



COMMONS REGISTRATION ACT 1965

Reference No. 213/U/127

In the Matter of parts of Lower Cow Pasture,
Midsummer Meadow, Cowham, Slinget, Midsummer
Heads, Palmers or Palmy Hatchet and Leech
Meadows, Twynning

DECISION

This reference relates to the question of the ownership of the parts of the land comprised in the Land Section of Register Unit No. CL.46 in the Register of Common Land maintained by the Gloucestershire County Council of which no person is registered under section 4 of the Commons Registration Act 1965 or the Land Registration Acts as the owner.

I held a hearing to inquire into the ownership of the land at Tewkesbury on 4 October 1988 and at Golden Cross House, Duncannon Street, London on 15 and 16 November 1988.

At the hearings Mr Frank Hinks of Counsel instructed by Messrs. Moore, Brown and Dixon of Tewkesbury appeared for Sydney Raymond Russell Williams and Constance Williams, for John Pitcher, Leighton Nicholas Pitcher and James Leighton Pitcher and for Charles Michael Healey. Mr Charles Aulde of Counsel instructed by Messrs. Thomson and Badham of Tewkesbury appeared for Brian Christopher Ball. Mr P C Davis, solicitor, of Messrs. Davis, Foster and Finley of Malvern appeared for Maurice Alwyn Albutt and Henry James West. Mr G B Limbrick, solicitor, represented the Gloucestershire County Council as registration authority.

The unit land falls into three areas marked 1, 2 and 3 on the supplemental map. The land, the ownership of which has been referred to me, is shown as white on that map and lies partly in area 1 and partly in area 3. The claims to ownership of the two unclaimed parts of area 3 are not disputed and I will deal with them first.

The claim of John Pitcher, Leighton Nicholas Pitcher and James Leighton Pitcher

These claimants claim ownership of the southern of the two unregistered parts of area 3. ("Area 3 south").

This is the land (known as "Leech Meadow and Palmers or Palmy Hatchet") in respect of which Maurice Charles Pitcher (as tenant) provisionally registered in the Rights Section of this unit "a right to take the first math". This registration was objected to and in due course the dispute came before the Chief Commons Commissioner Mr George Squibb Q.C. By his Decision (No. 2) dated 19 June 1979 Ref. 213/D/175-184 the Chief Commons Commissioner refused to confirm the registration on the grounds that the deeds which were produced showed that Maurice Charles Pitcher's landlord, George James Pitcher was the owner of the freehold in this land and not of a mere right to take the first math from it.



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The Commissioner said this (at page 3 of that Decision) -

"I have therefore come to the conclusion that my proper course is to refuse to confirm this registration and to leave Mr Pitcher to claim to be registered as the owner of the land in that reference which will have to be made later under section 8 of the Commons Registration Act 1965 with regard to the parts of the land comprised in the Register Unit of which no person is registered as the owner".

That claim is now made by George James Pitcher's successors in title. I am satisfied, for the reasons given by Mr Squibb, that at the date of registration George James Pitcher was the owner of this land. Mr Hinks produced the conveyance on sale dated 8 December 1952 which was before Mr Squibb and which shows that the land then conveyed to George James Pitcher included the whole of Area 3 south. I am, however, concerned with who owns it today. Mr Hinks produced the probate of the will of George James Pitcher dated 2 September 1982 and granted to Cissie Agnes Pitcher, Timothy Clarke and Charles Stephen Pitcher and an assent dated 26 November 1982 whereby these three assented to the vesting of land including Area 3 south in John Pitcher, Leighton Nicholas Pitcher and James Leighton Pitcher in fee simple.

On that evidence I am satisfied that these three gentlemen are the owners of this land and shall accordingly direct the Registration Authority to register them as joint owners of the land under section 8(2) of the Act of 1965.

Mr and Mrs Williams' claim

These claimants claim the northern of the two unclaimed parts of Area 3 including the small isolated triangle of land slightly to the west of the main area. ("Area 3 north")

Mr Hinks produced -

- (1) a conveyance on sale dated 29 September 1961 whereby Gerald Hone conveyed to Sydney Raymond Russell Williams land including the whole of this land. According to memoranda endorsed on that conveyance parts of the land were sold off.
- (2) a voluntary conveyance dated 18 March 1968 whereby Sydney Raymond Russell Williams conveyed to himself and his wife Constance Williams the land conveyed by the 1961 conveyance less that sold off but including the whole of Area 3 north.

This would be a faultless paper title but for the reference, here again, to "first math". In the 1961 conveyance the largest of the three parcels is described in the schedule thus -

<u>" O S Number</u>	<u>Description</u>	<u>Cultivation</u>	<u>Area</u>		
pt. 5	Midsummer Meadow (First Math)	Pasture	A 23	R 1	P 18"



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The other parcels are described in a similar manner. Now there is no doubt that "first math" can refer simply to the right to mow the land once - a mere profit à prendre and not the freehold. In this case - unlike Mr Squibb in the case referred to above - I have not been shown any previous deeds where the same parcels are conveyed as freeholds. Nevertheless, reading the 1961 deed as a whole, I cannot believe that it is intended to pass only a profit à prendre in the land.

Firstly the parcels are described as -

"First all that Abbots Court Farm .. containing two hundred and eight acres one rood and thirty two perches...more particularly described in the schedule - and delineated on the plan....."

The land described as "first math" is included in that schedule and its area in that acreage.

The parcels continue with (2) a pew in the parish church (3) a right of fishery (4) tithes and (5) eighteen rights of depasturing cows on Cowham, and other commons.

The logical place for a right of first math in that list would be with the other profits à prendre and not with the land.

Finally the conveyance is stated to be subject -

"to the right of grazing or aftermath... as to number part 5 in the said schedule from the fifth day of July to the thirteenth day of February following...." [and similarly with the other "first math" parcels]

This seems to me to be totally incompatible with the theory that "number part 5" in this schedule refers merely to a profit of first math. A mere profit of first math cannot be subject to a right of grazing but a freehold can.

For these reasons I am satisfied that this deed was intended to and did convey the freehold in Area 3 North and that Sydney Raymond Williams and Constance Williams are therefore the joint owners of that land. I shall accordingly direct the Registration Authority to register them as such under section 8(2) of the Act of 1965.



Low Cow Pasture - the disputed claims

The remainder of the land in this unit the ownership of which has been referred to me lies in Area I on the supplemental map which is known as Lower Cow Pasture.

The ownership of two areas of this land - in the southern part - is finally registered. The remainder has been divided into six parts marked A to F inclusive on the map attached to this decision and entitled "claim map".

The claims of the parties may be summarised as follows -

(1) Mr Ball claimed -

(a) The whole of the land A to F on the grounds that he was the lord of the manor of Twyning.

(b) Alternatively areas C-F on the basis that he had a good paper title to the "first math" and that in this case that carried with it the freehold.

(2) Mr Healy claimed ownership of areas A and B on the basis that he had a good title to the "first math"

(3) Mr Allbutt and Mr West claimed on behalf of themselves and other stinholders that the whole of the land A to F belonged to the owners of grazing rights as tenants in common and that, since there were more than four of them, the legal estate in fee simple had, under the transitional provisions of the Law of Property Act 1925, been vested by the Public Trustee to be held in trust for them.

Mr Ball's Claim as Lord of the Manor

I will deal first with Mr Ball's claim to be the owner of the whole of the referred land as Lord of the Manor of Twyning.

Estoppel

Mr Hinks first argued that Brian Christopher Ball was estopped from claiming that any of this land belonged to him as lord of the manor since that claim had already been put forward by him in support of his provisional registration of ownership of this land and had been rejected by Mr Squibb.

The way this came about is as follows. On 11 December 1969 George Stanley Niblett applied for the registration of a claim to the ownership of the land coloured orange on the supplemental map and edged in orange on the map attached to this decision (the "decision map"). This claim was duly registered on 18 February 1970 as Entry No. 5 in the ownership section of the register.



On 31 December 1969 Brian Christopher Ball applied for registration of a claim to ownership of the whole of the land comprised in this register unit. This claim was also duly registered on 18 February 1970 as Entry No. 7 in the ownership section.

Since Mr Ball's registration claimed the whole of the unit land it was in conflict with entries 1 to 6 in that register which claimed ownership of various parts of it. This conflict was in due course referred to a Commons Commissioner. At the hearing Mr Ball claimed to be the lord of the manor of Twynning which he undoubtedly was, and further claimed, as lord of the manor, to be owner of all the unit land, including the orange land claimed by Mr Niblett. In that claim he failed, the Chief Commons Commissioner Mr Squibb, in his decision No. 213/D/191 (later upheld by the High Court on appeal) saying -

"I have accordingly come to the conclusion that Mr Ball is not entitled, as lord of the manor, to the freehold interest in any part of Cowham or Lower Cow Pasture, any interest which former lords of the manor may have had in those areas having been long since alienated or enfranchised"

That, it was argued, was a decision between Mr Niblett and Mr Ball that Mr Ball was not entitled as lord of the manor to any of Lower Cow Pasture and now that Mr Niblett's successor in title wished to claim ownership of another part of Lower Cow Pasture Mr Ball was estopped from claiming, as lord of the manor, to own it.

Mr Hinks agreed that this was not a case of res judicata, for the question before Mr Squibb was who was the owner at the date of registration while the question before me is who is the owner today, but he relied on the doctrine of issue estoppel. It had been decided, he said, that at the date of registration Mr Ball was not the owner. That was therefore an issue which he was not entitled to raise again and, since a claim to be the owner, as lord of the manor, today necessarily involved a claim to have been the owner as lord of the manor at the date of registration he was estopped from putting forward that claim.

Mr Aulde argued that the doctrine of estoppel does not apply at all between decisions of Commissioners on ownership section disputes on the one hand and in inquiries under section 8 on the other.

This, as he pointed out, is essentially a question of the true construction of the 1965 Act.

Section 1 of that Act provides -

"(1) There shall be registered in accordance with the provisions of this Act

- (a) land in England and Wales which is common land
- (b) rights of common over such land; and
- (c) persons claiming or found to be owners of such land or becoming the owners thereof by virtue of this Act.

(2)



(3) Where any land is registered under this Act but no person is registered as the owner under this Act or under the Land Registration Acts 1925 and 1936, it shall -

(a)

(b) if it is common land be vested as Parliament may hereafter determine."

The Act then goes on to provide (section 4) for registration authorities to register land as common land or, as the case may be, any right of common over or ownership of such land on application duly made to it, (section 5) for objections to be made to such registrations and (section 6) for Commons Commissioners to inquire into disputed registrations and either to confirm the registration with or without modifications or to refuse to confirm it. The registration, if confirmed, is to become final and, if the confirmation is refused, become void. As far as registrations of land and of rights are concerned that is the end of the matter.

As far as ownership is concerned, however, there is another stage. Section 8 provides -

"8 -(1) Where the registration under section 4 of the Act of and land as common land has become final but no person is registered under that section as the owner of the land, then, unless the land is registered under the Land Registration Acts 1925 and 1936, the registration authority shall refer the question of the ownership of the land to a Commons Commissioner.

(2) After the registration authority has given such notice as may be prescribed, the Commons Commissioner shall inquire into the matter and shall, if satisfied that any person is the owner of the land, direct the registration authority to register that person accordingly; and the registration authority shall comply with the direction."

The basis of issue estoppel, like that of estoppel per rem judicatam, is that it is in the public interest that when an issue between two parties has been decided by the competent court or tribunal neither party should be allowed in later proceedings to raise the same matter again.

It follows that the second court is bound to accept the decision of the first court whether it is right or wrong, and even if there is evidence available which makes it clear that it was wrong.

In my view this doctrine can have no application to a statutory procedure which contemplates that, as far as ownership is concerned, where no registered claim has been confirmed at the first stage there should be a second stage at which the Commissioner is required to inquire into the matter and, if satisfied that any person is the owner of the land, direct the Registration Authority to register him as owner.



At that hearing in my opinion the Commissioner (who may or may not be the same Commissioner as previously dealt with any disputed registration) must decide whether he is satisfied that any person is the owner on the evidence available to him whether or not that evidence was or could have been given at the dispute stage. It follows that, while he will no doubt take into account any decision which may have been given at that stage, he is in no way bound by that decision.

To put it another way the provision in the Act for a further inquiry makes it clear that an important object of the Act is that the true owner should be discovered, if possible, and that that object is to be regarded as more important than relieving objectors of the necessity of contesting the matter twice.

Having said that, it seems to me that it is very unlikely that there will be many cases where an issue which has been decided one way at the dispute stage will be decided another way at the inquiry stage and that this is not one of these cases.

I entirely agree with the decision given by Mr Squibb on the evidence before him. The only argument which was put before me which does not appear to have been put before him was that since it was admitted that Mr Ball was the owner of Shuthonger Common it must follow that since he was the lord of the manor of Twyning and since all these commons lay in the Parish of Twyning, he must be the owner of the other commons also.

Further evidence

This argument, unconvincing in itself, is rebutted by the production of further evidence which was not mentioned by Mr Squibb. There was produced a statutory declaration dated 12 March 1946 made by the Right Reverend Bishop Maxwell Homfrey Maxwell-Gumbleton D.D. who, after declaring that he became owner in fee simple of the Manor or Lordship of Twyning on the death of Isabella Matilda Gumbleton on 24 February 1917, went on to declare that since that date he had continued to exercise the rights vested in him as Lord of the Manor without interruption or interference by any other person. He further declared -

"Those rights so vested in me extend over the Commons known as Bockeridge, Hill End Showborough and Shothonger Commons and the piece of waste of the Manor known as Ratley Green, all situate at Twyning in the County of Gloucester."

Thus, while Shuthonger Common is mentioned, Lower Cow Pasture is not.

Having made this declaration Bishop Maxwell Gumbleton on 20 March 1946 conveyed to Charles Ball "all that Manor or Lordship or reputed Manor or Lordship of Twyning in the County of Gloucester together with all manorial rights attaching thereto in under or over" the commons referred to in the statutory declaration. Again no mention is made of Lower Cow Pasture.

Endorsed on that conveyance are a number of memoranda of grants by Charles Ball of various rights over Shuthonger Common, Bockeridge Common, Hillend Common and Twyning Green but none over Lower Cow Pasture.



When by a deed of gift dated 16 February 1966 Charles Ball conveyed the Manor of Twynning to his son Bryan Christopher Ball the manorial rights over the same commons were conveyed but none over Lower Cow Pasture.

Again endorsed on that conveyance are memoranda of grants by Bryan Christopher Ball of various parts of or rights over those commons but none relating to Lower Cow Pasture.

Evidence was produced that in 1975 Mr Ball paid £406 for the clearing of the Mythe Brook part of which borders Lower Cow Pasture but I do not regard that as evidence that he owns it.

Mr Ball's claim to be owner of Lower Cow Pasture as Lord of the Manor is thus actually weaker than it was before Mr Squibb. It therefore fails.

The remaining claims

It remains to be decided whether I am satisfied that the ownership of this land is vested in the Public Trustee and if not whether the claims of Mr Ball or Mr Healey to parts of the land are made out in whole or in part. This involves a consideration of what is known of the history of the land.

The "cowpastures"

All parties agree that, at all material times, the rights of grazing over Lower Cow Pasture and over a number of other commons in the Parish of Twynning were divided into 123 units known as "Cowpastures" and that by, at latest, the early part of the 19th century these were owned by comparatively few owners and let to tenants.

The tithe valuation of 1842

A copy of the tithe valuation of 1842 for the Parish of Twynning was put in evidence. This showed, among the land which was exempted from tithe, a number of commons including Lower Cow Pasture. In the column headed "Names of Landowners" all these commons are described as being owned by "various owners according to their respective rights".

This is clearly some evidence that the fee simple in the commons was then vested in the owners of the cowpastures as tenants in common. It is not, however, very compelling evidence since the tithe commissioners would not have been concerned to establish the ownership of land which was not to be made subject to the tithe redemption annuity. Further doubt is cast by the fact that the commons named include Shuthonger which is agreed to be owned by the Lord of the Manor.



The verbal agreement of 1844

A statutory declaration dated 26 June 1883 by Thomas Tolley was put in evidence and its truth was accepted by all parties. The name of Thomas Tolley appears on the rating valuation of 1875 as the tenant of 36 cowpastures from two separate owners.

He states that he had known the commons including Lower Cow Pasture in the Parish of Twynning for upwards of 40 years. He does not state who are the owners, but he says that there are 123 cow or beast pastures over them, the greater part of them being appurtenant to or held with land in Cowham Meadow, that each cowpasture gives a right to depasture one cow or beast or its equivalent, and that the Representatives of the late John Proctor are the owners of 40 of them (this tallies with the entry in the 1875 valuation).

He then goes on to say that the 123 cowpastures have long been in the hands of very few persons as tenants, and that such tenants are accustomed to arrange from time to time among themselves the time and mode of stocking the commons "according as their mutual convenience and the character of the season."

He then states that in 1844 -

"a verbal arrangement was made amongst the tenants and has ever since been acted upon under which in lieu of turning into the Lower Cow Pasture on 14 May the said tenants mow and carry away the first math thereof the said Lower Cow Pasture being divided and apportioned among them according to the number of pastures held by them respectively"

This is the origin of the right of first math which has now devolved to Mr Ball and Mr Healey.

As a result of this agreement between the tenants as to the manner of exercise of their rights Lower Cow Pasture was set out into areas over which the owners of the cowpastures thereafter claimed and disposed of a right of first math, the land, however, as in other parts of the Parish remaining open and grazed in common after the hay had been carried.

It is worth noting that Mr Tolley also states that as part of the agreement the right to mow the "Lower Cowpasture Sling" and its exclusive occupation was given to the owner of Twynning Farm.

The evidential importance of this document, however, is that it in no way refers to the ownership of the land.



The rating valuation of 1875

A certified extract of the valuation for rating for the Parish of Twynning for 1875 was produced which set out the same commons as in the tithe valuation schedule including Lower Cow Pasture together with "The Lord's Leys 86 acres" which had not been included in the tithe schedule.

It then states "The rights of depasturage over the above common are as under - Class 1 at 37/6 each". It then sets out the names of the cowpasture owners of whom there are 5, and of their tenants of whom there are 7 and rates them according to the number of cowpastures held at 37/6 per cowpasture.

This, in my opinion, is no evidence as to the ownership of any land in Lower Cow Pasture. The cowpasture tenants are not being rated as tenants of land. They are being rated as persons exercising rights of pasture the exercise of which, practically exhausting as it did the value of the land, was treated as rateable occupation - see 39 Halsbury's Laws (4th Edition) para. 34.

The County Court judgment of 1907

A judgment of the Tewkesbury County Court dated 23 October 1907 was produced.

This was an action for damages brought by the Reverend Frederick Wigan and his tenants against one James Niblett for walking through the Lower Cow Pasture on or about the 4th day of July 1907 "when the hay crop was in its prime."

Mr Wigan claimed to be owner in fee simple of Twynning Farm but only to be "entitled the the first math vesture or cutting" of "the meadow land known as the Lower Cow Pasture containing 21 acres or thereabouts". This clearly refers to area D.

No evidence of the conveyance of this land to Mr Wigan was put in but in an abstract of title dated 1972 which was put in in support of Mr Ball's claim to ownership of this land there is abstracted an indenture dated 16 May 1922 which recites a conveyance dated 29 September 1920 whereby property including the "first math, vesture or cutting" of 21a Or 35p in Lower Cow Pasture was conveyed by the Reverend Frederick Wigan to George Hutton Jackson.

That being so it may be assumed that the first math of this land had been conveyed to Mr Wigan on the same terms.

The significance of this judgment (Mr Wigan recovered damages of one shilling together with costs and an injunction) was that Mr Wigan (or more probably the lawyer who drafted his particulars of claim, who would have seen his deeds) thought it right to distinguish his position as "owner in fee simple" of the Twynning Farm and merely "entitled to the first math vesture or cutting" of the 21 acres in Lower Cow Pasture.



It was argued that because the judgment states that "His Honour found as a fact..... that a trespass had been committed" it must mean that the Judge found that Mr Wigan was the owner and his tenants the occupiers of the land. I do not think this argument is right. Persons having a right of sole vesture may bring action for trespass even though they have no other estate in the land and both pleader and judge would have known that.

Thus the way Mr Wigan's case was put forward on this occasion is evidence against his ownership at that time.

Minutes of Commoners' meetings

A minute and account book of the pasture holders on Shuthonger Common, Cowham and Cow Pasture Meadow (sic) was produced. This records meetings held between 1898 and 1932. It records over the years various expenses being incurred in respect of the commons, for purposes such as clearing the brook, mending the fences and bridges, and divided among the holders of cowpastures in proportion to their holdings. On some occasions the expenses were apportioned not only according to the number of cowpastures but according to "acreages" which appear to refer to the areas of the first math. This decision may have been made to reflect the fact that some of the rights of the first math had been separated from the cowpastures and would therefore have been unfair to throw the whole burden on the owners or the cowpastures. It is in my opinion no evidence of ownership of the freehold.

It was pointed out that the entry for 9 May 1923 refers to "each owner's share of expenses" but it is quite clear that the reference is to ownership of cowpastures.



Land Value Duties Valuations - 1913

Mr Aulde produced copies of Provisional Valuations by the Inland Revenue for the purposes of the Finance (1909 - 1910) Act 1910 certified by the County and Diocesan Archivist together with a map which, although it is not certified as being anything more than a copy of an extract of a Second Edition (1902) O S Map, bears annotations which suggest that it is connected with these Provisional Valuations.

These provisional valuations are in some cases made on persons who, according to the title deeds referred to above, were owners of the first math of the land valued but who are described in the valuations as "owners" of the land. This shows, said Mr Aulde supported on this point by Mr Hinks, that whatever the deeds said, these people (who are the predecessors in title of Mr Ball and Mr Healey) were regarded by the Inland Revenue as being the owners.

The 1910 Act introduced a number of new duties on land values. These were levied on owners of land and "land" (Section 41) did not include any incorporeal hereditament. Section 26 required the Commissioners of Inland Revenue to cause a valuation to be made of all land in the United Kingdom. Each piece of land which was under separate occupation was to be valued.

"Owner" is defined as "the person entitled in possession to the rents and profits of the land by virtue of any estate in freehold"

By section 31 any person who paid rent in respect of any land could be required to furnish the Commissioners with the name and address of the person to whom he paid rent. By section 27(1) the Commissioners were required to serve a copy of the provisional valuation on the owner of the land and unless the owner objected in the prescribed manner the figures shown in the provisional valuation were to be adopted.

Apart from the map the documents put in evidence before me were four copies of forms of "provisional valuation" under the 1910 Act. No other documents relating to the valuation were produced and the only argument put before me was that these documents described persons who have been shown from other documents to have been at that time owners of the "first math" of the land as "owners" of the land. These provisional valuations are as follows -

1. A valuation of House, 2 Cottages, Buildings and Land; Twyning Farm, Twyning; No of hereditament 16; occupier Mr A E Craddock; 156a Or 12p. The form is initialed "Wm D" dated 31 July 1913 and signed by the "Valuer Appointed by the Commissioners of Inland Revenue". On the back it states that a copy was served on the owner, the Rev. P F Wigan, registered post on 31 July 1913.

On the map the words "about 21 acres 16" are written in area D. "16" referring to the hereditament No. Bearing in mind that the 1907 County Court action Mr Wigan claimed ownership of Twyning Farm and first math of area D, I am satisfied that Mr Wigan must have submitted to area D being included in valuation of his land although first math, being an incorporeal hereditament, would not have been "land" subject to be valued under the 1910 Act.



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This is confirmed by the fact that among the transactions recorded at the end of the form is "Sale 16.5.22 Jackson to Jones £2825" a sale which (as recorded above) included the "first math" of area D. The fact that later transactions are recorded also convinces me that this provisional valuation was accepted by Mr Wigan and that the words "amended 16 Oct 1913" written across the front refer not to the result of any appeal but merely to a change in Mr Wigan's address.

2. A valuation of "Land in Lower Cow Pasture, Twynning; No. of hereditament 123; 3la 2r 9p; occupier "Owner and A Baker"; initialled "Wm D" but not signed or dated. The owner is given as C C Moore but no date of service on him is given.

From the map it appears that No. 123 consists of areas B and E plus O S 44 3.944 acres the areas of which total 3la 2r 9p exactly.

It appears from the conveyances referred to above that at this time Charles Moore was the owner of the first math of areas B and D. This provisional registration is, however, poor evidence that he ever submitted to valuation as owner. Without more it is equally consistent with the form having been prepared but never signed or served. Perhaps because it was realised that C C Moore was not the owner.

3. A valuation of "house, cottage, buildings and land Woodend Farm Twynning," No. of hereditament 187; occupier, "owner"; 129a 1r 25p; initialled "Wm D"; signed by the valuer on 31 July 1913 and served on the owner A E Passey by registered post on the same day.

By the conveyance dated 20 October 1904 the abstract of which is referred to above Arthur Ernest Passey acquired Woodend Farm 129 acres and 25p or thereabouts. Included in that 129 acres was the first math cutting or vesture of 16a 0r 5p in Lower Cow Pasture - area F. Thus it would seem from that valuation document that Mr Passey was submitting to the inclusion of area F in the land owned by him.

4. A valuation of land in Lower Cow Pasture Twynning; No. of hereditament 311; occupier- "owner"; 1a 3r 14p; initialled "Wm D" but not signed or dated. Owner given as E Craddock, Twynning Farm but no date of service on him. This turns out from the valuation map to be O S 44 1.838acres (i.e. 1a 3r 14p).

This area is not part of the land which has been referred to me but is the very northern tip of Shothonger Common of which Mr Ball is already finally registered as the owner. It is, however, I think of some significance that this valuation of common land was neither signed nor recorded as having been served.

In my opinion these documents show only that in two cases, in each of which whole farms were valued (Twynning Farm and Woodend Farm), the first math land was included without apparent objection by the owners. I do not regard this as significant because this subtle distinction based on a statutory definition in regard to a small part of a farm could easily be overlooked. As to the rest of Lower Cow Pasture there is no evidence that any provisional valuation was ever served or, in respect of those parts not mentioned above, ever contemplated.



Previous decision by Mr Squibb

In dealing with disputes in the ownership section in 1979 Mr Squibb rejected all claims to ownership in Lower Cow Pasture based on conveyances of the first math. These decisions 213/D/185 (No. 3) and 213/D/190 (No. 8) were on disputes on claims to ownership of parts of lower Cow Pasture and were occasioned by the conflicting registration by Mr Ball claiming to own the whole unit referred to above (Reference no/ 213/D/191).

The reason for this rejection is summarised in 213/D/190 where he says:

"I have come to the conclusion that a conveyance of the first math in Lower Cow pasture does not convey the freehold, but only a profit à prendre"

For the reasons given elsewhere in this decision I agree with this conclusion (no one suggested in this case that any estoppel arose).

The main evidence against this conclusion which was before me but not before Mr Squibb was that of the valuations under the Finance (1909-1910) Act 1910 which, for the reasons I have given, do not convince me that the claimants had more than a profit à prendre.

Mr Squibb relied on The Bishop of Oxford's Case (1621) Palm, 174 as authority for the proposition that a grant of the first vesture of land does not pass the freehold in the soil. Mr Hicks cited Ward v Pettifer (1634) Cro, Car, 362. In that case the Court was of the opinion that "unless other matters be shown the freehold is in him that hath the first tonsure". Assuming this to state the law correctly (it does not appear that The Bishop of Oxford's case was cited) it does not apply in this case for here "other matter is shown". Where as here, the origin of the right which is being conveyed is known it becomes clear that conveyance of first math does not carry the freehold.



The claim of the cowpasture owners

The claim of Maurice Alwyn Allbut and Henry James West is not that they are owners in fee simple of any part of the land referred to me but that the fee simple is vested in the Public Trustee, who holds it on trust for them and others. They thus claim for themselves merely an equitable interest. Their case is that before 1926 the ownership of the land was vested in the owners of the cowpastures as tenants in common in proportion to the number of cowpastures owned by each owner, and that accordingly, since there were then more than four tenants in common, the fee simple in the land was on 1 January 1926 by virtue of the transitional provisions of the Law of Property Act 1925 vested in the Public Trustee who was to hold it on the statutory trusts for the benefit of the former tenants in common, of some of whom Mr Allbut and Mr West are successors in title.

Since it is not disputed that in 1925 there were five owners of cowpastures the only question which remains is whether those owners were also tenants in common at law.

Mr Davis argued, I think rightly that the rights of the cowpasture owners taken together were sole (or several) rights (there being no mention anywhere of the owner enjoying grazing rights in common with them). He went on, however to argue that it followed that they must be the owners of the soil. This I think is wrong. Stintowners who between them own the sole right of grazing and mowing may or may not be the owners of the soil. This is illustrated by the definition of "land subject to be inclosed under this Act" in section 11 of the Inclosure Act 1845 which speaks of -

"all gated and stinted pastures in which the property of the soil or of some part thereof is in the owners of the cattle gates; and also all gated and stinted pastures in which no part of the property of the soil is in the owners of the cattle gates or stints or any of them."

Nor is there as far as I know any presumption that a gated or stinted pasture falls into one category rather than another.

He then argued that the 1844 agreement could only have been made if the cowpasture owners were owners of the soil since such an agreement to alter the manner in which their rights were to be exercised could only be made with the concurrence of the owner. But if, as is quite possible, these rights were rights of sole vesture giving the cowpasture owners a right to take the grass by grazing or mowing or both they would be entitled to agree among themselves as to how that right was exercised.

Accordingly I am not satisfied that in 1926 the cowpasture owners were tenants in common of this land and must reject the claim that the freehold is vested in the Public Trustee.



Mr Healey' claim to Areas A and B

1. Area A: 2a 1r 7p

Mr Hinks produced an indenture dated 20 October 1883 whereby Elizabeth Procter and Henry Fisher as executors of John Procter conveyed Daw House Farm, Twynning amounting to 20a 3r 6p together with the first math vesture or cutting of area A identified by a plan and amounting to 2a 1r and 7p and four cowpastures to Matthew Keepence.

It is to be noted that, while title to four of the parcels of land can be traced to conveyances dated 1798 and 1849, no previous title can be shown for the first math of area A except that the statutory declaration dated 26 June 1883 is included in the title deeds. This is consistent with the right to the first math having its origin in the agreement of 1844 between the holders of the cowpastures. The fact that Mr Tolley's declaration specifically refers to the representatives of John Procter as owning 40 cowpastures as well as its date suggests that this declaration was made to support this conveyance of a right of first math in area A.

Mr Hinks produced a number of other conveyances as a result of which the first math in area A was finally conveyed to Mr Healey by an assent made by the Midland Bank Trust Company on 28 December 1981. In each one of these deeds area A was described as the "first math" or the "first math vesture or cutting" of the 2 a 1r 7p.

2. Area B: 11a 3r 10p

The title to this area commenced with an abstract made in 1922 of the title of Arthur Ernest Passey to "the first math of Lower Cow Pasture 11 acres 3 roods and 10 perches." Mr Hinks pointed out that this abstract abstracted a conveyance dated 11 December 1905 whereby Henry Wilson, Thomas Weaver Moore and Alfred Baker conveyed to Cecil Moore inter alia "all that piece or parcel of land containing by admeasurement 11 acres 3 roods and 10 perches or thereabouts situate in Lower Cow Pasture being part of nos. 248 and 97 on the ordnance plan of this Parish" Mr Hinks argued that since there had been a sale in 1905 of area B with no reference to "first math" the later conveyances of this area (all of which are confined to the first math) must be construed as conveying the freehold.

In my opinion this deed of 1905, even if correctly abstracted (the original deed was not put in evidence), appearing as it does in an abstract of the title of the "first math" in which was also abstracted a conveyance of 1 April 1920 whereby the executors of Charles Moore conveyed to Arthur Ernest Passey "the first math" of this area does not in all the circumstances lead me to believe that Cecil Charles Moore was ever in fact the owner of more than the first math still less that his executors can be credited with an intention to convey more. That abstract was followed by a conveyance dated 6 June 1922 whereby Arthur Ernest Passey conveyed "the first math" of this land to Frank Rouse whereafter it passed by a series of transactions all of which referred to "the first math" to Mr Healey.



Mr Ball's claim to areas C-F

1. Area C: 3a Or Op

Mr Ball's claim rests solely on a conveyance on sale dated 10 March 1952 whereby Samuel George Pepper conveyed to Mr Ball "all that first math of a piece or parcel of land comprising in area three acres or thereabouts situate in Twynning Pastures Twynning forming part of Ordnance Survey No. 248 and now in the occupation of T S Halling as tenant identified by a plan as area C.

2. Area D: 21a Or 35p

An abstract of title made in 1972 was produced. This abstracted a conveyance on sale dated 16 May 1922 whereby George Hutton Jackson conveyed to Alfred Jones certain freehold land and "the first math vesture or cutting" of 21 acres 35 perches in Lower Cow Pasture identified on a plan as area D. This area (always described as "first math") passed by a series of transactions and finally to Mr Ball by a conveyance dated 14 February 1972 from Maurice Henry Cook whereby (I think significantly) Mr Ball acquired the freehold of the 7a 2r 37p which lies to the south of area F (of which Mr Ball is finally registered as the owner) but only "the first math vesture or cutting" of area D.

3. Area E: 15a 3r 28p and Area F: 16a Or 5p

Mr Ball's title to area E commences with an abstract of the conveyance of 1 April 1920 (referred to above under area B) whereby the executors of Charles Moore conveyed certain hereditaments to Arthur Ernest Passey. One of these hereditaments is "the first math of" 15a 3r 28p in Lower Cow Pasture.

His title to area F commences with an abstract of a conveyance on sale dated 20 October 1904 between John Wright Guise and Alfred John Morton Ball (1), Gertrude Eleanor Frances Winscombe (2) and Arthur Ernest Passey (3) whereby there was conveyed to Arthur Ernest Passey inter alia -

"First math, vesture or cutting of the following
Pt 43 Lower Cow Pasture Meadow 16.0.5"

Arthur Ernest Passey thus became the owner of the first math of both these areas. After his death by a conveyance on sale dated 16 August 1971 his executors Edward Wilson Passey and Colin Ernest Passey conveyed to Mr Ball -

(1) "the first math vesture or cutting" of Part F

(2) "the first math" of Part E.

Both parts are identified on a plan.

The result of this evidence is that in the case of each of the four areas ownership of which is claimed by Mr Ball, the area was originally divided and apportioned as first math land under the tenants agreement of 1844 and has ever after been conveyed as "first math" of the areas concerned.



Summary

The conclusions which I draw from this voluminous evidence are as follows -

1. Before 1844 Lower Cow Pasture was an entire pasture undivided by metes and bounds. There is no evidence that the owner was the Lord of the Manor. Such evidence as there is suggests that he was not. The grazing rights were exercised by the tenants of the owners of the 123 cow pastures each of which gave the owner the right to graze one beast or its equivalent over this and several other commons.
2. The only evidence that the freehold of Lower Cow Pasture was vested in the owners of the cowpastures is a vague statement in the tithe schedule of 1842 to the effect that the ownership of a number of different commons was "various owners according to their respective rights". As far as Lower Cow Pasture is concerned, I reject this evidence such as it is, for three reasons, first because since all this land was free of tithe the Commissioners had no reason to enquire into its ownership, secondly because it applied equally to Shuthonger Common which is admitted by all to have belonged to the Lord of the Manor and thirdly because, as far as Lower Cow Pasture is concerned, it is inconsistent with what followed.
3. In 1844 the tenants of the cowpastures, of whom there were then about five, agreed between themselves to mark out Lower Cow Pasture into areas proportionate to the number of cowpastures held by each tenant and that thenceforth, instead of grazing the land throughout the year, each tenant would be entitled to take the first math of (i.e. to mow once for hay) the area allotted to him. Those areas have remained so marked out (but not enclosed) to this day. Thus the origin of the rights of first math is known and they did not originate in a right of ownership.
4. In recording this agreement in his statutory declaration made in 1883, the truth of which is accepted by all parties, and which was made to explain the origin of rights of first math which the representative of John Proctor were about to convey, Thomas Tolley referred only to the agreement of the tenants to exercise a right of first math and made no reference to ownership by the cowpasture owners of the freehold though if they had owned it he would have almost certainly known and if he had known he would certainly have mentioned it since it would have been very much to the advantage of the prospective vendors who would then have been able to convey the freehold.
5. As time went on others of the cowpasture owners sold their rights of first math separately from their cowpastures but always as first math of the land and never (with one possible exception which I have dealt with on page 16) purported to sell the freehold. The present claimants' rights to the land are based on an unbroken series of conveyances of "the first math" which in its turn originated in the verbal agreement of 1844.



6. When the land was valued for rating in 1875 the rate was not assessed on the tenants of the owners of the right of first math - as it would have been if the math-owner had owned the land - but on the cowpasture owners in proportion to their holdings.

7. The documents relating to valuation under the Finance (1909-1910) Act 1910 convince me only that in the case of Area D (as part of Twyning Farm) and area F (as part of Woodend Farm), the owners of those farms submitted to the valuation of those areas as part of the land owned by them without, apparently objecting that as owners of the "first math" they were not owners of "land" within the meaning of the Act. For the reasons set out above I do not consider that this proves that they were in fact the owners of the freehold. As far as area D is concerned this conclusion is supported by the County Court case of 1907.

8. Having carefully considered all the evidence and arguments put before me (some of which were not before him) I can find no reason to differ from the Decision of Mr Squibb in 1979.

Conclusion

Where, as here, no one can show a good paper title to the freehold the only way in which that title can be established, if at all, is by proof of acts of ownership. In the case of land subject to profits à prendre that is very difficult. Acts which on enclosed land can readily be interpreted as acts of ownership such as regularly and exclusively mowing the land over a long period are of no avail. They are to be explained by the ownership of the right of first math. Such other acts as have been proved such as contributing to the cost of repairs are equivocal. They might have been done for the benefit of land owned by the contributors or they might equally have been done for the benefit of the right of first math.

Accordingly I am not satisfied that any of the claimants is the owner of any part of areas A-F in Lower Cow Pasture. They will accordingly remain subject to protection under section 9 of the Act of 1965.

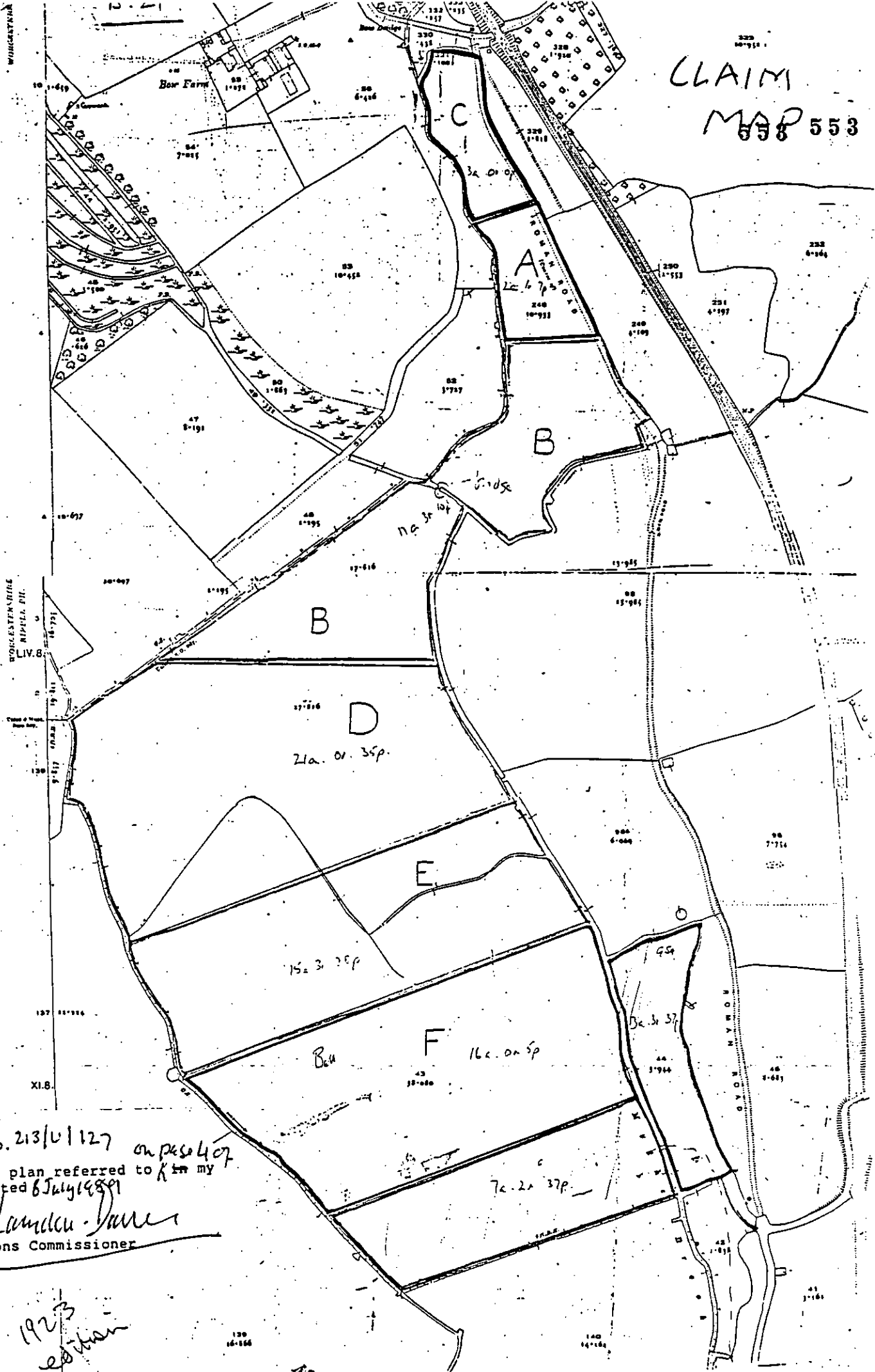
I am required by regulation 30(1) of the Commons Commissioners Regulations 1971 to explain that a person aggrieved by this decision as being erroneous in point of law may, within 6 weeks from the date on which notice of the decision is sent to him, require me to state a case for the decision of the High Court.

Dated this 6th day of July 1989

Peter Langdon-Davis

Chief Commons Commissioner

CLAIM MAP 553 553



Reference No. 213/0/127 on page 4 of
 This is the plan referred to in my
 decision dated 6 July 1959
 Peter Landon-Dave
 Chief Commons Commissioner

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