



COMMONS REGISTRATION ACT 1965

Reference Nos. 20/D/69
20/D/70

In the Matter of Kirkby Moor, Kirkby Ireleth, South Lakeland D.
Cumbria

DECISION

These disputes relate to the registrations at Entry No. 1 in the Land Section and at Entry Nos 1-26 inclusive in the Rights Section of Register Unit No. CL.52 in the register of Common Land maintained by the Cumbria County Council and are occasioned by Objection No. 5 made by the Holker Estate Trust and noted in the register on 4 December 1970.

I held a hearing for the purpose of inquiring into the disputes at Kendal on 7 March 1975. At the hearing (1) the Kirkby Ireleth Commoners Association, on whose application the Entry in the Land Section was made, were represented by Mr. H. Snow, legal executive with Arnold Greenwood & Son, Solicitors of Kendal; (2) Sir John Burrows and the Marquess of Salisbury, being the Trustees who under the name of the Holker Estate Trust own the land subject thereto, were represented by Mr D.J.L. Lee chartered surveyor their Agent; (3) Mr. Jack Ellwood and Mrs Amy Ellwood, Mr. John Knight and Mrs. Dorothy Knight and Mr. George Wilson, on whose application Entry Nos. 19, 20 and 25 in the Rights Section were made, were all represented by Mr. E. Gatterthwaite, solicitor of Thomas Butler & Son, Solicitors of Broughton-in-Furness; and (4) Mr. John Edgar Barton, on whose application the Entry No. 15 in the Rights Section was made, was represented by Mr J. Hargreaves solicitor of W.C. Kendall & Fisher, Solicitors of Ulverston.

The land ("the unit Land") comprised in this Register Unit has (as I scale the Register map) a length of about 4 miles and an irregular width of between 1 mile and contains (according to the application of the Association) about 1,773 acres. The Rights Section contains 26 Entries, all being of or including a right to graze various numbers of sheep amounting altogether to about 2,500: most of the grazing rights are described as gates (each sheep counting as 1 gate and each head of cattle counting a 5 gates), and all (except one) of the rights being over all the Unit Land; one right includes a right to cut and take peat and bracken and to get stone and slate (except from any quarry or place owned by the Lord of the Manor), 15 other rights include a right to cut and take peat and bracken, and 3 other rights include a right to take bracken. The Holker Estate Trust are registered (provisionally) as owners of all the Unit Land east of the line CD.

The grounds stated in the said objection are:- "That according to plans held by the objectors the manorial waste of the Manor of Kirkby Ireleth did not extend to the west of the red line shown on the attached plan. The area to the west was, during the 19th century enclosed land which has been covered over with spoil heaps. Since this area was enclosed we object to its inclusion within the area of registered common land". The red line shown is the same as the line CD on the Register Map. The part ("The Objection Part") of the Unit Land west of the line CD has (as I scale the Register Map) a length of about of a mile and an irregular width of between about 450 yards and about 100 yards and contains about 60 acres.



-2-

At the beginning of the hearing Mr Lee produced a map ("the J L map") showing Objection Part edged green and a smaller area ("the 1850 area") edged red; except for a length ("the Disputed Boundary") of about 450 yards on their southeast side, the Objection Part and the 1850 area are the same. At the Disputed Boundary, the boundary of the Objection Part (being here part of the line CD) is more or less straight, and the boundary of the 1850 area is irregularly curved. The difference ("the Disputed Part") comprises two narrowly connected areas (as I estimate from the J L Map) about 3 acres and about 1½ acres or perhaps less.

At the beginning of the hearing, it was agreed by all present that I should confirm the registration in the Land Section at least to the extent of all land east of the line CD, and that I should modify the registration at least by excluding the 1850 area; so in the result the only question requiring my decision is whether the Disputed Part is properly included in the Registration. Mr Satterwaite and Mr Barton said the their Clients were not interested in this question and accordingly they took no further part in their proceedings.

Mr Lee produced:- (1) a map (framed) of "Estates belonging to the Right Honourable Lord George Henry Cavendish and of the Common within the Manor of Kirkby Ireleth; Machell; 1808", (2) the 1850 Edition of the Ordnance Survey Map, and (3) the 1956 Edition of the Ordnance Survey Map (being that on which the Register Map is based). The 1808 map has written over it "INCLOSURES in the MANOR of KIRKBY IRELETH". Mr Lee pointed out: (a) that the line CD follows the line of the uninclosed land shown on the 1808 map and that such map shows three quarries near to and east of the line CD, on the then uninclosed land: (b) that the 1850 map shows these quarries had then become larger (they are marked together as "Kirkby Slate Quarries"), and also shows that there were then other quarries and levels west of the line CD, and extending right across the line CD up to the west boundary of the Unit Land. After describing the relevant part of the Unit Land as it now is, he contended that the land on the 1808 map shown as inclosed could not have subsequently become common land, and that because such land did not include the Disputed Part, the Objection wholly succeeded.

Mr Snow produced a copy (certified in 1847 by the Tithe Commissioners) of the Tithe Award for the parish of Kirkby Ireleth dated 18th June 1847. The map annexed to it showed the uninclosed land then forming Kirkby Moor as having a boundary (so far as now relevant) corresponding with that of the 1850 area (all of which was in the Award treated as tithable), save that it included in the Tithable Land a terrace of buildings (cottages?) marked "New Houses" which with their gardens may, a little more or less, be in the Disputed Part and outside the 1850 area. Mr Snow contended that I should treat the boundary shown on the 1847 Award Map (and confirmed by the 1850 O S Map) as decisive; the buildings marked "New Houses" are now completely submerged by many feet of quarry waste (as also is nearly all the rest of the 1850 area), so the difference between such boundary and the boundary of the 1850 area as delineated on the J L Map, is now of no practical consequence.



On my indicating that if the owners of Kirkby Moor or other persons who between 1808 and 1847 had been working the quarries, during this period encroached over the boundary shown on the 1808 map up to the boundary shown on the 1847 Award Map and the 1850 O S Map, I could I thought conclude that the encroachment took effect not only for the benefit of the owners but also for the benefit of the commoners. Mr Lee said that Mr Snow's contention had taken him by surprise and ask for an adjournment so that the Holker Estate Trust could produce their documents of title; these would or might he thought show how they had acquired a title to the Objection Part. Mr Snow opposed any adjournment relying on letters dated 9, 15, 18 and 27 October 1973 between Mr Lee and Mr P Downing, the then Secretary of the Commoners Association.

On the day after the hearing, I inspected the part of the Unit Land under discussion at the hearing, it having been agreed that I might do so unattended.

The quarrying operations on the Unit Land are on a large scale. There is a little to the east of the line CD a deep gully, half a mile or more long from the sides and bottom of which slate and stone is now being got, it is taken either over the west side of the gully or through tunnel, to a working area to the west of (possibly in part across) the line CD. There was on the ground no indication of the line CD or of any part of the boundary of the Disputed Part (I understood at the hearing I could not expect to find any such indication). New Houses and every other building within the 1850 area shown on the 1847 Award Map and the 1850 O S Map must now be covered by 50 feet and upwards of quarry waste. It was not suggested at the hearing that Holker Estate Trust were not as owners entitled to quarry the Unit Land as they are, and apparently for many years have been doing or that their disposal of quarry waste on the Unit Land is or ever has been unreasonable. Nevertheless, it is obvious that for grazing, for taking bracken and for taking peat, the Disputed Part (and also of course the 1850 area and much of the Unit Land to the east of the line CD) now is and for many years will be useless.

I refuse (as I indicated at the hearing I would) to grant the adjournment requested by Mr Lee. The inclusion in the Association's application for registration of the Unit Land of the 1850 area and the Disputed Part was I think reasonable. Near the quarrying, the only visible or apparent boundary of Kirkby Moor is the stone wall which now follows the west boundary of the 1850 area; in places quarry waste has fallen over this wall; nevertheless, on appearances alone, the wall is the obvious boundary of the piece of land which can sensibly be described as Kirkby Moor including the quarries on it; and the greater part of the quarries now on it are east of the line CD. In the 1973 correspondence, the Association offered to exclude the 1850 area; this offer was I think reasonable, because although the owners of the quarry might conceivably have acquired their present right to deposit quarry waste on it by encroachment, on a consideration of the 1847 Award it is more likely that they acquired such rights from the persons therein named as the owners. The 1973 correspondence indicates that the Association were relying on the 1847 Award Map and that Mr Lee was relying on the 1808 map and that their only difference was as to the effect and weight which should be attached the these maps. Although the Disputed Part is of some size, the value of the advantages which the commoners or the Holker Estate Trust would gain by a decision of mine in their favour is I think very small. Although it is possible that the Holker Estate Trust may have some documents of title made between 1808 and 1847 indicating that their predecessors in title acquired the Disputed Part under some transaction which had nothing to do with their ownership of the rest of Kirkby Moor, in the circumstances outlined above, I consider it would be unjust to the Association if, having regard to what Mr Lee wrote in 1973, I did not now decide the question at issue on the evidence given at the hearing, notwithstanding that I shall be doing so without seeing any of the documents of title relating to any of the land with which I am concerned or to any rights of common which have been registered.



The place from which the slate and stone is now being got, and also the unit land now comprising the remainder of the unit land is as far as I could see all higher than the land on the southwest. Between 1808 and 1847 the quarries there must all have been higher than the Disputed Part and the 1850 Area, so that the advantage and convenience of depositing quarry waste on the Disputed Part and the 1850 Area must during that period have been great. Having considered the maps produced to me and the appearance of the unit land as it now is, I conclude that those operating the quarry between 1808 and 1847 did encroach to the southwest at least to the extent of taking in the disputed part. The 1847 award shows the 1850 Area as being then in the ownership in part of the Earl of Burlington and in other parts of other persons; even assuming (as it is I think likely) that at some time in the 19th century Kirkby Moor and the 1850 Area somehow came into the same ownership, it seems to me the dominating use of the lands with which I am concerned was quarrying and accordingly it was the owners of the quarries who encroached on the Disputed Part and not the owners of the 1850 Area.

A tenant of land adjoining a common who encroaches on the common, as a general rule must treat the encroachment as part of his tenancy (so his landlord benefits), see Halsbury Laws of England (4th edition 1974) volume 6 paragraph 648. This general rule is part of a wider principle not limited to the relationship of landlord and tenant, e.g. it applies to copyholds, see Attorney General v Tomline (1877) 5 CH. D.750; the principle is not that encroachers must be presumed to have stolen the land encroached upon for the benefit of all interested in the land from which they were able to make the encroachment, but that a possible legal origin of the encroachment must be presumed and the rights of the persons interested deduced from the presumption so made, S.C. at page 766.

In most cases the most likely legal origin is some transaction under which the land encroached on somehow acquires all the legal incidents of the land from which the encroachment was made; in the parallel case of land which is added to by natural accretion (by the sea) the Court of Appeal have held that the accretion is subject to the same customary rights as the land to which it has accrued, Mercer v Denne 1906, 2CH.538; in this connection there is I think no relevant distinction between such a right and a right of common.

The 1808 map shows the Disputed part as enclosed; the 1847 and 1850 maps show it as part of the Common, with quarry workings much (although on a much smaller scale) as now. It is notorious that the areas of some commons have changed many times over the years; in certain economic conditions, the area is smaller because it is profitable to cultivate the marginal land; in other conditions these marginal lands are not so profitable and they fall back into the common. Although I conclude from the 1808 map that the land then appeared as thereon delineated, I see no reason for presuming that its appearance in 1808 was more likely to be in accordance with the legal position than its appearance in 1847 and 1850; as between two old maps the geographical reliability of which is not in question, I consider that the legal position in 1975 should be deduced from the later rather than the earlier.

I shall therefore presume that those who made the encroachments between 1808 and 1847 did so lawfully on the basis that the Common had from time immemorial always included the Disputed part and that the boundary shown on the 1808 map was so drawn as the result of an irregular encroachment made to the common before then, I prefer this conclusion to the other possibility that between 1808 and 1847 the owner of the Common acquired under separate title →





-5-

the Disputed Part as a distinct piece of land; on a consideration of the maps and the Disputed Part as it now is, this possibility is I think less likely.

Accordingly I conclude that the Disputed part is subject to the same rights of common as the rest of the unit Land. It is not disputed that the rest of the unit Land is subject to the rights of common as registered, and accordingly it follows, in my opinion that the Disputed Part is properly included in this registration.

Mr. Lee agreed that owing to the possible unreliability of the 1847 Award map, and of the 1850 O.S. map in relation to the boundaries of the land around "New Houses" it would be convenient (if I was against him on the main issue) that the boundary of the land removed from the register was defined in accordance with the said red line on the J.L. map.

Accordingly for the above reasons I confirm the registration in the Land Section with the modification that there be removed from the register land which is both west of the line CD marked on the register map and within the red verge line on the J.L. map and I shall to the notice I am required to give to the registration authority of my decision annex a copy of the J.L. map.

but for the objection the entries in the Rights section would have become final under the 1965 Act; they are only in dispute because the Entry in the Land Section has, as regards the objection part, been challenged, see section 4. In these circumstances it is I think unnecessary for any evidence to be adduced in support of these entries and accordingly, I confirm the registrations at Entries Nos 1-26 in the Rights section, without any modification.

I shall order Sir John Furrows of 21 Buckingham Gate, London, W.1 and the Rt. Hon. the Marquess of Salisbury of Hatfield House, Hertfordshire to pay to Walter Dixon Esq. of Bailiff Ground Kirkby in Furness, he being the present Secretary of the Kirkby Ireleth Commons Association the costs incurred by the said Association in these proceedings, such costs to be taxed under scale 2 of the County Court Rules, 1951 as amended.

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 7th day of July, 1975

a. a. Bate Jellie

Commons Commissioner.