



COMMONS REGISTRATION ACT 1965

Reference No. 213/D/185

In the Matter of Lower Cow Pasture,
Shuthonger Common and Cowham, Twynning
Gloucestershire (NO.3)

DECISION

This dispute relates to the registration at Entry No 1 in the Ownership section of Register Unit No.CL.46 in the Register of Common Land maintained by the Gloucestershire County Council and is occasioned by the conflicting registration at Entry No. 7 in the same section of the Register Unit.

I held a hearing for the purpose of inquiring into the dispute at Cheltenham on 28 and 29 March 1979, and at Watergate House, London WC2 and on 9 and 10 April 1979. The hearing was attended by Miss Sheila Cameron, of Counsel, on behalf of Mr E W Passey and Mr C E Passey, the applicants for the registration, and by Mr Martin Roth, of Counsel, on behalf of Mr B C Ball, the applicant for the conflicting registration.

The land comprised in the Register Unit consists of three areas. The first is known as Lower Cow Pasture and the second as Shuthonger Common. The third consists of a number of separately named, but contiguous, areas which can conveniently be referred to collectively as Cowham, the name of the largest of them. The registration relates to a part of Lower Cow Pasture and a part of Cowham. The conflicting registration relates to the whole of the land comprised in the Register Unit.

The applicants' interest in part of the land the subject of the registration has been acquired by Mr Ball since the registration was made, but this does not affect the basic question, which is whether the applicants were the owners of the legal estate in fee simple in the land when the registration was made or were entitled only to a profit à prendre. Before turning to the applicants' title it is necessary to have in mind that the whole of the land comprised in the Register Unit is subject to 123 rights, known as Cow Pastures originally appurtenant to or usually held with certain lands in Cowham known as Cowham Meadow. These rights are now owned in varying numbers by several persons. Two Cow Pastures carry with them the right to graze 8 sheep or 4 yearlings, heifers, or steers or 2 yearlings fillies or colts or one horse.

The applicants are the successors in title of Mr A E Passey, who died on 26 February 1949. By an indenture made 29 September 1904 between (1) John Wright Guise and Alfred John Morton Ball (2) Gertrude Eleanor Francis Winscombe (3) Alfred Ernest Passey there were conveyed to Mr Passey the farm with the farmhouse, buildings, closes, pieces or parcels of land belonging thereto called Woodend Farm containing together 129 a.0r.25p. described in the first part of the Schedule. In the first part of the Schedule there are set out nineteen pieces of land with areas totalling 129a. 0r.25p., but the last three, with the total area of 30a.3r.27p., have a separate subheading "First Math Vesture of Cutting of the following". These three items consist of 16a.0r.5p in part of Lower Cow Pasture and two parts of Cowham.



Another part of Cowham, named Slinget is among the first sixteen pieces of land. There were also conveyed to Mr Passey 24 cow pastures. There is no plan attached to this indenture, but among the earlier deeds relating to Woodend Farm there is a statutory declaration by John Wright Guise, dated 28 September 1904, to which there is exhibited a plan showing the whole of the land comprised in the 129a.Or.25p. coloured pink without any differentiation.

Mr Roth contended that the only right in respect of the three areas under the sub-heading "First Math" conveyed to Mr Passey in 1904 was the right to take the first crop of hay and that the freehold did not pass to him.

First math or, as it is more commonly termed first vesture, is well known to the Common Law. It was held in The Bishop of Oxford's Case (1621), Palm. 174 that a grant of the first vesture of land, "viz le Primer Cutting de grass", does not pass the soil, a distinction being drawn between a grant of vesture which passes the soil, and a grant of first vesture, which is only a liberty and profit in alieno solo.

It therefore follows that if the indenture of 1904 had been clearly drafted so as to convey the first math in certain land, Mr A E Passey would not have acquired the freehold of the land. Unfortunately the drafting was not so clear, for the main words of the parcels refer to hereditaments having a total area of 129a.Or.25p and contain no reference to profits à prendre. There is no reference to first math until one gets to the Schedule and there the land under the heading "First Math Vesture or Cutting" is included in the total area of 129a.Or.25p. This is accordingly not a case in which the rule in The Bishop of Oxford's Case can be applied mechanically. It is necessary to consider, not the meaning of the expression "First Math Vesture or Cutting" generally, but its meaning in the indenture of 1904. This can only be done by having regard to what is known of the conveyancing history of Woodend Farm, Lower Cow Pasture and Cowham.

From time out of mind the township of Twynning has been divided into two divisions, one called Southrop, the other called Dudage, which do not common together. All the land concerned in this reference lies within the division of Southrop and it is unnecessary to refer to Dudage.

The manor of Twynning belonged to Winchcombe Abbey. Shortly before the dissolution of the Abbey, the demesne lands of the manor were partly in the possession of Edward Baugh and partly in the possession of Anthony Aileworth as lessees. On 10 June 1557, the Abbot let the manor with the demesne lands, copyhold estates, rents and service to Aileworth and his wife for 99 years from Michaelmas 1557. After the dissolution of the Abbey this lease was allowed and exemplified under the seal of the Court of Augmentations. On 8 November 1557 Aileworth demised to Baugh the land in Baugh's occupation and on 12 May 1607 Aileworth's executor assigned to Baugh's grandson, also named Edward Baugh, the leasehold interest granted by the Abbot in 1557. Meanwhile, the Crown had granted the reversion expectant on the lease of 1557 to Ralph Sadler. The parcels of the grant to Sadler included the whole of the meadow called Cowham Mead. After some intervening transactions, to which it is not necessary to refer in detail, the whole interest in the manor became vested in Edward Baugh the younger. However, complexity brought about by the intervening transactions caused Baugh's advisers to seek the opinion of Matthew Hale, a barrister, who later became Sir Matthew Hale, the well-known judge.



It is not necessary to consider the technical point on which Hale's opinion was sought. What is important is that it appears from his instructions that Cowham formed part of the commonable land of the division of Southrop and that part of it was in the possession of Baugh and the remainder held by five copyholders of the manor, who had a stinted common for a certain number of beasts. It appears from the later history that this certain number was 123 and that the beasts could be grazed on Cowham and Lower Cow Pasture at certain times of each year.

The position with regard to the grazing rights during the middle of the nineteenth century was described by one Thomas Tolley in a statutory declaration dated 26 June 1883. Mr Tolley said that Lower Cow Pasture was commonable from 14 May to 2 February and Cowham from 12 August to 2 February. However, all the 123 pastures had long been in the hands of a very few persons as tenants, and the tenants were accustomed to arrange from time to time among themselves as to the time and made of stocking the commons according as their mutual convenience and character of the season might render desirable. Mr Tolley went on to say that in the year 1844 a verbal (presumably oral) arrangement was made amongst the tenants and had ever since been acted upon under which in lieu of turning into the Lower Cow Pasture on 14 May the tenants mowed and carried away the first mow thereof, the Lower Cow Pasture being divided and apportioned among them according to the number of pastures held by them respectively.

A little further light on the "verbal" arrangement of 1844 is thrown by the particulars of sale of property in Twynning prepared for a sale by auction held by Messrs. Moore and Sons on 24 August 1904. Lot 19 consisted of 26 cow pastures and it is stated in a note that under the arrangement the land was apportioned at 2r.18p. for each pasture, which was equal to 15a.3r.28p. of first mow, being part of O.S. No. 97, in addition to rights of depasturage. It further appears from these particulars that by 1904 some of the rights of first mow in Lower Cow Pasture had been separated from the pastures in which they originated, for Lots 18 and 20 consisted of the first mow of various pieces of meadow land in Lower Cow Pasture.

It is therefore apparent that the first mow of the various parts of Lower Cow Pasture were not the rights known to the law as first vestures, but originated in an arrangement between the tenants as to the manner in which they were to enjoy the grass growing on Lower Cow Pasture between 14 May and 2 February. This arrangement, if binding at all, affected only the tenants among themselves and could not give them any greater interest in the soil of Lower Cow Pasture than they had in respect of their holdings of the pastures. As the holders of pastures, they were not entitled to the freehold interest in any part of Lower Cow Pasture, so a conveyance of the first mow of any such part would not pass any freehold interest.

The arrangement of 1844 explains a discrepancy between the area of Woodend Farm as conveyed in 1904 and the areas ascribed to it in earlier documents. In the Will of the Rev. Charles Herbert Martin, dated 26 October 1864, is described as containing about 112a. In the first Schedule to an indenture made 17 September 1884 between (1) John Cave Winscombe (2) Gertrude Eleanor Frances Martin (3) Frances Ann Martin (4) Jane Ann Winscombe (5) John Wright Guise and Alexander Russell Pulling Woodend Farm is described as containing 117a. However, in an indenture made 14 September 1897 between (1) Frances Ann Martin (2) Arthur Ernest Passey, by which Woodend Farm was let to Mr Passey, the area of the farm was stated to be 120a.3r.26p. It was this discrepancy which led Mr J W Guise to make the statutory declaration of 28 September 1904.



An examination of the schedule to the declaration shows that Mr Guise was able to make up the area of 129a. 0r. 25p. referred to in his declaration by including the 16a. 0r. 5p. of the first math land in Lower Cow Pasture. Without this area Woodend Farm would have had an area of 113a. 0r. 25p., which can be regarded as equivalent to the area of "about" 112a. which it was said to have in 1864.

It is now necessary to consider whether the conveyance of two areas in Cowham under the heading of "First Math Vesture or Cutting" by the indenture of 1904 carried with it the freehold estate in those areas. The Tithe Apportionment Award shows that Cowham was divided among a number of owners. The main part, described as Lower Cowham, was divided into strips of varying widths. It was, in fact, a classic example of a common field, owned in parts, over the whole of which the owners had a right of grazing from Lammas Day to Candlemas. Had it not been for the fact that Mr Passey's parts of Cowham were included under the heading of first math in 1904, there would appear to be no question that the freehold passed on the conveyance. However, it would have been legally possible for a right to take the first math of these parts to have been created, so it is necessary to consider whether that alone passed in 1904.

Light on the problem is shed by a series of documents relating to other parts of Cowham. The parcels of an indenture made 3 September 1896 between (1) Edward Charles Riddell (2) Edith Mary Catherine Gerard (3) Hon. Robert Joseph Gerard-Dicconson, Richard Trappes-Lomar, Bruno Butler Bowden and George Efaehler included two areas at the southern end of Cowham known as Palmer's Hatchet Meadow and Leech Meadow. These two areas appear again in the parcels of a vesting deed made March 1926 between (1) R Trappes-Lomar, B B Bowden and George Thomas Gerard (2) E M C Riddell (née Gerard), but with the following entry in a column headed "Remarks": "First Math only i.e. subject to the existing commonable rights of pasturage between the 12 August and 12 February in every Year". The same areas appear in the parcels of a vesting assent made 2 March 1950 by Cuthbert Edward Alfonso Riddell and Charles Leigh Pemberton with the form of the "Remark" varied to: "First Math only. Subject to existing commonable rights of pasturage between 12 August and 12 February in every year."

It is apparent that the parcels of this series of documents were intended to have an identical content. There was nothing to indicate that the indenture of 1896 did not relate to the freehold interests shown in the tithe award. Indeed, it is there recited that both parts of the land in question were in 1864 the property of Charles Porter, who appears in the tithe award as the owner of Palmer's Hatchet Meadow. The "Remark" in the vesting deed of 1926 that the land was subject to the existing commonable rights could with equal accuracy have been included in the indenture of 1896 and in my view the words "First Math only i.e." show that by "First Math only" the draftsmen meant only that the land was subject to the existing rights. Since the land was subject to those rights, the only effective agricultural use that the owner of the land could make of it was to take the hay crop and it would appear that local custom limited him to taking the first crop only. That did not, however, mean that he had only a right of first vesture. He was entitled to the hay as the owner of the land, even though in practice he might not have any further use of the land. It is unfortunate that "i.e." was omitted from the vesting deed of 1950, but I do not consider that this had the effect of converting what had been a freehold interest into a mere right of first vesture. The introduction of the "Remark" was unfortunate in that it could be taken as an indication that only the first math passed, but when examined in its context it is perfectly accurate and was no doubt intended to be helpful. In my view, the parcels in each case consisted of freehold land.



I have therefore come to the conclusion that the applicants for the registration are the owners of the parts of Cowham to which it relates, but that they have never been the owners of any part of Lower Cow Pasture. It is their interest in the latter which has been acquired by Mr Ball.

For these reasons I confirm the registration with the following modification: namely the substitution of the words: "The part of the land comprised in this register unit and shown edged violet and numbered 2 on overlay number 2 to the register map for this register unit" for the words in column 4.

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

19th

day of

June

1979

Chief Commons Commissioner