



COMMONS REGISTRATION ACT 1965

Reference No. 262/D/296

In the Matter of Middleton Fell, Middleton
and Barbon, Cumbria (No. 3)

DECISION

This dispute relates to the registrations at Entry Nos. 30 and 32 in the Rights Section of Register Unit No. CL 110 in the Register of Common Land maintained by the Cumbria County Council and is occasioned by Objection No. 2/148 made by the Middleton Commoners Association and noted in the Register on 9 March 1972.

I held a hearing for the purpose of inquiring into the dispute at Kendal on 9 June 1981. The hearing was attended by Mr A J Elleray, of Counsel on behalf of Mr J W Handley, Miss N Handley and Miss A A Handley, the applicants for the registrations, and by Mr J A Hesmondhalgh, Solicitor, on behalf of the Objectors. The registrations are of rights to graze sheep attached to Catholes Farm and Birks Farm, both in the Parish of Sedbergh. The facts relating to each registration are the same and the two registrations can be dealt with together.

Middleton Fell is bounded on part of its north-eastern side by Holme Fell in the Parish of Sedbergh. There is no fence or other physical barrier between Middleton Fell and Holme Fell, so that sheep can move freely from one to the other.

For upwards of the last half century sheep from Catholes Farm and Birks Farm have been turned out onto Holme Fell at a gate on its north-eastern boundary. Most of the sheep so turned out have stayed on Holme Fell, but some have gone across the invisible boundary (which was the old county boundary between the West Riding of Yorkshire and Westmorland) onto the part of Middleton Fell nearest to the boundary. There was a considerable conflict of evidence as to the extent to which sheep turned out onto Holme Fell grazed on Middleton Fell. Mr J S Handley, the son of Mr J W Handley, said that of the combined flock of 600 sheep from the two farms about a third regularly went on from Holme Fell to graze on an area of Middleton Fell as far south as Holme Knott and a triangulation point numbered 1748 on the Ordnance Survey Map. This, Mr Handley said, was because these sheep were heafed on Middleton Fell, whence they had to be gathered several times a year for dipping and other operations. Mr Handley's evidence was corroborated by that of his mother, Mrs A E Handley, and Mr A B Wilson, the son of the late Mr A Wilson, the applicant for the registration at Entry No. 24.

Two farmers, Mr J H Metcalfe and Mr J R Mason, who graze their sheep on the part of Middleton Fell onto which Mr Handley's sheep go, disagreed with the



- 2 -

evidence of Mr Handley and his witnesses as to the extent to which the sheep turned out onto Holme Fell from Catholes Farm and Birks Farm had moved onto Middleton Fell. Both Mr Metcalfe and Mr Mason said that they had only rarely found Mr Handley's sheep among their own sheep and that, when they did, Mr Metcalfe informed Mr Handley by telephone. This evidence was corroborated by Mr Metcalfe's father, Mr J J Metcalfe.

Faced with this conflict of evidence, I have come to the conclusion that I must prefer that given on Mr Handley's behalf. That is not to say that I am rejecting that given on behalf of the Objectors as being untruthful. The difference between the two sets of evidence is a matter of quantum and depends upon observation and estimation. The matter was only brought to the attention of Mr J H Metcalfe, Mr Mason, and Mr J J Metcalfe intermittently and was not a matter of prime importance to them, while to those farming at Catholes Farm and Birks Farm it concerned their livelihood.

I therefore accept that Mr Handley's sheep have grazed on the part of Middleton Fell adjacent to Holme Fell in considerable numbers for substantiate periods. This, however, does not conclude the matter in favour of the registrations.

It has long been settled law that where two commons adjoin each other without any barrier between them, animals lawfully on one common may equally lawfully graze on to other common. This is known as common pur cause de vicinage. It is not a separate right, but is attached to the right to graze on what may be called the "home" common, subject only to the right of the owner of the adjoining common to enclose so as to prevent the cattle from straying: see per Arcaibald J. in Cape v Scott (1874), L.R.2 QB.269 at p. 227. Mr Elleray, however, contended that the extent to which the sheep from Catholes Farm and Birks Farm had grazed on Middleton Fell was inconsistent with lawful straying and that grazing to this extent over a long period had resulted in the acquisition of a prescriptive right. I find myself unable to accept this contention. A prescriptive right arises from doing something on the land of another which he could resist, but chose not to resist. The owners of the sheep did not put them onto Middleton Fell. They did no more than exercise their undoubted right to put their sheep onto Holme Fell. That right had attached to it a right for the sheep to stray onto Middleton Fell. So long as Middleton Fell remained unfenced from Holme Fell, sheep straying from Holme Fell were lawfully on Middleton Fell and the owner of Middleton Fell was not entitled to drive them off. In these circumstances it is impossible to say that the owner of Middleton Fell was not resisting the grazing of sheep from Catholes Farm and Birks Farm on his land, for he was not in a position to resist it. This applies to each and every animal from those farms. Mr Elleray's argument involves some limitation on the number of animals allowed to stray onto Middleton Fell to some proportion of the total flock which could be deemed to be reasonable, the excess being subject to the



- 3 -

general law relating to prescription. So far as I am aware, there is no authority for limiting a right of common pur cause de vicinage in this way. The only limitation of such a right is the number of animals that can be maintained on the "home" common: see Newman v Bennett, (1981) 2 W.L.R. 132, 139.

For these reasons I refuse to confirm the registrations.

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

25th

day of

June

1981

Chief Commons Commissioner