

COMMONS REGISTRATION ACT 1965



Reference No. 262/U/540

In the Matter of Herd House Moss, Angerton,
South Lakeland D

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 114 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 claims to ownership of the land in question ("the Unit land") were made by Mr J S H Stutt and by Mr C J Slater.

I held hearings for the purpose of inquiring into the question of the ownership of the land at Kendal on 21 April 1983 and 28/29 February 1984, and viewed the Unit land on 29 February.

At the hearings Mr L Hayton, Solicitor, appeared on behalf of Mr Stutt, and Mr Slater appeared in person. Mr R C Cleasby at the hearing in April 1983 was represented by Mr M S Graham, Solicitor, and in February 1984 by Mr E W Huck, Solicitor. Mr Cleasby made no claim to ownership but challenged Mr Stutt's claim.

The Unit land is divided by the railway line, running in a line from south-east to north-west. Mr Stutt's claim is to the section on the west side, and Mr Slater's to that on the east side, and I will refer to the two sections as "the west section" and "the East section" respectively.

A. Mr Slater's claim to ownership of the East section was not opposed. He produced a Conveyance dated 4 April 1968 whereby a Mrs Doris Wilson conveyed to Mr and Mrs Slater in fee simple land forming part of Marshfield Farm: the land conveyed is itemised in a Schedule and delineated in green on a plan, but does not include the East section. The Conveyance however includes the right of herbage on Herd House Moss and Rectory Moss as delineated in blue on the plan and this does comprise the East section. A right of herbage may carry extensive rights to the natural produce of land but it is not equivalent to ownership of the land itself, and it is to be observed that in 1969, Mr Slater registered ^{only a} right of grazing in the Register of Common Land. The documentary title sufficiently shows ownership of a right of herbage but, in my opinion, does not constitute satisfactory evidence of ownership of the East section itself.

Mr Slater also relied on agreements for the grant of wayleaves to a number of public bodies for the laying or erection of water pipes and electricity pylons and conductors. These were entered into by his predecessors in title, owners of Marshfield farm and of the herbage right on the East section. Whilst the wayleaves extend across the East section, they apparently commenced on and traversed the Marshfield farm property before reaching the East section, and it seems to me that the agreements would naturally enough be entered into with the owner of the farm property who also had the herbage right on the East section; and in all the circumstances the wayleave agreements cannot, in my view, be regarded as satisfactory evidence of ownership of the East section by Mr Slater or his predecessors in title.



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In the result, I am not satisfied on the evidence that Mr Slater or any other *person* is the owner of the East section, which will therefore remain subject to protection under Section 9 of the Act of 1965.

B. Mr Stutt's claim to the West Section. The principal basis for this claim is documentary evidence, the major part of which is the result of extensive and meticulous research by Mrs Susan Dench, a qualified archivist. The details and result of this research are contained in an affidavit sworn by Mrs Dench, and the considerable number of documents referred to in the affidavit were produced: this evidence was confirmed and supplemented by Mrs Dench's oral testimony at the hearings.

The documentary evidence is directed to showing (a) ownership of the West section by the 7th Duke of Devonshire in 1865 (b) a grant by him in that year of a right of herbage over the West section and the devolution of that right to Mr Stutt (c) a Conveyance in 1982 of the fee simple of the West section to Mr Stutt by the 7th Duke's successors in title.

(1) (a) In the earliest plans and documents produced by Mrs Dench it appears that Herd House Moss was not separately referred to by that description but was included as part of the extra parochial area of Angerton Moss. This at one time formed part of the property of the Abbey of Furness but following the dissolution of the monasteries passed to the Crown. By an Act of Parliament of 1726 the Crown was authorised to grant by letters Patent to trustees for Sir Thomas Lowther his heirs and assigns the estate of the dissolved monastery including "all that pasture turbary or moss called or known by the name of Angerton Moss": and by letters Patent in the following year that grant of the property including Angerton Moss by the same description was made to Sir Thomas Lowther his heirs and assigns for ever in fee and common solage subject to the payment of certain rents.

The evidence further shows that following the deaths of Sir Thomas Lowther and his only son in 1756 the estates in Furness passed into the Cavendish family - to Lord George Augustus Cavendish (in 1831 created Earl of Burlington) in 1803 and to his grandson the second Earl of Burlington in 1834. The last named became the 7th Duke of Devonshire in 1858.

Plans of 1806 and 1808 indicate Herd House Moss as part of the estates belonging to the Cavendish family. In the 1808 plan Herd House Moss is in two sections, No. 86 (82 acres) to the west and No. 87 (63 acres) to the east. In a valuation of the estates in Kirkby Ireleth belonging to Lord George Henry Cavendish made in 1826 the two sections are included and described as 'Moss (Freeholders get peats)', and there are similar entries in a survey made in 1841 of the estates in Low Furness belonging to the Earl of Burlington. It seems probable, and this is borne out by the evidence of Mrs Dench, that the references to 'freeholders get peats' were references, not to freeholders of the Moss itself, but to freeholders of the manor of Plain Furness who were entitled to take peat by virtue of their freehold tenements elsewhere in the manor.

The Tithe Award and accompanying Map of 1840 include among the properties shown as in the ownership of the Earl of Burlington Moss which included Herd House Moss. There is also evidence in the Estate Rentals of the Cavendish Estates in Furness and Kirkby Ireleth of the receipt of turbary rents for Angerton Moss.



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(b) By a Conveyance dated 10 April 1965 ("the 1965 Conveyance") made between the 7th Duke of Devonshire and William Sawley Rawlinson there was conveyed to W S Rawlinson, Moss House Farm and land comprising some 445 acres itemised in the First Schedule. The items in the Schedule included Nos. 86 and 87 which were shown on the accompanying plan, 86 and 87 being divided by the railway line and 86, no longer including some parts shown on the plans of 1806 and 1808 and now of 61 acres, and 87 now of 51 acres: 86 is the West section and 87 the East Section. What the Conveyance granted over Nos. 86 and 87 was "the sole and exclusive right of pasturage in perpetuity" and opposite the two numbers in the Schedule are the words "herbage only". However extensive the rights so granted may be, they do not in my opinion constitute a grant of fee simple ownership. That this was so is confirmed by recitals in the Conveyance to the effect that over those two items the right of pasturage only was comprised in an earlier Deed of release and settlement. The reason for this restriction is not clear but in my view the overall effect of the evidence adduced by Mrs Dench is (1) to show ownership of the west section devolving to the 7th Duke of Devonshire (2) a grant by him in 1965 of a right of pasturage or herbage over the West section to W S Rawlinson.

The right of herbage over the West section was included in the particulars of lot 38 (Moss Farm and Herd House) at the Sale of the Duddon Hall Estate in 1902. The property comprised in this lot was purchased by and conveyed to R C Whinerary by Elizabeth M Rawlinson, the Conveyance being dated 9 February 1904. The property, by now called Angerton Hall, subsequently devolved on Samuel Whinerary who by a Conveyance dated 9 March 1946 conveyed it to John R Stutt (Mr Stutt's father), and he in 1981 by two Deeds of Gift both dated 6 April 1981 conveyed it to Mr Stutt. On this evidence, I am of opinion, nor was it contested, that Mr Stutt acquired the right of herbage over the West section. →



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(→) The evidence to which I have so far referred shows in my opinion a paper title to ownership in 1865 of the west section by William 7th Duke of Devonshire: a grant by him in that year of a right of ~~use~~ over the west section and the subsequent devolution of that right to Mr Stutt. I turn now to the evidence adduced in support of Mr Stutt's claim to ownership of the fee simple of the West section.

(1) This evidence, so far as it continues the paper title from 1865, consists of ^{an} examined Abstract of Title commencing with the death of the 7th Duke in 1891. His will disposed of his freehold hereditaments in Lancashire on trusts for the benefit of the family. It is not I think necessary to detail these trusts or subsequent dispositions by will or appointments, under which the Lancashire estates continued in family ownership and in 1909 vested in Lord Richard Frederic Cavendish. In 1931 he agreed to sell them to Holker Estates Company, and following the liquidation of that company in 1968 the estates became vested in Richard Edward Osborne Cavendish as trustee for sale. The trustees for sale in 1982 were the Marquess of Salisbury and Timothy John Burrows and they by a Deed of Confirmation and Conveyance and on sale dated 1 April 1982 conveyed to Mr Stutt "such right title and interest as the Vendors may hold and enjoy in the fee simple in the West Section".

In an affidavit dated 24 February 1984 Mr Roger H Foden, a Solicitor of the firm of Currey and Co since 1963, said that he had since then been engaged more or less continuously in relation to conveyancing work for the Cavendish family on their Holker estates. He knew of nothing to cast doubt on Mrs Dench's conclusion that in 1865 the 7th Duke held the fee simple in Herd House Moss, nor had he any reason to doubt that the title deduced by his firm leading up to the Conveyance 1982 was one under which any outstanding estate of the 7th Duke passed to Mr Stutt. Nor was he aware of any other title under which the estate might have devolved.

(2) Further oral evidence was adduced by Mr Hayton in support of Mr Hayton's ^{Stutt's} claim. (a) Mr George Elwell, who was born in 1909, said that from 1925 to 1942 he worked at Moss Farm (now Angerton Hall Farm) which was owned and farmed by Mr S Whinerary. He used the West Section for young cattle in the summer - in the winter they were kept at Herd House Barn at the SW corner of the West section and hay was taken to them there. He and other farm hands ditched Herd House Moss to drain it - the ditch on the western side was where the tide reached. Apart from the cattle grazing there was little work done on the West section which was rough and stony. He did not remember any peat ever being dug on it or any one claiming any right to use that land.

(b) Mr Harrison Gainsford worked for Mr S Whinerary at Angerton Hall Farm from 1937 to 1946. As regards the West section, cattle and horses from the farm were pastured there, and there was a good barn at the SW corner where young stock were kept over the winter and he remembered carrying hay there to feed them. No one else used the West section and no one dug peat there, nor so far as the witness knew did ^{any} one else claim rights over it.

(c) Mr Stutt in his evidence stated that he believed "we" (sci: he and his father) owned the West section, and that their tenants of the farm had always formed it. Mr Stutt also produced a report dated 29 December 1980 of A Hoggarth and Son, Surveyors and Land Agents in which, after an examination of the soil of the West Section and taking trial borings, they concluded that any turbarry right could no longer be exercised and the peat had been extracted or worked out countless years ago.



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(d) Mr Thomas E Thexton has been the tenant of Angerton Hall Farm since 1969. He stated as regards the West section, that this was included in his tenancy. In cross-examination he agreed that when he took the farm it was advertised with grazing rights on Herd House Moss. In 1977/1978 some 50 acres of the West section were ~~drained~~ at a cost, after allowing for grants, of some £5000, and were rotovated and re-seeded. It is now good meadow and pasture land which has been mown for silage and hay.

In regard to the oral evidence, I should observe that this inquiry is concerned with ownership and not with rights of turbarry or peat. The registrations made under the Commons Registration Act and subsequent procedures have resulted in there being only one right of common registered over the West section viz. to cut and take peat, and this has become final.

(3) On the evidence adduced in support of Mr Stutt's claim, more particularly the documentary evidence of title, it would be my view that the claim had been satisfactorily made out. I have now to consider Mr Cleasby's challenge to the claim.

Mr Huck's main submissions were, in summary, (a) that the fee simple ownership did not pass under the 1865 Conveyance (or subsequent deeds) but only a right of herbage. (b) that the ownership did not continue in the Devonshire family until 1982 when the Deed of Confirmation and Conveyance was executed by the Trustees of the Holker estates in favour of Mr Stutt. As regard the first submission, I agree that ownership of the land did not pass under the 1865 Conveyance - see paragraph (1)(c) above. As to the second submission, Mr Huck did not seriously challenge the title of the 7th Duke in 1865 but adduced evidence which, he said, showed that after the 1865 Conveyance ownership had passed to W S Rawlinson and was vested in him when he died in 1875.

The evidence adduced was as follows: (i) Mr Huck produced a copy of the Abstract of Title to lot 34 (which did not include the West section) in the Auction sale in 1902, of the Duddon Hall Estate when the Vendor was the widow of W S Rawlinson (~~see para. above~~). This Abstract starts with a Mortgage by W S Rawlinson ~~dated~~ 30 December 1865 of Angerton Farm, which is itemised in a Schedule and totals 439 acres. There is no plan on the Abstract and the items do not mention Herd House Farm or Moss. In the Court proceedings for the administration of W S Rawlinson's estate after his death, an enquiry was directed as to the real estate which he was seized of or entitled to: and the Chief Clerk's certificate dated 6 May 1876 certified the particulars of such real estate in a Schedule which included (Item 9) Angerton Farm 439 acres and (Item 7) Herd House Farm 297 acres. By a Deed dated 17 May 1888, there was a Transfer of the Mortgage ~~by the successors in title under the Will of W S Rawlinson~~ which contained a declaration of charge on (as well as Angel Farm), Herd House Farm containing 445 acres: and there were two further Mortgages dated 14 July 1888 and 27 July 1896 of (inter alia) Herd House Farm containing 445 acres.

As regards the evidence afforded by the documents included in the Abstract of Title the absence of plans or adequate itemisation leaves only the general descriptions of Herd House Farm to depend upon in considering whether they show that Herd House Moss (and the West section in particular) was included. I am prepared to assume that they do but in the light of all the other evidence this falls very far short of establishing satisfactory proof of ownership of the fee



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simple of Herd House Moss by W S Rawlinson and the consequential displacement of the Duke of Devonshire's ownership. The most significant features of the other evidence is that by the 1865 Conveyance what W S Rawlinson was expressly granted by the Duke of Devonshire was only a right of herbage over Herd House Moss and that in 1904 pursuant to the Court Order for the sale of W S Rawlinson's residuary real estate nothing more than a right of herbage over Herd House Moss was included in that sale. Significantly too there is no evidence of any grant of the fee simple ownership to W S Rawlinson by the Duke of Devonshire or any other person. On the assumption that Herd House Farm of 297 acres comprised in the Chief Clerk's Certificate did include Herd House Moss, there is this to be said: first that the Certificate is of the "real estate" of W S Rawlinson and that a right of ~~turbary~~ was itself real estate: and secondly that there is nothing to show on what evidence the certificate was based and I cannot in all the circumstances infer that fee simple ownership by W S Rawlinson was necessarily being certified. On the same assumption as regards the mortgage documents of 1888 and 1896 that Herd House Farm of 445 acres included Herd House Moss, those documents comprised other lands of large acreages none of which were itemised, and there may well have seemed no practical point in itemising Herd House Moss as right of herbage only when the charges would take effect as regards that right equally as if ^{it} had been full fee simple ownership. To summarise, the evidence in the Abstract of Title would be consistent with ownership by W S Rawlinson but falls short of proving his acquisition of such ownership, and is of minimal significance when it is known that he did acquire a right of herbage in 1865 and it was that right only which his successor in title sold in 1904 pursuant to the Court order for sale of his residuary real estate. In this connection it is also to be observed that a Requisition by the Solicitors for the Purchaser of lot 38 in 1902 requested information as to the ownership of the fee simple in Herd House Moss, and the reply did not deal with this request but stated that the fee simple is not included in the sale but a right of herbage only.

Mr Huck also produced a contract of tenancy dated 27 August 1887 (also referred to in Mrs Dench's evidence) comprising Angerton Moss House and Herd House in which the description of the property includes the West section, described as "Moss Herbage only", the tenant being R C Whinerary. W S Rawlinson had died in 1875, and if he had in his lifetime acquired the fee simple of the Moss it can hardly be supposed that the grant would have been limited to the herbage right known to have been acquired in 1865.

Finally Mr Huck produced a copy of a letter dated 20 July 1903 by a Mr Webster, Land Agent, to Butler and Sons, Solicitors, (who apparently acted for Mr R C Whinerary the purchasers at the Auction sale of lot 38). This letter, (enclosing an extract from a letter to Mr Webster from a Mr Wadham) referred to Angerton Marsh fee farm rent. The extract referred to the rent as "payable upon 124 acres of pasture and turbary on Angerton and was formerly paid by Sir John Preston, from whom it came into the Devonshire family from whom it was purchased in 1869 by W S Rawlinson". As I understood it, Mr Huck said that W S Rawlinson was paying the chief farm rent, which indicated his ownership of the land. But I heard nothing to indicate that the 'Angerton Marsh' referred to included Herd House Moss and nothing further of a conveyance of 1869 to W S Rawlinson and I cannot regard this copy correspondence as in any sense reliable evidence of ownership of the Moss by him.

(4) My conclusion is that Mr Stutt's claim to ownership of the West section has been satisfactorily made out and that no material ground for attacking that claim



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has emerged from the case made on behalf of Mr Cleasby. Accordingly I shall direct Cumbria County Council as registration authority to register Mr J S H Stutt as owner under Section 8(2) of the Act of 1965.

(5) The conclusion stated in the last paragraph is based on the documentary evidence adduced on behalf of Mr Stutt. Mr Hayton did make alternative submissions of which the only one (in my view) of any substance was that a title by adverse possession of the West section for many years had been acquired. For this he relied on the evidence summarised in para. 2 above. But the facts established by the evidence viz. physical possession, fencing, draining, grazing and the treatment of the West section as part of Angerton Hall Farm are, in my opinion, readily attributable to the right of herbage over the West section granted to the successive owners of Angerton Hall Farm, and were not adverse to whoever might be the owner of the fee simple. A right of herbage is an extensive right to all natural produce, including pasturage of animals, and leaves little scope for the exercise of rights by the owner of the soil of land of this nature: nor would the true owner see any reason to consider as adverse to his ownership acts of maintenance or improvement such as fencing or draining.

For this reason I do not consider that this alternative submission, were it necessary to rely on it, would succeed.

(6) Mr Hayton asked for an order for costs against Mr Cleasby. The costs attributable to the extensive research and documentation and the presentation of that evidence at the hearing were incurred for the purpose of satisfying the Commissioner as to Mr Stutt's ownership and would have been incurred whether or not Mr Cleasby had raised his objection. Mr Cleasby appeared, not to claim ownership for himself or for any other interested party, but to challenge Mr Stutt's claim. This challenge was not directed at Mr Stutt's documentary evidence but was based on evidence with which Mr Huck did the best that could be done but which was unconvincing. The challenge has added to the costs incurred by Mr Stutt and has not succeeded, and I shall order Mr Cleasby to pay one half of Mr Stutt's costs of the hearing in February 1984, such costs to be taxed according to Scale 3.

(7) 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 4th June 1984

L. J. Morris Smith

Commons Commissioner