



COMMONS REGISTRATION ACT 1965

Reference No. 211/D/10-39

In the Matter of Hamsterley Common in the
Parish of Hamsterley South Bedburn and Lynesack
and Softley

DECISION

This dispute relates to the registration at Entry No 1 in the Land Section of Register Unit No. CL.9 in the Register of Common Land maintained by the Durham County Council and is occasioned by Objection No. 11 made by the Ministry of Agriculture Fisheries and Food and noted in the Register on 26 November 1970, and to the Registration at Entry No 1 & 3-30 in the Rights Section of the same Register Unit occasioned by numerous objections which are sunsequently referred to in detail.

I held a hearing for the purpose of inquiring into the dispute at Durham on 11 November 1980. The Objection in the Land Register related to two small areas of land in the southern boundary of the common which were owned by the Minister and managed by the Forestry Commission. Mr R Turner Solicitor appeared for the Minister. The Ministers legal advisers made strenuous efforts to obtain the concurrence of the applicants for rights to the modification of their applications to exclude these two areas. Their efforts were only moderately successful. However by the end of the hearing all the applicants for rights who pursued their claims did so on the basis that their rights did not apply to these two areas. In the result Mr Turner did not press his objection to the registration in the land section.

Before or during the hearing the following applications in the Rights Section were withdrawn namely those at Entry Nos. 3, 5, 7, 10, 13, 16, 17, and 19-26. The Objections to those at Entry Nos 1, 14 and 27-30 were withdrawn subject to the exclusion of the two areas and no one appeared to support the application at Entry No. 15.

Mr Winch of Messrs. Darling Heslop and Forester, Solicitors, ^{of} Darling ¹² appeared for the Trustees of the Underley Estates the owners of the Register Unit (~~which were~~ the two areas owned by the Minister). His client's had lodged objections to all the applications in the Rights Section.

Mr C Rich of Counsel instructed Messrs. Hodgson and Angus Solicitors of Bishop Auckland appeared for Mr Frank Ward the applicant at Entry No. 4. Mr Ward produced a conveyance to him of Harehope Farm Frosterly and referred me to the second ~~Schedule~~ ^{Schedule} where there was a reference to grazing rights.

In evidence Mr Ward said that he was 55 and lived at Rogerley Hall Frosterley. He grazed 800 sheep on Pikestone Fell (CL.40). His vendor had about 1100 sheep at Harehope Farm which he grazed on Pikestone Fell and Hamsterley Common. He (the witness) had been farming since 1939 starting with his father. He had known his vendor for 4-5 years before he purchased. Since 1949 sheep have been taken on to Pikestone and Hamsterley in each year about 1100. He claimed to graze 300 sheep in Hamsterley because that was about what it would carry. In 1949 he took over from his vendor 485 ewes 73 shearlings and 200 young hogs.



-2-

In cross-examination he said that he had counted his sheep in giving the figures. He had about 300 every year on Hamsterley. He had 60 sucklers at Harehope. There was 20 acres of wood land and 100 acres of steep hillside but no quarrie.

In answer to Mr Brown-Humes of Messrs. Hewitt Brown-Humes and Hare and Boo¹⁶ and Dickson, Solicitors of Bishop Auckland, who appeared the Hamsterley and South Bedburn Parish Councils he said that all the 1100 sheep were let out on to Pikestone in the first instance.

Mr Joseph Henry Dobson a retired farmer of Holbeck House Farm said that he was aged 70 and had lived at Sunnyside Farm Wolsingham until 1952. At Sunnyside he ran sheep on Hamsterley Common From 1935-52. He knew George Harrison who then farmed Harehope Farm. They had gathered sheep together during the war years. Harrison came to Harehope in 1920 and grazed sheep on Hamsterley He could not give exact figures, but Harrison had 'quite a few over 1,000 on Pikestone and Hamsterley.

In cross-examination he said that he had claimed rights in respect of Holbeck Farm. A lot of sheep had been lost in the bad weather in 1947 and the numbers of the flocks dropped for a time. He always knew that Pikestone and Hamsterley were separate.

William Lawrence Maddison said that he was 46 and lived at Harehope Farm. He was employed by Mr Frank Ward as a shepherd. The farm was 500 acres including the adjoining Fine Farm which had been bought in 1962.

In 1952 when he was first engaged the sheep were hefted and were grazing on Pikestone and Hamsterley. Blue Hefts on Fine Farm went to Pikestone and Red Hefts on Harehope went to Hamsterley. He had 300 red Hefts. They came in November for about three weeks and later for lambing.

In cross-examination by Mr Winch he said that there were 70 acres on Harehope suitable for grass. The sheep are counted four times each year.

In answer to Mr Brown-Humes, he said the common would take 1 sheep per acre.

Mr J N L Burn (a Solicitor) the applicant at Entry No. 11 for a right of Vicinage for 1,000 ewes ^{with} hogs and followers over Hamsterley as owner of Sunnyside Farm

He recalled Mr J H Dobson who said that he had lived and worked at Sunnyside Farm from 1910-1952 when he moved to the adjoining farm Holbeck House. He continued at Sunnyside Farm as a tenant from 1952-67 when that farm was sold to Mr Burn. ^{White} he ran a Fell Flock from Sunnyside Stragglers strayed onto Hamsterley. Two generations of his family had run a hefted flock from Sunnyside Farm. There was no fence between Pikestone Fell and Hamsterley Common. He had received no complaints about sheep straying.

Mr Watson of Messrs. Watsons, Solicitors of Barnard Castle appeared for Lord Barnard who claimed the right to graze 30 sheep. The application did not specify the land to which the right was attached but Mr Watson explained that the claim was made in respect of six properties on the Roby Estate to preserve the rights.



Lenton Hill Farm
Marris House
The Howle
Marn's Field
Softley Cottage
Softley Farm

The Roby Estate had been owned by Lord Barnard's predecessors since the seventeenth century. There were no title deeds.

Before 1925 the 10th Lord Barnard had paid fell rents in respect of the six properties to the benefice of Hamsterley.

In 1925 all these rents had been commuted and he produced the original receipts for the payments signed by the ~~Treasurers~~ of the Ecclesiastical Commissioners and the incumbent.

The last ~~time~~ a tenant had put sheep on the common was 1952. The claim was for 5 sheep for each property.

Mr Joseph Eric Dobson aged 45 said that he had been farming for 30 years. He had grazing rights over Bollihope Common when he found sheep from other commons on Bollihope he would tell the owners to come and get them. ~~He had~~ found strays from Pikestone and Hamsterley. ~~He had~~ also found sheep from Sunnyside Farm which have strayed from Pikestone on to Bollihope. ~~He~~ kept these sheep at home and told the farmer (~~Pickering~~) to come and fetch them. ~~He tried~~ to put strays from Pikestone back on to Pikestone where they belonged.

In answer to a question by Mr Watson he agreed that the procedure for returning sheep was common to the North of England.

In answer to further questions he agreed that some of his sheep strayed on to Pikestone. He had not heard of any legal proceedings or solicitors letters about sheep straying from one common to another. He would object if Pickering hefted sheep on Bollihope.

Charles Maurice Dobson said that he had been farming for 23 years and had rights of grazing over Bollihope Common. Sheep occasionally strayed from Pikestone and Hamsterley. If we find strays when we are on the Moor we drive them back where they belong. If we find them when we are dipping we taken them back with us and ask the owner to come and get them. He occasionally found strays from Sunnyside Farm on Bollihope.

Mr Winch called David Gray ~~who said that he was~~ a partner in the firm of ~~Smithe's~~ ~~Smithe's~~ Gore Land Agents of Darlington. He was F.R.I.C.S. and had a B.A degree in Agriculture. He was joint owner of a 2,000 acre hill farm in Northumberland and was involved in running it.

He referred to a decision of the Chief Commons Commissioner Ref: 268/D/283-287 dated 7 December 1979 that the material ~~was~~ for grazing rights was the number of beasts which the dominant land would bear in winter- in that case 2½ per acre. That decision concerned land in North Yorkshire. Hamsterley was 70 miles further north and the Yorkshire land was of better quality than the Durham Land. The Claimants' farms were grade 4-5 in the Ministry Classification.



-4-

Harehope Farm was 180 acres, 70 acres of which was grass. It would support 1,000 ewes during winter if there were no other beasts.

This figure should be reduced by 10 sheep for every cow kept on the grassland.

If there were 60 ~~ewes~~ ^{cows} the number of sheep would be 400.

In cross-examination he agreed that Mr Maddison was allowing $2\frac{1}{2}$ sheep per acre of the dominant tenement.

As to Mr Ward's claim.

Mr Winch submitted that on Mr Gray's evidence having regard to the presence of the 60 sucklers the limit for Harehope Farm having regard to the rules of levancy and couchancy was 400 sheep. Mr Ward's claim to put 800 ewes on Pikestone had been accepted and that more than exhausted his entitlements and his claim in respect of Hamsterley should be rejected.

Mr Brown-Humes submitted that the rights over Hamsterley Common were appurtenant only to land in the three parishes and could only be enjoyed by persons living on land in one of the parishes.

Mr Rich submitted that though Hamsterley Common was not specifically mentioned in the conveyance to Mr Ward it was adjoining or adjacent to the common that was mentioned. He further submitted that there was no authority for the proposition advanced by Mr Brown Humes. ~~The~~ only argument in its favour derived from the description in the register.

The evidence was that Harrison had exercised rights of grazing over Hamsterley since 1920. Mr Maddison said that some of his sheep were left on Hamsterley. Therefore the exercise of the right was sufficiently established.

There had been no suggestion of over stocking on the common. In his submission Mr Gray was wrong in claiming that regard must be had to the actual husbandry of the dominant tenement. If this were the case the figure claimed by Mr Ward was not excessive. It would be different if the claim had included cattle and sheep.

On Mr Burns claim Mr Winch submitted that the fact that the straying cattle had either been driven back or at least not permitted to stray was a complete answer to the claim for a right of ~~grazing~~. He referred to *Negamy's Manual* of Real Property 3rd Ed. p. 462 and to *Heath v Elliott* (1938) * Bingham N.C.388

Mr Burn submitted that the evidence was that on both sides it was not the practice to treat straying beasts as trespassors.

On Mr Watson's claim

Mr Winch submitted that as ~~stated~~ ^{advanced} the application was for rights in ~~grazing~~ ^{9 ewes} and the lack of particulars ~~defended~~ the claim.

I am satisfied that in the case of Mr Ward the practice of grazing 300 sheep on Hamsterley has been in force since about 1920.

Without authority I am not prepared in the face of that evidence to assume that the right to graze is limited to the inhabitants of the three parishes for whom Mr Brown-Humes appears. Even if there were such a right the period of user is sufficient to found a right by prescription.

On the issue of levancy and couchancy I have come to the conclusion that the



test referred to by Mr Gray is not subject to the *gloss* that one must have regard to the present mode of farming, the dominant tenement, if only for the reason that it introduces *an element* of uncertainty, which is not there if the *gloss* is disregarded.

In my view Mr Burn's case is the classic situation in which a right *pur cause de vicinage* can be acquired. The two commons are adjacent and unfenced and there is an established practice on both sides of not treating straying beasts as trespassers.

The receipts produced by Mr Watson are probably the best documentary evidence that one could expect to find in support of the existence of the rights and as Mr Winch's clients claim by purchase from the Ecclesiastical Commissioners the receipts create *an estoppel*

I am further of opinion that it is not too late for Mr Watson's client to particularise his claim in the way that he did.

My only hesitation is whether the claim fails in the absence of evidence of the exact number of sheep grazed. No such evidence was produced. However in the context of the evidence as to how the common was used I am entitled to assume that the payments received would entitle the tenant to graze 5 sheep as a minimum.

26/11/81 For these reasons I confirm the registrations in the Rights Section at Entry Nos 1, 4, 11, 12, 14, and 27-30 subject in each case to the modification that the two ~~cases~~ of which the Minister is owner are excluded and in the case of Entry No. 12 that each of the six named properties has the right to graze five sheep on the common.

I also confirm the registration at Entry No 1 in the Land Section, *in view of the exclusion of the land of which the Minister is registered owner.*

5, I refuse to confirm the registrations in the Rights Section at Entry Nos. 3, 7, 10, 13, ~~14, 15, 16, 17~~ and 19-26

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 17th day of March 1981

George Herbert
Commons Commissioner

Amended as allowed in and in pursuance to paragraph 33 of the Commons Commissioners Regulations, 1971

11 November 1981

George Herbert
Commons Commissioner

Further amended in pursuance of George Herbert