Sader Felle

Commons Commissioner