



COMMONS REGISTRATION ACT 1965

Reference No. 211/D/145

In the Matter of High Toft Hill Quarry,  
 Etherley, Teesdale D

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DECISION

This dispute relates to the registration at Entry No. 1 in the Rights Section of Register Unit No. CL 27 in the Register of Common Land maintained by the Durham County Council and is occasioned by Objection No. 61 made on behalf of Barnard Castle Rural District Council and noted in the Register on 3 August 1972.

I held a hearing for the purpose of inquiring into the dispute at Darlington on 22 July 1980. The hearing was attended by Mr R Mitchell, of Counsel, appearing on behalf of Mr Alan Thompson, the applicant for registration of Entry No. 1 in the Rights Section; and by Mr A E Pooley, Chief Executive, of Teesdale District Council, the successor to Barnard Castle R.D.C.

The right registered is to graze 30 cows and is claimed to be attached to High Farm, Toft Hill. The Objection is on the ground that the right claimed does not exist.

1. The witnesses called by Mr Mitchell were five in number - Mr Alan Thompson ("Alan"), his father Mr Joseph W Thompson ("Joseph"), Mr A Sewell, Mr M Sewell and Mrs Nelly Bell. Joseph was tenant of High Farm with some 32 acres from 1926 and bought the property in 1936; subsequently purchased O.S. 211a in 1938, High Martin Field about 1940/1941 and O.S. 146 about 1957. The whole property, which he conveyed by way of gift to Alan in 1972, is shown on the plan attached to the application (No. 328) to register the claimed grazing right. It lies on the southern side of the road A68; on the other side of the road is the Quarry ("the Unit land"). From the evidence given by these five witnesses and two witnesses (Mr S Barner and Mr J J Redfern), called by Mr Pooley, I find that cattle were regularly grazed on the Unit land from High Farm by Joseph from 1926 onwards until the 1960s and had been grazed by the Scalwells, the previous owners of High Farm, from about 1912 until 1926: that is to say, there had been until at least 1960 a period of some 48 years during which there had been regular grazing. On the evidence, the average number of cattle grazed did not exceed 15.

Mr Barner in his evidence said that there were no cattle on the Unit land between the early 1960s and 1972. Mr Barner is aged 71 and has lived at Toft Hill all his life and served as a parish councillor for 35 years but in cross-examination he said, in regard to this period, early 1960s to 1972, that he did not go on to the Unit land but passed it on his way to and from work. As will be seen there was a period subsequent to 1969 when there was no grazing but I am satisfied by the evidence given by other witnesses and having regard to the somewhat limited times of observation of the Unit land by Mr Barner, that regular grazing continued until at least 1970.



2. The Unit land on the Register map shows a white triangular shaped area which, Mr Barner said, was the only part used for grazing, the remaining area being rock, gorse and furze. The area, on which there had been quarrying, was over a period between 1968 and 1970 filled in by Durham County Council with materials excavated during the construction of a road improvement scheme. Following this, the Barnard Castle Rural District Council, which had acquired the Unit land in 1966, proc~~essed~~ a Contractor to carry out works of reclamation, which involved ploughing, discing, stone gathering, liming, fertilising, harrowing, seeding and rolling. This work was carried out between 12 July 1970 and 10 September 1970. The Works Department of the Durham County Council undertook the work of grading the site, building 30 linear yards of stone wall, and erecting roadside fencing and a field gate, the fencing work being carried out in April 1971. In August 1971, 150 tons of sewage sludge was brought to the site and spread by a Contractor.

During the carrying out of these works there was a period in which there was no grazing on the Unit land. A letter was produced written by Alan to the District Council dated 4 May 1971 in which he stated that before the levelling work prior to seeding began he grazed his cows on the quarry and "have now merely resumed this practise": in his evidence he said that he went off the land in the autumn previous to writing this letter and his cattle went back in the following April/May ie. 1971: later when raw sewage was put down he had to keep his cattle away for about a month. Joseph said that there was a period of some few months when soil was put on to level the surface during which there was no grazing. Mr Barner said that Alan Thompson started grazing again in 1972 when the land had been re-seeded and improved. Mr W N A Simpson, the Deputy Chief Technical Officer of Teesdale District Council, who was the supervising officer when the Unit land was re-claimed and re-seeded said that he knew the site from 1970 and did not see cattle on it before April 1971. He visited it perhaps six times in the early months of 1970, not in May or June, then once a week in July and August and more frequently in September when re-seeding started.

3. By an Inclosure Award dated 30 November 1965 made under the Railey Fell Inclosure Act 1763, the Unit land was directed and awarded to continue open and in common as a common quarry for the use of the owners of the shares and allotments therein set out in respect of their respective lands and tenements in Evenwood to take stones for buildings and repairs and for erecting walls and fences in or upon their lands and tenements. Teesdale District Council is the successor in title of Barnard Castle Urban District Council as owner of the Unit land. Mr Pooley made two submissions in support of the Objection.

(a) No prescriptive right to grazing could be acquired since this would contravene the provisions of the award. As to this, if a presumed grant, which is the basis of prescription, would have infringed the provisions of an Act or interfered with a right created by an Act for the benefit of the public, the presumption will not be made and a claim by prescription will fail. (see *Neaverson v Peterborough RDC* 1902 1 Ch 557). But this is not so if the Act or, in this case, the award under it, creates beneficial interests in individuals. Here the award would not have precluded the grant of a grazing right by the owner of the Quarry with the consent of the individuals entitled to take stone, or indeed by the owner without such consent if the grazing right was granted subject to the rights of those individuals. In my view there would have been no infringement of the provisions of the award



if such a grant had been made and the terms of the award do not inhibit the presumption of a grant or, accordingly, the acquisition of a right by prescription.

(b) The second submission was to the effect that there was an interruption to the enjoyment of the right during the years 1969-1971. The question of interruption is relevant to a claim based on the Prescription Act 1832: under that Act the relevant period during which enjoyment of the right has to be shown is thirty years without interruption, being the thirty years next before the date of the Objection - 12 July 1972 (S. 16(2) Commons Registration Act 1965). Upon the evidence I find that a right of grazing in respect of Hill Top Farm was enjoyed down to that date for well over thirty years, but with a period in 1970-1971 when it was not exercised. As to the length of that period whilst upon the evidence I cannot fix the precise dates I am satisfied that it did not begin before July 1970 and that it had ceased by May 1971: ~~as~~ I do not consider the keeping of cattle off the land for a month after the sewage sludge was spread as an "interruption". Apart from the time period, I feel some doubt whether the reclamation works can properly be regarded as an interruption, in the sense of an adverse obstruction, as in my view they were rather in the nature of a number of processes which, while they lasted, rendered the grazing of cattle temporarily impracticable. Moreover there was no evidence that Alan had had notice of the interruption as required by Section 4: the mere existence of an obstruction is not notice for this purpose - see *Seddon v Bank of Bolton* 1882 19 ~~Ch.~~ D. 442.

(c) I should add that Mr Pooley also submitted that the Farm would not carry 30 cattle, but the Objection is not as to the number of animals but as to the existence of the right, and I do not propose to consider the question of the appropriate number of animals.

4. In my view therefore the right claimed is established by prescription under the Prescription Act 1832, but if I am wrong as to this it is, alternatively, good under the doctrine of lost modern grant. On the evidence a prescriptive right on this basis was acquired well before the period of non-user in 1970-1971 and ~~is~~ <sup>is</sup> not subject to the provisions of Section 4 of the 1832 Act as to the period continuing without interruption down to the date of the Objection.

For these reasons I confirm the registration.

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 15<sup>th</sup> September 1980

*L. J. Morris Smith*

Commons Commissioner