



COMMONS REGISTRATION ACT 1965

Reference No. 262/U/473

In the Matter of Brackenthwaite
Hows; Loweswater, Allderdale D

DECISION

This reference relates to the question of the ownership of the land described above being the land comprised in the Land Section of Register Unit No. CL 411 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 this reference several claims to ownership of the land in question ("the Unit land") were made.

I held a hearing for the purpose of inquiring into the question of the ownership of the Unit land at Keswick on 23 March 1982. At the hearing there were four claimants who were represented as follows:- (1) Miss Nancy M Sale, represented by Mr J Mawson of the firm of Cartmell Mawson and Main, Solicitors, (2) Mr Michael E Thompson, represented by Mr A R Nobbs of the firm of Oglethorpe and Haugh, Solicitors, (3) Mrs Joan White, Mr E Robinson and Mr D B Robinson ("the Robinsons") represented by Mr D Mellor of the firm of Little and Shepherd, Solicitors, (4) The National Trust represented by its Land Officer, Mr G Hall.

(1) Miss Sale's Claim This is a claim to the ownership of a 5/16th undivided share in the Unit land. Mr Mawson produced a number of documents of title to a farm called Picket How which lies close to the northern boundary of the Unit land. In a Vesting Deed in favour of Miss N M Sale dated 6 February 1975 the property vested included "seven equal sixteenths shares of the grazing rights over.....Brackenthwaite How", shown on a plan and clearly being the Unit land. Earlier documents of title, relating to the devolution of title to the farm on successive deaths of the family owners, do not refer specifically to Brackenthwaite Hows, but Mr Mawson produced a Mortgage of 1852, a Release of 1856 and a Deed of Family Arrangement of 1850 relating to (inter alia) Picket How, which referred also to the grasses stints or cattlegates in Brackenthwaite Hows.

In a Statutory Declaration dated 17 March 1982 Miss Sale said that so long as she has known the farm - some forty years - the Unit land has been enclosed with walls or fences. The farm was let to the Mackereth family until 1978 and a Tenancy Agreement of 3 September 1947 included 7/16th shares or stints on the Unit land. She also said that in the Vesting Assent and the Tenancy Agreement the references to 7/16ths shares or stints should have been to 5/16ths.

In a Statutory Declaration dated 19 March 1982 Mr William Mackereth, who is 81 and went to live at Picket How in 1915, said that the Tenancy Agreement of the farm always included six stints on the Unit land. The stints were sublet for a time, but from the early 1950s to 1978 he farmed them as part of the farm.



He also rented the other ten stints. It was the responsibility of the owner of the Unit land to fence it against adjoining land and this he had done while in possession. Each stint entitles the owner to graze 1 cow in summer and 16 hogs in winter. At no time between 1913 and 1978 did any person object to or interfere with the occupation of the Unit land by the stint owners.

Mr Mawson also produced from the County Archives a Tithe Award and plan of 1844 which showed as owners of the Unit land three names viz Ruth A Skelton, Mary Anne Wood and Mary Fisher. In her Statutory Declaration Miss Sale said that Mary Anne Wood had a life interest in Picket ~~How~~; and she was the grantee under the 1836 Release which comprised property including the grasses stints or cattlegates in the Unit land.

(2) Mr M. E. Thompson's claim This is a claim to ownership of a 2/16th undivided share in the Unit land. It stems from a Conveyance dated 9 October 1978 between (1) R F Bell (2) Trustees (3) M E Thompson by which there were conveyed to Mr Thompson two stints on Brackenthwaite Hows "which.....is divided into sixteen stints". In earlier documents of title there are references to "my share or shares of and in Brackenthwaite Hows" (Will dated 24 July 1914 of Grace Bell) and to the "two stints on Brackenthwaite Hows" (Release and Conveyance dated 11 January 1923) (1) J H Prince (2) Joseph Bell and Mortgage dated 15 January 1923 (1) Joseph Bell (2) J H Prince).

In a Statutory Declaration dated 9 October 1978 R F Bell, the vendor to Mr Thompson, stated that since January 1955 he had exercised rights of pasturage on the Unit land (or been in receipt of the rents and profits therefrom) namely the right to use and enjoyment of two stints at 16 hogg grasses per stint, and had enjoyed undisturbed possession of the right without any adverse claim being made.

(3) The Robinsons' Claim This is a claim to ownership of an 8/16th undivided share in the land, the claimants being the three beneficiaries in whose favour an Assent dated 29 October 1975 was made by the personal representatives of Wentworth B Robinson. The Assent comprised property at Loweswater, itemised in a Schedule and including "eight out of sixteen stints" on Brackenthwaite Hows. The earlier title goes back as far as the Probate in 1769 of the Will of Richard Head who devised to Skelton Head (inter alia) "all my cattle gates share right and interest in the close or undivided pasture called the Howes in Brackenthwaite". In September 1812 there were a Lease and Release by Skelton Head to Richard Skelton of the former's "right share and interest of and in a certain open and undivided close or stated pasture called The Hows in Brackenthwaite consisting of eight cattlegates or beast grasses in the summer season and 85 sheep grasses in winter".

The years 1841 to 1905 are covered by an Abstract of Title and it appears that in 1892 James Brougham succeeded under the Will of Mary Davison (formerly Skelton) to property which included 2 2/3 cattle grasses or stints on Brackenthwaite How and under the Will of Margaretta Skelton to 5 1/2 cattlegrasses or stints Brackenthwaite How. On the occasion of the sale of property by J Brougham in 1905 a statutory declaration made by the Solicitor familiar with the property stated that for 30 years up to 1892 his firm collected the rents and profits from the property on behalf of Miss Skelton and Mrs Davison, and the property was itemised in detail and included eight stints on Brackenthwaite Hows, which is divided into 16 stints. The eight stints were included in the property conveyed on its sale by James Brougham, by an Indenture dated 6 December 1905. The



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property including the eight stints thereafter devolved on Wentworth B Robinson by virtue of an Assent dated 3 March 1956 and on the Robinsons by the Assent of 1975 referred to above.

Mrs Joan White gave evidence confirming a Statutory Declaration made by her on 19 March 1982 in which she stated that properties at Loweswater came into her family's possession in 1905 and mentioned the references to the eight stints which she said were let to the Mackereths and since 1978 to the tenant of Picket How: the tenants on the Hows always repaired the walls and fences surrounding the Hows.

(4) The National Trust's Claim This claim is based on a Conveyance in 1937 to the National Trust of the lordships of the manors of Loweswater, Thackthwaite and Brackenthwaite and Mr Hall's submission was that the Unit land is waste land of a manor which, in the absence of proof of ownership by any other person, continues in the ownership of the lord of the manor. There was no evidence adduced from manorial records or otherwise that the Unit land was manorial land.

As regards the claims to undivided shares Mr Hall submitted that the evidence in support of the claims showed a title $\frac{5}{16}$ grazing rights only and not to interests in the land itself: and he pointed out that Mr Thompson's predecessors in title had registered the right to graze 2 stints at 16 hog grasses per stint and that Mrs White had said that she had let the grazing rights.

Conclusions I am satisfied that the proportionate shares claimed by Miss Sale, Mr Thompson and the Robinsons have been established but the question, so far as they are concerned, is whether those are shares in the land itself or shares only in grazing rights quantified as a fraction of the total grazing rights, that total in this case amounting to sixteen stints. It appears that the law recognized a form of ownership which was a combination of grazing and soil ownership: whether such ownership exists depends on the wording used in relevant documents, the nature of and the use made of the land, and any other evidence which may indicate ownership of the soil as well as grazing rights. In the wording, quoted above, of some of the documents there are indications of something more than grazing rights: the word 'stints', in itself, indicates no more than the measure of a grazing rights but the word 'cattlegate' whilst also descriptive of a grazing right may, having regard to the context or other relevant facts, indicate also a share of ownership of the soil: see the definition of 'cattlegate' in Stroud's Judicial Dictionary 4th ed. Vol 1 p. 402. Of these indications, I refer to the 1739 Will (see (5) above) "all my cattle gates share right and interest in....."The Hows": the 1914 Will (see (2) above) "all my share or shares of and in Brackenthwaite Hows": the 1947 Tenancy Agreement (see (1) above) " $\frac{7}{16}$ ths shares or stints": and the several references to 'grasses' or 'cattlegresses'. More significantly are firstly, the 1844 Title Award which showed three named owners of the Unit land, as regards two of whom there is some evidence that they were predecessors in title of Miss Sale and the Robinsons: and secondly the Lease and Release in 1812 (see (5) above) of Skilton Head's right share and interest of and in the Hows. This form of conveyance was then in use for the transfer of a corporeal hereditament i.e. land,



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not of an incorporeal hereditament such as a grazing right: and in the case of *R V Whixley* 1 T. Rep 137 it was considered that the adoption of this form of conveyance for the transfer of cattleshates showed that they must have comprised an interest in the soil (see *Williams on Rights of Commons* p. 82).

The evidence given as to past and current user of the Unit land does not in my view help very much in determining whether the interests of the claimants are interests in grazing rights only or in ownership of the land plus proportionate grazing rights. The user and acts deposed to, while consistent with the latter could, I think, be attributable simply to grazing rights. Nevertheless the indicia of ownership ~~of the land~~ referred to above are, in my opinion, sufficient to establish that this is a case of combination of ownership and grazing rights: and accordingly I find in favour of the claim to ownership by Miss Sale, Mr Thompson and the Robinsons. Consequentially I do not accept the National Trust's claim: and I should add that had I found against the claims of the three claimants, I should not, in the absence of evidence that the Unit land was at some time part of the manorial land of the manor of *Brackenthwaite*, or of one of the other manors whose lordships were acquired by the National Trust, have been satisfied as to its ownership of the Unit land.

In determining ownership I am concerned to ascertain the owner of the legal estate in the Unit land: and the ownership of the three claimants being in undivided shares the devolution of the legal estate in the land has, to be considered with reference to the provisions of the Law of Property Act 1925 in relation to land held in undivided shares. The history of the three titles shows that what I have found to be ownership in undivided shares existed prior and up to the commencement of that Act, and the vesting of the legal estate in those circumstances is provided for by the transitional provisions in Parts iv and v of the First Schedule to that Act. Part v 2 provides for the vesting (on 1 January 1926) in the Public Trustee of any open space of land held in undivided shares in right of which each owner has rights of access and user over the open space. This provision (as to which see *Re Bradford City Premises* 1928 Ch. 138), taken by itself, is applicable to this case but it is not clear how the provision is to be reconciled with Part iv of the Schedule, which deals with the vesting of land held in undivided shares. In this case I think the question is somewhat academic since if Part iv, and not Part v, is applicable, equally the land would vest in the Public Trustee under paragraph 1 (4): of the earlier paragraphs 1(3) could have applied but for the existence of the incumbrance affecting the 2/16th share created by the Mortgage of 15 January 1925 (see (2) Mr Thompson's claim above).

In the result, therefore, I am satisfied as to the beneficial ownership in undivided shares of Miss Sale, the Robinsons and Mr Thompson and, having regard to the transitional provisions of the Law of Property Act 1925, I shall direct the Durham County Council, as registration authority, to register the Public Trustee as the owner of the Unit land under Section 9(2) of the Act of 1925.



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

21 June

1982

H. J. Morris Smith

Commons Commissioner